

GENERAL AGREEMENT ON TARIFFS AND TRADE

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LIST OF PRIORITY ISSUES IN THE ANTI-DUMPING FIELD

Submissions by Governments

In accordance with the invitation extended by the Committee on Anti-Dumping Practices at its meeting on 3-4 April 1978, the following communications relating to the four priority issues to be discussed at the annual meeting of the Committee to be held in the Autumn have been received from Austria and the European Communities.

A. AUSTRIA

Allowances relating to price comparability (Article 2(f) of the Anti-Dumping Code)

1. Article 2 of the Anti-Dumping Code permits a comparison of the price of export merchandise with the price of the like product sold in the domestic market or, in some instances, to third countries in determining whether sales are being made at less than normal value. The term "like product" is defined in Article 2(b) of the Code to mean a product which is identical to the export product under consideration, or in the absence of such a product, another product which has characteristics closely resembling those of the product under consideration. Thus, it is possible for the authorities of an importing country, in making an analysis of normal value, to use as a basis of comparison a product that is not identical with the export product under consideration. Such differences between the home market product and the export product are referred to as "technical differences".
2. However, where there are significant technical differences in the merchandise, it would be more appropriate to use the constructed value as basis of comparison.
3. In order to effect fair price comparisons, Article 2(f) of the Code requires that "Due allowance shall be made in each case, on its merits, for the differences in conditions and terms of sale, for the differences in taxation, and for the other differences affecting price comparability". Since technical differences between products will affect price comparability, due allowances for such differences must be made in comparing the prices of products that are not identical.

4. The amount of adjustment for technical differences should fairly reflect the accepted commercial practice on the basis of the types of cost accounting system employed in the production as well as the sale of the merchandise in question. The price of a product normally includes all costs, direct and indirect, related to production and sale of the product, and a reasonable profit. A technical difference is a portion of the total product and bears a portion of all elements that enter into the total product price. Therefore, the amount of price adjustment for a technical difference should include not only the labour, material, and direct factory overhead costs attributable to that portion of the product, but also a proportional share of all other elements entering into the total product selling price, including general expenses, warranty costs, selling expenses, commissions (if any), and any other administrative and selling costs as well as profit.

5. If the competent authorities of an importing country do not permit appropriate adjustments for a proportional share of the general costs, selling expenses, warranty costs, commissions and any other administrative and selling costs as well as profit included in the total product price and attributable to the technical differences, such a restrictive approach can cause less than normal value margins to be found simply because of incomplete allowance of adjustments for technical differences. Therefore, in the Austrian view such an approach is not in compliance with the requirements of Article 2(f) of the Code.

B. EUROPEAN COMMUNITIES

1. Sales at a loss

The Community's anti-dumping legislation does not contain any express rules on sales at a loss i.e. sales on the domestic market at less than the cost of production. It merely repeats the general rules contained in the Code that when there are no sales in the ordinary course of trade in the domestic market or when, because of the particular market situation, such sales do not permit a proper comparison, the export price to the Community should be compared to either (i) the export price to another third country or (ii) the cost of production in the country of origin.

The Community recognizes that sales at a loss may constitute a serious problem. While losses caused by short-term market fluctuations may be perfectly normal, it considers that a sales policy orientated towards persistent losses involving considerable quantities of goods cannot be considered as the ordinary course of trade and that they may reflect a particular market situation within the meaning of Article 2(d) of the Code. Thus, in certain circumstances, sales at a loss may not be an appropriate basis for price comparisons.

It notes that, in the United States, the Trade Act lays down that sales

- at less than the cost of production;
- which have been made "over an extended period of time and in substantial quantities";
- and at prices which do not "permit recovery of all costs within a reasonable period of time in the normal course of trade"

shall be disregarded and, in the event that the remaining sales are inadequate as a basis for the determination of fair value, the fair value shall be determined on the basis of cost of production plus (i) general expenses with a minimum of 10 per cent of the cost of production and (ii) profit with a minimum of 8 per cent of the cost of production plus general expenses.

The Community considers and has always underlined that these rules and their actual interpretation raise numerous problems. It considers that if a basis for further international harmonization is sought, clarification is required on the following questions:

- (a) the definition of the cost criteria to be applied;
- (b) the circumstances in which sales at a loss should be considered as not being those made in the normal course of trade;
- (c) the consequential treatment of sales at a loss.

(a) Cost criteria

For the purpose of defining the cost to be applied, the Community considers that:

- the costs should be the total costs (fixed and variable) and should exclude profits;
- fixed costs should generally be allocated pro rata on the basis of output irrespective of the rate of demand for the product;
- in accordance with the general philosophy of the GATT the financial practices to be taken into account should be those normally applied in the exporting country provided that the costs of financing should be the normal commercial costs which would arise if the financing were to be made at arm's length;
- where applicable the accounting standards applied should be those of the exporting country, though where internationally accepted conventions exist then these may be taken as an alternative.

(b) Circumstances in which sales at a loss could be regarded as not those in the normal course of trade

The Community considers that:

- it should be generally accepted that sales at a loss may occur in the normal course of trade and that only when these losses are persistent and are in substantial quantities over a considerable period of time can they be regarded otherwise;
- the period of time considered reasonable should be clarified, it should be possible to agree at least on a minimum period even taking account of differences between industries;
- the criteria to be applied when assessing whether quantities are substantial should be clarified. Should it be sufficient, for example, to demonstrate that sales are not an insignificant proportion of the total sales by the company of the product in question? The Community is not of this opinion and considers instead that the requirement should be that the quantities sold have the effect of causing an overall loss in the company's sales of that product;
- if the criterion to be applied was whether the prices permitted recovery of all costs within a reasonable period of time and in the normal course of trade, then this criterion should be clarified further;
- where sales take place at different prices then, in accordance with accepted business practice, this should be considered as perfectly normal as long as the weighted average of these prices is sufficient to cover full costs.

(c) Consequential treatment

The Community considers that when there are sales at a loss which are not in the normal course of trade, then the normal value might be based either on the remaining domestic sales made in the normal course of trade, or on the costs of production plus a reasonable amount for administrative, selling and any other costs and for profits. In these circumstances, however, it is of the opinion that the use of minimum rates for general expenses and profits is inappropriate and incompatible with Article VI of the GATT which stipulates that the additions to be made should be reasonable. The Community considers that a judgment on what is reasonable can only be made on a case-by-case basis, taking into account the particular situation of the industry in the exporting country.

2. Allowances

The rules adopted by the Community on allowances¹ follow closely those laid down in the GATT Anti-Dumping Code.² Although no major difficulties have arisen in the Community's application of these rules, the Community's experience in this matter - one of the most important questions to be addressed in seeking to establish dumping margins - leads it to propose that greater precision be sought in the current rules. Four matters in particular appear to require attention. These concern:

- (i) differences in merchandise;
- (ii) differences in quantities;
- (iii) differences in circumstances of sale;
- (iv) burden of proof.

These points may be taken separately.

(i) Difference in merchandise

In the Community's opinion, in calculating any allowances due because of differences in merchandise when sold on the home and export markets, a signatory should be guided, as a general rule, following upon the general orientation of the Code, by the differences in the market value of the merchandise.

The Community recognizes, however, that an over-strict application of this rule may lead to inequity and would accept, therefore, that reference to differences in the cost of manufacture of the merchandise in question ought not to be excluded where there is no discernable value on the home market or where this is not representative. Such cost of production should include full costs with overheads but should exclude profits.

¹Article 4(b) of Council Regulation (EEC) No. 459/68 and Commission Recommendation No. 77/329/ECSC.

²Article 2(b).

(ii) Differences in quantity

The absence of specificity on this matter in the present language of Article 2(b) is regrettable. In the Community's view due allowance should be made when it can be shown that, during a reasonable preceding period of time and in respect of a substantial quantity of like merchandise, similar quantity discounts had been granted by the exporter on his sales in the home market.

Alternatively, the exporter might demonstrate, and this may be taken into account by the importing country, that the discounts are cost-justified; that is, warranted on the basis of savings specifically attributable to the costs involved.

(iii) Differences in circumstances of sale

Although the principle set out above is clearly articulated in Article 2(b) of the Code, in the Community's view some greater precision is nevertheless possible and desirable. This should take into account the overriding need for simplicity in an area where analysis, in accounting terms, is notoriously difficult.

It should first of all be made clear that only circumstances directly related to the sale might be taken into account. Secondly, in assessing due allowances under this heading, full regard should be had to practices on both the exporting and importing markets.

Examples of differences in circumstances of sale for which reasonable allowances might be considered are those involving differences in credit terms, guarantees, warranties, commission, technical assistance, servicing, or selling and advertising costs insofar as these are directly related to the product in question. Generally the amount of these allowances should be allocated pro rata of the turnover involved for each of the markets and products in question.

(iv) Burden of proof

The Community recognizes that the overall proof of dumping and injury rests with the authorities of the importing country. However, as the foreign exporter or producer is the prime source of evidence on allowances and since such allowances are used to refute a prima facie case of dumping, it is considered only fair and equitable that the burden of proof on his claims for adjustment should rest with him.

3. Regional protection

The European Economic Community recognizes the need for special regional protection against dumping and this is provided for in its anti-dumping rules¹, the wording of which closely follows the provisions of the Anti-Dumping Code. The experience of the Community, however, is that while it has been possible to take anti-dumping action when the producers in the region concerned represented a major proportion of the Community industry it has proved difficult to apply the more rigid provisions of Article 4(a)(ii) of the Code.

The problems which have arisen when attempting to apply the strict regional criteria of the Code have been due in the main to two factors:

- (a) On the one hand the concept of market isolation contained in Article 4(a)(ii) of the Code has been found to be artificial to the extent that the market has to be almost completely isolated before action can be taken to protect a region and it has been found that such a degree of isolation rarely corresponds to the reality of the market. However, it has been found that imports are often concentrated in certain regions of the Community and threaten the continued existence of the injured industry in that region. This factor causes considerable economic and political problems which are not addressed by the present drafting of the Code.
- (b) On the other hand it has been found that Article 4(a)(ii) of the Code fails to give due guidance on other problems encountered in connexion with regional protection such as the requirement that imports have to be concentrated in a certain region of the Community or the minimum geographical size of the region. In theory, Article 4(a)(ii) allows a Contracting Party to protect a firm in a single village of the importing country provided that the rules on market isolation are fulfilled.

For this reason the Community proposes that the strict concept of market isolation contained in Article 4(a)(ii) of the Code should be complemented by more flexible criteria which would be centred on the concentration of imports on the market of a region of a certain geographical importance and on the degree of the injury suffered by the industry in that region.

¹Articles 4.5(a) and 19.5 of Council Regulation (EEC) No. 459/68 and Commission Recommendation No. 77/329/ECSC.

More concretely, the Community proposes that the criteria laid down in Article 4(a)(ii) of the Code should be complemented by the following alternative criteria before regional protection may be applied:

- (i) There should be a concentration of imports of the dumped product in the particular region;
- (ii) the region should contain a significant proportion of the whole of the industry in question;
- (iii) there should be evidence that the imports in question threaten the continued existence of the industry in the region;
- (iv) careful consideration should be given to the interests involved in the whole of the customs territory.

It would be understood, of course, that before imposing any anti-dumping duty in respect of the entire customs territory as a result of dumping causing injury only to a region, opportunity should always be provided to allow the exporter to undertake to cease as an alternative to the imposition of duties as provided for in Article 8(e) of the Code.

4. Price undertakings

The Community's anti-dumping rules¹ provide for the acceptance of undertakings in appropriate circumstances and for the continued review of their effect and the conditions for their application.

In the past it has been the Community's practice to settle by far the greater proportion of its anti-dumping problems by the acceptance of price undertakings. This is due, in part, to the Community's opinion that the main aim of the anti-dumping rules is to eliminate dumping. It cannot agree, moreover, with the theory of no free bite, i.e., that anti-dumping duties should be applied as a punitive or preventative measure, either in all cases in which dumping has been established, or in all cases except those in which the margins of dumping are minimal.

Although the Community's open approach to the acceptance of undertakings stems partly from its pragmatic attitude towards international trade questions, its experience has been that there are certain intrinsic advantages in their acceptance. There is little doubt, for example,

¹Articles 14 and 18 of Council Regulation (EEC) No. 459/68 and Commission Recommendation No. 77/329/ECSC.

that the undertakings enable the anti-dumping investigation to be completed more quickly and that more speedy relief is thus given to the injured industry. It has also been found that undertakings are more flexible than are anti-dumping duties.

In spite of their advantages, however, the Community appreciates that undertakings are not always an appropriate solution. It has to be recognized that anti-trust legislation might inhibit the solution of an anti-dumping problem by this means. Furthermore, there may be practical difficulties which prevent the acceptance of an undertaking. For example, the number of exporters may be too great or there may be a risk of the undertaking being evaded, or the administrative inconvenience involved in monitoring the undertaking may not justify its acceptance.

Community experience has also shown that in certain cases exporters have deliberately used delaying tactics before offering an undertaking, thereby aggravating the injury caused. In such cases it has been the Community practice to collect any provisional duty applied prior to the date of acceptance of the undertaking.

The Community considers that it is evident that undertakings should be monitored closely and that information for this purpose should be provided as required. It also considers that there is common consent that where undertakings are withdrawn, evaded or violated in any way then the importing country is allowed to take any remedial anti-dumping action in appropriate circumstances.

The Community concludes, therefore, that it is well satisfied with the price undertaking provisions contained in Article 7 of the Code and considers that all signatories of the Code should respect them by adopting an open attitude to any serious offer of a price undertaking. While it would not advocate an unconditional acceptance of undertakings it considers that they should not be rejected automatically simply as a matter of policy.