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Possible Ways of Concretizing Certain Legal Terms in the EU's Anti-Dumping Regulation Christian Tietje/Bernhard Kluttig

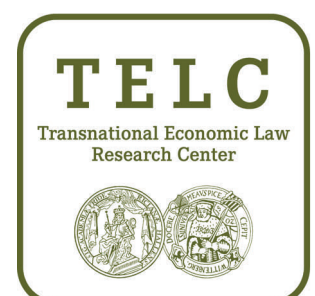
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I. Introduction

In December 2006 the European Commission published a Green Paper on the future of the EU's trade defence instruments (Global Europe – Europe's trade defence instruments in a changing global economy, 6.12.2006, COM (2006) 763 final, available at: http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131477.pdf) and thereby launched an intensive public consultation. The Commission received 542 replies to the questionnaire from a wide range of different stakeholders. The responses were assessed by the Commission and the results have been published recently in a short summary (Evaluation of the responses to the public consultation on Europe's trade defence instruments in a changing global economy – December 2006 – March 2007, 19.11.2007, available at: http://trade.ec.europa.eu/doclib/docs/2007/november/tradoc_136846.pdf). Various proposals for clarification of existing provisions of the basic anti-dumping Regulation (basic Regulation) have been made. However, the appropriate form of concretization remains undetermined. In a speech before the Committee on International Trade of the European Parliament on 20 No-

vember 2007 EU Trade Commissioner Peter Mandelson made clear that the Commission is in favour of drawing up guidelines in form of Commission Communications (available at: http://ec.europa.eu/commission_barroso/mandelson/speeches_articles/sppm179_en.htm). In addition to this approach two other ways of concretizing individual legal terms in the EU's anti-dumping law are conceivable: amendments of the basic Regulation, and delegation of the Council's implementation powers to the Commission. Each approach features different scope for exercising influence and making changes. This is in keeping with the varying degree of participation assigned to the Council, the European Parliament, and the Commission within the overall institutional equilibrium in which they are interlinked. For purposes of the Common Commercial Policy, the issuance of binding legal acts is fundamentally the task of the Council (Art. 133 (4) EC-Treaty). On its own, the Commission can issue binding legal acts only where specifically authorized and where the authorization itself lays down the basic principles governing the matter in question.

In assessing the various possibilities of concretizing that are discussed in this paper, account must, on the one hand, be taken of the major objectives of concretization efforts, which are legal certainty, transparency, and de-politicization. On the other hand, the various implications

trade defence instruments can have should also be kept in mind.

II. Possibilities of Legal Action

1. *Amending the Basic Regulation*

First of all, it would of course be possible to concretize individual legal terms contained in anti-dumping law by amending the basic Regulation. A conceivable way of concretizing the concept of “Community interest” would, for example, be both by amending Article 21 of the basic Regulation or by attaching an Annex to the basic Regulation with an appropriate reference in Article 21. Amendment of the basic Regulation would provide far reaching latitude in terms of introducing substantive changes and would not be restricted to codifying present practice only. However, if by adding of an Annex it is intended only to further specify a certain provision of the basic Regulation, the interpretative boundaries of that respective provision should be taken into account. Although it would legally be possible to introduce a provision in an Annex of the basic Regulation that is contradictory to a provision of the main text since both provisions are at the same level in the hierarchy of norms, systemic discrepancies between the interpreting and the interpreted provisions should reasonably be avoided. Therefore, the interpretative Annex should not go beyond the ordinary meaning of the provisions of the basic Regulation.

Taking the route of an amending Regulation would bring with it the need to observe the procedure as set forth under Article 133 EC Treaty, i.e. the Council would have to decide by qualified majority/consensus after the submission of a proposal by the Commission and the optional consultation of the Parliament. The Member States would thereby be given a decisive role both on whether a given legal term should be concretized and on the question of the specific criteria to be observed. The procedure would naturally not only apply to the introduction but also to later changes, for example, in a catalogue of criteria for the purposes of Art. 21 of the basic Regulation. On the one hand, this procedure guarantees a high degree of legal certainty that would be beneficial to all parties concerned. Moreover, it ensures a comprehensive involvement of the Member States and, thus, is likely to ensure a high level of acceptance of the changes made. On the other hand this way of concretization requires greater complexity and effort for legally implementing the concretization and the associated need for reaching a political compromise in the Council. However, it is to suppose that the potential difficulties for reaching that compromise would be less significant if changes were made only by attaching an interpretative Annex. In this case the provisions of the basic Regulation itself would remain untouched and consensus among Member States would

be required only with regard to specifying provisions in the Annex. Thus, compromises reached during the negotiations on the basic Regulation would not be questioned.

2. Delegation of Implementation Powers to the Commission

A further concretization instrument would be for the Council to confer on the Commission implementation powers pursuant to EC Treaty Article 202, indent 3, and Article 211, indent 4, (so-called tertiary Community law). In keeping with the rulings of the European Court of Justice, the authorization provision must itself set forth the basic principles of the matter in question. The implementation provisions must move within the framework of these parameters as tertiary Community law.

Since the procedural rules of the EC Treaty apply only to the authorization provision and not to the implementation provisions, the creation and amendment of the implementation act may be structured in a flexible manner. This flexibility makes possible a simple and expeditious response to new situations while, at the same time, allowing a high degree of legal certainty. There are no fundamental limitations imposed on the choice of the specific form of the implementation act. The term "implementation" is not defined and is broadly interpreted in the decisions handed down by the European Court of Justice. However,

restrictions may derive from the authorization provision. The Commission may therefore take all measures as required or appropriate for implementation insofar as they are consonant with the system prescribed by the authorization.

The procedure for issuing the authorization would also be guided by Article 133 of the EC Treaty since neither Article 202, indent 3, nor Article 211, indent 4, provide an independent legal foundation for conferring competence, with the result that independent authorization must be furnished. Just as in the case of implementation by amendment of the basic Regulation, the Council would correspondingly have to decide by qualified majority. And the Member States would thus play a prominent role also by this implementation route. Their influence, however, would be restricted to the extent that it applies only to the conferring of competence for implementation. In terms of the actual act of implementation and the specific enactment of the relevant tertiary Community law, the Commission decides independently on the basis of the authorization provision.

3. Substantiation in the Form of a Communication by the Commission

Finally, concretization may be undertaken by means of a communication by the Commission. Communications by the Commission are

not expressly treated in the EC Treaty. But they are recognized as acts sui generis and are used in numerous fields of responsibility such as in the areas of state aid control and competition law.

In such a communication, the term “Community interest” could, for example, be more narrowly defined by specifying how cases and circumstances are interpreted and decided within the framework of the existing scope of evaluation and discretion. The logic behind and purpose of such an interpretive communication is to guarantee the uniformity of administrative practice and thus the equal treatment of comparable matters. Since an interpretive communication exclusively serves to govern the administrative activity of the Commission and its subordinate units, it is an internal administrative act that falls within the competency of the Commission. However, there is also a certain external effect – in anti-dumping law, for instance, with regard to the question of whether an exporter should anticipate measures or whether an applicant can expect his applications to be successful. One may thus speak of an internal provision with external aspects. Nevertheless, an authorization basis is still not necessary since there is no genuine external impact.

Communications of the Commission are not legally binding. However, the European Court of Justice takes them into account in its nor-

mal practice and refers to them constantly in its decisions. The exclusive competency of the Court of Justice for final interpretation of Community law remains unaffected, as the Court repeatedly stresses. Despite the fact that communications are not legally binding, they nevertheless have a quasi-binding impact, as has already been suggested, since the Commission must act in conformity with the well-established principle in administrative law that the administration is bound by its own practice. The Commission is thus not able to depart from the content of a communication aimed at making administrative operations transparent and predictable. But this does not mean that the Commission would be prohibited in the long term from changing its administrative practice under certain circumstances. For that, a clarification by way of a communication certainly provides for less legal security and predictability than a clarification through an amendment of the basic Regulation.

Owing to the distribution of competencies and by reason of the institutional equilibrium, strict limits are set for the potential contents of a communication. The contents of the interpretive communication must in all cases reflect the respective status of Community law and may not extend beyond those bounds. It would therefore not be permissible for a communication either to further develop law or cre-

ate new law, thus expanding or restricting relevant primary and secondary Community law.

This view has been confirmed by the European Court of Justice on several occasions (Case C-366/88 France v. Commission, 1990, ECR I-3571; Case C-303/90 France v. Commission, 1991, ECR I-5315; Case C-325/91 France v. Commission, 1993, ECR I-3283; Case C-57/95 France v. Commission, 1997, ECR I-1627). The legal limits of communications are also a matter of dispute in a current annulment proceeding before the Court of First Instance brought by Germany against the Commission (Case T-258/06 Germany v. Commission, OJ 2006 C 294, p.52). The action is based inter alia on the ground that the Commission's interpretative communication on the Community law applicable to contract awards not or not fully subject to the provisions of the Public Procurement Directives would contain new rules on tendering which go beyond the obligations arising under existing Community law despite the non-existence of a respective authorisation in the EC Treaty.

Also the European Parliament has emphasised in a recent resolution that communications have to be used with caution (European Parliament resolution of 4 September 2007 on institutional and legal implications of the use of "soft law" instruments, P6_TA(2007)0366). It considered that, in the context of

the Community, so-called soft law, e.g. communications, often constituted an ambiguous and ineffective instrument, which was liable to have a detrimental effect on Community legislation and institutional balance. The European Parliament expressed its opinion that soft law could not be a substitute for legal acts and instruments, which are available to ensure the continuity of the legislative process. In particular with regard to interpretative communications the Parliament recalled in its resolution that "when they serve to impose new obligations, interpretative communications constitute an inadmissible extension of law-making by soft law" and that "when a communication lays down detailed arrangements not directly provided for by the freedoms established under the Treaty, it is departing from its proper purpose and is thus null and void." Communications should, therefore, "consequently be issued only in those cases where Parliament and the Council, in other words the legislature, have instructed the Commission to draw up the necessary interpretative communications" since "translating the Treaty into reality is the responsibility of the legislature and [...] its interpretation is the responsibility of the Court of Justice."

In terms of procedure, it is to be noted that the Commission may issue a communication on its own since such an action is first of all a measure undertaken as part of its internal relations as an authority. In

practice, however, the Member States are included in the matter prior to issuance of a communication although there is no provision requiring the Member States to be consulted prior to issuance of concretizing communication in anti-dumping law. The European Court of Justice has previously derived such an obligation for the Commission only in the field of statutes governing state aids on the basis of Article 88(1) of the EC Treaty. It would also be difficult to extrapolate a consultation obligation from the cooperation obligation in Article 10 EC Treaty since an interpretive communication, as explained, initially has no external effect.

III. Considerations of Legitimacy

For reasons of legitimacy, there is clearly the need for an early and comprehensive involvement of the Member States in the task of any possible substantive concretization of or changes in the basic Regulation. The Commission's obligation to consult comprehensively with the Advisory Committee of Member States, as provided under Article 15 of the basic Regulation, serves not least of all to help prepare the decisions of the Council on the conclusive measures and the approval of decisions on provisional measures by the Council. Thus, the less Member States are involved with regard to the substantive concretization of individual provisions of the basic Regulation, the less sense there will be in having the Member States

participate via the Advisory Committee as provided under the basic Regulation.

There are, above all, two reasons why there is a political need for the greatest possible involvement of the Member States. On the one hand, action to introduce or reject anti-dumping measures is significant for the Member States and cannot be underestimated in terms of its social and economic implications. Since some parts of the European internal market are still strongly fragmented from a macroeconomic perspective, the effects of decisions taken under anti-dumping law can vary considerably from Member State to Member State. It is therefore also not possible to speak of uniform European effects; rather, the situation in the respectively affected Member State must be distinguished and individually assessed, thus necessarily resulting in the need for the involvement of the Member States.

Furthermore, the need for an active involvement of Member States arises in terms of legitimizing actions and having them accepted. The many aspects of trade defence measures are the subject of wide-ranging discourse at national, European, and international levels. This is the result not least of the already mentioned extensive effects that trade defence measures may have. In particular with an eye to the anti-dumping measures, the range of opinions extends from fundamental rejection to unqualified agreement.

Early and comprehensive inclusion of the Member States is therefore indispensable if trade defence measures are to receive the greatest possible acceptance by citizens. This is true not only in the interest of arriving at decisions on individual cases but naturally all the more so where the concretization of legal terms in anti-dumping law and other legal areas of trade defence instruments are concerned.

It is evident that the quality of involvement of the Member States differs significantly between the three discussed ways of concretizing. Even if the Member States would be consulted comprehensively in the process of the drawing up of guidelines it has to be taken into account that in case of a formal amendment of the basic Regulation, first, the votes of the Member States in the Council are weighted and, secondly, the Member States have the power to vote out the Commission's proposal.

IV. Examples

For a clearer understanding of the concretization possibilities already discussed, three examples will now be used to illustrate the respective options. The question of permissibility under WTO provisions shall be disregarded in connection with the hypothetical changes described.

1. *Five-Year Deadline for the Expiration of Anti-Dumping Measures pursuant to Article 11(2) of the Basic Regulation*

The wording of Article 11(2) of the basic Regulation is clear and essentially requires no further interpretive clarification. At best, a communication to explain the practice would be conceivable in terms of technical questions such as the concrete details involved in deadline calculation.

Since there is no need for additional interpretation, only an amendment of the provision could be considered. Changes in the deadline would have to be made by amending the Regulation in accordance with normal procedures under Article 133 EC Treaty. Alteration by the Commission by virtue of its authorization would presumably not be possible since the essential basis underlying the adjustment must be spelled out in the authorization. In the case of an extension of the deadline, the essential focus is on the length of the respective time period, with the result that a decision on the period would already have to be contained in the basic legal act.

2. *Definition of Community Industry*

The term "Community industry" is described in Article 4(1) of the basic Regulation as "the Community producers as a whole of the like products or to those of them whose col-

lective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products.” Article 5(4) of the Regulation provides that the complaint shall count as having been submitted by Community industry if it is supported by those Community producers whose collective output constitutes more than 50% of the total production of the Community industry either supporting or opposing the complaint and if their share accounts for no less than 25% of total production of the like product produced by the Community industry.

Provisions for exceptions are found under lit. a) for cases in which the producers are related to the importers or exporters or import the involved product themselves, and under lit. b) for cases where there is a special regional sales concentration of the producers. As a consequence of these exceptions, it is permissible to exempt related firms from inclusion under the term Community industry or to divide up into several competitive markets the Community area for the production of the involved product. Article 4 (2) of the basic regulation provides for further clarification in which situations producers shall be considered to be related to exporters or importers.

Article 4(1) in conjunction with Article 5(4) of the Regulation helps to make more precise the initially indeterminate legal term “Community

industry”. The scope for further concretization steps has thus already been narrowed. Such a concretization could be achieved by amending the basic Regulation, by delegation to the Commission of powers to issue tertiary law, and by a communication from the Commission. Only the first two options would be legally binding. For concretization by way of a communication by the Commission, the provisions allowing exceptions for related producers could particularly be considered since they are worded in a relatively open fashion, thus giving the Commission with discretionary latitude. A communication could therefore set forth, for example, the minimum share of importation of the allegedly dumped product in relation to the own production that would require producers to be exempted. As already outlined, such a communication to guide discretion would to a certain extent bind the Commission to the contents of the communication via the principle that administrations are bound by their own practice. By contrast, undertaking concretization by way of a communication on threshold values would not appear to be possible for determining what constitutes a “major proportion” of Community production since Article 5(4) basic AD Regulation contains clear percentages and is in no need of concretization. The possibility of changing the threshold values via a communication would at any rate be ruled out since such action would transgress the border separat-

ing interpretation and the further development or formation of law.

A substantive change could only be made by way of a Regulation. For that, the basic Regulation itself could be amended, e.g. the threshold values for determining a considerable part of Community industry. Furthermore, with regard to the treatment of related companies, changes either by adding an interpretative Annex or by delegation of implementation powers to the Commission would be conceivable, the latter with the result that the Commission could independently determine by tertiary law under the specifications of the basic legal act when linked companies are to be exempted from the term Community industry.

3. Definition of Community Interest

Article 21 of the basic Regulation more closely explains the indeterminate legal term “Community interest.” There is first a determination of the various interests that must be taken into account. In procedural terms, the provision requires that all parties be given the opportunity to make their views known. In substantive terms Article 21 of the basic Regulation states that special consideration must be given to “the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition.” Finally, it is set forth that the application of measures can only be ruled

out in cases where it can clearly be concluded that doing so would not be in the Community interest.

Because of its meager requirements and open wording, the definition of the indeterminate legal term “Community interest” in Article 21 of the basic Regulation leaves considerably broader latitude for concretization than was the case with the examples already cited. Concretization by means of a communication would have to observe existing requirements. It would thus be conceivable for a communication to name criteria whose existence or absence would suggest the respective presence or non-presence of Community interest in the introduction of measures. Since Article 21 names the establishment of fair competition as an objective, competitive law aspects, for example, could thus be included in a catalogue of criteria to a greater extent.

By contrast, it would not be possible on the basis of a communication to provide that account is no longer to be taken of certain interests or to alter the presumption under Article 21 of the basic Regulation favouring the application of anti-dumping measures. This would amount to an impermissible further development of law by the Commission since the use of a communication allows the Commission only to act within existing legal bounds or to provide more specific interpretations to provisions within the framework of existing statutory pa-

rameters.

An alteration in substance would correspondingly be possible only by way of a Regulation, either an amendment of the basic Regulation or by delegation of the right of issuance of tertiary law, contingent upon the retention of the essential provisions in the basis legal act. If changes were made by adding a specifying Annex the interpretative boundaries of Article 21 should be taken into account.

V. Conclusion

The above outline shows that there are various avenues of approach to concretizing provisions in the basic Regulation. Both the extent and amendment/concretization possibilities vary on the one hand, and the degree of participation by the Member States on the other. In particular against the background of the many different implications that trade defence measures may have and in view of considerations of legitimacy, there is the need for a comprehensive participation of the Member States. The degree and quality of involvement varies between the three ways of concretizing ranging from non-mandatory consultations in case of communications over partial decision power in case of delegation of implementation powers to full decision power in case of amendment of the basic Regulation. The difference of participation between the latter two is that the Council, when it delegates

its implementation powers to the Commission, has full decision power only with regard to the authorization provision but not with regard to the implementation. The necessity of an early and broad involvement of the Member State is particularly evident in the case of a possible concretization by way of communications since such an approach does not normally require consultations. Even if this form of implementation cannot be designated as law-making in a narrow sense, there is an obligation to include the Member States in the respective process following also from the principle of better regulation. According to this principle the Commission is obliged to prepare proposals in a thorough and transparent manner especially with the comprehensive involvement of the Member States.

With regard to the possible extent of amendment/concretization it has been demonstrated that the drawing up of guidelines is legally restricted to codifying present practice only, meanwhile substantive changes could be introduced by amendment of the basic Regulation. If, however, the amendment was adopted in form of an interpretative Annex changes should reasonably not go beyond the ordinary meaning of the provision that refers to the Annex. In contrast to the concretization by way of a communication, the attaching of an Annex to the basic Regulation would guarantee broad involvement of the Member States

through voting in the Council, and would provide for a high degree of legal certainty as it could only be altered again through the legislative process and not merely by a change of practice.

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