

The concept of 'Union interest' in EU external trade law

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## Abstract

The category of 'Union interest' plays a specific role in EU common commercial policy. Its significance is especially substantial in the field of trade defence instruments. Even though trade defence instruments reflect on international trade distortions, their main objective is to protect European industries and other economic operators against the injurious practices of competitors from third countries, the imposition of restrictive trade measures might not only offer advantages to the affected EU industries, but also disadvantages to other actors in the European Union. Consequently, the Union interest test makes sure the other side of the coin is looked at and the European Union is prevented from imposing trade defence instruments, when the negative impacts on certain interested actors are clearly disproportionate to the positive impacts the trade defence measure might have on the protected EU industries. The current paper is focusing on the nature and character of the 'Union interest'. The paper starts by defining some basic concepts regarding the EU interests in EU law, examines the nature of 'Union interest' in the trade defence procedures, and then attempts to reflect on the new trade enforcement regulation and the EU general trade interests.

## Keywords

Union interest, national interest, public interest, Common Commercial Policy, trade defence instruments

## 1. Introduction

The category of ‘Union interest’ plays a specific role in EU common commercial policy (CCP). Its significance is especially substantial in the field of trade defence instruments, ie. anti-dumping, anti-subsidy and safeguard measures.<sup>2</sup> The ‘Union interest test’ requires the European Commission to always ensure that the imposition of trade defence measures is in the ‘interest of the Union’; in other words, it has to check up on reasons that would run counter to the introduction of such measures. Even though trade defence instruments reflect international trade distortions, their main objective is to protect European industries and other economic operators against the injurious practices of competitors from third countries, and the situation that arose is never simply black and white. The imposition of restrictive trade measures might not only offer advantages to the affected EU industries, but also disadvantages to other actors in the European Union. Demonstrating with an example it is obvious, that an anti-dumping duty increases the price level in the market, which in turn has a favourable impact on the competing EU industry, however it also leads to adverse effects on consumers or industrial users that are pressed to purchase the product at a higher price. Consequently, the Union interest test makes sure the other side of the coin is looked at and the European Union is prevented from imposing trade defence instruments, when the negative impacts on certain interested actors are clearly disproportionate to the positive impacts the trade defence measure might have on the protected EU industries. It operates as a ‘safety valve’ and allows the possibility of avoiding the automatic imposition of duties where the trade defence instrument would have an adverse effect on other industrial sectors (Maclean – Eccles 1999; Wellhausen 2001).

The consideration of Union interest is compulsory, this obligation has been included in the relevant EU law regulating trade defence instruments from the very outset, whereas the concept of ‘Union interest’ has been developed over time. It is worth noting that such an interest test is not required by the law of the World Trade Organization, therefore the Union interest test is an additional component in EU law called a ‘WTO plus’ obligation according to the terminology of the European Commission.

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The concept of ‘Union interest’ is relevant in the current paper from two perspectives. First, it is part of an underlying research project,<sup>4</sup> which is attempting to analyse the context of ‘national interest’ in EU law. Considering this point of view, the following question can be posed, whether ‘Union interest’ in external trade law can be regarded as a specific category of supranational interest, or pertains to a sort of EU public interest consideration. Second, Union interest is a topical issue today because EU

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<sup>2</sup> According to the terminology of the European Commission, the Trade Defence Instruments (or TDIs) encompass the anti-dumping, anti-subsidy and safeguard measures. Theoretically, these measures can be regarded as defensive trade measures, which are focusing on the import from third countries. In addition to these instruments, the EU uses so called offensive measures as well, the most important instrument in this field is the trade barriers regulation (TBR). The TBR tries to react to all trade barriers (illicit commercial practices) on foreign markets, which might be harmful for the EU exporters operating there. The TBR has also a secondary defensive character, because the EU is entitled to introduce restrictive measures, if it could not find compromise with the third country in question on eliminating the injurious trade barriers. It is worth noting, that also the TBR applies the concept of Union interest, which is a substantial requirements during the procedure. In spite of this, the following analysis will focus only on the defensive trade measures. For TBR and Union interest see, Gugerbauer 2005.

<sup>3</sup> Communication From The Commission To The Council And The European Parliament on Modernisation of Trade Defence Instruments Adapting trade defence instruments to the current needs of the European economy, COM(2013) 191 final, p. 3.

<sup>4</sup> ‘Policy Opportunities for Hungary in the European Union: the Analysis of the Legal Framework’, MTA Lendület-HPOPs Research Group. More information: <http://hpops.tk.mta.hu/en>

external trade law, specifically involving trade defence instruments, has undergone a reform recently, which will have – and still has – its footprint on ‘Union interest’ as well. The first part of the paper starts by defining some basic concepts regarding EU interests in EU law (2. *The ‘Union interest’ as the category of EU law*), the second part examines the nature of ‘Union interest’ in trade defence procedures (3. *The ‘Union interest’ and the EU Trade Defence Instruments*), then the fourth chapter attempts to reflect on the new trade enforcement regulation and EU general trade interests (4. *Defending the EU trade interest in the new Trade Enforcement Regulation*), and finally, the paper is closed by the conclusions (5. *Conclusion – The ‘Union interest’ as a specific public policy consideration*).

## 2. ‘Union interest’ as a category of EU law

As indicated above, the paper addresses the basic legal concept of ‘Union interest’ as a main question, therefore the analysis here will rely predominantly upon EU law considerations. However, it is also questionable whether Union interest is related somehow to the category of national interest: Is ‘Union interest’ a kind of own national – or to be more precise, supranational – interest, or are these incomparable categories? It is not within the scope of this paper to present all the theories on national interest from the realist Morgenthau to the newest constructivist theories of international relations, therefore here we refer only to a general definition: national interest includes the perceived needs and desires of one state in relation to other states comprising the external environment (Nuechterlein 1976), in other words national interest always says what is best for a society in foreign affairs (Rosenau 1968). National interest is usually linked to sovereignty, therefore the category of national interest can be normally applied to sovereign states.<sup>5</sup> However, it can be argued that even if the EU is not a sovereign state, it can exercise exclusive competences in certain policy fields, including CCP. Morgenthau did not exclude the possibility of applying national interest to other formations than sovereign states either.<sup>6</sup> It is also important that there is a differentiation in the literature between national and public interest, thus the definition draws a distinction between the external and internal (domestic) environment of a country; and the latter is usually referred to as the sphere public interest.<sup>7</sup>

The EU interest or common interest came up in several places in the founding treaties and secondary legislation as well. The ECSC Treaty referred already to more categories of interests: essential interests („Resolved to substitute for age-old rivalries the merging of their essential interests; to create, by establishing an economic community...”),<sup>8</sup> common interests („The institutions of the Community shall, within the limits of their respective powers, in the common interest”),<sup>9</sup> and specific interests of “workers and consumers” in a context where the rights to undertakings<sup>10</sup> were highlighted in the first founding treaty. Today, the founding treaties encompass more categories of ‘interests’. The Treaty on

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<sup>5</sup> The sovereignty was not an explicit requirement in Morgenthau’s theory, however the power as his centre-category has been applied only for sovereign countries, see Morgenthau 1973, pp. 27–39.

<sup>6</sup> „When the national state will have been replaced by another mode of political organization, foreign policy must then protect the interest in survival of that new organization” (Morgenthau 1952)

<sup>7</sup> This distinction was made quite early in the literature, Charles Beard (Beard 1934) was one of the first to distinguish national from “public interest,” which was used in reference to the domestic policies of nations.

<sup>8</sup> ECSC Treaty, Preamble, paragraph 5

<sup>9</sup> ECSC Treaty, Article 3

<sup>10</sup> ECSC Treaty, Article 48

the European Union (TEU) refers to the ‘interests of the European Union’,<sup>11</sup> ‘fundamental interests’<sup>12</sup> of the EU, ‘general interest’<sup>13</sup> of the EU and introduces the category of ‘strategic interest’<sup>14</sup> as well. Moreover, the Treaty on the Functioning of the European Union (TFEU) applies the formulation of ‘financial interest’.<sup>15</sup> The founding treaties do not define the meaning and content of these categories. Logically, the interest of the Union can be based on the interest of the EU itself, as an (relatively) independent and specific (supranational) actor; the common interest of Member States; and also on the partial and specific interests of individual actors, eg. companies, consumers, workers etc. The trade interest of the EU, or specifically the ‘Union interest’ is not mentioned in the founding treaties at all, but – as the next chapter will show – the EU regulations concerning trade defence instruments set out the main provisions with regard to ‘Union interest’.

### **3. ‘Union interest’ and EU Trade Defence Instruments**

#### ***3.1. The interest test in international economic law***

The International Economic Law basis for using Trade Defence Instruments is set out by the law of the World Trade Organisation. The anti-dumping and anti-subsidy measures are the subject of Article VI of GATT and two separate agreements,<sup>16</sup> moreover, Article XIX of GATT and a specific agreement disciplines the application of safeguard measures, which have less practical importance here.<sup>17</sup> The European Union as an efficient user of these trade measures implements the WTO framework into EU law in regulations and applies several additional conditions that are not part of the WTO legal basis. As mentioned earlier the typical example is the Union interest test, since the WTO framework does not prescribe any obligation of Member States that requires the consideration of the interest of specific actors in the procedure when deciding on the necessity of a given trade defence measure. However it doesn’t mean that WTO law precludes the application of specific interest tests on WTO members. Quite the contrary, the WTO Agreement on Safeguards explicitly refers to the significance of specific interests as ‘public interest’ considerations within its procedural chapter: the anti-dumping investigation “[...] shall include reasonable public notice to all interested parties and public hearings or other appropriate means in which importers, exporters and other interested parties

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<sup>11</sup> TEU Article 24 : „The Member States shall work together to enhance and develop their mutual political solidarity. They shall refrain from any action which is contrary to the interests of the Union or likely to impair its effectiveness as a cohesive force in international relations.”

<sup>12</sup> TEU Article 21: „... The Union shall define and pursue common policies and actions, and shall work for a high degree of cooperation in all fields of international relations, in order to (...) safeguard its values, fundamental interests, security, independence and integrity ...”

<sup>13</sup> TEU Article 17: „... The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them.”

<sup>14</sup> TEU Article 22: „...On the basis of the principles and objectives set out in Article 21, the European Council shall identify the strategic interests and objectives of the Union. Decisions of the European Council on the strategic interests and objectives of the Union shall relate to the common foreign and security policy and to other areas of the external action of the Union.”

<sup>15</sup> TFEU Article 86 : „...In order to combat crimes affecting the financial interests of the Union, the Council, by means of regulations adopted in accordance with a special legislative procedure, may establish a European Public Prosecutor’s Office from Eurojust.”

<sup>16</sup> Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Agreement on Subsidies and Countervailing Measures

<sup>17</sup> Agreement on Safeguards

could present evidence and their views, including the opportunity to respond to the presentations of other parties and to submit their views, inter alia, as to whether or not the application of a safeguard measure would be in the public interest.”<sup>18</sup>

Unlike the Agreement on Safeguards, the Anti-Dumping Agreement as well as the Agreement on Subsidies and Countervailing Measures do not explicitly require a specific interest test, however these agreements provide significant policy space with regard to the imposition of measures. Both agreements encourage members to make the imposition of duties voluntary, and not mandatory. The Anti-Dumping Agreement prescribes that any decision on whether or not to impose an anti-dumping duty in cases where all requirements for the imposition have been fulfilled are decisions to be made by the authorities of the importing Member.<sup>19</sup> The Agreement on Subsidies and Countervailing Measures includes the same provision with regard to the autonomy of the Members’ authorities and specifies that procedures “[...] would allow the authorities concerned to take due account of representations made by domestic interested parties whose interests might be adversely affected by the imposition of a countervailing duty.”<sup>20</sup> Regarding this term, the ‘domestic interested parties’ shall include consumers and industrial users of the imported product subject to investigation.<sup>21</sup> Furthermore, both agreements prescribe that the Countries have to provide opportunities for industrial users of the product under investigation, as well as representative consumer organisations in cases where the product is commonly sold at the retail level to provide information which is relevant to the investigation regarding dumping (or subsidy), injury and causality.<sup>22</sup>

The relevant WTO provisions show that WTO Members have considerable autonomy to decide on trade defence measures and specific considerations for introducing trade measures at a lower level, or not imposing trade defence instruments at all. Consequently, the ‘Union interest test’ applied by the European Union is not incompatible with the requirements of international economic law in advance. Although the EU has the most developed practice in balancing interests of specific domestic actors, other WTO Members, e.g., Australia, Canada, China, India, New Zealand, South Africa<sup>23</sup> and Ukraine (Kotsiubska 2011) can apply the public interest test as well.

### ***3.2. The EU law framework***

As noted above, the EU trade defence measures, namely the anti-dumping, anti-subsidy and safeguard measures require the consideration of the ‘Union interest’. The basis regulations implementing WTO law specify the requirements of the ‘Union interest test’. The less comprehensive provisions are included in the basis regulation with respect to the safeguard measures,<sup>24</sup> referring to the rights of the

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<sup>18</sup> WTO Agreement on Safeguards, Article 3.1. For procedural requirements see Lee 2014. at p. 120.

<sup>19</sup> Anti-Dumping Agreement, Article 9.1

<sup>20</sup> Agreement on Subsidies and Countervailing Measures, Article 19.2

<sup>21</sup> Agreement on Subsidies and Countervailing Measures, See Footnote for Article 19.2

<sup>22</sup> Anti-Dumping Agreement, Article 6.12., Agreement on Subsidies and Countervailing Measures, Article 12.10

<sup>23</sup> Australia, New Zealand and South Africa have no formal provisions but the authorities can exercise discretion as to whether to apply duties or not. India and China mention public interest in their legislative framework but no evidence of application can be found. See Evaluation of the European Union’s Trade Defence Instruments. Final Evaluation Study (27 February 2012) Volume 1: Main Report. Bkp Development Research & Consulting, 2012., p. 22.

<sup>24</sup> Council Regulation (EC) No 260/2009 of 7 July 2009 on common rules for imports. Due to the low number of safeguard cases, the measure plays no important role in the analysis of the Union interest. See for a short and early examination on this issue, Creally 1992, at p. 141.

interested parties<sup>25</sup> and applying the general phrase of ‘where the Community’s interests so require’<sup>26</sup> the EU is entitled to decide on the imposition of safeguard measures.

The basis regulations on anti-dumping, and anti-subsidy measures, however, go one step further and set out the detailed framework of ‘Community interest’. The most important elements of the interest test according to the basis regulations are as follows:<sup>27</sup>

- determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of domestic industry, users and consumers, and a determination shall only be made where all parties have been given the opportunity to make their views known;
- the need to eliminate the trade distorting effects of injurious dumping or subsidisation and restore effective competition shall be given special consideration;
- in order to provide a sound basis on which the authorities can take an account of all views and information in the decision as to whether or not impose measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organisations may make themselves known and provide information to the Commission;
- information shall only be taken into account where it is supported by actual evidence which substantiates its validity,
- measures may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.

Consequently the Commission as the EU authority responsible for conducting trade defence procedures, has to consider various interests ‘taken as a whole’, and the interested parties have the right to provide information to the Commission. On the other hand, the Commission has to hear the interested parties, and take into consideration those claims supported by evidence.

In other words, the Commission has to conduct a specific ‘Union interest test’ in order to prove whether the prospected trade defence measures are in the Union interest or not. It can be said that, above all, there is a presumption<sup>28</sup> that the EU is interested in implementing the intended measures, e.g. antidumping duties etc., because these measures are generally reactions to unfair import activities arising from third countries (the only exception is the safeguard measure, since that doesn’t address unfair but instead harmful imports).

Therefore, the ‘Union interest test’ has the objective of rebutting this presumption, and when the Commission can conclude that it is not in the interest of the EU, the measures at stake may not be applied.<sup>29</sup> Moreover, these formulations suggest that the Commission possesses a wide margin of

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<sup>25</sup> Council Regulation (EC) No 260/2009, Article 6.5

<sup>26</sup> Council Regulation (EC) No 260/2009, Article 16

<sup>27</sup> Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, Article 21; Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community, Article 31.

<sup>28</sup> Also the European Commission refers to the concept of ‘rebuttable presumption’, see: Draft Guidelines on Union Interest, DG Trade Working Document, not yet adopted, p. 4. The draft is available at: [http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc\\_150839.pdf](http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150839.pdf)

<sup>29</sup> In addition to decisions about the imposition of provisional or definitive measures, the two basic Regulations also state that Union interest must be considered in a number of other decisions to be made during trade defence

discretion in deciding what is in fact in the interest of the Union (Community). Therefore the next question is how the Commission applies the interest test and the answer to that can help in specifying the (abstract) nature of the Union interest as well.

### ***3.3. The nature of the ‘Union interest’***

Three main questions have to be posed when seeking for the nature of the ‘Union interest’. First, it is important to determine which considerations, factors fall within the scope of the concept of ‘Union interest’, second, it is to be answered whose interest should be taken into consideration, and the third question is how the Commission evaluates these partial interests.

#### **3.3.1. The relevant factors concerning ‘Union interest’**

The basic regulations fail to determine which effects of the measures are to be considered in the Union interest test. However, the European Union’s practice presents explanations on the relevant considerations. In “Footwear with uppers of leather originating in the People's Republic of China and Vietnam” case<sup>30</sup> the council regulation on the imposition of a final duty highlighted that the interest test is an economic analysis focussing on the economic impact of taking or not taking anti-dumping measures on operators within the EU. In terms of that, it is not a tool by which anti-dumping investigations can be instrumentalised for general political considerations relating to foreign policy, development policy etc. The Council refers also to the interested parties listed in Article 21 of the basic Regulation. While this list is not exhaustive (in some investigations, suppliers of the raw materials for the product concerned have also made comments and these comments have been taken into account), it follows clearly from the types of parties mentioned that only the economic effects on the parties within the Community are at stake in this test.<sup>31</sup>

Despite of the intent of EU authorities to restrict considerations only to economic factors, parties in procedures are attempting to submit claims based on other, e.g. environmental policy factors. In the “Biodiesel originating in the USA” case<sup>32</sup>, an environmental argument was also submitted, namely, one interested party alleged an incoherence of the anti-dumping proceeding with international and EU policy decisions to promote bio-fuels production and sales related to environmental protection and reduce the dependency on mineral fuels. The Commission rejected this argument in its regulation on a provisional anti-dumping duty, emphasising that the Union interest test according to the basic regulation requires that special consideration be given to the need to eliminate trade distorting effects of injurious dumping and restore effective competition. Against this background, general considerations on environmental protection and the supply of mineral diesel cannot be taken into account in the analysis and at the same time cannot justify unfair trade practices.<sup>33</sup>

As a result, non-economic considerations are not normally addressed in the Union interest test and the Commission and/or the Council are trying to reject such arguments. Therefore the answer to the first

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investigations, i.e. when deciding whether or not to terminate an investigation following the withdrawal of a complaint, or suspend measures.

<sup>30</sup> Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam

<sup>31</sup> Council Regulation (EC) No 1472/2006, recital 279.

<sup>32</sup> Commission Regulation (EC) No 193/2009 of 11 March 2009 imposing a provisional anti-dumping duty on imports of biodiesel originating in the United States of America

<sup>33</sup> Commission Regulation (EC) No 193/2009, recitals 157-158.



question is that ‘Union interest’ refers definitely to economic considerations (Van Bael – Bellis 2011, Hartmann 2012).

### **3.3.2. The relevant stakeholders**

The basic regulations include a list of stakeholders whose interests must be considered in the Union interest test (Union industry, industrial users and consumers). This list is non-exhaustive, therefore the EU authorities can take into consideration other parties’ interests as well (importers, suppliers to the Union industry), but the method of considering these categories of interests are very similar to the examination of the three standard types of interests (Van Bael – Bellis 2011, Hartmann 2012).<sup>34</sup>

#### *a) Union industry*

The expected impact of measures on the Union industry is always addressed in the test. The consequences of trade defence measure are higher prices, therefore the competing EU industry is able to increase sales at a higher price, which generally improve the profitability of the industry. In the “Footwear with uppers of leather originating in the People’s Republic of China and Vietnam” case the investigation led to more specific findings: EU authorities considered that imposing measures, i.e. removing materially injurious dumping, would allow the Community industry to maintain its activity and bring an end to the successive closures and job losses it faced over the last years, and the adverse effects that the measures may have on certain other economic operators in the EU are not disproportionate compared to those beneficial effects for the EU industry.<sup>35</sup> Moreover, the EU authorities assess the likely impact of a non-imposition of measures on the Union industry as well. The findings typically predict the further deterioration of the Union industry’s sales volume, market share and profitability, leading to lower investment, production cuts and job losses. In certain cases this analysis refers only to the situation before the imposition, e.g. of a provisional duty, when the dumped or subsidised import was damaging the EU industry. In the “Footwear with uppers of leather originating in the People’s Republic of China and Vietnam” case, for instance, it was noted that the decrease in production volume of the EU footwear industry, and thus decline in market share, was accelerated by the emergence of dumped imports.<sup>36</sup>

#### *b) Industrial user’s interests*

As the imposition of measures tends to increase users’ costs – they can access the product at a higher price –, users are typically not interested in introducing trade defence instruments. In addition to increasing prices, other frequent arguments made by users against measures are that they tend to increase unfair competition on the product’s downstream market – i.e. users are afraid of being affected by dumping in their market – and have a negative impact on the security of supply and product choice.<sup>37</sup> Although the EU authorities frequently recognise the effect on prices induced by the measures, the standard argument is that the product concerned only accounts for a low share in the users’ production costs. On the other hand, the consideration of negatively affected users is

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<sup>34</sup> For detailed analysis: Evaluation of the European Union’s Trade Defence Instruments. Final Evaluation Study (27 February 2012) Volume 1: Main Report. Bkp Development Research & Consulting, 2012.

<sup>35</sup> Council Regulation (EC) No 1472/2006, recital 286.

<sup>36</sup> Council Regulation (EC) No 1472/2006, recital 246.

<sup>37</sup> Evaluation of the European Union’s Trade Defence Instruments. Final Evaluation Study (27 February 2012) Volume 1: Main Report. Bkp Development Research & Consulting, 2012., p. 333.

occasionally acknowledged. In the “Synthetic staple fibres of polyesters (PSF) originating in Malaysia and Taiwan” case the EU terminated the procedure<sup>38</sup> based predominantly on the grounds that the imposition of measures would have a negative effect on users. A large number of users and users associations came forward and claimed that the level of measures was particularly high and that they were, as a consequence, prevented from importing from their largest sources of supply in Asia. The analysis carried out on the possible impact of the imposition of measures revealed that the bedding and upholstering industry may probably be more sensitive to possible raw material price increases than the spinning sector. Manufacturers of pillows, quilts, cushions, upholstery etc. had a profit margin below 5% on average and the analysis showed that the likely impact on their cost of production might have been as high as 6-8%. Therefore the conclusion was that due to such an increase in costs, and the fact that the bedding industry will be seriously affected by the increasing competition they are facing from China on finished products, any decision to impose anti-dumping duties on imports from Malaysia and Taiwan would have led to a further weakening in their competitiveness.<sup>39</sup> Based on these arguments, the Commission terminated the procedure.

### *c) Consumers’ interests*

The effect of measures on consumer interests<sup>40</sup> is addressed in only a minority of cases. In the remaining cases, the Commission usually found that the impact of measures on consumers was insignificant. As an illustration, the “Sweetcorn in kernels originating in Thailand” case can be cited,<sup>41</sup> in which two trading organisations also submitted observations. As the analysis has shown, the average spending on sweetcorn per household is very limited (up to EUR 5 per year). Taking into account the moderate level of the current measures, the Commission concluded that the effects of the continued imposition of measures would likely be negligible for consumers.<sup>42</sup> Interestingly, not only consumers’ representatives used to submit contributions to the procedures. It can frequently happen that affected exporters argue with the Commission on the likely effects of the measures on consumers. In the “Footwear with uppers of leather originating in the People’s Republic of China and Vietnam” case the provisional conclusion was that consumer leather footwear prices would only be marginally affected by the imposition of definitive measures. No representations were received from consumers’ organisations following the publication of the imposition of provisional measures, therefore the interest of consumers was not challenged by any association. However, certain exporting producers claimed that they did not agree with the findings concerning the limited impact of measures on consumers, and that those measures would result in a major increase in household costs. The Commission rejected these arguments referring to the fact, that exporting producers do not have standing with respect to Community interest under anti-dumping rules. Their points have nevertheless been analysed for the sake of argument. In spite of this clear legal background, the Commission finally

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<sup>38</sup> 2007/430/EC Commission Decision of 19 June 2007 terminating the anti-dumping proceeding concerning imports of synthetic staple fibres of polyesters (PSF) originating in Malaysia and Taiwan and releasing the amounts secured by way of the provisional duties imposed

<sup>39</sup> 2007/430/EC: Commission Decision, recitals 12-26.

<sup>40</sup> Only consumer organisations have standing in the procedure. Individual consumers have no right to take part in the Union interest test, see: T-256/97, *Bureau européen des unions des consommateurs (BEUC) v Commission of the European Communities*, ECR 2000-II 101, paragraph 77.

<sup>41</sup> Council Implementing Regulation (EU) No 875/2013 of 2 September 2013 imposing a definitive anti-dumping duty on imports of certain prepared or preserved sweetcorn in kernels originating in Thailand following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009

<sup>42</sup> Council Implementing Regulation (EU) No 875/2013, recitals 127-129.

analysed the substance of the argument, but concluded the imposition of definitive measures on the product concerned would not be against the overall interest of consumers.<sup>43</sup>

### **3.3.3. Specificity of the Commission's procedure and procedural reform**

The Union interest test may lead to the non-imposition of measures or termination of procedures. Cases which were stopped based on Union interest considerations are in relatively low number.<sup>44</sup>

As the Union interest test takes a micro-economic approach, by considering individual stakeholders' interests, the question arises as to how the Commission evaluates these interests, or how these interests are to be aggregated into the Union interest. Especially in view of the fact that interests of different stakeholders will typically conflict with one another, the issue of weighting of interests becomes important (Van Bael – Bellis 2011, Hartmann 2012).

However, according to the practice of the Commission, the Union interest test is not a cost-benefit analysis in the strict sense. While the various interests are put in balance, they are not weighed against each other in a mathematical equation, not least because of obvious methodological difficulties in quantifying each factor with a reasonable margin of security within the time available, and furthermore there is not just one generally accepted model for a cost-benefit analysis.<sup>45</sup> This is also the reason why the basic regulations stipulate that the need to restore effective competition shall be given special consideration and measures may not be applied, on the basis of information submitted, where it can clearly be concluded that it is not in the Community interest to apply such measures. In other words – according to the argumentation of the Commission –, the law accepts that trade defence measures have certain negative effects on those parties which are typically not in favour of such measures. And measures would only be considered as not in the interest of the Community, if they had disproportionate effects on the aforementioned parties.<sup>46</sup> The interests of the Union industry are given more weight than the interests of other stakeholders, for instance, the main focus of an antidumping investigation is put on the competing EU industry, because the most important objective is to restore effective competition, and only secondly, are the interests of other stakeholders to be taken into consideration (Didier 2001, Hartmann 2012).

Finally it is worth noting, that trade defence instruments have actually undergone substantial reform. In April 2013, the European Commission adopted a Communication on the modernisation of Trade

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<sup>43</sup> Council Regulation (EC) No 1472/2006, recitals 248-258.

<sup>44</sup> See e.g. “imports of recordable compact discs (CD+/-R) originating in the People's Republic of China, Hong Kong and Malaysia” case, the Commission concluded that the imposition of measures would, on the one hand, have substantial negative effects on importers, distributors, retailers and consumers of the product concerned, while on the other hand, the Community industry is unlikely to obtain any significant benefits. It was therefore considered that the imposition of measures would be disproportionate and against the Community interest and as a consequence, the Commission terminated the procedure (Commission Decision of 3 November 2006 terminating the anti-dumping proceeding concerning imports of recordable compact discs (CD+/-R) originating in the People's Republic of China, Hong Kong and Malaysia, recital 116.) The same conclusion was reached in “imports of recordable digital versatile discs (DVD+/-R) originating in the People's Republic of China, Hong Kong and Taiwan” case (Commission Decision of 20 October 2006 terminating the anti-dumping proceeding concerning imports of recordable digital versatile discs (DVD+/-R) originating in the People's Republic of China, Hong Kong and Taiwan, recital 41.)

<sup>45</sup> Council Regulation (EC) No 1472/2006, recital 279.

<sup>46</sup> Council Regulation (EC) No 1472/2006, recital 279.

Defence Instruments which contained both legislative and non-legislative proposals.<sup>47</sup> This was the second time the Commission attempted to bring changes to the EU's trade defence measures, which were last substantially amended in the 1990s. A first attempt in 2006 met with such resistance that it had to be abandoned. But the new regulatory reform has been successful; the basic regulations on protection against dumped imports against subsidised imports have been modified.

Probably from the point of view of the 'Union interest test', the most important consequence is that trade defence instruments will be subject in the future to new decision-making rules, since the reform amendment modified the comitology rules as well. Under the new regulatory framework, definitive trade defence measures can be imposed by a Commission Regulation. Member states have the possibility of asking for amendments or appeal against the Commission's proposal in an appeal committee, which is only able to overturn the Commission proposal with a qualified majority. It is an entirely new situation, because previously, definitive antidumping and countervailing measures were imposed by a Council Regulation (following a Commission proposal).

This procedural amendment addressed a serious problem of political nature regarding Union interest. This was because, while the Commission has made several attempts to define the concept Union interest in legal terms, a parallel political notion of Union interest developed in the Council over the last decades (Maclean – Eccles 1999; Wellhausen 2001). This was the notion that the concept of Union or earlier Community interest was in fact an expression of the collective national interests of the majority of Member States, particularly manifested in the Council of Ministers. This opened the door allowing other interests of Member States to be expressed. Realising that the administrative procedure did not recognize their commercial interests adequately, interested parties, particularly industrial user groups and distributors, turned their attention toward lobbying Member States to oppose the adoption of measures. Obviously, if enough Member States opposed the adoption of measures, the Council could block any proposal. By trying to persuade government representatives that antidumping duties would cause damage to specific industrial user groups located in their countries, these groups tried to use extra-procedural means to achieve their ends.<sup>48</sup>

#### **4. Defending the EU trade interest in the new Trade Enforcement Regulation**

While the 'Union interest test' is based on the aggregated, partial interests of stakeholders in trade defence procedures, a new regulation targets the enforcement of a more abstract category of trade interest in the European Union. In May 2014, the Council adopted this regulation concerning the exercise of the Union's rights for the application and enforcement of international trade rules (Horváthy 2014).<sup>49</sup> The Regulation will introduce a new horizontal framework to enhance the EU's

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<sup>47</sup> Communication From the Commission to the Council and the European Parliament on Modernisation of Trade Defence Instruments Adapting trade defence instruments to the current needs of the European economy. COM(2013) 191 final

<sup>48</sup> The best example to illustrate this is probably the Soda Ash case from the 1990s. The EU glass industry, which used significant quantities of soda ash in its production process, actively lobbied the individual Member States to prevent the adoption of definitive antidumping duties. Imposing these duties, argued the glass industry, would increase their production costs and render them less internationally competitive. While the Commission effectively ignored their arguments in its Community interest assessment of the matter, seven Member States sympathized with the case of Community glass producers and refused to support definitive antidumping measures. So the implications for TDI proceedings are significant (Maclean – Eccles 1999; Wellhausen 2001).

<sup>49</sup> Regulation (EU) No 654/2014 Of The European Parliament And Of The Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common

ability to enforce its interests in the international trading system and take measures against third countries that violate obligations stemming from international multi- and bilateral trade agreements. Previously the EU was able to react to these restrictive measures of its trading partners only in an *ad hoc* manner, therefore the new Regulation will fill an existing procedural gap in Common Commercial Policy. Consequently the draft Regulation in 2012<sup>50</sup> intended to take into consideration the fact that the EU did not yet have a horizontal framework on efficient and swift reactions to the unlawful measures of trading partner countries. Moreover, the proposal might have been a remedy to the slightly paradoxical situation that the Commission has had to face after the Treaty of Lisbon entered into force. Namely, the Lisbon amendment generally introduced ordinary legislative procedure in the field of Common Commercial Policy, consequently, in terms of Article 207 TFEU, the Council and European Parliament are already acting as co-legislators in relation to the measures on implementation of trade policy as well. The new procedural framework, on the one hand, was a substantial commitment to the democratic legitimacy of EU trade policy, but on the other hand, particularly as a consequence of the European Parliament's participation, the legislative procedures became more complex and significantly slowed down after treaty reform. Enforcement of trade interests under trade agreements concluded by the EU, however, requires adopting and implementing measures in rapid procedural frameworks within strict deadlines, to which the standard EU law-making methods can hardly respond that can draw out the procedures up to thirty months. Therefore it was appropriate and reasonable to delegate these powers from the European Parliament and Council to the European Commission as typical executive functions and lay down a predictable framework for the adoption of acts that serve the enforcement of EU trading interests *vis-à-vis* third countries. The proposal was adopted by the Parliament with amendments on 2 April, 2014, then by the Council on 8 May 2014. The main objective of the adopted Regulation is to address the effective and timely exercise of the Union's rights to suspend or withdraw concessions or other obligations arising from international trade agreements, including both multilateral and bilateral agreements to which the EU is a party. The above objectives can be achieved within the scope of the Regulation, which is limited to the following three subjects.

*a) Retaliatory actions against third countries following dispute settlement mechanisms under the WTO Dispute Settlement Understanding (DSU), as well as under other international trade agreements, including regional or bilateral agreements*

The Regulation provides a procedural tool for making decisions, when the EU has been authorised to suspend concessions or other obligations following dispute settlement procedures. However, it is important to note that the policy leeway of the EU in these cases is substantially limited by WTO law, or the provisions of other relevant trade agreements. As for WTO law, e.g. Article 22 of DSU – on the principles of compensation and suspension of concessions – lays down a strict order in choosing which concessions or obligations have to be suspended, i.e. the complaining party should first seek to suspend concessions in the same sector as that in which the violation was declared; then as a 'cross-sectoral' retaliation, it is allowed to suspend concessions in relation to other sectors under the same agreement; and only thirdly, in a 'case of last resort', are the WTO members entitled to introduce 'cross-agreement' retaliation actions (e.g. lifting concessions in the field of GATS in response to a violation of GATT). Other regional or bilateral agreements include provisions on the dispute

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commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization

<sup>50</sup> Proposal for a Regulation Of The European Parliament And Of The Council concerning the exercise of the Union's rights for the application and enforcement of international trade rules COM(2012) 773 final

settlement mechanism, but in most cases, if the other parties are also members of the WTO, these specific rules on dispute resolving methods have only a subsidiary character in nature, e.g. several regional or bilateral trade agreements exclude trade defence instruments from the scope of specific dispute settlement provisions, which, therefore, can be complained about only in the WTO dispute settlement procedure.

*b) Rebalancing of concessions or other obligations in response to a safeguard measure taken by a third country under the WTO Agreement on Safeguards and other free trade agreements*

When countries apply the ‘escape clauses’ of trade agreements, specifically the safeguard measures in terms of article XIX of GATT and the WTO Agreement on Safeguards, the European Union, in return, has the right to demand concessions. According to article 8 of Agreement on Safeguards, generally the restricting country has to offer trade compensation for the adverse effects of the restrictive safeguard measure. If the parties cannot find a compromise on the concessions, the Agreement on Safeguards gives the right to the country affected by the safeguard to take rebalancing measures against the restricting country (e.g. introducing additional customs duties etc.). In general, other bilateral and regional free trade agreements include the possibility of rebalancing trade concessions, therefore the Regulation can apply in those contexts as well.

*c) Modification of concessions by a WTO member under Article XXVIII of the GATT, where no compensatory adjustments have been agreed*

Principally, article XXVIII of the GATT gives members the right to propose modifications of their contracted concessions within consultations with the other parties. If the countries involved cannot come to an agreement, the contracting party that initiated the negotiations has the right to modify its concessions unilaterally; however, rebalancing measures can be taken by countries that are entitled to by article XVIII of the GATT (e.g. countries having substantial interest or principal supplying interest etc.). Even though the EU has not yet withdrawn concessions under Article XXVIII of the GATT, the possibility could arise and in that case the regulation would facilitate an effective procedural background to decide on withdrawal or modification of certain concessions, which have to occur within short deadlines.

If action is necessary to safeguard the Union’s trade interest, the European Commission has to pursue implementation actions determining the appropriate commercial policy measures. The Regulation lays down the conditions, which implementation actions must follow [Article 4 of the Regulation]. These requirements refer partly to the relevant legal provisions and limitations of any retaliatory action introduced by the European Union; and specify general concerns, which determine the commercial policy measure to be chosen (e.g. effectiveness, potential of the measures to provide relief to EU economic operators, avoidance of disproportionate administrative complexity and costs in the application of the measures etc.). The possible commercial policy measures include customs duties (suspension of tariff concessions, imposition of new customs duties etc.), quantitative and other administrative restrictions (quotas, import or export licences etc.), and suspension of concessions regarding goods, services or suppliers in the area of public procurement. The Regulation sets down a reasonable institutional method, seeing that the adoption of the commercial policy measures will be carried out within the standard comitology procedure established by Regulation (EU) No 182/2011,<sup>51</sup>

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<sup>51</sup> Regulation (EU) No 182/2011 Of The European Parliament And Of The Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission’s exercise of implementing powers

and the Commission shall be assisted by the committee established by the so called Trade Barriers Regulation.<sup>52</sup> In other words, neither new nor parallel institutions have to be set up following the Regulation.

As a result, the Trade Enforcement Regulation will allow the European Union to implement trade retaliatory actions within a clear and efficient horizontal procedural framework, when EU trade interests are at stake. Moreover, the Regulation can effectively encourage countries adopting trade restrictions to comply with international trade law obligations and remove illicit trade measures; therefore the very purpose of the new Regulation is to provide more compliance and not at all place a protectionist tool in the hands of the Commission. From the point of view of European companies and other business operators the impressive features of the new regulation are that on the one hand, it simplifies the procedures under which the EU can take countermeasures, resulting in shorter and less complex comitology procedures. On the other hand, it is also important that the Regulation will have an impact not only on the trade of goods, but also included is the suspension of concessions in the field of services. Therefore, the potential of the Regulation has been extended to a wider range of business actors that all will be able to take advantage of the swift and compact procedures governed by the Regulation, when facing barriers in regard to international trade.

The regulation cites ‘general interest’ and ‘Union’s interest’ in several places but no clarification has been given in defining these terms. Technically it means that the Commission is entitled to interpret these categories and decide which factors have to be taken into consideration when imposing measures.

## **5. Conclusion – ‘Union interest’ as a specific public policy consideration**

As the previous analysis has shown ‘Union interest’ in the field of CCP is a relatively well developed category and legal concept shaped by the practice of the Commission. In trade defence procedures, the Commission takes into consideration the interests of several actors and tries to aggregate these concerns. In other words, the Union interest test is based on an appreciation of all various interests taken as a whole. It should be noted that the Commission presently considers only economic factors and is trying to reject all attempts of stakeholders to submit other policies, e.g. environmental policy grounds. Probably the weakest point of current regulation and practice is the relativeness of the respective EU industry to other stakeholders. The current situation seems to reflect an uneven playing field in favour of the affected EU industry, because in terms of presuming Union interest, other stakeholders have to stand the proportionality test as well. But despite this fact, it is notable that the concept of ‘Union interest’ is well determined in legal terms, and even if it covers predominantly the interest of the relevant EU industry, other concerns, partial interests can be taken into consideration within the ‘Union interest test’ as well. In other words the EU approach would appear to have an advantage in that it clearly sets out the – purely economic – interests involved, which ensures a transparent and foreseeable application of the ‘Union interest test.’

Although the new trade enforcement regulation seems to provide a more abstract category of ‘Union interest’ than that which trade defence instruments are based on, it is most likely that the Commission will follow the same criteria, which have been developed in the practice of trade defence instruments. In other words, the Commission will possess a wide margin of discretion when balancing the interests of the relevant actors, and it is also expected, that it will make decisions based on only economic

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<sup>52</sup> Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization

grounds. The latter argument is underpinned by the textual interpretation as well, since the preamble of the regulation refers to the safeguard of EU economic interests.<sup>53</sup>

Noticing these characteristics, the concept of ‘Union interest’ can be regarded as a rather specific ‘public interest’ aggregated at EU level, than a kind of abstract, supranational interest of the European Union. However, it is not suggested here that supranational interest – in terms of international relations theory – does not exist at all. The conclusion says only that the concept of ‘Union interest’ in external trade law is rather similar to a category of ‘public interest’, or a public policy consideration which is composed of interests of EU industry and other stakeholders. This ‘EU public interest’ can be clearly differentiated from other, “public interest” considerations set out by founding treaties<sup>54</sup> because these considerations are accumulated at the EU level and the Commission, thanks to recent procedural reform, can make a decision on Union interest more or less independently of Member States.

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<sup>53</sup> Regulation (EU) No 654/2014 Of The European Parliament and of the Council, preamble paragraph 2. However, it is questionable, whether the legislator has intentionally distinguished between the ‘general interest’ and the ‘Union’s interest’ in the text of the regulation. In view of the fact that the ‘general interest’ comes up only once in the text and the context doesn’t refer to any specificity, it may be hypothesized that the distinction is unintentional.

<sup>54</sup> See e.g. Article 36 TFEU in context of the free movement of goods. Unlike the ‘Union interest’ in the field of CCP, this public policy exception is based on the individual Member States’ considerations, therefore a Member State itself are entitled to refer domestic – i.e., national – public policy interests.



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