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The E.E.C. Antidumping Rules— A Practical Approach

Now that the Council of the European Communities has adopted the first three decisions[1] imposing antidumping duties, it may be appropriate to review the European Economic Community (EEC) Antidumping Regulation to see how it is being applied in practice.

Pursuant to Article 113, para. 1 of the Treaty of Rome providing for a common commercial policy, the Council of the European Communities issued Regulation (EEC) N. 459/68 of April 5, 1968 "on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community."[2] This Regulation was amended on a few procedural points in 1973[3] and 1977.[4]

The Regulation is in harmony with the rules laid down, as a result of the "Kennedy Round,"[5] in Article VI of the General Agreement on Tariff and Trade (GATT) and in the Agreement on Implementation of that Article (in particular, the so-called antidumping code). With repect to imports from countries which are not members of GATT, the European Communities ex-

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[1]Cycle chains (Taiwan), Council Regulation (EEC No. 316/77 of February 14, 1977, O.J. No. L 45, February 17, 1977, p. 4). Rolling bearings (Japan), Council Regulation (EEC No. 1778/77 of July 26, 1977, O.J. No. L 196, August 3, 1977, p. 1. Steel nuts (Taiwan) Council Regulation (EEC) No. 2464/77 of November 7, 1977, O.J. No. L 286 of November 10, 1977, p. 7.

[2]O.J. No. L 93 of April 19, 1968; O.J. Spec. Ed. 1968 (I) p. 80.

[3]Council Regulation (EEC) No. 2011/73 of July 24, 1973 (O.J. No. L 206 of July 27, 1973, p. 3).

[4]Council Regulation (EEC) No. 1411/77 of June 27, 1977 (O.J. No. L 160 of June 30, 1977, p. 4).

[5]Apparently the GATT antidumping code came about as a result of the interest of the EEC and the U.K. to clarify the administration of the withholding of appraisement measure as a provisional remedy under the U.S. Antidumping Act, combined with the interest of the United States to influence the drafting of the EEC antidumping regulation mainly in the area of procedural safeguard and to cause Canada to introduce an injury requirement in its antidumping law. *See, e.g.*, J. Rehm, *The Kennedy Round of Trade Negotiations*, 62 AM. J. INT'L L. 427-431 (1968).

pressly reserved the right to go beyond the protective measures laid down in the Regulation.[6]

The Regulation applies to all products covered by the Treaty establishing the EEC. As to the products covered by the Treaty establishing the European Coal and Steel Community, the Commission quite recently adopted antidumping rules.[7] These new rules are *similar* to the Regulation under discussion, except for some procedural points which reflect the different conceptions of the two treaties, particularly regarding the form of cooperation between the Commission and the Member States.

With respect to agricultural products, the Regulation provides that it shall operate "by way of complement" to the existing Community regulations regarding agricultural products.[8] Since the latter also contain some protective measures against imports causing serious disturbances, the Commission appears to enjoy some discretion whether in a given instance to proceed under the rules covering the market organization of a given agricultural product or under the antidumping regulation.[9]

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[6]Art. 1 ¶ 2 of the Regulation. However, it appears that in practice the European Communities comply with the Regulation also in proceedings against countries not members of GATT, as was shown for instance in the Taiwan bicycle chains case, cited above.

[7]Commission Recommendation 77/329/ECSC on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Coal and Steel Community, O.J. No. L 114, May 5, 1977, pp. 6-14. Presumably, this Recommendation is to be seen as a reaction by the Commission against some recent national antidumping measures adopted by the United Kingdom authorities (*see, e.g.*, the Commission's answer to Written Question No. 227/77, O.J. No. C 214, September 9, 1977, pp. 7-8).

Commission Recommendation No. 77/329/ECSC was amended on December 28, 1977 by Commission Recommendation No. 3004/77/ECSC, O.J. No. L 352, December 31, 1977, pp. 13-14. The amendment, in addition to streamlining procedures regarding the monitoring of price revisions promised by exporters and the refund of duties collected, introduces certain provisions from the GATT antidumping code related to the simultaneous examination of dumping and injury, sporadic dumping (calling for a retroactive application of dumping duties) and the imposition of antidumping duties within a basic price system. With respect to the latter system, Article 8(d) of the GATT code provides that within a basic price system the antidumping duties shall be ". . . equivalent to the amount by which the export price is less than the basic price established for this purpose, not exceeding the lowest normal price in the supplying country or countries where normal conditions of competition are prevailing. . . ." To cope with the crisis in the steel industry, the Commission issued on December 31, 1977, basic prices for certain iron and steel products, effective from January 1, 1978, O.J. No. L 353, December 31, 1977, pp. 1-14. The introduction of a basic price system has enabled the Commission at the beginning of 1978 to impose provisional antidumping duties on a number of iron and steel products without first publishing a notice in the *Official Journal* and organizing a hearing as would otherwise have been required pursuant to Article 11(2) of Commission Recommendation No. 77/329/ECSC. In fact, the respective Notices of the initiation of antidumping proceedings in several cases were published on the same day as the publication of the impositions of provisional antidumping duties. It is to be pointed out, however, that the system of basic prices for iron and steel products is only intended as an interim arrangement, applicable during the first quarter of 1978, pending the finalization of bilateral agreements between the EEC and the countries concerned regulating quantities and proces of iron or steel imports.

[8]Art. 1, ¶ 3.

[9]On this question, see D. Ehle, *Basic Aspects of the Antidumping Regulations of the Common Market*, 3 INT'L LAW. 494-497 (1969).

I. The Definition of *Dumping*

The Regulation considers a product to have been dumped if the price of the product when exported to the Community is less than the comparable price, in the ordinary course of trade, of the like product[10] on the home market.[11]

This comparison between the home market price and the export price of the product concerned is normally to be made at the ex-factory level and with respect to transactions made as nearly as possible at the same time.[12]

If the product in question is not sold on the domestic market or where sales on the domestic market, because of "the particular market situation," do not allow a meaningful comparison to be made, the reference price, replacing the domestic price, is either the price to a third country or a deemed price, based on the cost of production in the home country increased by a reasonable amount for overhead charges and for profits.[13]

One will have noted that the discretion of the Community authorities in selecting either the third country price or the constructed value is considerable, especially when compared to the situation in the United States.[14]

Likewise noteworthy is that under the Regulation the third country price used in replacement of the home market price may be the highest third country price, whereas in the United States, in case the export prices to third countries vary, it is the preponderant price or a weighted average which is to be used as reference.[15] According to the EEC Regulation, it suffices that the selected third country price be "representative."

Where no export price exists or where such price appears to be unreliable because the exporter and importer are in one way or another related to each other, the export price may be determined on the basis of the first resale to an independent buyer, or if the goods are not resold in the same condition as imported, on any reasonable basis.[16]

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[10]The term *like product* is interpreted in Art. 5 to mean "a product which is identical, *i.e.,* alike in all respects. . . , or in the absence of such product, another product which has characteristics closely resembling those of the product under consideration."

[11]Art. 3, ¶ 1(a).

[12]Art. 3, ¶ 4(a).

[13]Art. 3, ¶ 2, which, as to the addition for profits, provides that "it shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin." *Compare to* the U.S. Antidumping Act which provides for a specific minimum amount of expenses (10% of cost of materials and processing) and of profit (8% of materials, processing and expenses) § 206(a)(2), 19 U.S.C. 165(2).

[14]For instance, § 153.3 of the U.S. Customs Regulations only provides for a reference to the third country price when the quantity of the product concerned which is sold on the home market is too small to form an adequate basis for comparison. Also, in the United States the constructed value test may only be followed if the other tests are insufficient or inadequate (§ 153.6), whereas Art. 3, ¶ 2 of the Regulation does not hold such restriction (*see also* J. F. Beseler, *Protection against Dumping and Subsidies from Third Countries,* 6 C.M.L. REV., p. 333 1969).

[15]Section 153.16 of the U.S. Customs Regulations.

[16]Art. 3, ¶ 3.

Similarly, the Community enjoys substantial discretion with respect to imports from countries which have a state-controlled economy since in such a situation special problems may arise in comparing prices.[17]

In the event the product concerned is not exported into the Community from the country of origin, but through an intermediate country, the price comparison is not to be made with the domestic price in the country of origin but with the domestic price in the exporting country. However, the comparison is nevertheless to be made with the domestic price in the country of origin if the product simply passes in transit through the country of export or if there is no comparable price for it in the country of export.[18]

Of course, when one compares the domestic with the export price for a given product in order to determine the dumping margin, adjustments are to be made for all factors affecting the price comparability. In this connection the Regulation simply provides that due allowance is to be made "for the differences in conditions and terms of sale, for the differences in taxation and for the other differences affecting price comparability,"[19] without spelling out in detail, again unlike the U.S. Regulations,[20] which factors may qualify as such "other differences."

Thus, under the Regulation any such difference is to be taken into account from the moment it "affects" the price comparability. In practice, however, the rule is interpreted to require, as in the United States,[21] that the circumstances in question bear a "direct relationship" to the sales under consideration.[22] Therefore, due allowance is usually made for differences between the domestic and export price resulting from differences in transportation (including storage, packaging, handling, insurance), financial cost (credit terms, guarantees, exchange rate), selling expenses, volume discounts, taxes and customs duties. To the extent such expenses are higher in the country of origin than in the EEC, (or are properly allocated only or mainly to domestic sales), the export price to the EEC may legitimately be lower than the domestic price.

Research and development expenses are less likely to be taken into account since, as a rule, they do not bear a direct relationship to any sales under consideration. As to certain selling expenses, it may often prove difficult to draw

[17]Art. 3, ¶ 6. *Compare to* § 153.7 of the U.S. Customs Regulations which sets more precise guidelines, referring in such instances to the price (domestic or for export) for—or the constructed value of—the product in a non-state-controlled-economy country. On the problem in general, see R.A. Anthony, *Antidumping Law and Policy*, 54 CORNELL L. REV. 159 (1969).

[18]Art. 3, ¶ 1(b).

[19]Art. 3, ¶ 4(b).

[20]Sections 153.9 and 153.10 of the U.S. Customs Regulations.

[21]Section 153.10(a) of the U.S. Customs Regulations.

[22]W. MUELLER-THUNS & J.F. BESELER, DAS ANTIDUMPINGRECHT DER EWG, (Frankfurt, 1971) p. 36.

the line between expenses that have a direct impact on the sales under consideration and expenses that affect such sales only indirectly.[23]

As mentioned earlier in this paper, on the question of the relevant time period, the Regulation requires the price comparison to be made in respect of sales made as nearly as possible at the same time. This broad requirement offers no ready solution to the numerous practical problems which may arise when one endeavors to render the domestic price comparable to the export price. For example, if, during a period of fluctuating exchange rates, the impact of the exchange rate on the price comparability is to be measured, several approaches could be followed. One could, for measuring the impact, select the date and rate of the day the contract was formed, or the day on which the goods were shipped, or the day on which the goods entered the Common Market. The lack of precise guidelines in this respect again leaves wide discretion to the Community authorities.

II. The Definition of *Injury*

For an antidumping duty to be applied, it is not sufficient that a given product is being dumped. Its introduction into the Community must also cause (or threaten to cause) a material injury to an existing Community industry or must substantially delay the setting up of an industry whose early establishment in the Community is contemplated.[24]

Rather than defining the term injury, the Regulation[25] specifies the circumstances which are relevant to an injury finding, to wit, developments and prospects regarding—

- turnover, market share, profits,
- prices,[26]
- employment,
- export performance,

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[23]Whereas commissions and/or salaries of salesmen in the field and servicing costs are normally taken into account, it is more difficult to determine whether part of the administrative overhead may properly be allocated to the sales under consideration. It remains a question of fact regarding which the Regulation leaves a wide discretion to the Community authorities. In the event an exporter claims, for instance, that the domestic price is to be reduced by certain advertising expenses, he will have to show that there is a direct relationship between such expenses and domestic sales and that export sales do not benefit from the advertising done in the country of origin. (*See* MUELLER-THUNS & BESELER, *op. cit.* p. 37).

[24]Art. 2.

[25]Art. 4. ¶ 2.

[26]". . . including the extent to which the delivered, duty-paid price is lower or higher than the most representative comparable price of the like product prevailing in the ordinary course of trade within the Community." (Art. 4, ¶ 2). This implies that the meeting of local competition on the export market is no defense against a dumping charge. *See* BESELER, *op. cit.* p. 336. Incidentally, in the United States the meeting of local competition defense has often led to no-injury decisions (J.P. Hendrick, *The United States Antidumping Act,* 58 AM. J. INT'L L. 929 (1964).

- volume of dumped and other imports,
- productivity and utilization of capacity of the Community industry in question and,
- restrictive trade practices.

None of these factors needs to be conclusive. In other words, the Regulation requires that a comprehensive examination be made of all the circumstances involved.

In addition the Regulation requires a casual relationship between dumping and injury and provides that, if, as often is the case, the injury is the combined result of the dumped imports and other factors as well, e.g., economic recession, the impact of the dumped imports must outweigh the impact of all other factors taken together. The Regulation does, indeed, require that the dumped imports are "demonstrably the principal cause" of the injury.[27]

The effect of the dumped imports is to be assessed in relation to the Community production of the like product or of the range of products which include the like product. Normally, reference is to be made to the whole Community output or at least to a major portion of total Community production. However, in exceptional circumstances, the Regulation accepts the regional industry concept as a valid substitute for the Community industry concept. This is notably the case if, due to transport costs, for example, all the producers of a given region sell all or virtually all their production within such a region. However, in such a case also, injury may only be found if there is injury to all or virtually all producers within the region or sub-market as defined.[28]

It is to be noted that unlike the situation in the United States,[29] the establishment of dumping and injury by itself does not cause the imposition of an antidumping duty; a third condition is to be fulfilled, to wit "the interests of the Community should call for Community intervention."[30] In other words, it is not sufficient that a particular industry is being injured but there is to be examined the question whether or not the Community interests as a whole run parallel with the industry concerned. For instance, the interests of the users or consumers of the product at stake might make an intervention undesirable. The discretion which the Community authorities enjoy in this respect is important because the automatic application of antidumping duties could, depending on the circumstances, lead to the undesirable result of protecting certain competitors at the expense of competition.[31]

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[27]Art. 4, ¶ 1(a).
[28]Art. 4, ¶ 5(a).
[29]Antidumping Act, § 202(a), 19 U.S.C. 161.
[30]Art. 17, ¶ 1.
[31]On this question in general see Note, *The Antidumping Act—Tariff or Antitrust Law?*, 74 YALE L. J. 713 (1965).

III. Rules of Procedure

1. *Opening of Proceeding*

Under normal circumstances a dumping proceeding is opened pursuant to a complaint. It may be lodged by any natural or legal person, or any association not having legal personalty, acting on behalf of the Community industry which considers itself injured or threatened by dumping.[32]

The complaint is to be filed in writing and should contain the following information:

(a) a description of the allegedly dumped product;
(b) the name of the exporting country;
(c) where possible, the names of the country of origin, the producer and the exporter of the product in question; and
(d) evidence both of dumping and of injury resulting therefrom to the industry which considers itself injured or threatened.[33]

The Commission has forms available for possible use by complainants.[34]

The complaint is to be filed either with the Commission (which must forward it to all Member States forthwith) or with any of the Member States in which the Community industry in question is carried on. In the latter case the Member State(s) in question must forward a copy of the complaint to the Commission.[35]

In the absence of any complaint a proceeding may be opened whenever a Member State has sufficient evidence both of dumping and of injury resulting therefrom to a Community industry. Such Member State is to immediately communicate the evidence to the Commission which in turn is to forward it forthwith to the other Member States.[36]

It is to be noted that the right to initiate proceedings without a complaint is only granted to the Member States, not to the Commission. Furthermore, it requires the existence of sufficient evidence both of dumping and of injury, whereas in case a complaint is filed it suffices that the complainant submit some evidence which need not yet be "sufficient."

2. *Preliminary Examination by Member State(s)*

The division of authority in the Regulation between the Member States and the Commission is the result of a compromise between the defenders of national sovereignty and those advocating Community powers which had to be reached at the time the Regulation was enacted.

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[32]Art. 6.
[33]Art. 7.
[34]*See Appendix I* hereto.
[35]Art. 8, ¶ 2 and 3.
[36]Art. 8, ¶ 2 and 3.

Basically, this compromise provides for a preliminary examination of the complaint by one or more Member States to see whether or not it contains the information required and whether the margin of dumping, the volume of dumped imports, actual or potential, or the injury is negligible.[37]

Only after a Member State has found the complaint to be in good order and the matter not trivial, is the Commission in a position to commence the examination of the matter at Community level.[38] In other words, the Commission always needs the green light from at least one Member State before it can start investigating the matter.

If a Member State finds the complaint not to be in good order and/or the matter to be trivial, it so advises the Commission which is in turn to inform all other Member States. Such complaint will be rejected unless the Commission, on its own behalf or on behalf of one of the other Member States, objects.[39]

The rejection of the complaint is made by the Member State to whom it was sent or by the Commission, if filed with the Commission. Only in the latter instance could the complainant challenge the rejection before the Court of Justice of the European Communities on the basis of Article 173 of the Treaty.

The rather rigid division of power between the national authorities and the Commission, caused by purely political considerations since the matter otherwise clearly falls within the scope of the Community's concern, appears to have been worked out in practice through a spirit of cooperation rather than antagonism.[40]

The vehicle for this cooperation has been the so-called Advisory Committee, composed of representatives of each Member State, with a representative of the Commission as Chairman.[41]

The 1973 amendment to the Regulation endorsed the informal nature of the cooperation between the Commission and the Member States by allowing the latter to inform the Commission orally of their views about the admissibility of the complaint at the Advisory Committee. Thus, in practice the Commission would seem to be involved from the outset, working together with the Member States rather than intervening only at a second stage as planned by the drafters of the Regulation.

3. *Investigation by the Commission*

Once the Commission is backed by at least one Member State, it formally

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[37]Art. 9.
[38]Art. 10, ¶ 1.
[39]Art. 9.
[40]J.F. Beseler, *Straffung des Europäischen Antidumping-Verfahrensrechts,* AWD, May 1974, p. 265.
[41]Art. 12.

opens the antidumping proceeding by publishing a notice to that effect in the *Official Journal.*

This notice indicates the product and country concerned and invites all interested parties to set forth their views in writing to the Commission within a period of time and to apply for a hearing if they so wish.

A copy of the notice is sent to all exporters and importers concerned, together with a standard questionnaire[42] designed to give the Commission the necessary information regarding the domestic and export prices concerned. Usually the Commission's covering letter specifies the types of the product concerned for which the answers to the questionnaire are to be prepared, and for which period. In other words, the matters receiving prime emphasis in the Commission's investigation are usually indicated in order to generate as specific replies as possible.

All the parties directly concerned, i.e., the complainant, the exporters and importers of the product in question and the official representatives of the exporting country are to be given access by the Commission to "all information that is relevant to the defense of their interests and not confidential . . . , and that is used by the Commission in the antidumping investigation."[43]

In actual practice the exporters and importers receive a copy of the complaint, nothing more. One may rightly wonder whether the Commission's file at the outset of the proceeding does not already hold more information of interest to the parties concerned, notably the documents reflecting the cooperation between the Commission and the Member States in the initial investigation stage.

Prior to the 1973 amendment of the Regulation, the Commission was authorized to obtain all necessary information from importers, exporters, traders and producers, and from trade associations, but it had to send a copy of the request to the Member State where the addressee has his activities. However, when the Commission wanted to double-check the information so supplied, both in and outside the Community, it had to delegate the matter to the Member States.

The 1973 amendment gives the Commission autonomous powers of investigation outside the Community provided it shall first "hear the opinion" of the Advisory Committee.[44] Needless to say, the condition remains that the undertakings concerned and the government of the country in question have to be notified and have to give their consent.

Thus, in this field also, the Advisory Committee appears as the vehicle for the necessary cooperation between the Commission and the Member States.

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[42] *See Appendix I* hereto.
[43] Art. 10, ¶ 4.
[44] Art. 10, ¶ 3(b).

The Committee meets any time this is deemed desirable by a Member State or the Commission or whenever required under the Regulation. The consultations within the Committee are in closed session. The 1973 amendment allows the Committee to be consulted in writing by the Commission; this is for the sake of expediency when a meeting of the Committee might be less convenient.

As to the issue of confidentiality of documents submitted to the authorities pursuant to the Regulation, the party making the disclosure is the first judge as to whether the information released is confidential or not. If the authorities find confidential treatment unwarranted, they may disregard the information unless it can be double-checked otherwise.[45]

The problem of confidentiality may be particularly acute at the hearing. Indeed, at the hearing the opposing views of the parties in conflict confront each other in a manner which resembles an adversary proceeding,[46] the complainant(s) assuming in practice a function similar to that of plaintiff or public prosecutor and the Commission acting as judge. During such confrontation the exporters can hardly avoid discussing their prices and costs in the presence of complainant(s). It is obvious that in this context and in the absence of any guidelines in the Regulation, unlike the situation in the United States,[47] a party may in the course of the hearing be pressured into disclosing information to the other side out of fear that otherwise the Commission might disregard it.

One last point to be mentioned in connection with the investigation in dumping cases is that the Regulation, in line with the GATT code, requires the questions of dumping and injury to be considered simultaneously.[48]

4. *Possible Decisions*

If the fact-finding of the Commission indicates that no dumping and/or injury exists, it terminates the proceeding, provided no objection is raised within the Advisory Committee. If objection is so raised, the Commission refers the matter to the Council of Ministers. If the Council approves the Commission's proposal by a qualified majority, the proceeding shall stand terminated. The same is true in the absence of a reaction from the Council within one month. The parties concerned are so informed and the termination is normally published in the *Official Journal.*[49]

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[45]Art. 11, ¶ 3.

[46]Yet, the Regulation does not provide for a truly adversary type of proceeding, it remaining the duty and responsibility of the Commission to determine the existence of dumping and injury. *See also* the Commission's answer to Written Question No. 302/77, O.J. No. C 214, Sept. 7, 1977, p. 14: "Once the case has been accepted for full investigation. . . , it is the duty of the Commission, not the industry, to prove that dumping is taking place."

[47]Section 153.23 of the U.S. Customs Regulations.

[48]Art. 10, ¶ 1.

[49]Art. 14, ¶ 1(b).

The proceeding is likewise terminated when the exporters agree to revise their prices or to cease their exports, provided that the Commission, after hearing from the Advisory Committee, finds it acceptable.[50]

The termination of a dumping proceeding because of a price revision undertaking is likewise published in the *Official Journal* but no details as to the contents of the undertaking are revealed.

In the author's experience, a price revision undertaking usually comprises:

- the establishment of a minimum price which is to serve as the base or reference price[51] for the agreed-upon increases;
- the undertaking that, if the reference price is set CIF frontier EEC and the product is imported by an affiliate, the resale price in the Community shall not be lower than the reference price, increased by the applicable customs duty, plus a given percentage representing freight and a given percentage representing profit;
- the undertaking of the exporting firms(s) to increase[52] the price(s) of the product(s) concerned by given percentages[53] with reference to the base price and on a step-by-step basis over a stated period of time;
- the undertaking of the exporters to use their best efforts to prevent evasion of the price revision by deliveries made indirectly from non-Member States or by resales made by independent exporters;
- the undertaking of the exporters to use their best efforts to prevent evasion of the price revision by sales of a different origin than the sales subject to the dumping charge;
- the undertaking to submit regular[54] reports to the Commission, intended to allow the Commission to keep a close watch on price developments;
- the starting date of the price revision[55] and the term[56] for which it is concluded.

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[50]Art. 14, ¶ 2(a). However, in the rolling bearings case, instead of terminating the proceeding, the Council merely suspended the actual collection of the antidumping duties in view of the exporters undertaking to revise their prices. This matter is at present on review before the Court of Justice.

[51]In some cases the reference price was defined CIF frontier EEC whereas in other instances reference was made to the first resale price within the EEC. The reference price is ordinarily defined in terms of the net weighted average price (taking into account year-end or other special rebates) during a given period of time per type of the product concerned and expressed in a given currency (the currency of the Member State in which delivery is made if the reference price is defined in terms of the first independent resale price).

[52]To the extent the stipulated increase is not in conflict with price control legislation applicable in the importing countries involved.

[53]These percentages reflect the presumed dumping margin plus reference to a system which keeps track of the rise in manufacturing costs in the country of origin.

[54]Usually on a quarterly basis.

[55]Usually the date of the conclusion of the settlement, but with the possibility of some specified exceptions for contracts concluded at an earlier date but still awaiting performance.

[56]Usually one year, renewable half-yearly by tacit agreement unless notice of termination is

Since, according to the words of the Regulation, the voluntary undertaking of the exporters is given "during examination of the matter,"[57] it is obvious that the undertaking is to be considered as a kind of "Consent Decree," not implying any admission of guilt on the part of the exporters.

If the proceeding is not ended by way of settlement or by a finding of no dumping and/or injury but instead dumping and injury are finally established and the interests of the Community require an intervention, the Commission shall, upon consultation of the Advisory Committee, submit a proposal to the Council of Ministers for the levy of antidumping duties.[58]

As to the form by which antidumping duties are imposed the Regulation provides for a Council Regulation.[59] This implies a reasoned opinion and publication in the *Official Journal.*

Such Regulation is to include a description of the product covered, including a tariff description, commercial description, country of origin or export and the name of the supplier.[60]

If several suppliers are involved from the same country and it is impracticable to name them all, they need not be so named. Similarly, if several suppliers are involved from different countries, either all the suppliers are named or all countries involved are specified.[61]

The amount of an antidumping duty may not exceed the margin of dumping established. Unlike the U.S. Antidumping Act,[62] it should even be less than such margin if such lesser duty would be adequate to remedy the injury.[63]

Where a product is imported into the Community from more than one country, the duty is to be levied on a nondiscriminatory basis on all dumped imports causing injury.[64]

Antidumping duties may not be imposed nor increased with retroactive effect. They shall only apply to all products entering for Community consumption (i.e., date of customs' declaration) after the coming into force of the Regulation.

As to the geographic scope of application of the Regulation imposing duties,

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given by one side to the other some time before the expiration of each period. The length of the applicable notice period is usually shortened (to as little as a few weeks) in the event the market situation of the product is substantially modified.

[57]Art. 14, ¶ 2(a). Compare this wording with the terms used in Art. 17, ¶ 1: "Where the facts *as finally established* show that there is dumping and injury. . ." (emphasis added).

[58]Art. 17, ¶ 1.

[59]Art. 19, ¶ 1.

[60]Art. 20, ¶ 1.

[61]Art. 20, ¶ 2.

[62]Section 202(a), 19 U.S.C. 161.

[63]Art. 19, ¶ 3.

[64]Art. 19, ¶ 2(c).

it is to be the whole Community even when the relevant market did not comprise the whole Community.[65]

An importer able to show that his imports were not dumped, or that the margin of dumping is lower, has three months to file a claim for refund with the Member State in whose territory the product entered. Such Member State is to inform the Commission, which in turn is to inform the other Member States. If within one month the Commission has not raised any objection, the Member State in question will settle the issue independently.[66]

The actual collection of the antidumping duties remains the task of the Member States.[67]

The Commission, after consulting the Advisory Committee or, in cases of extreme urgency, after informing the Member States, may fix an amount to be secured by way of provisional antidumping duty, whenever the "preliminary examination of the matter shows that there is dumping and there is sufficient evidence of injury and the interests of the Community call for immediate intervention. . . ."[68]

It is to be noted that the provisional duty is not collected but only secured[69] and that such measure ordered by the Commission may not exceed a period of three months unless extended by Council decision (for a period not exceeding three months) upon request of the exporters and importers when the examination of the matter has not been completed.[70]

Said secured duties are to be released unless the Council decides to collect all or part of the moneys as an antidumping duty under the procedures explained above.

Any Member State may request the Commission to impose provisional antidumping duties. The Commission has only five days to decide the question. A negative decision of the Commission may be overruled by the Council.[71]

Thus far the Commission has twice imposed provisional antidumping duties. It did so in *two* of the proceedings which resulted in the imposition of definitive antidumping duties.[72]

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[65]However, in such instance the exporters are to be given a chance to undertake to cease dumping in the region concerned before any antidumping duties are applied on a Community-wide basis. Art. 19, ¶ 5.

[66]Art. 19, ¶ 4(b).

[67]Art. 21.

[68]Art. 15, ¶ 1(a).

[69]In practice by way of a bond acceptable to the customs authorities.

[70]Art. 16, ¶ 2.

[71]Art. 15, ¶ 1(c).

[72]Bicycle chains (Taiwan): Commission Regulation (EEC) No. 2757/76 of November 12, 1976, O.J. No. L 312 of November 13, 1976, p. 41; completed by Commission Regulation (EEC) No. 2888/76 of November 29, 1976, O.J. No. L 331 of November 30, 1976, p. 26. Rolling Bearings

IV. Current Practice

1. *Settlement*

From an analysis of the Table of Cases attached hereto[73] one learns that until now in a majority of cases proceedings have been terminated as a result of a voluntary undertaking to raise prices subscribed to by the exporters. As a matter of fact, of the twenty-seven cases, or so considered, fourteen were closed because of a price revision, ten were closed because of changes in the market situation, one[74] was closed because the requirements for antidumping measures were not met, and two cases were closed by the imposition of antidumping duties: bicycle chains (Taiwan), rolling bearings (Japan) and steel nuts (Taiwan), (*see supra* note 1).

The Commission's apparent policy favoring enforcement of the Regulation by the conclusion of voluntary undertakings may be explained by the fact that the Commission thereby avoids having to go to the Council of Ministers for approval of its action, and by the fact that, prior to the 1973 amendment to the Regulation, the Commission's powers of investigation depended on the cooperation of Member States. These two factors, together with a lack of staff[75] may well be the reason for the Commission's preferences to dispose of dumping proceedings by way of settlement, instead of engaging in painstaking fact-finding leading to the imposition of an antidumping duty, which would require the consent of the Council of Ministers and would be subject to judicial review.

The advantage of such a policy for the Commission and the *parties* would seem to be the speed with which the problems are resolved and results are obtained. In addition, it provides a "graceful way out" for all three parties involved: the complainants, the exporters and the Commission.

An obvious drawback to the price revision practice is that, except for those participating in the settlement negotiations, it is hard to know how the Regulation is administered in practice. The price revision practice prevents case law from developing. It would be helpful for everybody concerned if the wide discretion left to the Commission under the Regulation rendered more precise through interpretations and guidelines issued by the Court of Justice of the Communities in reviewing a number of particular situations.

(Japan), Commission Regulation (EEC) No. 261/77 of February 4, 1977, O.J. No. L 34 of February 5, 1977 pp. 60-61.

[73] *Appendix I.*

[74] Ammonium nitrate fertilizers (Yugoslavia).

[75] At the Commission only some five professionals presently deal with antidumping investigations.

The Commission's emphasis on the conclusion of settlements rather than on the findings of dumping and injury may also be the reason why some of the procedural safeguards built into the Regulation have thus far not received the attention and emphasis they deserve.

This fact is highlighted, for instance, by the way in which the hearings are organized, particularly in that the Commission is known for not providing for a taped or stenographic record of what transpires at the hearing. This implies that the Commission is in a position to make use of data discussed at the hearing as it sees fit, whereas the other parties are unable to avail themselves of the discussions at the hearing, later in court for example, because they are not reproduced in any form.[76]

It is understandable that the absence of a record may stimulate the free flow of information during the hearing, which in turn may make it easier for the Commission to reach a compromise and obtain a price revision. However, this possible benefit is clearly at the expense of due process and therefore hardly acceptable. This is especially apparent if the proceeding is subsequently not terminated by way of a voluntary undertaking given by the exporters but by way of a Council Regulation imposing antidumping duties.

2. *Decision*

A reading of the first two decisions imposing antidumping duties is disappointing if one had hoped to learn how such duties are actually arrived at by the Community authorities. In both the bicycle chain and rolling bearing cases, the Council explains its findings of dumping and injury in rather cryptic language, not even allowing the *parties* concerned, let alone complete outsiders, to grasp how the Regulation has been applied to the case.

Symptomatic of this state of affairs, for instance, is the fact that the "whereas clauses" used to explain the finding of injury in the Council Regulation on rolling bearings from Japan are virtually identical to the finding of injury in the Commission's earlier Regulation imposing a provisional antidumping duty on bicycle chains originating in Taiwan. This goes to show that the language used to describe the finding of injury in one case has been so broad and general that it could be used without "major surgery" to fit a different case. Yet, the products and countries concerned were quite different.

The obvious danger of basing the essential finding of injury on rather abstract generalizations is that the protection offered by the Regulation is in effect being preempted of any real meaning. Indeed, what good does it do for

[76]The author of this paper has had the experience of the Chairman of the hearing expressly forbidding the parties to make a record by tape, or otherwise, of the hearing.

the exporters to know, for instance, that both in the bicycle chain and rolling bearing cases the Regulations state that "the dumped imports are demonstrably the principal cause of such injury" if such statement appears to be no more than *ipse dixit*? No mention is made, for example, of the undeniable impact of the economic recession and the rationalization measures of local producers on the unemployment and reduction in profits mentioned to support the injury finding.

The same criticism, i.e., the lack of precision,[77] appears to be warranted with respect to the dumping findings in the two Council Regulations discussed. Neither of the two Regulations offer any specific pricing data on which the finding is based or give any indication of the method of calculation of the allowances made for the differences affecting the comparability of the domestic and export prices. Thus, notwithstanding the publication in the *Official Journal* of the Council's decision in their case, the parties remain in the dark as to how the figures they submitted have been used or interpreted to arrive at the finding of dumping.

This "inquisitorial" aspect of antidumping proceedings is particularly serious in view of the fact that in any antidumping proceedings the method of calculation and the interpretation of the figures and data supplied are at least as important as the figures and data themselves.

In light of the first two cases decided by the EEC Council, the point is to be stressed that a meaningful application of the Antidumping Regulation requires more than lip service to its main provisions. Above all it requires that the facts on which the essential findings are based are to be set out in some detail. It would seem that both the parties concerned and the public in general are entitled to know how the Regulation is administered in practice.

The lack of disclosure in the proceedings before the EEC Commission and Council is also quite unfortunate if one realizes that when the matter is on appeal before the Court of Justice of the European Communities, this Court will have to perform the difficult dual function of establishing the facts of the matter and finally deciding the case. A more open proceeding before the Commission would alleviate the burden of the Court and would give the applicant in Court the benefit of a true appellate review.[78]

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[77]Also unclear in the Council Regulation imposing an antidumping duty on rolling bearings is the fact that the finding of dumping ecompasses all bearings originating in Japan, irrespective of the producers concerned, whereas regarding the collection of the provisional duties the Regulation only provides for definitive collection from four named producers. No explanation is given for this apparent discrepancy.

[78]The question whether or not an appeal is at all possible against a council regulation imposing a dumping duty is apparently one of the issues presently before the European Court of Jusitce in the Rolling Bearings (Japan) case. The author understands the Commission to argue that according to

Until now, the Commission's policy of accepting voluntary undertakings from exporters has enabled it to dispose of most cases. However, the present economic recession and the rising tide of protectionism will in all likelihood make it more and more difficult for the Commission to terminate proceedings by the way of settlement. This implies that, from the outset of an antidumping proceeding, the parties concerned have to reckon with the possibility that the proceding may well end by the imposition of antidumping duties rather than by the conclusion of a settlement (or because of changes in the market situation), as used to be the case until recently.[79]

In this perspective, it becomes all the more important that the procedural safeguards in the Regulation are complied with and that the Court of Justice sets the standards of fairness in the areas where the Regulation leaves wide discretion to the Community authorities. Only by the development of a body of case law may one expect the Regulation to protect the principle of freedom of commerce in times of crisis when political and economic pressures tend to override the rule of law.

article 173 para. 2 of the EEC Treaty, regulations may only be appealed by private persons, when they are of direct and individual concern to them. The Commission apparently claims that this condition is not fulfilled in the Rolling Bearings case pending before the court.

[79]Needless to say, the preparation of a file for use by the exporters at settlement negotiations with the EEC Commission may be different from the file a legal practitioner would advise his client to prepare for eventual use in the Court of Justice, should the settlement negotiations fail and antidumping duties be imposed.

APPENDIX

Table of Cases
(in chronological order)

EEC

MERCHANDISE	COUNTRY	OPENED OJ NO.	CLOSED OJ NO.	PROCEEDING TERMINATED BECAUSE OF
1970				
nitrogeneous fertilizers	Greece	C52 of 30.4.1970	C123 of 8.10.1970	price revision
sisal cords	Cuba	C133 of 5.11.1970	C10 of 4.2.1971	price revision
1971				
explosives	Yugoslavia	C8 of 29.1.1971	C77 of 30.7.1971	changed circumstances
ammonium nitrate fertilizers	Yugoslavia	C103 of 16.10.1971	C14 of 15.2.1972	requirements not being met
urea	Yugoslavia	C103 of 16.10.1971	C51 of 30.6.1973	changed circumstances
ternary (NPK) complex fertilizers	Yugoslavia	C103 of 16.10.1971	C138 of 11.11.1974	changed circumstances

1972				
oxalic acid	Japan	C30 of 25.3.1972	C79 of 20.7.1972	price revision
rubber boots	Czechoslovakia	C30 of 25.3.1972	C79 of 20.7.1972	price revision
steel pipes	Spain	C48 of 13.5.1972	C123 of 27.11.1972	price revision
			C135 of 28.12.1972	price revision
ammonium nitrate fertilizers	Rumania	C51 of 23.5.1972	C123 of 27.11.1972	changed circumstances
urea	Poland	C51 of 23.5.1972	C59 of 21.5.1974	changed circumstances
acrylic fibre	Taiwan	C79 of 20.7.1972	C17 of 4.4.1973	price revision
yarns	Rep. of Korea	C79 of 20.7.1972	C33 of 23.5.1973	price revision
	Japan	C79 of 20.7.1972	C63 of 4.8.1973	price revision
1973				
zip fasteners	Japan	C51 of 30.6.1973	C63 of 1.6.1974	changed circumstances*
1974				
acrylic socks	Taiwan	C25 of 12.3.1974	C73 of 29.6.1974	price revision
acrylic socks	Rep. of Korea	C25 of 12.3.1974	C73 of 29.6.1974	price revision
polyethylene packing sacks	Hungary	C285 of 13.12.1975	C183 of 7.8.1976	changed circumstances
trichlorethylene	Poland	C285 of 13.12.1975	C183 of 7.8.1976	changed circumstances
	German Democratic Republic	C285 of 13.12.1975	C183 of 7.8.1976	changed circumstances

*Whereas the notice of termination published in the *Official Journal* stated that "Having regard to the development of the situation, it is not considered necessary at present to introduce defensive measures," one learns from the Commission's Reply to Written Question No. 759/76 (Official Journal No. C94, April 18, 1977, pp. 8-9) that the "procedure was terminated after the Japanese exporters had undertaken to raise their prices." In other words, it appears that sometimes proceedings are terminated by way of a price revision although the notice of termination only refers to the changed market situation. This is one more example of the lack of clarity in the EEC antidumping proceedings.

MERCHANDISE	COUNTRY	OPENED OJ NO.	CLOSED OJ NO.	PPROCEEDING TERMINATED BECAUSE OF
1976				
wood panelling	Brazil	C48 of 3.3.1976	C138 of 19.6.1976	changed circumstances
furazolidone	Hungary	C123 of 4.6.1976	C183 of 7.8.1976	price revision
bicycle chains	Taiwan	C183 of 7.8.1976	L45 of 17.2.1977	imposition of dumping duty. Additional duty.
steel nuts	Taiwan	C183 of 7.8.1976	L286 of 10.11.1977	
calcium ammonium nitrate fertilizer	Rumania	C183 of 7.8.1976	C4 of 7.1.1977	changed circumstances
rolling bearings	Japan	C268 of 13.11.1976	L196 of 3.8.1977	imposition of dumping duty
1977				
steel reinforcing bars	South Africa	C26 of 3.2.1977	C89 of 14.4.1977	price revision
sisal twine	Brazil Mexico	C89 of 14.4.1977	C216 of 9.9.77	price revision
bicycle tubes and tyres	Rep. of Korea	C89 of 14.4.1977		
bicycle tubes and tyres	Taiwan	C89 of 14.4.1977		
soya meal	Brazil	C89 of 14.4.1977	C298 of 10.12.77	price revision
housings for bearings	Japan	C257 of 26.10.1977		
Quartz crystal units	Japan	C273 of 12.11.1977	C35 of 11.2.78	price revision

tubes of iron or steel	Spain	C278 of 18.11.1977		
kraft liner	USA	C304 of 17.12.1977		
titanium	Japan	C304 of 17.12.1977		
punching machines	Japan	C312 of 28.12.1977		
heavy steel forgings	Japan	C316 of 31.12.1977		
wood chipboard	Spain Sweden	C31 of 7.2.1978		

ECSC

haematite pig iron	Brazil	C187 of 5.8.1977	C315 of 31.12.77	price revision
galvanized steel sheets and plates	Australia Bulgaria Canada Czechoslovakia German Democratic Republic Japan Poland Spain	C19 of 24.1.1978		

MERCHANDISE	COUNTRY	OPENED OJ NO.	CLOSED OJ NO.	PROCEEDING TERMINATED BECAUSE OF
certain sheets and plates of iron or steel (subleading 73.13BIa)	Australia Bulgaria Czechoslovakia German Democratic Republic Hungary Japan Poland Romania Spain	C19 of 24.1.1978		
haematite pig iron	Canada	C19 of 24.1.1978		
certain sheets and plates of iron or steel (subleading 73.13BII b and c)	Czechoslovakia Japan South Korea Spain	C19 of 24.1.1978		
Coils of iron or steel for re-rolling	Australia Bulgaria Czechoslovakia Hungary Japan Poland South Korea Spain USSR	C19 of 24.1.1978		

Wire rod	Australia Czechoslovakia Hungary Japan Poland Spain	C19 of 24.1.1978
galvanized steel sheets and plates	Finland	C27 of 2.2.1978
hot rolled or extruded angles, shapes and sections of iron or steel	Czechoslovakia Hungary Japan South Africa Spain	C33 of 9.2.1978