The Handbook of Trade Enforcement

2012

A Global Competition Review special report published in association with:

Economic Laws Practice

Law Offices of Stewart and Stewart

RayYin & Partners Lawyers

Salans

Sidley Austin LLP

GCR
GLOBAL COMPETITION REVIEW

www.globalcompetitionreview.com

Overview

Arnoud R Willems, Sven De Knop and Jeremie Charles
Sidley Austin LLP

The European Union (EU), together with its 27 member states, is a member of the World Trade Organization (WTO). Its trade enforcement instruments are therefore disciplined by WTO law.

A number of proposed legislative changes and a recently opened Public Consultation on the Modernisation of EU Trade Defence Instruments suggest that there may be quite a number of changes to the EU's trade defence law and practice forthcoming. In addition, in recent years, the EU courts and even the WTO have shown an increasing willingness to rule against the EU investigating authorities' decisions in trade defence cases.

The below provides a short introduction to the EU's trade enforcement mechanisms and discusses some of the expected changes to the EU's trade defence law and practice.

Trade enforcement mechanisms used by the EU

The EU utilises a variety of mechanisms to defend its producers from commercial harm due to market barriers or distortions. Generally speaking, trade enforcement instruments can be categorised as 'offensive' or 'defensive.'

Offensive trade instruments

Offensive trade instruments aim to improve market access for EU operators in third countries. For example, the Trade Barriers Regulation (Regulation No. 3286/94) enables EU businesses to request that the European Commission (Commission) investigate and challenge market access barriers in foreign markets (including those applicable to goods, services and intellectual property rights), using WTO or other mechanisms if necessary.

A Trade Barriers Regulation (TBR) complaint must provide prima facie evidence that the trading practices of a third country are violating international trade rules and causing commercial harm to the EU market, eg, financial losses or reduced profit margins. Although the vast majority of TBR cases are settled through bilateral negotiations, resort to dispute settlement always remains an option. Since 1996, the EU has initiated 24 TBR investigations, none of which took place in 2011.

Defensive trade instruments

Defensive trade instruments aim to protect the EU market against the import of a product causing injury to EU producers of the same or similar product. The most prominent defensive trade mechanisms are the anti-dumping, anti-subsidy and safeguards instruments. These instruments allow the EU to impose additional import duties to artificially increase the price of the targeted import and decrease the import flow. In all cases, the Commission conducts the investigation, but final measures are imposed by the European Council (Council).

Anti-dumping investigations

The EU's anti-dumping rules are contained in Regulation No. 1225/2009. Anti-dumping measures aim to counteract dumping practices that cause injury to the EU industry.

EU producers may request the Commission to investigate imports of a dumped product when they consider their economic performance impaired by such imports. A product is considered dumped when its export price is lower than its normal value. The normal value is usually the product's sales price on the domestic market of the exporting country. Under certain conditions, the Commission 'calculates' a normal value on the basis of the cost of production and adds a reasonable amount for selling, general and administrative costs, and a profit. For non-market economies (eg, China, Vietnam and Kazakhstan), as a rule, the Commission uses data from a market economy third country (eg, the US) to determine the normal value (which normally facilitates a finding of dumping) and calculates only a country-wide duty level.

During the 15 month investigation, the Commission examines whether: imports are dumped; the EU industry is injured; the injury is caused by the dumped imports; and anti-dumping duties are in the overall interest of the EU.

If all four conditions are met, the EU may impose provisional anti-dumping measures within nine months, and must make a final decision within 15 months of the initiation of the investigation.

The objective of these duties is only to offset the injurious effect of the dumped imports. Hence, the level of the duty must reflect the margin of dumping uncovered by the investigation, unless a lower rate would remove the injury suffered by the EU industry (lesser duty rule). Anti-dumping duties are generally imposed for five years and can be extended indefinitely.

In 2011, the Commission initiated 12 anti-dumping investigations and imposed anti-dumping duties (whether provisional or definitive) in 14 cases. As in previous years, imports from China were by far the most targeted. Indeed, eight of the 12 investigations initiated covered imports from China and eight of the 14 cases in which anti-dumping measures were imposed concerned Chinese imports.

Anti-subsidy investigations

The EU's anti-subsidy rules are contained in Regulation No. 597/2009. Anti-subsidy measures aim to counteract certain subsidies that are deemed to cause injury to the EU industry.

EU producers may request the Commission to investigate imports of subsidised products when they consider their economic performance impaired by such imports. Under EU law, an actionable subsidy is one which is specific (ie, limited to a particular industry) and which confers a benefit to its recipient (ie, no adequate compensation in return). EU anti-subsidy investigations are very similar to EU anti-dumping investigations. The main difference in anti-subsidy investigations is that the public authorities of the concerned third country are a party. In addition, the investigation must be concluded in 13 months instead of 15 months.

During the 13 month investigation, the Commission examines whether: imports receive actionable subsidies; the EU industry is injured; the injury is caused by the subsidised imports; and anti-subsidy duties are in the overall interest of the EU. If all four conditions are met, the EU imposes anti-subsidy measures aimed at counteracting the detrimental impact for the EU industry of the subsidised imports (lesser duty rule).

In 2011, the Commission initiated three anti-subsidy investigations (one concurrently with an anti-dumping investigation). It imposed anti-subsidy measures in only two cases. Historically the EU has only conducted anti-subsidy investigations covering market economy countries, but it has recently shown a willingness to initiate anti-subsidy investigations also against non-market economy countries also. As a result, in 2011, the EU imposed its first anti-subsidy duties against products originating in China. At the same time, it launched a parallel anti-subsidy investigation covering Chinese products. Although the latter investigation was terminated after the initial complaint was withdrawn, a new anti-subsidy investigation against Chinese products was initiated earlier this year.

Safeguards investigations

The EU's rules on safeguards are contained in Regulation No. 260/2009 for imports from WTO countries; Regulation No. 625/2009 for imports from non-WTO countries; and Regulation No. 427/2003 for imports originating in China. Specific provisional rules were negotiated for China upon its accession to the WTO. They provide for less stringent requirements than for general safeguards and will expire in 2013.

Safeguards aim to counteract an unforeseen, sharp and sudden increase of imports. Contrary to anti-dumping and anti-subsidy measures, safeguards are not intended to offset perceived unfair trade. Rather, their aim is to provide the EU industry with temporary 'breathing space' to restructure and adapt to the new competitive environment. In addition, safeguards normally apply to all imports without discrimination. Imports from specific countries may not be targeted. As a result, the conditions for imposing safeguards are considerably more stringent than in other trade defence proceedings, and safeguards are generally considered a blunt instrument to be used only as a last resort.

For several years safeguards measures were not utilised by the EU. But in 2010, the Commission initiated a safeguard investigation following a request from Belgium. However, Belgium almost immediately withdrew its request and the Commission terminated the investigation in early 2011 without the imposition of safeguard measures. Only eight such measures have been imposed as of this writing, none of which are still in force.

The future of trade enforcement mechanisms used by the EU

After a failed attempt to change the Basic Regulation by Trade Commissioner Mandelson, the EU planned to wait until the WTO negotiations in the Doha Development Round would be concluded before tabling any changes. Indeed, the anti-dumping rules are part of the WTO negotiations and therefore may result in a need to change the EU rules. However, the Lisbon Treaty and recent case law from the WTO and the EU courts may force the EU institutions to already make changes in the near to medium term. Due to the far-reaching nature of the reforms needed, the below is limited to highlights.

Upcoming changes in the legislation

Changes in the decision-making process

With the entry into force of the Lisbon Treaty, the European Parliament (Parliament) became co-legislator with the European Union (Council) in trade matters. Because it would be unduly burdensome for the Parliament and the Council to be fully involved in trade enforcement matters, they agreed to shift the enforcement power to the Commission with only limited control. The involvement of the Council will thus fall away under the new rules. In practice, the new decision-making system will shift more power to the Commission especially in trade defence matters. The new rules will be incorporated in the respective trade enforcement legislations once they are updated.

Interested parties hoping to influence trade defence investigations – and regardless of whether they see a need to apply a particular set of measures – will have to focus their advocacy efforts on convincing the Commission.

Procedural and substantive changes

The Council and Parliament are currently discussing several legislative proposals made by the Commission to amend the EU's trade enforcement mechanisms, which – subject to some changes – are expected to be adopted in the near-to-mid future.

The so-called 'Omnibus' proposals, in addition to the above-mentioned changes in the decision-making process, aim to introduce certain procedural changes in the trade enforcement mechanisms. For example, whereas in anti-dumping investigations the Commission currently has three months to determine whether producers in non-market economies warrant market economy treatment, the proposal increases that period to six months. This will be an important change, since the Court of Justice recently ruled that the three month deadline is not a flexible one, as repeatedly argued by the Council and Commission (case C-249/10 P *Brosmann*). More time will give the Commission more scope to investigate the particular facts and circumstances of each producer.

In addition, the Commission has prepared a proposal that (at least in theory) changes how the EU will treat exporting producers in non-market economy countries. This amendment is necessary following two separate rulings from the WTO Appellate Body 2011, which found that the EU anti-dumping law violates WTO rules to the extent that, as a rule, the EU does not calculate individual dumping margins for exporting producers in non-market economy countries (See DS405 EU – *Footwear from China*; DS397 EC – *Certain Iron or Steel Fasteners from China*). Under the new rules, the Commission will be required to calculate an individual anti-dumping duty for exporting producers in non-market economy countries, unless it can show that the exporting producer operates as a single entity with the state.

Finally, the Commission on 3 April 2012 launched a Public Consultation on the Modernisation of EU Trade Defence Instruments. This consultation aims at exploring different ways to modernise the EU's trade defence instruments, by asking stakeholders' viewpoint on areas for possible improvements. The Commission identified six broad themes for the purpose of the public consultation: increase of transparency and predictability for all stakeholders; fight against undue retaliation from EU's trading partners; improvement of the effectiveness and enforcement of trade defence instruments; facilitation of cooperation; optimisation of review practices; and codification efforts to bring EU legislation in line with WTO and EU jurisprudence.

Upcoming changes in trade enforcement practice

In addition to the anticipated changes in the law, several court judgments against the application of trade defence laws may trigger changes in how the Commission will apply the law going forward.

For example, when calculating the dumping

margin, the Commission often makes adjustments to the normal value and/or export price to ensure a fair comparison. Although the Commission has a wide margin of appreciation, the Commission's practice of making adjustments is increasingly coming under scrutiny. Thus, in 2011 alone the EU courts on two separate occasions found that the Commission was wrong to make a downward adjustment to the export price (thereby increasing the dumping margin) to reflect the involvement of a sales company in the export sales, whereas it would not have made such an adjustment for sales to the domestic market in the country of export (see joined cases C-191/09 and C-200 09 *Interpipe* and case T-107/08 *Kazchrome*). Similarly, the EU courts are currently examining the Commission's practice of making (upward) adjustments for energy costs (thereby increasing the dumping margin) on the grounds that the Commission considers energy prices in certain countries (eg, Russia) too cheap.

Another example is the Commission's treatment of exporting producers in non-market economy countries in investigations covering a large number of exporting producers. The Commission had argued that where investigations cover a large number of exporting producers, it is not practicable and therefore not required that the Commission examine market economy treatment requests of all companies. However, the Court of Justice in early 2012 confirmed that the Commission is required to always examine all duly completed market economy treatment claim forms (see case C-249/10 *Brosmann*).

A further example is the binding nature of the deadlines set out in the EU anti-dumping rules. Thus, the Commission often argued that where the law does not explicitly sanction the failure to meet a deadline, the deadlines should be interpreted flexibly to ensure the practicability of investigations. However, the courts have on several occasions ruled that the Commission is required to respect the deadlines (see eg, case C-141/08 *Foshan Shunde*).

In summary, although the above rulings may not necessarily lead to a change in actual legislation, they will undoubtedly affect how the EU applies its trade enforcement measures going forward.

SIDLEY AUSTIN LLP

SIDLEY

NEO Building, Rue Montoyer 51
Montoyerstraat
B-1000 Brussels
Belgium
Tel: +32 2 504 6400
Fax: +32 2 504 6401

Arnoud R Willems
awillems@sidley.com

Sven De Knop
sdeknop@sidley.com

Jeremie Charles
jeremie.charles@sidley.com

www.sidley.com

Sidley Austin LLP is one of the world's premier law firms, with a practice highly attuned to the ever-changing international landscape. The firm has built a reputation for being a powerful adviser for global businesses, with approximately 1700 lawyers in 18 offices worldwide. Sidley maintains a commitment to providing quality legal services wherever they are needed, offering advice in litigation, transactional and regulatory matters spanning virtually every area of law. The firm's lawyers leverage their diversity of knowledge and wide-reaching legal backgrounds with a dedication to teamwork, collaboration and superior client service. Sidley values the recognition it has received in response to its leadership in its wide cross-section of legal services around the globe. These accolades, which come from professional peers, publications and industry journals and clients in numerous industries include:

- Received the most first-tier national rankings of any US law firm in the 2011/12 US News – Best Lawyers 'Best Law Firms' survey, repeating its performance in the inaugural 2010 survey.
- Consistently ranked among the top global capital markets firms in the Thomson Reuters league tables.
- Named USA Law Firm of the Year and Global Trade & Customs Law Firm of the Year in 2011, Who's Who Legal Awards.
- Named Competition/Regulatory Team of the Year in The Lawyer Awards 2011.

The international trade practice of Sidley Austin LLP

From our offices throughout the United States, Europe and Asia, the international trade team of seasoned negotiators, deal-makers, litigators and policy advisers draws on extensive private sector and government experience to help companies, governments and trade associations shape the rules that govern every aspect of the international economy – from capital movements to trade in goods and services, to intellectual property and product standards.

Our international group assists clients in the full range of trade and arbitration matters including anti-dumping, countervailing duty, safeguard and other trade remedy proceedings; customs and export controls; embargoes and economic sanctions compliance; food safety, product regulation and industrial standards issues; trade policy issues before government agencies; disputes arising under the World Trade Organization (WTO) and bilateral investment treaties (BITs), as well as international commercial arbitration and disputes, and protection of intellectual property.

ABOUT THE AUTHORS

Arnoud R Willems
Sidley Austin LLP

Arnoud Willems is a partner in Sidley's Brussels office and leads the EU trade team. As an EU and international trade practitioner, he advises on trade and customs legislation as well as on the negotiation, conclusion and implementation of trade agreements and WTO rules. In this respect, Mr Willems regularly represents clients before the European, Dutch and Belgian administrative authorities, courts, and arbitration panels.

A key aspect of his practice involves helping companies improve their competitiveness through optimised use of trade and customs laws, eg, import tariffs, anti-dumping, trade barriers, customs matters as well as bi-and multi-lateral trade agreements.

Since 1995, Mr Willems has successfully represented numerous companies in trade defence cases, including the ground-breaking cases before the EU courts concerning silicon metal, silico-manganese, footwear and bed linen.

Mr Willems further is a thought leader on competitiveness, the application of WTO rules to the energy sector, climate change and the new EU energy regulation. He has particular experience in providing advice related to BRICs regarding these matters.

Mr Willems features prominently in the EU and international trade rankings of the leading bar publications such as *Chambers*, *The Legal 500*, *Who's Who Legal* and *Practical Law Company* (PLC). He is a member of several committees, publishes and speaks widely on trade topics such as anti-dumping, customs, the WTO accession of Russia and China, trade rules in energy, climate change, export controls and sanctions. His articles have been published in Asian, European and American journals.

Before entering private practice, Mr Willems was a lieutenant in the Royal Dutch Navy and served as a legal officer at Royal Philips Electronics.

Sven De Knop
Sidley Austin LLP

Sven De Knop is an associate in Sidley's Brussels office and a member of the firm's international trade and arbitration group.

Mr De Knop's practice focuses on EU and WTO trade and customs law, market access issues and EU regulatory law. He has particular experience in anti-dumping investigations and a broad range of customs and trade matters. He also advises on a wide variety of EU regulatory issues, including those applicable to the food, pharmaceuticals, biotechnology and cosmetics sectors, as well as product safety issues.

Prior to joining the firm, Mr De Knop worked as a lawyer at another law firm in Brussels, where he focused on competition law and commercial law (fair trade practices, privacy law, distribution contracts, e-commerce and litigation).

Jeremie Charles
Sidley Austin LLP

Jeremie Charles is an associate in Sidley's Brussels office and a member of the firm's international trade practice.

He advises multinational companies, governments and trade associations on international trade and investment, focusing particularly on European Union trade policy and legislation.

Mr Charles has notable experience advising clients on EU trade enforcement instruments. He was involved in several anti-dumping investigations and participated in several proceedings before the European courts.

Prior to joining Sidley, Mr Charles was a legal attaché to the Permanent French Representation to the World Trade Organization, where he provided legal advice to the French government in the framework of the Doha Round negotiations and various dispute settlement proceedings.