

1985

Settlement of EEC Antidumping Proceedings

Daniel B. Silver

George L. Bustin

Recommended Citation

Daniel B. Silver & George L. Bustin, *Settlement of EEC Antidumping Proceedings*, 19 INT'L L. 1273 (1985)
<https://scholar.smu.edu/til/vol19/iss4/9>

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SHORT ARTICLES,
COMMENTS AND CASENOTES

Settlement of EEC Antidumping Proceedings[‡]

Two important features of the antidumping procedures of the European Economic Community (EEC)¹ are the frequency with which proceedings are terminated by the acceptance of written undertakings from exporters and the relative flexibility of the procedures relating to such undertakings.² In 1983, the most recent year for which the Commission of the European Communities (the Commission) has published statistics, definitive duties were imposed in twenty cases and price undertakings accepted in twenty-seven. The preponderance of undertakings was even greater in 1982 with thirty-five undertakings as opposed to only seven decisions imposing definitive duties.³

*Mr. Silver is a resident partner in the Washington office (and until recently was a resident partner in the Brussels office), and Mr. Bustin is a resident partner in the Brussels office of the law firm of Cleary, Gottlieb, Steen & Hamilton.

‡A similar version of this article will be published in Japanese in the JOURNAL OF THE JAPANESE INSTITUTE OF INTERNATIONAL BUSINESS LAW.

1. Both the European Economic Community (EEC) and the European Coal and Steel Community (ECSC) have similar rules on dumping subsidies. The EEC rules are administered in part by the Council of Ministers and in part by the Commission of the European Communities, whereas the ECSC rules are administered entirely by the latter body. In order to avoid unnecessary complexity, this comment generally will refer only to the EEC antidumping rules.

2. See generally, J. CUNNANE & C. STANBROOK, DUMPING AND SUBSIDIES: THE LAW AND PROCEDURES GOVERNING THE IMPOSITION OF ANTIDUMPING AND COUNTERVAILING DUTIES IN THE EUROPEAN COMMUNITY, at 86-89 (1983); DAVEY, *An Analysis of European Communities Legislation and Practice Relating to Antidumping and Countervailing Duties*, (1983); ANN. PROC., FORDHAM CORP. L. INST. 39, 92-98 (1984). See also, Toepke, *EEC Law of Competition: Distribution Agreements and Their Notification*, 19 INT'L LAW. 117 (1985); and Van Bael, *A Practitioner's Guide to Due Process in EEC Antitrust and Antidumping Proceedings*, 18 INT'L LAW. 841 (1984). Compare Holmer and Bello, *Suspension and Settlement Agreements in Unfair Trade Cases*, 18 INT'L LAW. 683 (1984) (discussing a similar approach used in the United States).

3. COMM'N OF THE EUROPEAN COMMUNITIES, SECOND ANNUAL REPORT OF THE COMMISSION OF

While there are indications that since the end of 1983 the Commission may have become somewhat more rigorous in its decisions to accept undertakings, there can be little doubt that undertakings remain a significant feature of EEC antidumping practice.⁴ Thus, an exporter to the EEC involved in an antidumping investigation is very likely to be confronted eventually with the issues of whether to offer an undertaking and, if so, of what the Commission can be expected to accept. In many circumstances the exporter will consider it preferable to enter into an undertaking, since the price increase required by the undertaking goes into the exporter's pocket, whereas an antidumping duty goes to the customs authorities. On the other hand, an undertaking normally leaves the exporter little flexibility to meet competitors' price reductions (unless the exporter withdraws the undertaking, thereby exposing itself to the possible imposition of an antidumping duty) and thus may be risky if the price required by the undertaking is too high.

This comment will review recent developments in the Community's practices relating to undertakings, as reflected both in published materials and in the authors' experience, and will offer some comments on issues that may affect the possibility of obtaining a satisfactory resolution of an EEC antidumping proceeding through the offer of an undertaking.

I. Legal Background

EEC antidumping procedures are regulated by Council Regulation (EEC) No. 2176/84⁵ (the Regulation). Under the Regulation, the Commission, the EEC's executive body, is responsible for the initiation and investigation of antidumping cases, for the imposition of provisional duties and for recommending to the Council of Ministers (the Council) proposals for the imposition (which must be by Council regulation) of definitive duties and the definitive collection of provisional duties. The activities of the Commission are carried on in close consultation with an Advisory Committee composed of representatives of the Member States. The possibility of terminating an antidumping proceeding by an undertaking is provided for in the Regulation in terms drawn essentially from article 7 of the GATT

THE EUROPEAN COMMUNITIES TO THE EUROPEAN COMMUNITIES ON THE COMMUNITY'S ANTIDUMPING AND ANTISUBSIDY ACTIVITIES, COM. (84) 721 final, at 4 (1984) [hereinafter cited as SECOND ANNUAL REPORT].

4. Undertakings also are possible in countervailing duty (subsidy) cases, but such cases are quite infrequent. In 1983, for example, only two antisubsidy investigations were initiated as compared with thirty-six antidumping investigations. *See id.* Annex G. For the sake of convenience, this article refers only to undertakings in antidumping cases.

5. 27 O.J. EUR. COMM. (No. L 201) 1 (1984), as corrected at 27 O.J. EUR. COMM. (No. L 227) 35 (1984), 2 COMMON MKT. REP. (CCH) ¶ 3821 (1984) [hereinafter cited as Regulation 2176/84].

Antidumping Code.⁶ The relevant provisions of the Regulation are fairly simple and allow the Commission great flexibility.

The principal provisions of the Regulation relating to undertakings are as follows:

(a) Undertakings can be offered, except in unusual circumstances, only before the end of the period during which the exporter can make representations to the Commission following the Commission's provision of information relating to the essential facts and considerations underlying the Commission's intended recommendation to the Council of a definitive duty.⁷

(b) Termination of the proceedings by way of an undertaking does not preclude the definitive collection of provisional duties.⁸

(c) Undertakings can take the form of a promise either to raise prices to a level sufficient to eliminate the dumping margin or the injury or to reduce exports to an extent sufficient to eliminate injury.⁹

(d) The failure of the Commission to suggest or to accept an undertaking shall not prejudice the consideration of the case, "[h]owever, the continuation of dumped . . . imports may be taken as evidence that a threat of injury is more likely to be realized."¹⁰

(e) Even if an undertaking is accepted, the investigation of injury shall be continued if the Commission so decides after consultation with the member states or is requested to do so by exporters representing a significant percentage of the trade involved. If the ultimate determination is that no injury has been shown (unless the lack of injury is itself due to the exporter's compliance with the undertaking), the undertaking shall automatically lapse.¹¹

(f) The Commission may require an exporter from which an undertaking has been accepted to provide information periodically or to permit verification of relevant data, and failure to comply will be deemed a violation of the undertaking.¹²

(g) If the undertaking is withdrawn or the Commission has reason to

6. Agreement on Implementation of article VI of the General Agreement on Tariffs and Trade, Apr. 12, 1979, 31 U.S.T. 4919, T.I.A.S. No. 9650.

7. Regulation 2176/84, *supra* note 5, arts. 10 (1), 7(4)(c)(iii). Regulation 2176/84, art. 7(4)(b) provides that the exporter can request such information. The request must be in writing and must be received, in cases where a provisional duty has been applied, no later than one month after publication of the duty. Art. 7(4)(c)(i). The Commission then must provide the information, normally no later than fifteen days prior to submitting to the Council a proposal for final action, and must set a further period of at least ten days during which representations can be made by the exporter. Art. 7(4)(c)(iii).

8. *Id.* art. 10(1).

9. *Id.* art. 10(2).

10. *Id.* art. 10(3).

11. *Id.* art. 10(4).

12. *Id.* art. 10(5).

believe that it has been violated, the Commission can impose provisional dumping duties "forthwith" on the basis of the facts established before the acceptance of the undertaking, after consultation with the member states and after having offered the exporter a chance to comment.¹³

In order for an antidumping proceeding to be terminated by acceptance of an undertaking, the matter must be referred first to the Advisory Committee. If any member state objects, the Commission must submit to the Council a proposal for termination. The proceeding is terminated if, within one month, the Council has not decided otherwise, acting by a "qualified majority."¹⁴

II. Issues and Developments

The provisions of the Regulation relating to undertakings leave the Commission with considerable discretion as to whether to accept an undertaking in a given case, as well as the terms and conditions thereof.¹⁵ The Commission has stated that "[t]he Community is impartial in its stance on the acceptance of price undertakings as an alternative to the imposition of duties."¹⁶ In practice, however, it appears that, over the years, the Commission has tended to prefer undertakings over the conclusion of proceedings by the imposition of definitive duties, as is shown by the comparative statistics cited above.¹⁷ One likely reason for such preference is that, if all member states agree, an undertaking can be accepted, and the proceeding terminated, at the Commission level, *i.e.*, without recourse to the Council. The undertaking route is thus administratively simpler and is likely to be faster.

It often has been observed in practice that the Commission has tended to be severe in rejecting exporters' claims for allowances or adjustments which would reduce or eliminate the dumping margin in cases where dumping incontestably exists and has been relatively unreceptive to arguments that

13. *Id.* art. 10(6).

14. *Id.* arts. 9(1), 10(1). A "qualified majority" means, in the case of a proposal from the Commission, a vote of forty-five in favor, with the votes of the member states weighted so that Germany, France, Italy and the United Kingdom each counts for ten; Belgium, Greece and the Netherlands each counts for five; Denmark and Ireland each counts for three; and Luxembourg counts for two. Treaty Between Member States of the European Communities and the Hellenic Republic Concerning the Accession of the Hellenic Republic to the European Economic Community and to the European Atomic Energy Community, May 28, 1979, art. 14, 22 O.J. EUR. COMM. (No. L 291) 17 (1979).

15. In this regard Regulation 2176/84, *supra* note 5, should be compared with the relevant provisions of U.S. law, which are more detailed and restrictive. See 19 U.S.C. 1671c and 1673c, as amended by the Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948 (1984).

16. COMM'N OF THE EUROPEAN COMMUNITIES, FIRST ANNUAL REPORT OF THE COMMISSION OF THE EUROPEAN COMMUNITIES TO THE EUROPEAN COMMUNITIES ON THE COMMUNITY'S ANTIDUMPING AND ANTISUBSIDY ACTIVITIES, COM. (83) 519 Final/2, at 4 (1983).

17. See SECOND ANNUAL REPORT, *supra* note 3 and accompanying text.

there is no resulting injury. On the other hand, the Commission has shown a tendency to be more lenient in setting the undertaking price and conditions. The reasons for this seem obvious. When a duty is imposed the amounts of both the dumping margin and the duty are made public. Although the fact of a decision to accept an undertaking is published, the undertaking price is not. Flexibility in setting an undertaking price thus leaves no public trace and furnishes no arguments to exporters in other cases.

The Commission's practice in negotiating undertakings traditionally has been marked by a degree of diversity from case to case, extending both to questions of timing and content. Recently, however, the Commission has shown signs of developing more consistent policies relating to undertakings, some of which have considerable potential importance for affected exporters to the EEC. Certain of these are embodied in a new standard form of undertaking which the Commission recently has put into use. Some of the major features of recent Commission practice and of the new form of undertaking are discussed below.

A. TIMING

From the perspective of the exporter it would often be advantageous to enter into an undertaking at an early stage in the proceeding. For example, if the exporter knows that a finding of both dumping and injury is inevitable, it may wish to avoid the expense and trouble of proceeding with a full investigation and hearing. (This is a particularly attractive prospect in any case in which the dumping margin or percentage of price undercutting alleged in the complaint appears lower than that which might be revealed by a full investigation.) The Commission traditionally has been reluctant, if not totally unwilling, to enter into undertakings before completion of at least some investigation as to whether dumping and injury exist.¹⁸ Until recently, however, the Commission showed willingness to accept an undertaking after the investigation was substantially completed but before a provisional duty was imposed, and followed this approach in many cases.¹⁹

This may no longer be possible. Senior officials have indicated that the Commission in most cases will follow a policy of accepting undertakings only after publication of a regulation imposing a provisional duty.²⁰ There would

18. See SECOND ANNUAL REPORT, *supra* note 2, at 5. The Commission's general reluctance to enter into undertakings before the completion of the investigation renders somewhat useless the provisions of art. 10(4) of Regulation 2176/84 which permit the investigation to be continued even after an undertaking is accepted. See *supra* note 11 and accompanying text.

19. See, e.g., Plasterboard from Spain, Commission Decision of Mar. 26, 1985 (85/209/EEC) 28 O.J. EUR. COMM. (No. L 89) 65 (1985); Paraformaldehyde from Spain, Commission Decision of Oct. 23, 1984 (84/512/EEC), 27 O.J. EUR. COMM. (No. L 282) 58 (1984); Asbestos-cement Corrugated Sheets from Czechoslovakia and the German Democratic Republic, Commission Decision of Sept. 26, 1984 (84/465/EEC), 27 O.J. EUR. COMM. (No. L 259) 48 (1984).

20. Personal communications.

seem to be good reasons, from the Commission's point of view, to adopt such a practice. First, negotiations concerning possible undertakings conducted before publication of a provisional duty may prove unsuccessful. If so, they serve only to delay the effectiveness of the provisional remedy and thus, from the Commission's perspective, to aggravate the injury which is being caused. Second, the Commission's position *vis-à-vis* the exporter is strongest after a provisional duty has been published; indeed, at that point, the Commission normally can offer its desired terms for an undertaking on a "take it or leave it" basis. Third, publication of a provisional duty, even if shortly thereafter terminated by acceptance of an undertaking, may provide greater psychological satisfaction to the complaining parties, thus reducing political pressure on the Commission and enhancing the likelihood that no Member States will raise an objection. Fourth, completion of the procedure to the point of publishing a provisional duty tends to legitimate the undertaking by removing the suspicion that the exporter was pressured into making a deal before the facts were known.

Finally, publication of a provisional duty permits the rapid reimposition of that duty in the event that the undertaking is withdrawn or violated. In a recent decision, the Court of Justice of the European Communities held that the Commission cannot impose a provisional duty simply because the exporter withdrew or violated the undertaking.²¹ It must find that the elements of both dumping and injury are present. Where the Commission already has imposed a provisional duty before accepting the undertaking, it would be difficult for the exporter to challenge the Commission's action for failure to make such findings. This decision is likely to reinforce the Commission's preference for publishing a provisional duty before accepting an undertaking.

In the past, one of the advantages of an undertaking for some exporters has been avoidance of adverse publicity associated with the imposition of antidumping duties. If the Commission adheres to a policy of only accepting undertakings after publication of the provisional duty, it may be that some exporters will find the prospect of an undertaking less attractive than before. It remains to be seen whether this factor will have any effect on the percentage of cases terminated by way of undertakings.

A Commission policy of accepting undertakings only after publication of a provisional duty would have timing consequences, which might be disadvantageous to the exporter. Under the Regulation, a provisional duty has a maximum period of validity of four months; it can be extended, but only by the Council, only if exporters representing a significant percentage of the trade involved request such an extension or do not object to the Commis-

21. *Allied Corp. et al. v. Council of the European Communities*, Decision of May 23, 1985 (unpublished).

sion's proposal for an extension, and only for a further period of two months.²² Consequently, an extension is burdensome for the Commission. A proposal to take definitive action or extend provisional measures must be submitted by the Commission to the Council not later than one month before expiration of the validity of the provisional duty.²³ Thus, the Commission in effect has three months after a provisional duty has been published to decide whether to accept an undertaking or submit a proposal for a definitive duty if it wishes to avoid asking the Council to extend the provisional duty. During this time the Commission must not only obtain from the exporter the offer of an undertaking which is acceptable to the Commission, but it must seek the unanimous approval of the member states early enough to allow, should there be an objection, for submitting a proposal to terminate the proceedings to the Council before the one-month deadline. Thus, the effective time within which to negotiate is quite limited, and the exporter is likely to be confronted with an ultimatum carrying a short deadline. Even where the exporter has meritorious arguments to present in favor of a change in the undertaking, if they are not quickly accepted by the case handler there may not be enough time to raise them with more senior Commission officials before the deadline expires.

It is not unknown for the Commission to continue negotiations on an undertaking even after submitting to the Council a proposal for a definitive duty. This has occurred, for example, where the provisional duty had already been extended and the Commission felt that it had to submit such a proposal or risk losing the ability to do so. Such situations are not common, however, and it appears that the Commission will endeavor in the future to avoid them by pressing exporters for early decisions on whether to offer an undertaking in a form acceptable to the Commission.

B. NEGOTIATION

As indicated above, the Commission often will present the exporter with an ostensibly non-negotiable proposal for an undertaking and a relatively short time in which to accept or reject it. There still may be room for negotiation, however, especially if there are weaknesses in the Commission's position which might make it wish to avoid having the exporter challenge a definitive duty before the Court of Justice of the European Communities. Thus, the degree of flexibility shown by the Commission is likely to vary somewhat from case to case.

An exporter is always free to submit its own form of proposed undertaking, even if the Commission has indicated that the terms are unacceptable.

22. Regulation 2176/84, *supra* note 5, art. 11(5).

23. *Id.* art. 11(6).

The Regulation would appear to require that the Commission consult the member states on such a proposal even if the Commission is opposed to accepting it. It does not appear, however, that the Member States can compel acceptance of an undertaking, and the Regulation makes no provision for the Council to do so. Submission of an undertaking which is unacceptable to the Commission, therefore, would seem to be of value primarily as a way of ensuring that the time limit on submission of an undertaking is met, leaving the door open for possible negotiation with the Commission.

C. EXPORTERS FROM CERTAIN COUNTRIES

In a 1984 regulation imposing a provisional antidumping duty on vinyl acetate monomer from Canada,²⁴ the Commission indicated that it would not accept an undertaking from the Canadian exporters because Canadian legislation did not provide for the possibility of suspending or terminating proceedings by way of the acceptance of an undertaking from exporters. In a 1985 regulation involving the imposition of definitive dumping duties on imports of pentaerythritol from Canada, the Council noted that, while the exporter had expressed an interest in offering a price undertaking, no offer had been made,²⁵ but the Council then went on gratuitously to comment that “. . . when examining a possible undertaking from a Canadian exporter, account would have been taken of the fact that the new Canadian legislation does not provide for satisfactory conditions under which undertakings may be offered by exporters to suspend or terminate proceedings.”²⁶ Shortly thereafter, however, a corrigendum was published removing the quoted language from the Council regulation.²⁷

It is understood that the Community's concern was directed at the fact that, under Canadian procedures, exporters to Canada were required to offer undertakings before being informed of the proposed findings on dumping and injury, thus exposing them to undue pressure and depriving them of information relevant to establishing a fair undertaking price. It is also understood that while the pentaerythritol case was pending, the Canadian authorities gave the EEC assurances that EEC exporters would be informed of proposed Canadian findings on dumping and injury in advance of the deadline for offering an undertaking. On this basis the Community changed its position, as reflected in the corrigendum.

The Canadian episode, although apparently concluded, illustrates the fact that the Community authorities are willing to introduce considerations

24. Commission Regulation (EEC) No. 512/84, 27 O.J. EUR. COMM. (No. L 58) 17 (1984).

25. Council Regulation (EEC) No. 96/85, 28 O.J. EUR. COMM. (No. L 13) 1 (1985).

26. *Id.*, at 15.

27. 28 O.J. EUR. COMM. (No. L 20) 46 (1985).

of trade policy, extraneous to the particular case at hand, into their decisions on the acceptance of undertakings. Thus, the same approach as used in the case of Canada might in the future lead the Commission to limit its acceptance of undertakings from exporters in other countries. For example, one might imagine the Commission imposing strict reciprocity on United States exporters if it came to feel that EEC exporters to the United States were being treated unfairly or restrictively as regards the acceptance of undertakings by the United States authorities. Similarly, if trade relations with Japan continue to deteriorate, it is possible that the Commission's willingness to accept undertakings from Japanese exporters may be very limited.

D. POTENTIAL EXPORTERS

After following varying practices in individual cases, the Commission announced in several 1984 decisions²⁸ that it no longer would accept undertakings in respect of possible future exports from companies which did not export to the EEC during the reference period. This policy is likely to prove troublesome for numerous companies.

A regulation applying a dumping duty, whether provisional or definitive, normally covers all exports to the EEC from the designated country, whether or not made by companies which were parties to the investigation. Where the regulation sets different specific duty levels for identified companies, it normally also includes an "other" category, usually setting the duty in that category at the highest level found for any exporter covered by the investigation. Thus, a company which begins exports from the same country during the period covered by the regulation will find its products automatically subject to an antidumping duty, and one which may be higher than that imposed on some of its direct competitors. This could be a serious commercial barrier to entry.

The Commission's answer to potential exporters²⁹ is that if they begin to export to the EEC it may be appropriate to apply the provisions of articles 14 and 16 of the Regulation, relating, respectively, to reviews and to refunds of antidumping duties. These seem unlikely, however, to provide much practical relief.

Article 16 of the Regulation permits an importer, where the dumping duty collected exceeds the "actual dumping margin," to apply for reimbursement of the excess. This seems unlikely to be a practical solution to the potential exporter's commercial dilemma for several reasons. First, the exporter

28. See, e.g., *Electronic Typewriters from Japan*, Commission Regulation (EEC) No. 3643/84, 27 O.J. EUR. COMM. (No. L 335) 43, — 37–39 (1984); *Dense Sodium Carbonate from the United States*, Commission Regulation (EEC) No. 3337/84, 27 O.J. EUR. COMM. (No. L 311) 26, — 8–10 (1984).

29. For example, see the cases cited *supra* note 28.

cannot apply for the refund. The importer must initiate the procedures, a burden many importers presumably would prefer to avoid. Second, the procedures under article 16 of the Regulation are time-consuming and cumbersome. Third, in the case of a potential exporter which was not covered by the investigation, it is not clear how "the actual dumping margin" is to be determined. Some regulations imposing antidumping duties are silent on the issue of the dumping margin to be attributed to companies which were not covered by the investigation. Even if the regulation imposing an antidumping duty does state a presumed dumping margin for such companies, this is usually the highest margin of any of the companies actually investigated,³⁰ and thus is of little use in refund proceedings. The potential exporter often will want to sell at the lowest price which would permit his importers to claim a refund, *i.e.*, a price which would not involve dumping, taking account of the exporter's own normal value—a quantity as to which the Commission has no information. Thus, such an exporter presumably would have to support the importers' applications with information on his actual normal value. The Commission would then very likely want to verify these figures before giving a favorable opinion on the application. In short, the refund procedure for an exporter which was not covered by the investigation seems likely to be at best a protracted and complicated endeavor.

The provisions of article 14 on reviews also seem less than fully responsive to a potential exporter's concerns. Among other things, article 14(1) provides that such a review at the request of an "interested party" cannot be opened before one year has elapsed since the conclusion of the investigation. Second, the Commission's statements suggest that a company would only have standing to seek review, and the Commission would only be able to reopen the investigation, once that party had become an actual exporter. (Otherwise the review process could not lead to a finding of no dumping, since there would be no exports to the EEC to compare with the normal value, and the Commission could not accept an undertaking without putting itself in an inconsistent position.) Thus, the potential exporter who is precluded from the protection of an undertaking today probably will be able to escape application of the antidumping duty, whether by way of a finding of no dumping or of an undertaking, only after undergoing the costs and commercial risks of making exports subject to the antidumping duty during an undefined period. In many cases, such costs and risks will be too great to incur. Thus the Commission's policy is likely to foreclose new exporters entirely.

30. *See, e.g.*, Glycine from Japan, Commission Regulation (EEC) No. 997/85, 28 O.J. EUR. COMM. (No. L 107) 8 (1985).

D. REVIEW

One of the drawbacks of the review provisions of the Regulation, as described above, is that the one-year minimum period before review may be too long in a case where there are sharp changes in market circumstances. In this regard, the Commission's new form of undertaking, which is likely to be generally presented to exporters as not open to negotiation, is less comforting than its predecessor. In earlier undertakings there was a clause under which "[t]he Company reserves the right to make proposals to the Commission and is willing to receive proposals from the Commission to revise this undertaking if price conditions change to such an extent as to make the undertaking in its present form unworkable." The current standard form, however, contains no such clause, and the Commission has shown strong reluctance to consider reinserting it in individual cases.

The earlier clause was used even though, since 1982, the predecessor to the Regulation also had a similar one-year rule.³¹ Thus it appears that the Commission interprets the rule only as providing a sufficient basis for rejecting premature requests for review whenever the Commission wishes to do so, but not as precluding any review the Commission may care to make "on its own initiative." Of course, an affected exporter can always suggest to the Commission that strong reasons exist for such review and hope that the Commission will agree. In light of this, it is hard to see why the Commission is unwilling to provide more concrete assurances to exporters in meritorious cases.

E. IMPOSITION OR REINSTITUTION OF PROVISIONAL DUTY

Earlier forms of undertaking were silent on the subject of the imposition or reinstatement of duties if the undertaking were withdrawn or found to have been violated. In contrast, the new form provides that "[w]here this undertaking has been withdrawn by the Company or where the Commission has reason to believe that it has been violated, a provisional antidumping or countervailing duty may forthwith be imposed by the Commission."

This provision on its face appears to conflict with the Regulation, which provides that in such circumstances the Commission may apply a provisional duty "after consultations and after having offered the exporter concerned an opportunity to comment."³² However, the new form is qualified by a general provision that the undertaking "will be subject to the provisions of [the Regulation]," and Commission officials have stated³³ that the Commission

31. Council Regulation No. 3017/79, 22 O.J. EUR. COMM. (No. L 339) 1 (1979), art. 14(1), as amended by Council Regulation (EEC) No. 1580/82, 25 O.J. EUR. COMM. (No. L 178) 9 (1982).

32. Regulation 2176/84, *supra* note 5, art. 10(6).

33. Personal communications.

has no intention of reinstating provisional duties without complying with the procedural requirements of the Regulation.

It should be noted that the Regulation itself uses the word "forthwith" and requires only that the Commission have "offered" the exporter an opportunity to comment. This language suggests that the exporter wishing to justify an alleged violation of the undertaking may find himself faced with a highly expedited procedure.

F. EFFECTIVE DATE OF THE UNDERTAKING

Prior forms of undertaking provided that the undertaking would come into effect "for all resales made in the Community after the date of the Commission's decision accepting the undertaking." This formula appears to have presented few problems, since it enabled an exporter to begin applying the undertaking price to its sales only as of the date of publication.

In contrast, the new form of undertaking contains language on the effective date which may create difficulties for exporters. It provides that:

[t]he present undertaking, provided the Commission considers it acceptable, will come into effect for all shipments arriving in the Community as from the date of the publication in the official journal of the Commission's decision accepting the undertaking and terminating the proceeding. It will also apply to orders already placed, but for which the delivery will take place as from this date.

If, as usually is the case, the exporter cannot determine the shipping time to the EEC with certainty, the new clause may put the exporter in a quandary. If sales are made below the undertaking price and shipments are delayed, some shipments at that price may enter the EEC after the effective date of the undertaking, causing the exporter technically to be in violation. On the other hand, where a provisional duty is in effect at the time the undertaking is proposed, the exporter normally does not want to sell at the undertaking price subject to the risk of definitive collection of the provisional duty, since the combination of that price and the duty normally will make his products uncompetitive.

As a practical solution, it would seem reasonable for an exporter in such a situation to begin applying the undertaking price only to sales that reasonably are anticipated to reach the EEC after the normal expiration date of the provisional duty. In such a case, if circumstances beyond the exporter's control caused a technical violation of the undertaking to occur, it seems unlikely that the Commission would act to withdraw its acceptance of the undertaking.

In the past, the Commission has been willing to adapt undertakings to take account of specific commercial circumstances. For example, it has excepted certain long-term contracts from application of the undertaking price until a specified date. It is possible that such arrangements still can be negotiated on a case-by-case basis, but it would seem unwise for an exporter

to assume that the Commission will make special provisions of this kind as a matter of course.

G. PRICE TERMS

Previous standard forms of undertaking used by the Commission stated the undertaking price in terms of "free delivery to customers' premises, duty paid." Other terms have also been used, however, including "free delivered" and "free Community frontier."

The new form states the undertaking price on the basis of "duty unpaid, CIF Community frontier." It appears likely that in most, if not all, cases the Commission will wish to have the undertaking price stated on this basis, regardless of the exporter's actual terms of sale.

Statement of the undertaking price on a CIF Community-frontier basis does not preclude the exporter from invoicing customers on some other basis, such as delivered to customer, or FOB a shipping point outside the Community. Indeed, the right of the exporter to do so is implicitly recognized by a provision in the new form of undertaking in which the exporter promises "[t]o ensure that CIF Community frontier prices are indicated to the Commission, or where invoicing is at another level, *e.g.* CIF delivered customer, to indicate to the Commission freight and any other charges beyond FOB level."

It is not clear whether the Commission would consider that this provision was met if the price invoiced to the customer, together with average charges from the FOB level to the Community frontier (as opposed to those actually experienced by the specific customer), equalled the undertaking price. It seems likely that the Commission instead will require that the undertaking price be met on each specific transaction. If so, the exporter must be prepared to furnish to the Commission details of freight and other charges for each sale which is not made on a CIF Community frontier basis. In the case of an FOB sale, this presumably would require the cooperation of the purchaser or any commercial intermediaries and might present some practical difficulties.

H. VERIFICATION BY NATIONAL CUSTOMS AUTHORITIES

The current form of undertaking contains a new provision acknowledging the exporter's awareness of the fact that "[t]he product concerned may, when it is released for free circulation in the Community, be subjected by the customs authorities of the member states to specific verifications in relation to this undertaking." This provision apparently contemplates (despite some ambiguity in the wording) only a verification at the point of first entry into the EEC. It is not clear what consequences the Commission envisages if national customs authorities believe that the product concerned

is being imported to the EEC at less than the undertaking price. Nothing in the Regulation, the new form of undertaking or other Community law would seem to empower the national customs authorities in such a situation to delay clearance of the products or to impose an antidumping duty which had not been authorized by the Commission or Council. Therefore, the effect of the new language would seem at most to be that the customs authorities may inform the Commission of any apparent violations of the undertaking.

I. REFUSAL OF AN UNDERTAKING

The language of the Regulation would not seem to give an exporter any legal basis for insisting that the Commission accept an undertaking. To the contrary, the sole criterion is that the undertaking be one which the Commission "considers acceptable,"³⁴ and there are no express criteria limiting the discretionary nature of the Commission's decision. Moreover, as noted above, the Regulation makes no provision for the member states or Council to intervene if the Commission determines not to accept an undertaking.

Even where the Commission has discretionary powers, its actions may be challenged if they constitute an abuse of its powers.³⁵ This concept has been narrowly defined by the Court of Justice of the European Communities as encompassing only those acts which are in pursuit of an objective other than the purpose for which the Commission was entitled to act.³⁶ Thus, if the Commission were to reject an undertaking on grounds which had nothing to do with the purposes of the Regulation, it is likely that its action would be open to challenge before the Court of Justice of European Communities.

A judicial test of the extent of the Commission's discretion may occur in a pending appeal. In a decision imposing a definitive antidumping duty on ball bearings from Japan and Singapore³⁷ the Council indicated that:

[a]ll exporters against which an individual provisional antidumping duty had been imposed offered price undertakings. However, after consultation, it was decided that these undertakings were not acceptable because past experience with price undertakings in the ball bearings sector has shown that undertakings, even if generally respected, do not constitute a satisfactory solution, seem likely to cause controversy and are difficult to monitor, thereby requiring a considerable amount of time and expense.³⁸

This decision was challenged by one of the Japanese exporters in an appeal to the Court of Justice of the European Communities,³⁹ *inter alia* on the

34. Regulation 2176/84, *supra* note 5, art. 10(1).

35. Treaty Establishing the European Economic Community, *done at Rome*, Mar. 25, 1957, art. 173, 298 U.N.T.S. 11, 175.

36. See *Hauts Fourneaux de Chasse v. High Authority*, 1957-1958 E. COMM. CT. J. REP. 199, 207.

37. Council Regulation (EEC) No. 2089/84, 27 O.J. EUR. COMM. (No. L 193) 1 (1984).

38. *Id.*, at 24.

39. See 27 O.J. EUR. COMM. (No. C 313) 5 (1984).

ground that the duty infringes the principle of proportionality because the antidumping duty is unnecessarily onerous to the exporter as compared with the proffered undertaking. The facts of the case as disclosed in the published materials do not suggest that there is a clear issue of abuse of power by the Commission. The latter issue would have been posed more clearly, for example, if a Canadian exporter, denied an undertaking because of the Commission's dissatisfaction with Canadian antidumping procedures, had sought review of that decision on the grounds that the Commission's action was unrelated to the purposes for which the Regulation empowered it to accept undertakings.

III. Conclusions

The Commission's recent actions give the impression that it may have somewhat narrowed the degree to which exporters might be able to negotiate undertakings adapted to their specific situation. There are some signs—as yet only tentative and unclear—that the Commission is striving for greater consistency in its handling of antidumping cases and, as a result, that it may be less flexible in the area of undertakings, both as to timing and terms. Nonetheless, the undertaking continues to be a highly important feature of EEC antidumping procedures. It is expected that in the future, as in the past, most cases will be settled through the acceptance of undertakings, given the advantages such settlements present to both exporters and to the EEC authorities.

