

The International Practice of the European Communities: Current Survey

Commercial Defence Actions and Other International Trade Developments in the European Communities: 1 January 1993 – 30 June 1993

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This is the sixth in the series of reports on developments in the field of EC international trade law.¹ This report will cover developments that occurred during the six-months period 1 January 1993 to 31 July 1993.

1. Dumping

1.1. General Developments

Market economies – State traders

As from 1 May 1993, Romania and Bulgaria are also considered as market economies for anti-dumping purposes.² This brings the number of countries that are presently considered as state-controlled for the purposes of application of EC anti-dumping law to sixteen:³ Mongolia, North Korea, PRC, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam.⁴ Reportedly, Mr. Yeltsin is also trying to have Russia recognized as a market

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1 The first report was published in 1-2 *EJIL* (1990) 337-364. The second report was published in 2/1 *EJIL* (1991) 166-199. The third report was published in 2/2 *EJIL* (1991) 146-176. The fourth report was published in 3 *EJIL* (1992) 372-421. The fifth report was published in 4 *EJIL* (1993) 283-304.

2 Council Regulation (EEC) No. 1013/93, OJ (1993) L 105/1, which was the last amendment to Regulation 1765/82, OJ (1982) L 195/1.

3 And indeed, for all EC contingency protection laws.

4 See also Council Regulation (EEC) No. 848/92, OJ (1992) L 89/1; Council Regulation (EEC) No. 3859/91, OJ (1991) L 362/83; and Council Regulation (EEC) No. 2727/90, OJ (1990) L 262/11. To be sure, it is recalled that the identification of China as a non-market economy is based on Regulation No. 1766/82, OJ (1982) L 195/21, not Regulation No. 1766/82, *op. cit.* For a brief discussion of the situation of Poland, Hungary, the Czech and Slovak Republics, and the three Baltic States, please refer to our fifth report, *supra* note 1, at 284.

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economy,⁵ and thus the political pressure to have it so regarded will increase in the near future.

1.2. Administrative Determinations

DRAMs from Korea, OJ (1993) L 9/1 (extension provisional)

Polyester staple fibers from India and Korea, OJ (1993) L 9/2 (definitive)

Definitive anti-dumping duties were published in the Official Journal on 15 January 1993. Of the Korean companies involved Cheil Foods was exempted from the duty. The other Korean companies obtained duties of less than 5%. Of the Indian companies, JCT was exempted from the duty. Reliance, the largest company in India, obtained a 2.1% duty. The duties of the other five companies varied between 2 and 7.2%.

An important issue in the case was the sale of so-called B-grade products on the Korean market. B-grade sales are sales of substandard products and the Korean producer concerned in his cost accounting records had valued these on the basis of the net realizable value, a generally accepted accounting principle in Korea. B-grade sales are really sales of reject products and as such the Korean producer did not keep cost accounting records for this product (indeed, what is the production cost of a production reject?). The Commission rejected the cost accounting method of the Korean producer and instead employed the costs of manufacture and selling, general and administrative expenses of other standard types of polyester staple fibers sold on the domestic market, plus a profit rate based on the average profit achieved on domestic PSF sales as a normal value. Needless to say this method inflated the normal value for the substandard product.

Outer rings of tapered roller bearings from Japan, OJ (1993) L 9/7 (definitive)

The Commission imposed anti-dumping duties of 11.3% and 6% on Koyo Seiko and NTN Corporation respectively. These duties were based on the dumping margins found. In the construction of the export price the Commission used a profit margin of 6%. As regards the like product, the Commission made a distinction between unfinished tapered roller bearing cups and finished tapered roller bearing cups and excluded unfinished tapered roller bearing cups from the scope of the proceeding.

Deadburned (sintered) magnesia from China, OJ (1993) L 15/1 (extension provisional)

Magnesium oxide from China, OJ (1993) L 15/2 (extension provisional)

Herbicide from Romania OJ (1993) C 22/3 (expiry)

Bicycles from Taiwan and China OJ (1993) L 58/12 (provisional)

Because of the large number of Taiwanese producers involved, the Commission decided to resort to sampling. In agreement with the relevant Taiwanese trade association, eight companies were selected for a complete investigation. The eight companies represented 49% of all Taiwanese bicycle exports to the Community during the investigation period. With respect to China a sample was also taken, and in view of the fact that there were two types of Chinese producers, i.e. state-owned organizations and joint ventures (companies with non-Chinese participation), the sample chosen for China consisted of two state-owned

⁵ Speech by Dr. Beseler delivered at European Trade Law conference in Brussels on 16 June 1993.

organizations and two joint venture companies. A fifth exporter selling bicycles produced in China and exported via Hong Kong was also included in the sample.

With respect to the like product, the Commission acknowledged that there are really five types of bicycles i.e. mountain bicycles, sport/racing bicycles, touring bicycles, junior action bicycles and other bicycles. However as there was no clear dividing line between the different types, the Commission decided that the whole range of models had to be considered as forming one like product.

As far as normal value for Taiwan was concerned, the Commission decided to use constructed values even though six of the sampled companies had sold sufficient quantities of bicycles in a domestic market, in view of the large number of discrepancies and variations in models. With respect to China, Taiwan was used as an analogue country. Where export prices were constructed a profit margin of 5% was used. An OEM claim made by several Taiwanese producers was rejected by the Commission on the grounds that prices, costs and profits for OEM sales on the Taiwanese market were found to be comparable to those for own brand sales. The weighted average dumping margin calculated for all Taiwanese companies amounted to 1.05%. The Commission considered this to be *de minimis* and refrained from imposing dumping duties on Taiwan.

This approach is inconsistent with previous cases such as *video tapes* where the Commission had actually applied *de minimis provisional* anti-dumping duties on the grounds that the calculations as such were still provisional and might still be subject to change at the definitive stage. With respect to China, the Commission applied the one-country-one-duty rule. The Commission stated that none of the companies involved had been able to demonstrate to the satisfaction of the Commission that it enjoyed, and could be expected to continue to enjoy, the necessary degree of commercial autonomy to be granted individual treatment. The dumping margin found for China was 34.4% and duties were imposed at the same level as the undercutting margin was higher than the dumping margin.

Finally the claim by some of the state-owned Chinese companies that their exports to the EEC should be decumulated from other exports was rejected by the Commission. It is indeed consistent Commission practice to reject claims for intra-country decumulation.

Large aluminium electrolytic capacitors from Korea and Taiwan OJ (1993) C 677 (initiation)

The case was initiated on 10 March.

The targeted products are:

'large electrical capacitors, non solid, aluminium electrolytic, with a CV product (capacitance multiplied by rated voltage) between 8,000 and 550,000 μC (micro-Coulombs) at a voltage of 160 V or more'. It is alleged that the targeted products fall within CN Code ex 8532 2200.

This differs from the scope of the Japanese capacitors proceeding where:

'large electrical capacitors, aluminium electrolytic, with a CV product (capacitance multiplied by rated voltage) between 18 000 and 310 000 μC (micro-coulombs) at a voltage of 160 V or more and with a diameter of 19 mm or more and a length of 20 mm or more ... and falling within CN code ex 8532 22 00' were the targeted products.

The scope of the new capacitors case is therefore slightly larger because the 'CV product' is more extensive and the product is not limited by a particular dimension. On the other hand

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the new capacitors case only covers 'non-solid' capacitors as opposed to the Japanese case that did not have this restriction.

Television camera systems from Japan OJ (1993) C 67/8 (initiation)

The proceeding targets television camera systems. These systems consist of: a camera head with three sensors (12 millimetre or more charge-coupled device pick-up devices) with more than 400,000 pixels each, which can be connected to a rear adaptor, and having a specification of the signal to noise ratio of 55 dB or more at normal gain; either in one piece, with the camera head and the adaptor in one housing or separated; a view finder (diagonal of 38 mm or more); a base station or camera control unit (CCU) connected to the camera by a cable; an operational control panel (OCP) for camera control (i.e. for colour adjustment, lens opening or iris) of single cameras; a master control panel (MCP) or master set-up unit (MSU) with selected camera indication, for the overview and for the adjustment of several remote cameras. The parts are imported together or separately.

These different components of a television camera system do not function separately and cannot be used outside the camera system of a particular producer.

Lenses, video tape recorders and camera heads with a recording unit in the same housing are not covered by the complaint.

It is alleged that the professional TV cameras fall within the following CN codes:

- ex 8525 30 99
- ex 8537 10 91
- ex 8537 10 99
- ex 8529 90 98
- ex 8543 80 80

The complaint was lodged by the Committee for Appropriate Measures to Establish Remedial Anti-dumping [Camera]. The main complainant is Philips.

Seamless pipes and tubes from iron or non-alloy steel, from Former Czechoslovakia, Hungary, Poland, and Croatia, OJ (1993) L 58/1 (extension provisional)

DRAMs from Korea OJ (1993) L 66/1 (definitive); DRAMs from Korea OJ (1993) L 66/37 (acceptance undertakings)

The Regulation imposing definitive duties and the Commission decision accepting undertakings were published on 18 March.

The dumping margins for the three cooperating producers were: 14.6% for Samsung and in excess of 50% for Goldstar and Hyundai. The residual duty was set at 24.7% (the highest level of undercutting).

Undertakings were accepted from all three cooperating companies.

A particular aspect of the case was that provisional duties were collected for four months only. This unique feature of the case merits reproduction *in toto*:

With respect to provisional duties, it is Community practice to collect these duties definitively if substantial injurious dumping provisionally determined is confirmed at the definitive stage and if the situation with respect to the injurious effect of the dumped imports to the Community market has not fundamentally changed since the imposition of the provisional duties. In the present case, substantial injurious dumping was definitively confirmed. However, due to the specific aspects of the situation, in particular the fact that

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after acceptable undertakings had been offered by all three Korean producers which cover the entirety of imports originating in Korea, it was considered that the interests of the Community did not require the collection of these duties for their full period of validity but only for the initial period of validity of four months.

This is one of the very rare proceedings where the provisional duties were not (totally) collected after the acceptance of undertakings.⁶

On virtually all other issues, which were already discussed in our previous report⁷ the Council upheld the Commission's findings.

Polyester yarn from Turkey OJ (1993) C 76/3 (initiation review)

This was a newcomer review request.

Urea from Czechoslovakia and the [former] USSR OJ (1993) C 87/7 (initiation review)

This review was initiated by the Commission itself. The reasons were an increase in exports from these countries and a decrease of the Community market.

Low carbon ferro-chrome (LCFECR) from Kazakhstan, Russia, Ukraine OJ (1993) L 80/8 (provisional)

This case was characterized by a high degree of non-cooperation. As a result the Commission had to use best information available, i.e. trade statistics of the EC, certain information given by interested parties and information supplied by the sole Community producer. South Africa was used as a surrogate country for the three Russian Republics. A fixed anti-dumping duty of ECU 0.276 per kg net was imposed.

Refractory chamottes from China OJ (1993) C 104/8 (initiation)

The sole Community producer argues that the United States should be used as a surrogate for China.

3.5" Microdisks from Japan, Taiwan and China OJ (1993) L 95/5 (provisional)

The proceeding had been initiated in July 1991 as a result of a complaint filed by the Committee of European Diskette Manufacturers (Diskma) on behalf of the major proportion of EC producers of 3.5" microdisks.

The investigation period ran from 1 April 1990 to 31 March 1991.

The products covered were:

6 Up to now this has occurred only six times in the history of EC anti-dumping law: DRAMs from Japan, OJ (1990) L 193/1 (definitive; undertakings), but under certain requirements; Urea from Austria, Hungary, Malaysia and Romania, OJ (1989) L 52/37 (undertaking); Certain angles, shapes and sections of iron or steel, from the GDR, OJ (1984) L 227/33 (undertaking); Shovels from Brazil, OJ (1984) L 330/28 (undertaking); Artificial corundum from China and Czechoslovakia, OJ (1984) L 340/82 (undertakings); Dicumyl peroxide from Japan, OJ (1983) L 329/19 (undertakings).

7 See our fifth report, *supra* note 1, at 290.

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3.5" microdisks used to record and store encoded digital computer information falling within CN code ex 8523 20 90 (Taric code: 8523 20 90* 10), and originating in Japan, Taiwan and the People's Republic of China.

The microdisks are available in various types, depending on their storage capacity and on the way in which they are marketed. However, the Commission determined that between the various types no significant differences in the basic physical characteristics and technologies exist. Therefore, for the purpose of this proceeding all 3.5" microdisks should be considered as one product.

In order to examine whether the complainants constituted a major proportion of the total Community production of the like product, the Commission requested the cooperation of all known non-complainant producers in the EC and took into account the information by the non-complaining cooperating producers. Further, the producers that were related to producers in the exporting countries were excluded from the EC industry. On this basis, the complainant EC microdisks producers represented approximately 77% of the total EC production during the investigation period.

The dumping margins found and the duties imposed, expressed as a percentage of the total CIF value, were as follows:

| Country | Company | Dumping margin | Provisional duty |
|---------|------------------------|----------------|------------------|
| Japan | Memorex Telex | 41.3% | 5.2% |
| | Hitachi-Maxell | 37.3% | 23.4% |
| | TDK | 41.6% | 27.8% |
| | Sony | 60.1% | 40.9% |
| | Residual Duty | n.a. | 40.9% |
| Taiwan | CIS Technology | 20.4% | 20.4% |
| | Megamedia | 33.5% | 33.5% |
| | Residual Duty | n.a. | 33.5% |
| China | Hanny Magnetics | 35.6% | 35.6% |
| | General Dumping Margin | 41.5% | n.a. |
| | Residual Duty | n.a. | 41.5% |

The duties for Japan were limited by the injury margin. For Taiwan and China the duties were limited by the dumping margin.

The proceeding lasted 21 months from the initiation (July 1991) to the imposition of provisional duties (April 1993). The Commission stated at recital (6) that:

the investigation has exceeded the normal time period of one year because of the volume and complexity of the data gathered and examined.

This means that once the definitive duties are imposed, 27 months will have lapsed since the notice of initiation.

The UK has voted against the imposition of provisional duties on the ground that it is a consumer of floppy disks and has no production facilities. Obviously, duties will mean more expensive disks for British consumers.

The Commission decided again to apply the one-country-one-duty rule for China. However it made an exception for one company. This company was fully owned by a foreign

investor and the Commission found, on the basis of its articles of association and other relevant documents concerning the establishment and functioning of the company that, in addition to being profit oriented with the freedom to transfer profits outside the People's Republic of China, it was totally independent in the administration of its business and in the setting of export prices.

For Japan a constructed value was used with a 15% profit margin. Where export prices were constructed, a profit margin of 5% was used. Finally it may be noted that the Commission decided to exclude so-called fall-out microdisks, i.e. production rejects. This may be contrasted with the situation in polyester staple fibers quoted above where the Commission decided to *include* production rejects.

Roller chains for cycles from China OJ (1993) C 113/2 (expiry)

Electronic weighing scales from Japan OJ (1993) L 104/4 (definitive)

This Regulation was the result of a review. This review had been requested by the Community producers under Article 15 (sunset review) and Article 14 (normal review).

The investigation period ran from 1 January to 31 December 1990.

The products covered were:

Electronic weighing retail trade scales falling within CN code 8423 81 50 (Taric code 8423 81 50 * 10) and originating in Japan.

The scales are available in three types: one for the low-range segment; one for the mid-range segment; and one for the top range segment. Nevertheless the Commission determined that although the potential use and quality of the scales may vary, there is no significant difference in the basic physical characteristics and marketing methods. In addition, it stated there are no clear dividing lines as models in neighbouring segments are often interchangeable. The Commission therefore considered the scales for the purpose of the proceeding as one product.

The Japanese producers that cooperated were:

- Ishida Scales, Kyoto
- Teraoka Seiko, Tokyo
- Tokyo Electric, Tokyo
- Yamato Scales, Akashi

The investigation that started in February 1991 exceeded the normal period 'because of the volume and complexity of the data which had to be gathered'. (26 months!) *Quaere* what is complex about an investigation involving only one country and four producers!

The dumping margins found exceeded 60% in all cases, except for Yamato Scales, for which the margin was 15.3%.

The duties were as follows: Tokyo Electric Co. 22.5%; Teraoka Seiko 22.6%; Ishida Scales 31.6%; and Yamato Scales 15.3%. Clearly, the duties have - except for Yamato - been limited by the injury margin. The residual duty was set at 31.6%, the highest injury margin found.

With respect to substantive issues, the Commission accepted a selective normal value for one Japanese producer. Trade-in rebates were again rejected following earlier rejection in the Photocopiers proceeding.

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Urea ammonium nitrate solution from Bulgaria and Poland OJ (1993) C 123/5 (Initiation)

Electronic weighing scales from Singapore and Korea OJ (1993) L 112/20 (provisional)

The Regulation was the result of the proceeding against weighing scales from Singapore that started in January 1992 and that was extended to include Korean weighing scales in April 1992.

The investigation period ran from 1 January to 31 December 1991, which was one year later than the investigation period used in the review proceeding concerning weighing scales from Japan.

The products covered were:

electronic weighing scales for use in retail trade which incorporate a digital display of the weight, unit price and price to be paid, whether or not including a means of printing this data falling within CN code 8423 81 50 (Taric code: 8423 81 50 *10) and originating in the Republic of Korea and Singapore.

Dumping Korea

Where the export sales were made to related importers, the export prices were constructed with a 5% profit margin.

The normal value was based on the weighted average domestic selling price. Two Korean exporters made a level of trade argument, i.e. they claimed that normal value should be established selectively on the basis of the weighted average prices of their sales to a particular category of customer. The exporters claimed that the dealers would be at the most comparative level of trade for comparison with their export sales.

The Commission rejected the argument because the producers failed to establish adequately a consistency of quantities, costs and prices at one distribution level in relation to other levels. The Commission even determined that:

[i]n fact the evidence provided on some of these factors for the specific category of customer in question showed that they were similar to a significant degree to other categories alleged to be different.

As a result, the normal value was determined on the basis of all sales to independent customers.

Normal value was compared with the export prices on a transaction-by-transaction basis. The dumping margins were as follows:

| | |
|------------------------|-------|
| - Cas Corporation: | 9.3% |
| - Descom Scales: | 29.0% |
| - Han Instrumentation: | 7.2% |

Approximately 85% of the Korean producers did not cooperate. These producers were subject to the residual dumping margin, which was set at 29.0%, the highest dumping margin found.

The sole cooperating producer in Singapore was:

- Teraoka Weigh-System PTE, Singapore

Dumping Singapore

The dumping margin found for this producer was 8.5%. The residual dumping margin for Singapore 'was calculated to amount to 31%'.

Injury

For the injury determination the Commission cumulated the imports of Singapore and Korea. From the exporters' side, the Commission established that the market share of Singapore and Korea had risen from 2.3 to 10.3 per cent. The price undercutting exceeded 20 per cent and in one case even 30 per cent. For the Community industry the production and the utilization rate had fallen significantly. Also the market share and the prices of the Community industry had decreased. Further, the profit of the Community industry had gone down and the employment had declined. In view of these facts the Commission established that there was material injury.

It was argued by one of the exporters that the injury was also caused by other factors, notably the imports from other countries such as Japan, Turkey and Taiwan. The Commission found however that: (1) there had not been imports from Turkey during the investigation period; (2) the imports from Taiwan did not concern a sufficiently alike product; and (3) the dumped imports from Japan did not preclude that the imports from Korea and Singapore had a substantial influence on the injurious situation of the Community industry. Therefore, concerning the causality, the Commission determined that the dumped imports were the cause of the injury.

Duties

The injury margins exceeded the dumping margins in all cases. Accordingly, the duties were limited by the (above-mentioned) dumping margins. The residual duties for both countries were set at the highest dumping margin found.

Cotton yarn from Brazil and Turkey OJ (1993) C 131/2 (initiation review)

This was a newcomer review request.

Seamless pipes and tubes of iron or non-alloy steel from Hungary, Poland and Croatia OJ (1993) L 120/34 (Hungary, Poland, Croatia) (acceptance undertakings); OJ (1993) L 120/42 (Hungary, Poland, Croatia) (definitive)

The Commission accepted undertakings from a variety of exporters concerned. Surprisingly, although the Commission decision accepting undertakings was published only on 15 May 1993, it applies to all shipments released for free circulation in the Community as from 1 January 1993. Residual duties of 21.7%, 10.8% and 17.4% were imposed on Hungary, Poland and Croatia respectively. No residual duties were imposed on the Czech and Slovak Republics.

Manganese steel wear parts from South Africa OJ (1993) L 122/46 (termination)

This case was essentially terminated without protective action on the basis of the best information available rule. The reason was that during the injury investigation the Commission received information concerning only a small proportion of the total Community production.

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Iron or steel sections from Turkey and former Yugoslavia, OJ (1993) C 144/5 (notice of impending expiry)

Inner tubes and new tyre cases for bicycles from Korea and Taiwan OJ (1993) C 144/6 (expiry)

Dot-matrix printers from Japan, OJ (1993) C 146/2 (notice of impending expiry)

Paint, distemper, varnish and similar brushes from China OJ (1993) L 127/15 (termination)

The Commission resorted to sampling as regards the Community industry. . . .

Potassium permanganate from China, OJ (1993) C 148/18 (notice of intention to carry out a review)

Outboard motors from Japan, OJ (1993) C 154/6 (notice)

This concerned a change in a trade name of a foreign exporter.

Acrylic fibres from Mexico OJ (1993) C 154/7 (initiation review)

This review was initiated at the request of three Mexican producers/exporters. The Mexican producers argue that there is no longer material injury caused by imports from Mexico.

Magnesium oxide from China OJ (1993) L 145/1 (definitive)

The Commission used Turkey as a surrogate country and a specific anti-dumping duty of ECU 112 per tonne was imposed on the Chinese exports. With respect to the calculation of the dumping margin, the Commission made special adjustments to allow for beneficiation and sorting processes found in Turkey but not found in China. The Commission made an additional allowance for the ease of access to raw materials in China as compared to that of Turkey. On the other hand, the Commission refused to make a further allowance for the claimed proximity of the open case mines to the kilns in China. The Commission recalled that only differences which stem from the different natural advantages of the product in China and in Turkey can justify adjustments to be made to the normal value based on the situation in Turkey. The location of kilns however was not considered a natural advantage but rather a result of commercial decisions made by the production organization concerned.

Paracetamol from China, OJ (1993) C 168/4 (notice of impending expiry)

Compact disc players from Japan, OJ (1993) L 150/44 (refund applications of Amroh BV, PIA, Hifi, and MPI Electronic)

The Commission granted a partial refund of 16.9% (32% previous dumping margin minus 15.1% dumping margin calculated for Accuphase).

Bicycles from China, OJ (1993) L 155/1 (extension provisional)

Polyester yarn from Korea, Taiwan, and Turkey, OJ (1993) C 175/9 (notice of impending expiry)

Potassium chloride from Belarus, Russia, or Ukraine OJ (1993) C 175/10 (initiation review)

This review was initiated by the Commission itself on the basis of information concerning changed circumstances in the Russian Republics as a result of the decentralization from the former Soviet Union. The Commission had further received conflicting data on the appropriateness of the anti-dumping measures in the form of a variable duty.

Electronic typewriters from Japan, OJ (1993) L 157/76 (termination)

The Article 15 review proceeding has resulted in a termination of the measures that were in force against Japan.

The termination is based on the conclusion by the Commission that any injury to the EC industry is not attributable to dumped imports from Japan, but to its own restructuring.

Gas-fuelled, non-refillable pocket lighters from China, OJ (1993) L 158/43 (termination)

This case resulted from a newcomer review request made by three Chinese producers. The Commission determined that all three companies were state-controlled to such an extent that application of an individual dumping margin would not be warranted. As a result the requests were rejected. Consequently, the residual duty will continue to apply to these companies.

1.3. Court Cases

Case C-136/91, Findling v. Hauptzollamt Karlsruhe, Judgment of 1 April 1993, not yet reported

Council Regulation (EEC) No 374/87 of 5 February 1987 imposed definitive anti-dumping duties on housed bearing units (ball bearing housings) from Japan.⁸

Article 1 (3) of the Regulation sets forth the various rates of duty by means of an overview table that distinguishes 8 possible situations of production and export of Japanese ball bearing housings. These eight situations consist of seven individual duties for individual exporters and producers, and one remaining category: 'other' (residual duty).

A situation arose whereby ball bearing housings produced by Asahi were exported by Nachi, a situation that was indeed envisaged in the overview table of the Regulation. However, these exports took place indirectly, through Gloria and Ehara, two trading houses in Japan, a situation that was not (explicitly) envisaged in the overview table. The German Customs Authorities considered that this type of export should be classified as 'other' and accordingly imposed the residual duty of 13.39 per cent. The Commission supported the Customs Authorities' literal reading and argued that to do otherwise would be harmful to legal certainty and a uniform interpretation of EC customs legislation. The importer, Findling, considered that this was an individual situation as foreseen by the table contained in the Regulation and argued that the imports should be subject to an individual 2.24 per cent duty and that the customs' interpretation of Article 1 (3) was incorrect. Therefore, the importer challenged the decision of German Customs Authorities in court.

The German court considered that a literal reading of the Article meant that the situation had to be classified under 'other'. However, the German court questioned whether the purpose of the Regulation was not different and that therefore under a 'teleological' interpretation the outcome would be different. Accordingly, the German court referred the case to the European Court of Justice [ECJ] for a preliminary ruling on the interpretation of the table contained in the Regulation and an interpretation of the notion of 'exporter'.

⁸ OJ (1987) L 35/32 (definitive).

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The ECJ considered that, according to its consistent jurisprudence, a reading of EC legislation should not only be literal, but should also consist of interpretation in context. The ECJ then referred to the obligation laid down in the basic Regulation and the Anti-Dumping Code not to impose duties higher than the injury margin. The ECJ states that this obligation is neglected in cases where a higher duty is imposed on product A exported by company B (the exporter), rather than when company A (the producer) would have exported product A itself. If in the latter situation a lower duty is sufficient to remove the injury, then a higher duty in the former case is out of proportion with the targeted aim of removing the injury. The ECJ neglects the fact that injury margins did not play a role in this case (see for criticism below).

The ECJ stressed that this teleological interpretation of Article 1 (3) is not contrary to a uniform interpretation of EC customs legislation. The ECJ added that a uniform interpretation of EC customs law should be ensured by a clear and precise formulation of the Article in question.

The ECJ therefore concluded that the table contained in the Regulation should be interpreted so 'that it is sufficient for the individual duties to be applied to the ball bearing housings when they are manufactured by, or for, the individually identified exporters'.

Critical remarks

1. The *outcome* of the Judgment is satisfactory from a logical point of view. The *reasoning* used to come to this result is less satisfactory. The reasoning of the Court is partly based on the obligation to impose duties not higher than the injury margin [*lesser duty rule*]. However, the duties in this case had not been limited by the injury margin but by the dumping margin. The Court's *reasoning* therefore makes no sense.
2. The Judgment misses an opportunity to provide more clarity on the notion of 'exporter' under EC anti-dumping law.

2. Other Trade Protection Laws

2.1. Countervailing Duties

Certain ball bearings from Thailand, OJ (1993) L 56/24 (provisional); OJ (1993) L 163/1 (definitive)

We recall that this was an Article 14 review that was initiated to check whether inadvertent circumvention of the undertaking had taken place.⁹ Such unintentional circumvention had been possible since *indirect* exports to the EC were not covered by the undertaking.

The Commission determined that Thai bearings had indeed entered the EC (indirectly) without being subject to export tax. To remedy the loophole the Commission promptly imposed a countervailing duty on indirect imports. *Direct* imports were exempt from the duty since on these imports the export tax had been collected at the Thai border in accordance with the undertaking. The Council later confirmed the Commission's findings and subsequent actions.

To ensure equal treatment of direct and indirect imports, the countervailing duty was set at the same rate as the export tax, converted to CIF level at the EC frontier. For the provisional countervailing duty this meant 13.4% *ad valorem*. The definitive countervailing duty was calculated to amount to 06.7%.

9 OJ (1992) C 182/6 (initiation review).

The 6.7% anti-dumping duty that was already imposed in 1990,¹⁰ remains unaffected. The Council confirmed (once again) that imposition of both anti-dumping and countervailing duties is possible in this case.

Therefore, in sum: direct exports from Thailand are now subject to the undertaking plus a 6.7% anti-dumping duty; indirect exports from Thailand are subject to the same anti-dumping duty of 6.7% plus a 6.7% countervailing duty.

2.2. Safeguards

Unwrought aluminium from Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Russia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan, Estonia, Latvia, and Lithuania, OJ (1993) C 94/4 (initiation)

The targeted product is unwrought aluminium falling within CN code ex 7601 (aluminium, not alloyed, falling within CN code 7601 10 00 and aluminium alloys, primary, falling within CN code 7601 20 10) originating in the above-mentioned countries.

It was alleged that imports had increased and were continuing to increase in such a way as to cause material injury to the Community industry producing like or competing products. EC Member States requested that Community safeguard measures be adopted in respect of the imports in question, pursuant to Article 11 of Regulation No. 1765/82 on common rules for imports from State Trading countries.

Accordingly, the EC opened the Community investigation based on Regulation No. 1765/82. The legal basis for the opening of the proceeding against Estonia, Latvia, and Lithuania seems deficient because these countries were removed from the list of State Traders by Council Regulation No 848/92.¹¹ The normal legal basis for the investigation against these three countries would have been Regulation No. 288/82.

Textile and clothing products from third countries, OJ (1993) L 103/1

This Council Regulation¹² lays down the rules and procedures governing the administration of quantitative import limits and monitoring procedures established by the Community in the framework of protocols, bilateral agreements with supplier third countries pursuant to the Multi-Fibre Arrangement in force or in the framework of arrangements or other specific import regimes in which a double-checking mechanism to control or to monitor imports is laid down.

Steel products from the Slovak Republic, OJ (1993) L 157/59; Steel products from the Czech Republic, OJ (1993) L 157/67

These two decisions of the EC-Czech Republic and Slovak Republic Joint Committee subjected certain steel products to a tariff quota system.

¹⁰ OJ (1990) L 281/1 (definitive).

¹¹ OJ (1992) L 89/1 (amendment). This Regulation applies from 1 January 1992.

¹² Council regulation (EEC) No 958/93 of 5 April 1993 establishing a Community procedure for administering quantitative import restrictions and monitoring of textile and clothing products originating in certain third countries.

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2.3. Commercial Policy Instrument

Port charge or fee in Japan, OJ (1993) L 166/45 (termination)

On 9 June 1993 the Commission terminated the examination procedure. Since the suspension of the examination procedure,¹³ the Commission has determined that the Japanese Harbour Management Fund was effectively discontinued on 31 March 1992. The Commission also determined that the Fund had not been continued in a different guise, and that the money collected and not yet disbursed had been used for projects of some benefit to Community shipping lines. Given the amount of time that had expired since the suspension of the examination procedure, the Commission considered it to be in the Community interest to terminate the procedure.

Piracy of sound recordings in Thailand

During the period under investigation there have been no developments that were formally published. However, in response to a Parliamentary question Sir Leon Brittan stated that: '[t]his proceeding is now making promising progress'.¹⁴

3. Miscellaneous

This section will deal with GSP, MFA, Enlargement, and the Association Agreements.

3.1. GSP

As reported previously, the EC's GSP Regime was extended into 1993.¹⁵

To coordinate and update the GSP regime with its amendments,¹⁶ the EC Commission published a 'consolidated version' thereof.¹⁷ The document incorporates all the amendments that were made since the basic GSP scheme that was enacted in 1990.

Although the document is without legal status, it facilitates comprehension of the complete regime with its – mostly minor but numerous – amendments.

3.2. MFA

The EC Council approved the protocol (February 1993) prolonging the MFA until 31 December 1993.¹⁸ In parallel, the EC succeeded in renewing all of the Community's bilateral agreements concluded under the MFA for a period of two years, with a possibility of tacit renewal for a third year.

It is recalled that in the context of the Uruguay Round it is intended to replace the Multi-Fibre Arrangement. The draft Agreement foresees that textiles and clothing products will be integrated into the GATT progressively, in stages, over a period of 10 years. The draft

13 Port charge or fee in Japan, OJ (1992) L 74/47 (suspension).

14 Response to written question No. 2438/92, published in OJ (1993) C 141/34.

15 Regulation (EEC) No 3917/92, OJ (1992) L 396/1. See our fifth report, *supra* note 1, at 299.

16 See *supra* note 1, at footnote 33.

17 OJ (1993) C 169/1.

18 See also our fifth report *supra* note 1, at 299.

agreement also provides for a detailed safeguard mechanism to deal with any difficulties that may arise in the markets of importing countries.

3.3. Enlargement: Austria, Finland, Norway and Sweden

Early in 1993, the EC had launched accession negotiations with Austria, Finland, Norway, and Sweden with a view toward enlarging the Community to 16 Member States. The negotiations are being conducted on the basis that the four candidate countries would accede to the EEC Treaty, as modified by the Maastricht Treaty. Therefore, the accession negotiations will eventually address the key pillars of Maastricht, including a single currency and a common foreign and defence policy.

Thus far, however, the negotiations have not reached such substantive questions. The principal exercise for the first several months of the year was a review by each candidate of the *acquis communautaire* and a submission to the EC of position papers reflecting those aspects of the *acquis* that the candidate can simply sign on to and those where it may require a transitional period or other concession.

Although the negotiations are being conducted separately with each of the four candidates, there are certain common subjects – and these include the areas of agriculture and budgetary issues – where the negotiations are likely to be the most difficult. Certain candidates are also likely to have very specific problems, such as Austria's request for special treatment in the transport sector and Norway's request for special treatment in the energy sector (not to mention its resumption of commercial whaling). However, the Commission has made clear to the four candidates that the EC is not willing to grant opt-outs of the kind obtained by the United Kingdom (e.g., from the Social chapter and single currency) and Denmark (e.g., from the common foreign and defence policy) for certain of the Maastricht Treaty obligations.

These difficult issues are not expected to be addressed in substance until the Autumn, which complicates the preferred timetable of the four candidate countries. The four would like to conclude negotiations by the end of 1993 so that the accession agreements can be ratified in 1994 and enter into force in January 1995; their goal is to ensure that they can participate fully in the Intergovernmental Conferences of 1996. However, although the Belgian Presidency has indicated that while it would like to accelerate the pace of accession negotiations, it is not optimistic that the negotiations can be concluded by the end of this year.

3.4. Association Agreements

At the end of 1991, the EC had reached association agreements with Hungary, Poland, and what was then Czechoslovakia, respectively, providing for gradual improvements in trade relations as a means of binding these countries more closely to Western Europe. However, these countries have argued forcefully during these 18 months (January 1992-June 1993) that the association agreements are inadequate, particularly since they grant only limited access to EC markets for the products in which Eastern European countries are most productive – steel, textiles and agricultural produce.

In response, the Commission submitted a report to the European Council meeting at Edinburgh last December in which it recommended, among other things, that the Community should set more generous market access terms for products from Eastern and Central Europe than had been devised in the association agreements. The conclusions to the Edinburgh Council contained a pledge that when the European Council met again (at Copenhagen on 21-

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22 June 1993), the Council would reach decisions on the various components of the Commission's December 1992 recommendation.

Thus, in preparation for the European Council at Copenhagen, the Commission adopted a Communication to the Council setting forth numerous specific proposals for deepening the Community's relationship with the countries of Eastern and Central Europe. The Communication contained recommendations for intensified political dialogue, for more effective use of EC assistance programs (such as PHARE), for cumulating rules of origin for Eastern and Central European products, and, perhaps most importantly, for improving access to the Community market for Eastern and Central European products.

This Commission proposal was endorsed by the European Council on 29 June and although its endorsement has been overshadowed by reports of dissension at the Council on the Community's economic situation, the initiative should prove to be a substantial benefit to EC relations with Eastern and Central Europe.

The Interim Agreements with Romania and Bulgaria, entered into force on 1 May 1993 and 1 June 1993, respectively.

4. Appendix: Anti-Dumping Decisions and Regulations

| Table Anti-Dumping: January 1993 – July 1993 | | | | | | | |
|--|---|---------------|-------------------|------------------|-----------------|-------------|--------------------|
| Product | Exporting Country | Investigation | Initiation Review | Provisional Duty | Definitive Duty | Undertaking | Termination Expiry |
| DRAMs | Korea | | | OJ L 9/1* | | | |
| Polyester staple fibers | India | | | | OJ L 9/2 | | |
| Outer rings of tapered roller bearings | Japan | | | | OJ L 9/7 | | |
| Dead-burned (sintered) magnesite | China | | | OJ L 15/1* | | | |
| Magnesium oxide | China | | | OJ L 15/2* | | | |
| Herbicide | Romania | | | | | | OJ C 22/3 |
| Ball bearings (countervailing) | Thailand | | | OJ L 56/24 | OJ L 163/1 | OJ L 163/5 | |
| Bicycles | China | | | OJ L 58/12 | | | |
| Large aluminium electrolytic capacitors | Korea, Taiwan | OJ C 67/7 | | | | | |
| Television camera systems | Japan | OJ C 67/8 | | | | | |
| Seamless tubes, of iron or non-alloy steel | Hungary Poland Czechoslovakia Croatia Serbia Montenegro Macedonia Bosnia-Herzegovina Slovenia | | | | OJ L 58/1* | | |

* Extension

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| Table Anti-Dumping: January 1993 - July 1993 | | | | | | | |
|---|---------------------------------|---------------|-------------------|------------------|--------------------------------------|--------------------------------------|--------------------|
| Product | Exporting Country | Investigation | Initiation Review | Provisional Duty | Definitive Duty | Undertaking | Termination Expiry |
| DRAMs | Korea | | | | OJ L 66/1 | | |
| DRAMs | Korea | | | | OJ L 66/37 | - | |
| Polyester yarn | Turkey | | OJ C 76/3 | | | | |
| Urea | Czechoslovakia, [former] USSR | | OJ C 87/7 | | | | |
| Low carbon ferro-chrome (LCFECR) | Kazakhstan Russia Ukraine | | | OJ L 80/8 | | | |
| Refractory chamottes | China | OJ C 104/8 | | | | | |
| 3.5" Microdisks | Japan Taiwan China | | | OJ L 95/5 | | | |
| Roller chains for cycles | China | | | | | | OJ C 113/2 |
| Electronic weighing scales | Japan | | | | OJ L 104/4 | | |
| Urea ammonium nitrate solution | Bulgaria Poland | OJ C 123/5 | | | | | |
| Electronic weighing scales | Singapore Korea | | | OJ L 112/20 | | | |
| Cotton yarn | Brazil Turkey | | OJ C 131/2 | | | | |
| Seamless pipes and tubes of iron or non-alloy steel | Hungary Poland Croatia | | | | OJ L 120/34 (Hungary Poland Croatia) | OJ L 120/42 (Hungary Poland Croatia) | |

| Table Anti-Dumping: January 1993 – July 1993 | | | | | | | |
|---|------------------------------|---------------|-------------------|------------------|-----------------|-------------|--------------------|
| Product | Exporting Country | Investigation | Initiation Review | Provisional Duty | Definitive Duty | Undertaking | Termination Expiry |
| Manganese steel wear parts | South Africa | | | | | | OJ L 122/46 |
| Inner tubes and new tyre cases for bicycles | Korea Taiwan | | | | | | OJ C 144/6 |
| Paint, distemper, varnish and similar brushes | China OJ | | | | | | L 127/15 |
| Potassium permanganate | China | | OJ C 148/17 | | | | |
| Acrylic fibres | Mexico | | OJ C 154/7 | | | | |
| Magnesium oxide | China | | | | OJ L 145/1 | | |
| Bicycles | China | | | OJ L 155/1* | | | |
| Potassium chloride | Belarus Russia Ukraine | | OJ C 175/10 | | | | |
| Electronic typewriters | Japan | | | | | | OJ L 157/76 |
| Gas-fuelled non-refillable pocket lighters | China | | | | | | OJ L 158/43 |
| Ball bearings (countersailing) | Thailand | | | | OJ L 163/1 | | |
| | | | | | | | |
| * Extension | | | | | | | |

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