

The Lisbon Treaty and EU Trade Defence Instruments: A New Framework for Court Challenges and Decision-making¹

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 Anti-dumping duties; EU law

Introduction

The Lisbon Treaty² has brought about a number of important changes to the EU legal landscape, not least of which are changes in relation to international trade matters. Much attention so far has focused on the increased involvement of the European Parliament (EP) in the legislative decision-making process, regarding both the ratification of international trade agreements and the adoption of so-called internal framework legislation. This article examines the implications of the new decision-making process for trade defence measures, and anti-dumping measures in particular, but focuses first and foremost on the significant practical consequences of a Lisbon Treaty change to the framework for challenges to those measures before the European Courts.

1. The authors work with the international law firm Sidley Austin LLP, in Brussels. The views expressed in this article, however, are exclusively those of the authors and do not necessarily reflect those of Sidley Austin LLP or of its partners. This article has been prepared for academic purposes only and does not constitute legal advice. The authors also gratefully acknowledge the helpful comments of their colleagues Arnoud Willems and Hazel Pearson, but take full responsibility for the contents of this article.

2. The Treaty of Lisbon's full title is Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, signed December 13, 2007. It entered into force on December 1, 2009.

Easier access to the European Courts to challenge measures but a tight deadline

Less strict standing requirements for a direct challenge

Standing before the Lisbon Treaty took effect

Up until the entry into force of the Lisbon Treaty, natural and legal persons could go to the European Court of First Instance (now the General Court) to make a direct challenge of a Council Regulation imposing an anti-dumping duty, i.e. ask for the regulation to be annulled insofar as it imposed a duty on the applicant, only if it could be shown that the regulation met two conditions cumulatively:

- the regulation was of “direct concern”, and
- the regulation was of “individual concern”.³

There has been ample European Court case law over the years in relation to the interpretation of the concepts of “direct concern” and “individual concern”, including several cases in the context of challenges to regulations which imposed anti-dumping measures.

As a general matter, the European Courts have held that a regulation is of “direct concern” when it directly affects the applicant’s legal situation and the Member States have no discretion when implementing the regulation. With regard to regulations imposing anti-dumping duties, the courts have summarily said that they are of direct concern to producers and importers as they “oblige the Member States’ customs authorities to levy the duty imposed without leaving them any discretion”.⁴

The real hurdle for applicants challenging regulations imposing anti-dumping measures was the requirement of “individual concern”. Based on the criteria developed already in the 1962 *Plaumann* case, the European Courts found that an anti-dumping regulation may be of individual concern to traders who prove the existence of certain attributes which are peculiar to them and which distinguish them from all other traders.⁵ Accordingly, this test has been applied on a case-by-case basis.

3. These were the standing requirements set out in art.230 of the EC Treaty. The Lisbon Treaty, as with past treaties, amended the two main existing treaties, the Treaty on European Union and the Treaty Establishing the European Community (known as the EC Treaty), and renamed them the Treaty on European Union and the Treaty on the Functioning of the European Union (TFEU), respectively.

4. See, e.g. *Shanghai Bicycle Corp v Council of the European Union* (T-170/94) [1997] E.C.R. II-1383 at [41], citing *ISO v Council* (118/77) [1979] E.C.R. 1277 at [26], and *Climax Paper* (T-155/94) [1996] E.C.R. II-873 at [5].

5. See, e.g. *British Shoe Corp Footwear Supplies Ltd v Council of the European Union* (T-598/97) [2002] E.C.R. II-1155 at [44].

Over the years, case law established that exporters and producers of the countries targeted by an anti-dumping investigation, as well as EU importers associated with those exporters, were “individually concerned” where they had co-operated in the investigation on the basis of which the anti-dumping regulation was adopted.⁶ Trade associations and Community producers, whose initial complaint was the basis for the Commission to open an anti-dumping investigation, as well as Community producers co-operating in the investigation, were also considered individually concerned.⁷ Further, in *Extramet*, an independent importer was deemed to be individually concerned based on exceptional circumstances, in particular where the regulation in question seriously affected that importer’s business activities.⁸

However, in *British Shoe Corp*, an independent importer failed to show factors supporting its claim of individual concern despite the fact that it had co-operated in the anti-dumping investigation.⁹ Similarly, in *Büchel & Co*,¹⁰ the applicant was an intermediary importer of unassembled bicycle parts and its participation in an anti-circumvention investigation (i.e. an investigation of the circumvention of anti-dumping measures on complete bicycles) was insufficient for it to be considered individually concerned by the resulting regulation.

6. *British Shoe Corp* [2002] E.C.R. II-1155 at [45]–[47].

7. See *Euroalliages v Commission of the European Communities* (T-188/99) [2001] E.C.R. II-1757 at [19] where the European Commission in its pleas on admissibility recognised “that the contested decision is of direct and individual concern to the applicant”. In that case, it was the association of Community producers, Euroalliages, which brought the anti-dumping complaint. The CFI did not address the question whether Euroalliages was directly and individually concerned, but focused on another point of admissibility and later proceeded directly to address the merits of the case. While that case concerned a Commission Decision to terminate the anti-dumping investigation, rather than a Council Regulation imposing anti-dumping duties, the fact was that the legislation resulting from the investigation was considered to be of direct and individual concern to the applicant. See also *Timex Corp v Council and Commission of the European Communities* (264/82) [1985] E.C.R. 849 at [15]–[16].

The case law does not indicate directly whether consumer organisations are individually concerned. However in *Bureau européen des unions des consommateurs (BEUC) v Commission of the European Communities*, the CFI ruled broadly that consumer organisations have a right to be considered an interested party and participate in an anti-dumping investigation, which would indicate that there is at least the possibility that consumer organisations could be individually concerned, in particular if the Commission uses information provided by the organisation to determine the outcome of the investigation. See *BEUC v Commission* (T-256/97) [2000] E.C.R. II-101.

8. See *Extramet Industrie SA v Council of the European Communities* (C-358/89) [1991] E.C.R. I-2501 at [17].

9. *British Shoe Corp* [2002] E.C.R. II-1155 at [57].

10. *Büchel & Co Fahrzeugteilefabrik GmbH v Council and Commission of the European Communities* (Joined Cases T-74/97 and T-75/97) [2000] E.C.R. II-3067.

For parties who were not able to demonstrate both direct and individual concern, and were thus precluded from bringing a direct action under art.230 of the EC Treaty, the European Courts recognised the possibility that the applicant bring an *indirect action*, by challenging the validity of an anti-dumping regulation in the context of an action before a national court, and having the national court make a reference to the European Court of Justice for a preliminary ruling regarding the validity of the regulation.¹¹ The *Ikea* judgment is an example of just such a case, where an importer which could not have brought a direct challenge against an anti-dumping regulation raised its invalidity in an action before a national court, and the national court then referred to the Court of Justice a request for a preliminary ruling regarding the issue of the invalidity of the regulation.¹²

Standing since the Lisbon Treaty took effect

The Lisbon Treaty significantly modified the standing requirements in art.263(4) TFEU (ex art.230(4)). There is now a new subcategory of institutional acts—the “regulatory act” which “does not entail implementing measures”—which an applicant may challenge directly if it can demonstrate direct concern. The second and more challenging standing requirement, “individual concern”, does not apply for a direct challenge to this subcategory of acts.

The first question which arises is the definition of a “regulatory act”. The Lisbon Treaty does not provide a definition and yet it is only with regard to such acts that there is no longer an “individual concern” standing requirement. For a direct challenge to other acts, applicants still need to demonstrate both direct and individual concern.

At the time this article was drafted, there was widespread uncertainty and debate about the extent to which a “legislative”, “non-legislative” or “implementing” act qualifies as a “regulatory act” under art.263(4) TFEU. From the Convention responsible for drafting the TFEU, it appears that the term “regulatory act” was meant to encompass both “non-legislative” and “implementing” acts, i.e. acts adopted on the basis of delegated or implementing powers under arts 290 or 291 TFEU respectively, as opposed to “legislative

11. See, e.g., *Allied Corp v Commission of the European Communities* (239/82 and 275/82) [1984] E.C.R. 1005 at [15], where several parties had brought an action for annulment. The action was ruled inadmissible for one of the parties, the importer Demufert, but the court pointed out that “in so far as it was compelled to pay anti-dumping duties, it is open to the applicant to bring an action in the competent national court in the context of which it can put forward its arguments against the validity of the regulation at issue”.

12. *Ikea Wholesale Ltd v Commissioners of Customs & Excise* (C-351/04) [2007] E.C.R. I-7723.

acts” which art.289(3) TFEU defines as “legal acts adopted by legislative procedure”.¹³

Regulations adopting anti-dumping measures are the outcome of individual investigations carried out under the Basic AD Regulation. As such, they are “implementing acts” under art.291 TFEU because they implement the Basic AD Regulation, and do not “supplement or amend certain non-essential elements of the legislative act”.¹⁴ Accordingly, the Council has, since the entry into force of the Lisbon Treaty, continued to adopt definitive measures under the applicable Basic AD Regulation and to identify those acts as “Implementing Regulations”.¹⁵ Further, as there is no need for EU Member States to adopt legislation implementing individual Community anti-dumping measures, there should be little controversy about the conclusion that an individual Community regulation imposing anti-dumping duties qualifies as a “regulatory act” which “does not entail implementing measures”.

Accordingly, as a result of the Lisbon Treaty, every applicant who is able to demonstrate that a given anti-dumping regulation is of direct concern now has standing to challenge that measure directly before the EU General Court. This would in principle cover any operator who is obliged to pay the duties imposed by that regulation, and this change does away with the need for a case-by-case factual assessment of that person’s particular circumstances, e.g. whether they cooperated in the underlying investigation, whether they were named in the regulation, whether information they provided was used by the Commission, etc.

This modification of the standing requirement will greatly expand the circle of parties able to bring a direct challenge of EU regulations adopting anti-dumping (and other trade defence) measures, in particular to include those importers who are not related to exporters or producers in the countries targeted by the measures in question.

13. See CONV 734/03, at p.20:

“... [A] ‘regulatory act’... would enable a distinction to be made between legislative acts and regulatory acts, maintaining a restrictive approach in relation to actions by individuals against legislative acts (for which the ‘of direct and individual concern’ condition remains applicable) while providing for a more open approach to actions against regulatory acts.”

14. The supplementing or amendment of certain “non-essential elements” of the legislative act is the essence of a “non-legislative act” under art.290(1) TFEU.

15. Article 291(4) TFEU requires that implementing acts be designated as such. As an example of anti-dumping measures adopted since the Lisbon Treaty entered into force, there is Implementing Regulation of the Council 126/2010 of February 11, 2010, extending the suspension of the definitive anti-dumping duty imposed by Regulation 1683/2004 on imports of glyphosate originating in the People’s Republic of China [2010] OJ L40/1.

The deadline for a direct challenge is very short

Under art.230 of the EC Treaty, a direct challenge needed to be instituted within two months of the publication of the measure. In other words, if a person was either the addressee of a decision adopted by a Community institution or directly and individually concerned by another Community measure, and therefore had standing under art.230 to bring a direct challenge to the validity of the measure, but failed to do so within the time-limit laid down by the fifth paragraph of art.230 EC, that measure became definitive as against that person.

The *TWD* case highlighted the importance of that time limitation before the entry into force of the Lisbon Treaty. In that case, the Court of Justice held that a party who did not bring a direct action against the Commission (state aid) decision in question within the time limit prescribed by the predecessor to art.230 EC Treaty could not then challenge the validity of that decision in an action before the national courts against the measures taken by the national authorities in implementation of that decision.¹⁶

The *Nachi Europe* case applied the *TWD* reasoning in a case involving an anti-dumping regulation. In that case, the Court of Justice addressed the situation of an EU importer, *Nachi Europe*, which was related to an exporting producer named in the anti-dumping regulation in question, and whose resale prices were used to establish the dumping margins in respect of the exporting producer. Based on previous case law, it was clear that such an importer was directly and individually concerned by the anti-dumping regulation. Accordingly, the court held that an anti-dumping regulation becomes definitive as against an operator, such as *Nachi Europe*, in regard to whom it must be considered an individual decision, and who could undoubtedly have sought its annulment under art.230 EC, a fact which prevents that party from pleading the illegality of that regulation, and the anti-dumping duty it imposes, before the national court.¹⁷

The Lisbon Treaty did not modify the deadline for direct challenges by natural and legal persons before the European Courts. Accordingly, the fact that many more operators are now able to bring direct challenges of anti-dumping regulations also means that those operators need to act within the deadline set out in art.263 TFEU. The question then becomes one of whether and how the *Nachi* case law will be applied in the case of a failure

16. *TWD Textilwerke Deggendorf* (C-188/92) [1994] E.C.R. I-833 at [24] and [25].

17. *Nachi Europe* (C-239/99) [2001] E.C.R. I-1197 at [35]–[37].

of a natural or legal person who is directly concerned by an anti-dumping regulation to bring a challenge to its validity before the General Court within the two-month deadline.

In this regard, one might argue that because the “regulatory act” and the reduced standing requirement to challenge such an act is a new feature introduced by the Lisbon Treaty, the *TWD* and *Nachi Europe* case law would not necessarily apply to foreclose national court challenges by persons who are directly concerned but fail to bring a direct challenge against such an act. However, the Court of Justice in *TWD* and *Nachi Europe* focused simply on the principle of legal certainty and the mere fact that the person in question clearly had standing to bring a direct challenge but did not do so within the deadline laid down in the Treaty. In this regard, it would appear sufficient for application of the foreclosure rule in the *TWD* and *Nachi Europe* case law that a person directly concerned by an anti-dumping regulation has standing to bring a direct challenge under art.263 TFEU, and did not do so within the two-month deadline, with the consequence that the admission of a later challenge before a national court would effectively allow the circumvention of the time limit for a direct challenge.

Accordingly, the authors believe it most likely that a person directly concerned by an anti-dumping regulation who fails to bring a direct challenge before the General Court within the two-month deadline of art.263 TFEU will be held unable to challenge the regulation in an action subsequently brought before the national courts.

Overall: a clearer and easier access but a strict deadline

Prior to the entry into force of the Lisbon Treaty, many parties, especially importers, faced uncertainty as to whether they had standing to bring a direct action against an anti-dumping regulation before the European Court of First Instance, regardless of the merits of their case. As it was not possible to get a ruling on standing from the court before deciding whether to bring a direct action (especially given the short deadline for bringing that action), parties needed to prepare and file a full direct action on the merits of the case, with the risk of being rejected on grounds of admissibility, in order not to lose any chance of challenging the validity of an anti-dumping regulation.

The Lisbon Treaty has brought a welcome clarification and liberalisation of the standing requirements by making it possible for any operator which is directly concerned to bring a direct challenge of an anti-dumping regulation before the

General Court. The downside, however, is that those parties which before had (the opportunity) to challenge the validity of anti-dumping regulations in proceedings before national courts need to understand that the rules have changed, and that they will most likely be foreclosed from challenging the validity of the regulation if they have not brought a direct challenge to the General Court within the two-month deadline set out in art.263 TFEU.

Legislative decision-making

Adoption of international agreements and internal framework legislation

Under arts 207(5) and 218(6)(a)(v) of the TFEU, the EP is entitled to ratify essentially all trade agreements under the so-called “consent procedure”. In addition, the TFEU (art.207(2)) effectively gives the EP the right to co-legislate with the Council as regards “the measures defining the framework for implementing the common commercial policy”. These are the “big picture” changes which have attracted attention, but the most frequently used legislative instrument with a major impact on trade flows is the set of regulations by which the European institutions impose trade defence measures, in particular anti-dumping duties. Those regulations are not “framework” legislation, but rather regulations implementing the framework legislation. The TFEU does not speak directly about how decision-making should work in that context, but only addresses the framework legislation, which in the case of anti-dumping duties is currently Council Regulation (EC) No.1225/2009 of November 30, 2009 (the Basic AD Regulation).¹⁸

Decision-making under the revised Basic AD Regulation

General

Article 207(2) of the TFEU directs the EP and the Council, using the so-called “ordinary legislative procedure”, to adopt regulations defining the framework for implementing the common commercial policy. Article 289 of the TFEU defines that procedure as “joint adoption” (a co-decision procedure) based on a proposal from the Commission. There is no timeframe set in the TFEU within which the Commission must make a proposal to

18. Council Regulation 1225/2009 on protection against dumped imports from countries not members of the European Community [2009] OJ L343/51, as corrected by the Corrigendum published January 12, 2010 [2010] OJ L7/22.

revise the current framework legislation, and the timing of such a proposal is therefore in the hands of the Commission.

In this regard, the new EU Commissioner for Trade, Karel De Gucht, indicated to the EP that the Commission will come forward first with a proposal on the general rules for implementing powers, and subsequently with a proposal for the adaptation of the current trade defence legislation.¹⁹ Thus the initial focus is on the horizontal question of how the Commission's implementing powers are generally to be exercised under framework legislation, rather than on the revision of individual pieces of framework legislation. In this manner, the specific question of how implementing powers will be exercised under the Basic AD Regulation may already be settled before the Trade Commissioner puts forward a proposal for the revision of that legislation.

Alternatives

Implementing powers are the focus of art.291 TFEU. Although it is clear that the Council and the EP are to adopt revisions of framework legislation by the "ordinary legislative" (co-decision) procedure, the Lisbon Treaty does not direct how the decision-making process is to work for the adoption of implementing measures under the framework legislation (e.g. individual anti-dumping measures adopted under the Basic AD Regulation). Under the Basic AD Regulation as it currently stands, it is the Council which adopts definitive measures in individual cases on the basis of a proposal from the Commission.

Article 291 TFEU provides that the Member States shall adopt national law measures necessary to implement legally binding EU acts. However, "where uniform conditions for implementing legally binding Union acts are needed", as in the area of anti-dumping measures, there are two alternatives for how the framework legislation can confer implementing powers:

- those powers shall be conferred on the Commission; or

19. See Answers 3 and 5 of the Answers to European Parliament, Questionnaire for Commissioner-Designate Karel De Gucht (Trade), dated January 4, 2010, document number CM\800569EN.doc, available on the website of the European Parliament. In Answer 3, the Commissioner-Designate noted that "*the new Commission will submit as soon as possible a legislative proposal in accordance with Article 291 TFEU on implementing acts, in order to lay down the rules for the Commission's exercise of implementing powers. This horizontal framework will govern the institutional arrangements for trade as for every other policy area*" (emphasis added). In Answer 5, the Commissioner-Designate reported that "Concerning Trade Defense Instruments, [Commission] President Barroso has asked me in my mission letter to oversee the updating and modernisation of these instruments *during this Commission's term*" (emphasis added).

- "in duly justified specific cases", those powers shall be conferred on the Council.

Implications of conferring implementing powers on the Commission

If the Commission were to have implementing powers under the Basic AD Regulation, this would bring about a significant change from the situation which has existed since 2004.²⁰ Since 2004, the Council adopts Commission proposals "unless it decides by a simple majority to reject the proposal". If the Commission were to have implementing powers under the Basic AD Regulation, it would mean that it would no longer be the Council but the Commission which adopts definitive anti-dumping measures. The next question would be what means will be put in place to allow the Member States the possibility of blocking a Commission measure implementing the Basic AD Regulation (i.e. a measure adopting anti-dumping duties).

The recent Commission proposal on the exercise of implementing powers²¹ (the Commission Proposal or the Proposal) does not actually address the question of whether the Basic AD Regulation (or other framework legislation) will grant implementing powers to the Commission or to the Council. The Proposal only addresses "the mechanisms which shall apply in cases where a legally binding Union act . . . requires that the adoption of binding implementing acts by the Commission be subject to the control of Member States".²² This formulation assumes that it is for the Commission to adopt implementing acts, and that the only question is the mechanism which will apply by which the Member States will exercise control over the Commission's power. In other words, unless a given piece of framework legislation lays out a proper justification for conferring implementing powers on the Council, the Commission effectively assumes it will exercise those powers "where uniform conditions for implementing binding Union acts are needed".

Commercial policy matters, including the adoption of anti-dumping measures, are an area requiring uniform implementation throughout the EU. In the Proposal, the Commission proposes that the mechanism for Member State control of its implementing powers in trade matters be the so-called

20. After Council Regulation 461/2004 [2004] OJ L/77, amended the then applicable Basic AD Regulation, the Council could no longer block the adoption of a Commission proposal to impose anti-dumping measures with a simple majority of votes (as before), but then needed to have an absolute majority to block adoption.

21. Document COM(2010) 83/3, Proposal for a Regulation of the European Parliament and of the Council laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

22. Proposal art.1.

“examination procedure”.²³ Under that procedure, an implementing act could be adopted by the Commission unless a qualified majority of a committee made up of Member State representatives (and chaired by the Commission) (the Examination Committee) expressly votes to oppose the intended measure. In other words, if the Council and EP accept the Commission’s Proposal for the exercise of implementing powers in trade matters, the Commission will most likely have a significantly greater power to adopt anti-dumping measures than it has currently (which is already more than it had prior to 2004).²⁴

At the time this article was written, it was not clear how the EP and the Council would react to the Commission’s Proposal with regard to implementing powers.

If the Council and EP accept a significant increase of the Commission’s power with regard to the adoption of definitive anti-dumping measures, this would make the Commission’s role in trade defence matters more akin to its cumulated investigative and decision-making powers in competition matters. This in turn would raise the question of whether there will be other (counterbalancing) changes made in the procedures by which trade defence measures are adopted (e.g. an independent injury determination as is done in the United States, or greater transparency and safeguards for the exercise of rights of defense). These latter changes, if not made in the legislation concerning the implementing powers of the Commission,²⁵ could of course still be adopted in the revision(s) of the internal framework legislation.

Further, the question arises whether the European Courts will react to the greater power of the

Commission by taking a more active role in supervising the Commission’s actions, examining more closely both the Commission’s respect for procedural obligations and the substantive findings in individual challenges to specific anti-dumping measures.

Conclusion

The public focus regarding Lisbon Treaty innovations in trade matters has generally been on the additional decision-making powers granted to the European Parliament with regard to international agreements and internal framework legislation. This article draws attention to the fact that the Lisbon Treaty leaves open what in practice is perhaps the most important decision-making procedure in trade defence matters, and at the same time the Lisbon Treaty gives to a much broader circle of persons standing for direct legal challenges to trade defence measures adopted through that procedure. That expansion of the possibility for direct challenges before the European Courts is the change which will likely have the greatest practical impact for parties affected by anti-dumping measures, especially because it acts as a two-edged sword : those who are able yet fail to bring a direct challenge within the short statutory period appear to be foreclosed from the possibility they had prior to the Lisbon Treaty’s entry into force of subsequently challenging the validity of those measures before national courts.

23. Proposal art.2(2)(b)(iii). The examination procedure essentially replaces the management and scrutiny procedures under Council Decision 1999/468 (known as the Comitology Decision).

24. The Proposal also gives the Commission significant leeway to withdraw, modify or represent a proposal, as well as not to adopt a proposal which has the approval of the Examination Committee (see art.5 of the Proposal). Further, there is a possibility of the Commission adopting measures against the opinion of the Committee or even adopting measures without first consulting the Committee (see art.5(5) and art.6 of the Proposal), but it appears unlikely that the adoption of anti-dumping measures would justify recourse to those provisions.

25. The Proposal puts the EP on the same footing as the Council in terms of access to the documentation relating to the working of the Examination Committee, but does not address transparency vis-à-vis interested parties (see art.8(2) of the Proposal).