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The European Economic Community's New Measures against Unfair Practices in International Trade: Implications for United States Exporters

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The European Economic Community's New Measures Against Unfair Practices In International Trade: Implications For United States Exporters

In a move likely to intensify trade battles between the United States and Europe, the European Economic Community has adopted new measures to deal with unfair trading practices of non-member countries.[1] The measures provide a complaint mechanism by which European firms may challenge trade practices of other countries and obtain retaliatory action by the Commission and Council of Ministers of the Community. In rough form, the measures parallel section 301 of the 1974 Trade Act in the United States.[2] The Community views the new measures as strengthening its hand within the dispute-settlement framework of the General Agreement on Tariffs and Trade (GATT)[3] and, more generally, as providing a potentially swift and powerful tool in trade disputes with the United States and other countries.

This comment summarizes the new Community measures and considers, however preliminarily, their implications for the United States firm engaged in international trade with the European Common Market. The measures bear watching, for they are likely to increase the hazards of selling into European markets.

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1. Council Regulation (EEC) No. 2641/84, 27 O.J. Eur. Comm. (No. L 252) 1 (Sept. 17, 1984) [hereinafter cited as Reg. 2641/84].

2. 19 U.S.C. § 2411(a).

3. *E.g.*, General Agreement on Tariffs and Trade, *opened for signature* Oct. 30, 1947, arts. XIX & XXIII, 61 Stat. A3, A58–60, A64–65, T.I.A.S. No. 1700, *amended by* Protocol Amending the Preamble and Parts II and III of the GATT, *done at Geneva*, Mar. 10, 1955, 8 U.S.T. 1767, 1786–87, T.I.A.S. No. 3930.

I. Regulation 2641/84 and its Background

Article 113 of the Treaty of Rome[4] provides generalized legal authority for the Commission and the Council of Ministers, working jointly, to develop a common Community commercial policy in the sphere of international trade. Regularized procedures were previously adopted under Article 113 to implement Community policy in particular trade areas, most particularly in disputes concerning dumped or subsidized imports[5] and in the development of common rules on imports.[6] But until now, no comparable procedures existed to address the situation where a non-member country was engaging in a trade practice which—in the Community's eyes—was unfair to Community trade. Such situations could be handled by the Community only on an *ad hoc* basis under the general provisions of Article 113, which left neither the Commission nor the Council with clear authority to press a matter to prompt resolution. Compared to procedures utilized by the Community's trading partners—particularly the United States—the Community felt that it lacked effective measures to move decisively against unfair trade practices of others.

Regulation 2641/84 was the response. It was drafted by the Commission following a 1982 Council request that the Commission develop procedures which would enable the Community to act "with as much speed and efficiency as its trading partners" in the protection of trading interests and "to defend vigorously the legitimate interests of the Community in the appropriate bodies."[7] The Commission undertook a formal study of the trade-protection measures of other countries, of the kinds of trade practices which might warrant Community response, and of the procedures which would best fit the Community's legal structure and traditions.[8] A draft regulation was provided to the Council in February 1983[9] and, after debate and modification, was approved by the Council in April 1984. Final adoption was delayed until September 1984, largely for extraneous political reasons.[10] Regulation 2641/84 became effective on September 23, 1984.[11]

4. Treaty Establishing the European Economic Community, *done at Rome*, Mar. 25, 1957, art. 113, 298 U.N.T.S. 4, 60. The official English text is found at 2 Common Mkt. Rep. (CCH) ¶ 3815.

5. *See* Council Regulation (EEC) No. 2176/84, 27 O.J. Eur. Comm. (No. L 201) 1, 2 Common Mkt. Rep. (CCH) ¶ 3821 (1984) [hereinafter cited as Reg. 2176/84]. This regulation superseded various predecessors on the same topics. *See* 2 Common Mkt. Rep. (CCH) § 3816.07 (giving history of predecessor provisions).

6. Most importantly, Council Regulation (EEC) No. 288/82, 25 O.J. Eur. Comm. (No. L 35) 1, 2 Common Mkt. Rep. (CCH) ¶ 3829 (1982). Again, this regulation is only the most recent in a series of measures dealing with the same topic. *See* 2 Common Mkt. Rep. (CCH) ¶ 3816.25 to .29.

7. Reg. 2641/84, *supra* note 1, preamble ¶ 7.

8. *See* Proposal for a Council Regulation, COM(83) 87 final, p. 1 (Feb. 28, 1983) (Explanatory Memorandum).

9. *Id.*

10. *See* Financial Times, Sept. 18, 1984, at 5, col. 1.

11. *See* Reg. 2641/84, *supra* note 1, art. 14.

A. Practices Subject to the Regulation

The aims of Regulation 2641/84 are set forth in its first article: to establish procedures for the purpose either (a) of removing injury resulting from any "illicit commercial practice" of a non-member country or (b) of ensuring the full exercise of the Community's rights with regard to the commercial practices of other countries.[12] In either case, the Regulation specifies that the Community's responsive actions shall be "subject to compliance with existing international obligations and procedures."[13]

The critical term "illicit commercial practices"is defined as "any international trade practices attributable to third countries which are incompatible with international law or with the generally accepted rules."[14] An earlier draft used the phrase "practices . . . which are incompatible with international law or the rules commonly accepted by the Community's principal partners regarding commercial policy."[15] The change in the wording does not appear to be material; it is clear in either case that the Regulation is directed at practices that are either "incompatible with the commitments of the non-member country concerned vis-à-vis the Community or, more generally, . . . condemned by international law or the rules regarding commercial policy commonly accepted by the Community's principal partners."[16] Two examples specifically cited by the Commission as falling within the Regulation are restrictions on raw materials contrary to the GATT and import restrictions or other charges that are incompatible with the GATT.[17]

The Regulation's definition of unfair practices was intended to occupy a middle ground between what the Commission regarded as two extremes. On the one hand, the Commission wanted to avoid a particularized listing of specific practices, an approach which inevitably would raise issues of compartmentalization and create the risk of gaps or under-inclusion. On the other hand, the Community wanted to avoid a catch-all approach such as that in section 301 of the United States Trade Act—reaching practices that were "unjustifiable, unreasonable or discriminatory"[18]—on the grounds that such an approach would be too unstructured and arbitrary, might itself create the risk of Community actions in violation of the GATT, and could raise excessive expectations among Community industries of official protective action which could not realistically be met. Adoption of a standard based on international obligations and generally accepted rules of trade conduct was intended to avoid either extreme.[19]

12. *Id.*, art. 1(a) & (b).
13. *Id.*, art. 1.
14. *Id.*, art. 2(1).
15. Proposal for a Council Regulation, *supra* note 8, art. 2(2).
16. *Id.*, p. 2 (Explanatory Memorandum).
17. *Id.*, p. 2 n.1 (Explanatory Memorandum).
18. 19 U.S.C. § 2411(a)(2)(B).
19. Proposal for a Council Regulation, *supra* note 8, pp. 1–2 (Explanatory Memorandum).

Independently of the right to act against illicit trade practices, Regulation 2641/84 is also applicable when needed to ensure "full exercise of the Community's rights with regard to the commercial practices of third countries."[20] For this purpose the Community's rights are defined as "those international trade rights of which [the Community] may avail itself either under international law or under generally accepted rules."[21] As explained in greater detail below, however, this more open-ended application of the Regulation may not be invoked by private complainants.

On the chance that Regulation 2641/84 may prove self-confining in unforeseen circumstances, the Community expressly reserved the right to proceed directly under Article 113 of the Treaty of Rome against any other improper trade measures not falling within the scope of the Regulation.[22]

B. The Initiation of Complaints

Regulation 2641/84 may be invoked by any member state of the Community, whether the objective is to confront an "illicit commercial practice" or to ensure the "full exercise" of Community rights.[23] More interesting, however, is the right of a private party to invoke the Regulation, a right which did not exist previously under Article 113 of the Treaty, at least not in any formal sense.[24]

Private complainants must, however, meet certain specified requirements. First, they may challenge only illicit commercial practices of other countries and may not invoke the broader "full exercise" arm of the Regulation.[25] Further, a private party must demonstrate by its complaint that it is acting on behalf of a Community industry which considers itself injured by the challenged practice.[26] For these purposes, "Community industry" is defined as Community producers who (a) produce products identical to, similar to, or competitive with the product that is the subject of the illicit practice or (b) are consumers or processors of the subject product.[27] The second part of this definition, which was not included in the original Commission draft,[28] significantly widens the availability of the

20. Reg. 2641/84, *supra* note 1, art. 1(b).
21. *Id.*, art 2(2).
22. *Id.*, preamble ¶ 10 & art. 13.
23. *Id.*, art. 4(1).
24. Obviously, a private party previously had the right to complain informally to the Commission and to request the Commission to initiate action under Article 113.
25. *Id.*, art. 3(1). *See also* Proposal for a Council Regulation, *supra* note 8, p. 3 (Explanatory Memorandum) ("this right to submit [private] complaints direct should be accorded only in respect of unfair commercial practices—i.e., cases covered under [article 1(a)]").
26. Reg. 2641/84, *supra* note 1, art. 3(1).
27. *Id.*, art. 2(4).
28. Proposal for a Council Regulation, *supra* note 8, art. 2(4) (limiting the definition to producers of identical, similar, or competitive products).

Regulation, although it still falls short of granting standing to "[a]ny interested person" as allowed under the comparable United States procedures.[29] For the most part, a complainant must represent all or a major portion of the relevant producers within the Community industry, although Community producers who are affiliated with the subject foreign exporters need not be included and, in particular circumstances, producers within a single region of the Community may be a sufficient plaintiff group.[30]

Every private complaint must also contain proof of injury.[31] The alleged injury may be either existing or threatened, but in any event it must be material.[32] Evidence of injury must address three major topics: (a) the volume of Community imports or exports involved, and particularly whether there has been a significant increase or decrease; (b) prices, in particular to determine whether there has been a significant undercutting of the prices of Community producers, either in the Community itself or in third countries; and (c) the consequent impact on the Community industry, as indicated by trends in such economic factors as production, utilization of capacity, stocks, sales and market shares, negative effects on prices or profits, employment, and investment.[33] The showing with respect to injury should, of course, exclude injury caused by extraneous factors.[34]

C. The Processing of Complaints

A major goal of Regulation 2641/84 is the speedy processing of trade complaints. The initial step after receipt of a complaint is for the Commission to consult with an advisory committee of the member states.[35] The consultation can be simply a brief written procedure,[36] and its function is to distinguish between complaints which justify investigation and those which do not. Where the Commission concludes that the complaint does not warrant further steps, it may terminate the proceeding after the consultation stage.[37] If the Commission decides that further investigation is appropriate,

29. 19 U.S.C. § 2412(a).

30. Reg. 2641/84, *supra* note 1, art. 2(4). The Community's Economic and Social Committee had urged inclusion of this "regional interest" concept, which was already found in the Community's antidumping and antisubsidy rules and is recognized by the GATT. *See* Opinion of the Economic and Social Committee, 26 O.J. Eur. Comm. (No. C 211) 24, 26 (1983).

31. Reg. 2641/84, *supra* note 1, art. 3(1). Where the complaint of a member state is directed against an illicit commercial practice, it must also show injury. However, no injury showing need be made under the "full exercise" clause. *Id.*, art. 4(2).

32. *Id.*, art. 2(3). In the case of alleged threatened injury, the anticipated injury must also be clearly foreseeable. *Id.*, art. 8(2).

33. *Id.*, art. 8(1). This test of injury is substantially borrowed from the Community's antidumping regulation. *See* Reg. 2176/84, *supra* note 5, art. 4(2).

34. Reg. 2641/84, *supra* note 1, art. 8(3).

35. *Id.*, art. 5.

36. *Id.*, art. 5(4).

37. *Id.*, art. 3(5) & 4(4).

it will initiate an examination procedure.[38] This threshold decision—whether to terminate the proceeding or initiate an examination procedure—must be made within 45 days of receipt of the complaint, or within 60 days in the case of (undefined) special circumstances.[39]

Where an examination procedure is initiated, the Commission will first publish a notice of the investigation in the *Official Journal of the European Community* and also give notice to the country or countries which are the subject of the complaint.[40] Consultations with those governments may occur at this stage,[41] but in most instances this will probably be deferred until the completion of the investigation. The Commission may proceed with independent fact-finding, and, if requested evidence is not supplied, the Commission is entitled to rule on the basis of the evidence put before it by the complainant and other cooperating entities.[42] Confidential treatment may be requested for submissions, but the Commission is the final judge as to what will and will not be made public.[43]

As in the Community's procedures for antidumping complaints,[44] Regulation 2641/84 provides for the possibility of a hearing with the Commission and meetings among the adverse parties so that the Commission may hear opposing arguments and rebuttal.[45] At such meetings, however, parties may withhold confidential information, and the failure to attend may not be prejudicial to their case.[46] Thus, as is often the case with Commission proceedings in other areas (particularly, antidumping and antitrust), there are only limited opportunities for the accused to confront its accusers and rebut their evidence. Moreover, in borrowing from its antidumping procedures to frame these administrative procedures, the Commission made no adjustment for the fact that proceedings under Regulation 2641/84 will typically be directed at the actions of governments rather than of private parties. Whether a nonmember government, such as the United States, would be willing to participate in the Commission's administrative proceedings may be questioned. Further, the retaliatory response arising from a Regulation 2641/84 proceeding may, for strategical reasons, be directed at products of the offending country that differ from the products involved in

38. *Id.*, art. 6(1).
39. *Id.*, art. 6(8).
40. *Id.*, art. 6(1)(a) & (b).
41. *Id.*, art. 6(1)(b).
42. *Id.*, art. 6(2) & (7).
43. If the Commission concludes that a request for confidentiality is unwarranted and if the supplier is unwilling either to make the information public or to authorize its disclosure in generalized form, the information will be disregarded. *Id.*, art. 7(4). But in any event, the Commission remains free to disclose "general information" and, in particular, the reasons on which its decisions are taken. *Id.*, art. 7(5).
44. *See* Reg. 2176/84, *supra* note 5, art. 7(5) & (6).
45. Reg. 2641/84, *supra* note 1, art. 6(5) & (6).
46. *Id.*, art. 6(6).

the unfair practice at issue. This again raises the question whether, at the administrative level at least, the Commission's proceedings are likely to result in a full airing of the economic and legal issues relevant to both the complaint of unfair practice and to the question of relief.

D. Decision and Ultimate Action

The Commission will normally be expected to submit its report to the advisory committee of member states within five months after initiating an examination procedure.[47] After discussion in the committee, the Commission is directed to adopt a decision, which then is subjected to a "guillotine" procedure: the decision becomes effective unless, within ten days, a member state refers the matter to the Council. By majority vote the Council may revise the decision, but if no Council action is taken in thirty days the Commission's decision as submitted becomes effective.[48] Thus an objecting member state has the burden not only of appealing to the Council but also of gaining majority support at the Council within thirty days. Moreover, an interested private party has no independent appeal rights to the Council; it may protect its position only through a cooperative member state.

The Commission decision is not the last word, however. Where the Community is precluded by the GATT or other international agreement from taking unilateral measures against an illicit commercial practice, the Commission will pursue the required consultative or dispute-settlement procedures with the targeted country. The Community's negotiating position concerning the initiation, conduct, and termination of the international procedures will be governed by the guillotine procedure just described.[49] However, after conclusion of the international procedures, an affirmative majority vote of the Council is needed before responsive action may actually be taken.[50] Hence, for GATT signatories such as the United States, the Community's principal political body—the Council—ultimately must agree by majority vote to any action which would fall within the GATT framework.

With respect to what kinds of action may ultimately be taken, Regulation 2641/84 requires only that they be "compatible with existing international obligations and procedures."[51] This presumably incorporates the traditional international-law restrictions of proportionality and equivalency.[52] Possible forms of retaliation that are specifically identified in the Regulation are: (a)

47. *Id.*, art. 6(9). Seven months are allowed for unusually complex proceedings. *Id.*
48. *Id.*, art. 12.
49. *Id.*, art. 11(2)(a).
50. *Id.*, art. 11(2)(b).
51. *Id.*, art. 10(3).
52. Under both articles XIX and XXIII of the GATT, *supra* note 3, it is recognized that retaliation should be limited to the suspension of equivalent obligations or concessions.

suspension or withdrawal of any concession resulting from commercial policy negotiations; (b) the raising of existing customs duties or the introduction of any other charge on imports; and (c) the introduction of quantitative restrictions or any other measures modifying import or export conditions or otherwise affecting trade with the third country concerned.[53]

II. Potential Implications

Undoubtedly, regulation 2641/84 has increased the hazards of trade with the European Common Market. Alarmism would be ill-advised, but the fact remains that the Regulation is now on the books and not likely to be ignored, either by the Commission or certainly by European industries. The avowed purpose of the Regulation is to strengthen the Community's hand in trade disputes with its trading partners, of which the United States is most important. Moreover, the Regulation gives a new avenue by which European industries can bring complaints to political levels within the Community and demand decision and action. None of this can be comforting to the United States business executive selling into Europe, who faces new risks of becoming embroiled in economic and political battles over which he will have little control.

This is not to say that the Community will frequently impose sanctions under Regulation 2641/84. Just as section 301 of the 1974 Trade Act has never been the source of unilateral import action by the United States, Regulation 2641/84 will rarely run its full course. In most instances, as with section 301, the Regulation procedures will probably be initiated at the early stages of a trade dispute for purposes of leverage, but a negotiated solution will result in a suspension or termination of formal proceedings before final Council action on sanctions.[54] The Regulation will have an impact, but the ultimate weapon of unilateral action will rarely be invoked.

As a practical matter, what can a United States firm do to avoid embroilment with Regulation 2641/84 and with the political and economic battles in which its procedures will be invoked? In many instances, very little. The Regulation is focused on the trade practices of governments, not of private firms. Accordingly, even the most cautious United States company might be caught in a Regulation proceeding because of United States government actions which the private company neither sought nor benefited from.

53. Reg. 2641/84, *supra* note 1, art. 10(3).

54. This is contemplated by the Regulation itself, which provides for termination of proceedings where the targeted third country or countries have taken corrective steps. The Commission is instructed to monitor implementation of those corrective steps, and may reinstitute the proceedings on a prompt basis where appropriate. *Id.*, art. 9(2). In its initial proposal for the Regulation, the Commission observed that the initiation of formal examination procedures under the Regulation should itself bring political and economic pressure on target countries. Proposal for a Council Regulation, *supra* note 8, p. 3 (Explanatory Memorandum).

Presumably in some instances, though, the United States company will have some control over its destiny. One can anticipate that the retaliatory actions which a European industry might seek under the Regulation will, if possible, focus on those United States firms which are perceived to have inspired the United States trade practice under attack. Where, for example, the United States widget industry seeks restrictions from Congress, the United States Trade Representative, or the International Trade Commission on the importation of European widgets into the United States, the United States industry's exports of widgets to Europe will be a jeopardy if the Europeans are likely to conclude that the proposed United States government action would be improper under the GATT. Retaliation was always possible in the past, but Regulation 2641/84 raises it to a higher level of likelihood.

Thus the obvious lesson to be drawn for the United States firm is to analyze carefully the implications for its European sales before seeking United States government relief with respect to imports from Europe. Regulation 2641/84 provides an obvious stimulus for European competitors to initiate counter-proceedings in Brussels, with the likely result that the matter will quickly be escalated to the political level where the United States firm may have little control over the outcome. Indeed, the European counter-proceeding may largely coincide in time with the United States one, since—as mentioned—Regulation 2641/84 may be involved in the case of threatened injury,[55] and presumably the Europeans will conclude that their leverage would be more effectively applied in preventing unwanted United States actions than in seeking their termination. Again, this suggests that United States trade proceedings are likely to be affected even more than presently by a heavy dosage of international politics.

Finally, when a United States firm finds its trade is jeopardized by a Regulation 2641/84 proceeding, it must, of course, consider the desirability of seeking to participate as a concerned party.[56] The risks of participating would include the danger of disclosure of business data that the United States firm considers confidential but which the Commission does not.[57] There is also the expense of a European legal proceeding. But to ignore the proceeding is also risky, particularly because the Commission is authorized to rely entirely on the adverse evidence of complainants if others do not provide rebuttal evidence.[58] The early proceedings under the Regulation will bear careful watching, to see whether their level of procedural fairness and objectivity is sufficient to inspire reasonable confidence that participation by United States respondents may contribute to favorable results.

55. *See supra* note 32 and accompanying text.
56. *See supra* text accompanying notes 40–46.
57. *See supra* text accompanying note 43.
58. *See supra* text accompanying note 42.