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Basic Aspects of the Anti-Dumping Regulations of the Common Market†

I. The First Rules of the Common Commercial Policy for the European Economic Community

With the regulation "concerning protection against practices of dumping, of bounties and of subsidies of countries not belonging to the European Economic Community (EEC),"¹ "the Community has taken its first step in the direction of a common commercial policy (Art. 110 ff of the EEC Treaty). The original plan, to protect trade within the EEC against all improper practices of non-member countries,"² has up to now failed because the member states were not yet willing to entrust the Community with the contemplated authority to regulate trade policy. The regulation concerning the protection against practices of dumping, bounties and subsidies thus only exercises part, although a very important part, of the power conveyed to the Community by Art. 113, par. 1 of the EEC Treaty in which the "protective measures of trade policy" are included. In the view of the Commission, this limited exercise of the powers of Art. 113, par. 1 does not prohibit the Community from making fuller use of those powers *at a later time*. As a result of this deliberate limitation to fact situations which are already regulated by Art. VI of GATT,³ one will hardly be able to assume that

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¹ Reg. of the Council No. 459/68 of April 5, 1968, official gazette of April 17, 1968, No. L 93/1 ff.

² Bundestags-Drucksache IV/1739, document 1/com (63) 321.

³ The agreement on the application of Art. VI of GATT is presently being elaborated, which was discussed in the scope of the Kennedy-round and which presently only refers to dumping, in order to attain a larger degree of unity and protection in the implementation of this regulation—compare Aussenwirtschaftsdienst des Betriebsberaters (AWD) 1966 p. 259. The regulation No. 459/68 depends greatly on the knowledge gained thereby.

by means of this regulation the first important switch had already been set for a European trade policy. At most, one will be able to tell by the use which the competent organs of the EEC make of their new powers, whether they are more inclined to a liberal trade policy or whether they will let themselves be guided by a protectionist philosophy. The first cases will give an indication. If the decisions under the new regulation are based on the principles underlying Art. 110 of the EEC Treaty, it is clear that there will be no attempt to misuse the regulation for protectionist purposes.

II. Purview of the Regulation

The regulation demonstrates in an interesting way how the Community organs envision "the coordination of the commercial relations with third countries during the transitional period" (compare Art. 111, EEC Treaty) and how they envision "the formation of the common commercial policy according to uniform principles at the end of the transitional period" (compare Art. 113, EEC Treaty). At the same time this is a question of the temporary validity of the regulation.

1. During The Transitional Period

During the transitional period every member state can take those actions which it considers suitable for the protection of a domestic industry (Art. 26, par. 2 of the regulation). But since the substantive provisions of the regulation (Art. 1, par. 1 and 2, Art. 2-5 and 22) are correspondingly applicable, a uniform legal application is also guaranteed during this time. The difference to the final regulation lies in the realm of procedure. The factual investigation and the decision concerning the introduction of a temporary or final tariff still is taken on the national level. The Commission is only to be informed and consulted.

This transitional regulation includes two far-reaching exceptions (Art. 26, par. 1), which might limit its application to only a few cases. The so-called anti-dumping regulation has already been applied since July 1, 1968, in cases where either the interests of a branch of the industry of the Community are concerned or a product is involved which is the subject of a European market organization for agricultural products. In the case of the agricultural products a Common Market has already been realized. Protective measures may now only be introduced on grounds of a uniform regulation and according to a common policy. These market regulations already foresee for themselves extensive

defensive measures (prelevings, compensatory taxes).⁴ Also in cases in which an industry of the Community is involved, one should be able to assume that with the realization of the customs union for the introduction of defensive measures in the form of anti-dumping and countervailing duties, the transitional period in the sense of Art. 113, EEC Treaty, has already expired. Within the framework of a customs union it is hard to imagine that the Community will apply a uniform tariff in trade with third countries, but that each country of the Community should have the right to levy a defensive duty at its border in case of practices contrary to the international law.

In the realm of the defensive measures, the customs law and the foreign trade law, as well as the policy directing their application, are closely related, so that only a uniform application is reasonable. When Art. 26, par. 1, of the regulation requires, for the regulation to be applicable, that the "interests of an industry of the Community"—and not merely those of an industry of individual states—be involved, then this condition should generally be satisfied when the definition of an "industry of the Community" contained in Art. 4, par. 5a of the regulation is satisfied.⁵ What Community industry of a not altogether subordinate position will not under present conditions of integration be affected by practices of third countries such as dumping? If one surveys the scope of the competences transferred to the Community during the transitional period, one must come to the conclusion that the transitional regulation is no longer of any importance and that already today the defense against the distortion of the competition by means of dumping, bounties or subsidies is an affair of the Community. Although there has been formal compliance with the requirements for the co-ordination of national policies as stated in Art. 111 of the EEC Treaty, the status of integration in the agricultural and customs areas has already required a Community regulation, similar to that called for by the Treaty when its final phase is reached.

2. After the Expiration of the Transitional Period

For the time after the expiration of the transitional period, Art. 113 EEC Treaty, on which Council regulation No. 459/68 is mainly based, foresees the formation of a common trade policy "according to uniform principles." Although there is agreement that this notion

⁴ For particulars on the relation to the anti-dumping regulation, compare under III.

⁵ Thereby the Community may be divided into several competition markets in case of exceptional circumstances.

includes more than the "coordination of trade relations" mentioned in Art. 111 of the EEC Treaty,⁶ the extent of the power of the Community to establish a common commercial policy is not clear. With the release of the so-called anti-dumping regulation, the principle has apparently been established that the organs of the Community may not only prescribe uniform goals by means of directives (Art. 189 of the Treaty), but that they may directly promulgate regulations binding throughout the Common Market. The regulation itself refers, in the part explaining its justification, to the indispensability of uniform measures of defense.

3. *The Relation to the National Anti-Dumping Laws*

At the latest, by the end of the transitional period all intrastate regulations in the field of application of the regulation No. 459/68 will no longer be applicable.⁷ The defense against dumping, bounties and subsidies from third countries will be regulated exclusively by Community law. An exception exists only in cases where the interests of the Community do not require common action. (Compare Art. 17, par. 1). However, the individual states may not decide this, but only the Commission and the Council. In the rare instance where common action is not required, national regulations might still be applicable. The same is true when the national laws also offer defensive measures against practices which do not present themselves as dumping, bounties, or subsidies.⁸ Yet, in order to prevent distortions of competition, such provisions should promptly be unified or, as far as they include an unjustifiable protection of trade, prohibited within the Community.⁹

III. Relation to the Protective Measures of the European Market Organizations

The anti-dumping regulation refers to products of industrial as well as of agricultural origin (Art. 1, par. 3, "all goods"). Yet the great-

⁶ Compare Wohlfarth-Everling-Glaesner-Sprung, commentary to the EEC Treaty, Art. 113, note 3; Ernst, *Handbuch für Europäische Wirtschaft*, Art. 113, note 3.

⁷ To the question of the effect of the higher ranking Community law on incompatible national law, compare lastly *Recueil*, decision of April 4, 1968, case 34/67; Meier, *AWD* 1968, p. 205 ff.

⁸ For example, France also averts low price imports, compare *AWD* 1966, p. 136.

⁹ The international discussion concerning protective measures of trade policy occupies itself intensively with the market disturbance produced by imports at improperly low prices. Dumping and subsidies are excluded from this circumstance. The prerequisites of such market disturbances are considerable imports at improperly low prices with threatening or already occurred disadvantages for the industry. A corresponding proposition of the EEC Commission—compare footnote 2—has failed up to now.

er part of the agricultural products is already subject to regulation by the market organizations of the Community, which include—apart from exceptions—on the one hand, protective provisions in the form of introductory prices (*Einschleusungspreise*),¹⁰ additional prelevying (*Zusatzabschöpfung*),¹¹ compensatory taxes¹² and general protective measures,¹³ and, on the other hand, prohibit the levy of customs and charges with equivalent effect in the commercial intercourse with third countries.¹⁴ It is therefore necessary that the relationship of regulation No. 459/68 to the agricultural market organizations be clarified. A not wholly successful attempt to do this was made in Art. 1, par. 3 of the regulation.

The last sentence of Art. 1, par. 3, of the regulation makes it clear that anti-dumping and countervailing duties may be levied even when the respective market organizations prohibit the levying of duties. To this extent the provision contains an exceptional regulation. Thus the anti-dumping regulation is also applicable to products regulated by market organizations which only provide for prelevying.

If disturbances appear in the market of an agricultural or manufactured product, and such disturbances have been caused by a dumping or export subsidy, then the protective measures of the respective market organization and the anti-dumping regulation are in principle concurrently applicable. As Art. 1, par. 3 of regulation No. 459/68 explicitly states, that regulation does not prevent the application of Community regulations relative to agriculture, nor the application of the regulations No. 160/66, 189/66 and 170/67. This formulation implies the priority of the anti-dumping regulation. If the following sentence states that the provisions of the regulation No. 459/68 can be applied “in addition,” and if the reasons given in the regulation for its existence mention that the protective measures against practices of dumping, bounties and subsidies are to be applied “in addition” to the generally effective import regulation of agricultural products and their processing products, then this certainly called

¹⁰ Compare Art. 12 of Reg. 121/67 (pork), Art. 7 of Reg. 122/67 (eggs).

¹¹ Compare Art. 13, Reg. of 121/67 (pork); Art. 8, of Reg. 122/67 (eggs); Art. 8, of Reg. 123/67 (poultry).

¹² Art. 11, of Reg. 23/62 (fruit and vegetables); Art. 3, of Reg. 136/66 (fats).

¹³ Compare Art. 20, Reg. 120/67 (grain); Art. 18, Reg. 121/67 (pork); Art. 12, Reg. 123/67 (poultry).

¹⁴ Compare, for example, Art. 18, of Reg. 120/67 (grain).

the priority of the anti-dumping regulation into doubt again. The question of this relationship has therefore not been settled.

For the determination of the relationship one must start with the principle that only one defensive measure may be taken up against the unfair practices, and that measure should be designed to fully counter-balance any advantages gained by the unfairness. If Art. 24 of the regulation provides that anti-dumping and countervailing duties may not be levied at the same time for the same product, then this principle must also be valid in the relation between the protective measures of regulation No. 459/68 and the effective market organizations. If the Community organs were entitled to use the defensive measures of the market organizations in cases of dumping, bounties or subsidies, in which "serious disturbances" or "offers at improper prices" in the sense of the Market organizations may be involved, then the anti-dumping regulation would be of no importance in the agricultural sector. The basis for an already instituted anti-dumping procedure could be destroyed by means of a security measure taken under the Market organization regulations, control over which lies solely in the hands of the Community organs. Thereby the possibility of reaching a particular type of protection desired by the applicant would not only be negated, but, more important, the concerned importers and exporters would be deprived of the regular anti-dumping procedure (compare Art. 10, 14, par. 2 of the regulation) and to demand, in case of unjustified defensive measures, a restitution of customs collected, or the release of security which they had been required to post (compare Art. 19, par. 4 of the regulation).

The Market organizations foresee that during their own execution the goals mentioned in Art. 39 and 110, EEC Treaty, will be at the same time accommodated in a suitable manner.¹⁵ But the application of protective measures falls within the scope of the commercial policy, which policy, according to the goals of Art. 110 of the EEC Treaty, may not be of a protectionist nature. Thus the introduction of protective measures has to conform mainly to the regulation of trade policy as laid down by regulation No. 459/68.¹⁶ But if the reason for

¹⁵ Compare, for example, Art. 16a, of Reg. 23/62 (fruit and vegetables).

¹⁶ According to the Vereinigte Wirtschaftsdienst Europa (VWD) of July 12, 1968, France applied for a countervailing duty on grounds of dumping practices of imports of castor oil from Brazil according to Art. 3, par. 6 of Reg. 136/66 (fats), and allegedly saw therein the "only means" of protection against dumping. Today the right course is by way of Reg. 459/68.

market disturbances is to be found in practices not covered by regulation No. 459/68, then there will be no conflict between the agricultural and foreign trade regulations.

IV. Practices Against Which Measures May Be Taken

The regulation No. 459/68 covers only the practices of dumping, and of giving bounties or subsidies. Anomalous practices of other kinds lie beyond its scope. As a defensive measure against one and the same condition, there may only be levied either anti-dumping or countervailing duties. If a market disturbance is caused by dumping prices as well as export subsidies, then it seems admissible to institute simultaneously a proceeding against both practices. Whether an anti-dumping or countervailing duty is levied in the event of positive findings depends on which practice is the main cause of the material damage. That can sometimes be determined only after completion of the factual investigation.

1. *Illegal Dumping Practices*

The imposition of an anti-dumping duty can only be demanded by one who, for a certain product, names the country of export, and claims and proves (compare Art. 7 of the regulation) that:

- the import is the subject of price dumping,
- by means of the introduction of this product into the market of the Community an industry suffers a material injury,
- the dumped import is the main cause for the injury.

These prerequisites for an anti-dumping duty correspond closely in substance to the rules of Art. VI of GATT.¹⁷ Thus the cases¹⁸ which were decided under Art. VI of GATT will not be without influence on the administrative practice of the Commission. Regulation No. 459/68 endeavors to show the decisive criteria for the establishment of a price-dumping or material injury,¹⁹ in order to assure uniform and predictable results and thereby to promote legal certainty.

¹⁷ For the interpretation of Art. VI of GATT, compare Langen, *Studien zum Internationalen Wirtschaftsrecht*, 1963 p. 70 ff., as well as the "Genfer Antidumpingkodex," which exists only as a draft and shall be taken up in the last act of the GATT trade-conference (Kennedy-round). In view of this anti-dumping code, the United States also wants to change their anti-dumping regulations, compare AWD 1967, p. 492.

¹⁸ Compare Langen, *supra*, p. 76 ff.

¹⁹ This is also the interest of the GATT anti-dumping code.

a) Price Dumping

According to Art. 3 of the regulation, a product is the subject of dumping when the export price is lower in the exporting country than the normal domestic price. Thereby the price relation compares a "like product" (Art. 5) of the same trade level and at time periods as close together as possible (Art. 3, par. 4a). The difficulty is to take account of all the factors which affect the comparability of the prices.

The ascertainment of the export price to the Community will as a rule be simple. If this price has been effected by an agreement of the persons involved (so-called "hidden dumping"), then it can be calculated on any suitable basis when a more direct method is not available (Art. 3, par 3 of the regulation). The calculation of the decisive domestic price of the country of origin or of the exporting country can be far more complicated. As a matter of principle, it should be based on the domestic price, which was formed in the normal commercial intercourse. The basis for such a calculation is not given when the domestic prices are decisively influenced by trusts, pools, market organizations or foreign trade monopolies as they exist above all in states with government controlled commerce. One must start in such cases either with representative prices used for the export to a third country, or the production costs with suitable additions for costs and profit (so-called constructed prices) (Art. 3, par. 2). Both bases of calculation will be applied especially in case of dumping practices of the East European Bloc,²⁰ whereby Art. 3, par. 6 of the regulation grants a certain scope of discretion. An additional protection is offered by regulation No. 3/65, which regulates commercial relations with states having government controlled commerce.²¹

For the price comparison required by Art. 3 of the regulation, one has to take into consideration the differences in sales terms, in taxation and in other circumstances influencing the comparability of the prices (Art. 3, par. 4). In case of monopolies, one may give due regard to the possibility that an exact comparison of the export price and the domestic price of these countries is not practical, since the establishment of the comparability of the prices in such cases meets with special difficulties. Only such circumstances may be considered which influence the comparability of the prices and not those which simply

²⁰ To the anti-dumping regulation on imports from states with government controlled commerce *cf.* applications in writing in the official gazette No. C68 from July 9, 1968, pp. 1 and 8.

²¹ Official gazette No. 14 from January 29, 1963, pp. 153/63.

influence the prices themselves. Thus, imports from low price countries do not fall under the notion of dumping.²²

The above discussion shows what comprehensive and complicated considerations must be undertaken in order to render the domestic and the export prices comparable and to calculate the dumping margin from the difference. The difficulties are increased by the fact that findings must be made relating to the market of a third country, whose market conditions are not always known, verifiable or understandable.

b) Material Injury of an Industry

The notion of "injury," as it is used in the anti-dumping regulation, includes the following three cases: injury to an existing industry, the threat of injury to an existing industry, and the causing of substantial delay in the establishment of a new industry (Art. 2, par. 1 and 2 of the regulation). The determination that an injury is threatening must be based on clearly foreseeable and immediately impending facts (Art. 4, par. 1b of the regulation). The same must be true regarding the delay in the establishment of an industry, and this applies both to the importance of the injury as well as to the probable early erection of the industry.

The injury must always relate to an industry of the Community, which generally means all producers of like products in the Community or the producer with largest output (Art. 4, par. 5). But from this it can not yet be concluded that in case of an injury of an industry of a member state, the legal Community regulation is eliminated. For Art. 4, par. 5a of the regulation contains a very significant exception for the practical application, that in case of "exceptional circumstances" the Community will be divided into several markets and that the industry of each of these markets can be considered as an industry of the Community. "Exceptional circumstance" will be found to be present in cases where common action of the Community is required.

For the determination of the existence of a material injury, the main cause of which is dumping, the Commission has to ascertain all the facts and must verify the detrimental effect on the industries involved. Art. 4, par. 2-4 of the regulation sets up a number of general criteria which are to be observed in the determination of whether an injury has occurred and what was its cause. The practical application of these directives requires an extensive knowledge of the industry

²² Compare also Langen *supra*, note 70b.

concerned,²³ which can often only be achieved in the investigatory proceedings.

2. Subsidies

If considerable injury to Community industry is caused by bounties or subsidies, then this can lead to the levy of a countervailing duty, according to Art. 22, 23 of the regulation. These provisions still leave open a part of the material legal questions, partly because a more extensive regulation could not be agreed upon, and partly because the parties wanted to await further development in GATT.

a) Subsidies and Bounties

While dumping usually concerns private industrial practices, bounties and subsidies represent financial gratuities of the state to enterprises. In the case of state-business corporations of the East European Bloc, the two practices are usually intermingled. The reason the regulation differentiates between bounties and subsidies is not clear. Bounties are a kind of subsidy, even if they are mainly intended to be a reward for certain accomplishments. The EEC Treaty speaks of "subsidies" in Art. 113. If—in the opinion of the issuers of the regulation—this term was not comprehensive enough, one ought to, in order to maintain a unified terminology, have referred to the term "aids" (*Beihilfen*) as used in Art. 91 of the EEC Treaty, which according to its use in the Treaty includes all kinds of state allowances.

Included in the gratuities against which protective measures may be taken are all the direct export bounties and subsidies which the country of origin or the exporting country grants its exporters. But from Art. 23 of the regulation it follows that gratuities which are granted for any reason regardless of their type or of the way they are granted, can justify countervailing duties if they are given even only indirectly for manufacturing, production or export. The purpose of the subsidy is decisive. If they are intended to achieve a preferential position for an exported product against the foreign competition, then protective measures suggest themselves.

The amount of the subsidies will frequently be apparent from the legal provision authorizing them. In other cases, Art. 23 of the regulation permits the Community organs to estimate their amount, which is the upper limit of the countervailing duty which may be

²³ For practical examples *cf.* Langen *supra*, p. 78, note 71.

applied. A special problem is raised by export Subsidies disguised as export restitutions. It is the purpose of these restitutions to unburden the exported produce of the domestic duties. For the inner Community trade (Art. 96 of the EEC Treaty), as well as for the trade of the member states with third countries (Art. 112, par. 2 of the EEC Treaty), the order is in force that restitutions are not permitted to be higher than the duties which fall upon the exported product directly or indirectly in the country of origin.²⁴ Third countries also have to abide by order insofar as their exports to the European Economic Community are concerned. The "amount exceeding" the real rate of restitution runs the risk of being equalized as an unjustified export subsidy.²⁵

b) Material Injury of an Industry

Corresponding to the provision in Art. VI, § 6 a of GATT, Art. 22 of the regulation requires, for the imposition of a countervailing duty, a material injury to an industry of the Community. Art. 2 of the regulation lists three cases of injuries to an industry. Since Art. 25 does not declare Art. 4 of regulation No. 459/68 as correspondingly applicable, one must suppose that the subsidy does not have to be the main cause for the injury. However, this does not negate the obligation of the Community organs to examine, in corresponding application of Art. 4, par. 2-4 of the regulation under consideration, all factors very carefully to determine whether the subsidy has caused the injury, and in case of an injury which is only threatened, to base its findings only on proved facts or events which are imminent.

V. Principles of the Procedure

The anti-dumping procedure itself is governed by a number of very detailed provisions which shall not be discussed in detail here. The normal procedure is divided into two sections. In the first section (Art. 6-9), which is not public, it is decided whether the prerequisites for the opening of a proceeding are given. If the request does not contain the required information, or if the margin of dumping or the injury is too insignificant, then the application is rejected at once (Art. 9 of the regulation). In this preliminary examination the questions are also examined, whether there is sufficient proof as to the dumping (or the

²⁴ For the interpretation of Art. 96 of the EEC Treaty *cf.* Recueil, decision of December 1, 1965, case 45/64, AWD 1966, p. 16.

²⁵ But recently Italy has been accused, in an anti-dumping procedure introduced in the United States, of not having given too high export restitutions on the export of tomato paste, *cf.* VWD of April 25, 1968, p. 9.

payment of a subsidy) and as to the injury to an industry. If, after a strict preliminary examination, the request turns out to be admissible, the Commission makes the required inquiry in a second stage of the proceeding (Art. 10-14), the so-called "examination proceeding," in cooperation with the member states. There is, moreover, the possibility of a preliminary procedure (Art. 15-16 of the regulation), which is, however, only admissible when a dumping has been established by the first investigation, and sufficient proof of an injury is given, and when the interests of the Community require an immediate intervention. In an additional procedure (Art. 18), the Commission checks continually if the prerequisites for a preliminary or a final defensive duty are still given or if a change is required.

During the entire procedure the customs clearance of the concerned product will not be impeded (Art. 19, par. 6). The anti-dumping procedure is governed by the thought that a comprehensive determination of the facts will be made quickly with the smallest possible hindrance to commercial intercourse, and that only those measures will be taken which are absolutely necessary to redress the injury. Misjudgments will later be corrected by the complete or partial restitution of the duties. The whole regulation of the procedure corresponds to the principle of an open, not protectionist, trade policy. The rules of procedure also have to be applied in this sense. The following principles govern the procedure:

1. The Right of Application

The anti-dumping procedure is usually begun by an application. Entitled to make application are, besides natural and legal persons, associations (*Vereinigungen*) which do not have legal capacity, especially associations (*Verbände*) and federations of national associations (*Zusammenschlüsse nationaler Verbände*) on the level of the European Economic Community. However it is necessary that the associations concerned be authorized to act in the name of an industry of the Community. Since in extraordinary circumstances even regional markets may be considered as "an industry of the Community" (Art. 4, par. 5), regional associations may also be entitled to present applications in such cases. The application can be directed to the Commission or a member state or to both. Even in the absence of an application a member state may introduce an anti-dumping procedure before the Commission if it has sufficient evidence concerning a dumping and a material injury resulting therefrom.

2. *Comprehensive Factual Investigation*

The factual investigation at the level of the Community, which must relate both to the dumping and to the injury, rests with the Commission. For the accomplishment of this responsible and difficult duty a number of competences were assigned to it by Art. 213 of the EEC Treaty. It can gather all the required information from the parties economically concerned (importers, dealers, producers, etc.) (Art. 10, par. 3); it can request the member to furnish it with information; it can make investigations and listen to the interested parties. The confidential treatment of the information is granted as far as such treatment is justified (Art. 11 of the regulation).

3. *The Publicity of the Procedure*

The Commission officially informs the representatives of the exporting country as well as the known exporters and importers concerned. Simultaneously it publishes a notice in the official gazette (Art. 10, par. 2). By means of these two measures the public learns of the anti-dumping procedure. The economic circles concerned are warned, but at the same time they are given the opportunity to protect their rights before the Commission. This publication, which the Commission must make when the requirements are met, can have a double effect:

a) It could hinder further import which can lead to considerable damages. In order to keep this risk of injury as small as possible the regulation requires that the information which the Commission must "reveal that protective measures could be necessary." The factual investigation must have reached a stage permitting the Commission to come to a decision supported by convincing reasons. Thereby the Commission must be aware of the fact that according to the latest OECD statistics in only barely 6% of the cases in which anti-dumping applications had been made could dumping be established and that an anti-dumping procedure may not be misused for protectionist purposes. A premature publication of an examination procedure may lead to a liability for damages on the part of the Commission according to Art. 215, par. 2 of the EEC Treaty.²⁶

b) It could incite an intensified import of the product concerned before anti-dumping or countervailing duties can be levied. In such cases there is the possibility of introducing a provisional duty

²⁶ Compare for the interpretation of Art. 215, par. 2 Recueil of the EEC Treaty, decision of July 14, 1967 and November 30, 1967 cases 5, 7, 13-24/66 vol. XIII, p. 332 ff and 30/66 vol. XIII, p. 368 ff, Ehle, *Klage-und Prozessrecht des EWG-Vertrages*, Art. 215.

simultaneously with the publication (Art. 10, par. 7a, 15 of the regulation), provided that the prescribed prerequisites, which are even more severe than those prescribed for publication, are fulfilled.

4. *The Legal Hearing*

The principle of the legal hearing is—corresponding to the principles of modern administrative law in the member states—especially distinct in the published anti-dumping procedure.²⁷ The persons concerned have access to the Commission's file for the purpose of defending themselves (Art. 10, par. 4). Furthermore, the Commission is obligated to read and hear the representations of the interested parties, so far as they made timely application for a hearing in writing and have thereby shown that they may be directly concerned with the results of the factual investigation (Art. 10, par. 6). In addition, the directly concerned parties are, upon application, given the opportunity to express their conflicting opinions in a discussion. Extensive use should be made especially of this contradictory procedure, since it allows—after the carefully prepared factual finding—the greatest possibility of finding the truth with due regard to all interests. The violation of the hearing as an important part of the procedure can make the decision illegal. The denial of the hearing is independently subject to attack as a burdening act.

VI. Decision and Legal Protection

If the Commission finds on the basis of the factual investigation, and after conclusion of the consultations, that protective measures are not necessary, it submits to the Council a proposal for the conclusion of the procedure (Art. 14). If the Council approves the proposal with a qualified majority, then the proceeding is ended. The Commission instructs the parties directly concerned and publishes the conclusion in the official gazette. If, on the other hand, the final statements show a practice against which protective measures can be taken, and also a material injury to an industry, then the Commission submits a positive proposal to the Council (Art. 17 of the regulation), which includes the establishment of duties.²⁸ The Council decides on this with a qualified

²⁷ Compare the Community model in Art. 19 of Reg. of the Council 17/62 (cartel reg) as well as the Commission's regulation published by it on Hearing No. 99/63.

²⁸ The text leaves open whether other measures may also be introduced; a limitation to anti-dumping and countervailing duties has not followed. But since the regulation only includes a regulation as to the establishment and the levy of duties, there is no room for other kinds of measures.

majority and thereby makes a decision which may be of great importance to trade and to economic policy.

Anti-dumping and countervailing duties are established by means of regulations which must determine the kind, rate and other details of application of these duties (Art. 19, 21 of the regulation). Thereby security is given that the duties come directly into force in every member state and that they be applied uniformly and immediately (Art. 189, par. 2 of the EEC Treaty). Art. 19, par. 2a of the regulation explicitly states that the duties can neither be levied nor raised retroactively.²⁹ Material and unreal retroactiveness is also prohibited. It is true that this only concerns a present not yet completed transaction for the future, but thereby it simultaneously depreciates retroactively the legal position concerned or withdraws retroactively its basis.³⁰ Since the protective duty is shifted to the consumer, it is also decisive to the question of retroactiveness whether a resale has been made in the meantime.

The essential legal protection of the enterprises concerned consists in the legal hearing which is to be granted to them. If a provisional or final protective tariff is introduced, the importer concerned can apply within three months for the liberation of the security or the remuneration of the levied tariff from the member state (Art. 19, par. 4) insofar as he can prove that the product brought on the market by him was not the subject of dumping. Yet he is not—in view of the applicable time limits—hindered from simultaneously contesting the levy of the protective tariff in order to attain a judicial statement as to whether the prerequisites for the establishment of an anti-dumping or countervailing duty of the given rate were given. In case of doubt as to the interpretation of certain legal concepts contained in regulation No. 459/68, national courts must request preliminary decisions from the European Court of Justice according to Art. 177 of the EEC Treaty.³¹

VII. Special Rights of the Exporters

In addition to the general right to be informed of the start and close of an anti-dumping proceeding, the right to information, and the right to inspect the files and to a legal hearing, the regulation No. 459/68 grants special rights to the exporters.

²⁹ For details, compare Heisecke, AWD 1963, p. 165 ff. and Ditges, AWD 1963, p. 336.

³⁰ Compare footnote 28 and decisions of the Bundesverfassungsgericht, vol. 14, p. 297.

³¹ Compare Ehle, *Klage-und Prozessrecht des EWG-Vertrages*, Commentary, Art. 177, note 2 ff.

During the factual investigation, the exporters can obligate themselves, voluntarily or at the request of the Commission, to change their prices in such a way that the margin of dumping is eliminated or the export of the product concerned to the Common Market is completely stopped. If the Commission accepts these obligations, the procedure is ended. On request of the exporters the examination of the injury will nevertheless also be completed (Art. 14, par. 2 of the regulation). If the exporters do not accept such an obligation, the regulation explicitly states that they do not harm their case with this attitude. A special regulation applies when prohibited practices are found in a regional market in the sense of Art 4, par. 5a of the regulation. The Commission gives the exporters the chance of stopping the dumping in the market concerned. In the case of a quick and sufficient promise, all protective measures are discontinued. If a promise is not made or not kept, the exporters, it is true, do not harm their cause according to Art. 14, par. 2c, but they run the risk that the Commission will introduce a preliminary or a final duty for the whole Community (Art. 19, par. 5 of the regulation).

After the introduction of protective measures, the suppliers (producers and exporters) can at any time apply, by means of a well-founded statement of position, to the Commission or to a member state, requesting that it examine the effects of the measures and review if the prerequisites for the application of protective measures are still given (Art. 18, par. 1b of the regulation). Provisional and final anti-dumping duties and countervailing action shall not exist any longer than is necessary to achieve their purpose.