

# EU Review

A recurring feature  
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*A review and commentary on recent decisions relating to licensing in the European Union.*



## EU Developments - United States Steel Tariffs

**O**n March 5, 2002, President George W. Bush announced that the United States would impose temporary safeguard measures on imports into the U.S. of a wide range of steel products, to be effective from March 20, 2002. The move has been internationally condemned as inconsistent with WTO rules and the spirit of free trade but there is also wide recognition that the decision was taken for domestic political reasons.

Put crudely, the “trade war” which the President’s proclamation has unleashed between the U.S. and most of its trading partners has come about through payment of a political debt. Bush won the crucial steel-producing state of West Virginia by only 40,000 votes, after he and Vice President Cheney pledged to come to the aid of steel workers during the 2000 election campaign.

On March 5, 2002 it was time to deliver on pre-election promises, with a timely eye also to the autumn election for the House of Representatives. And we should not overlook the fact that Bush is still seeking trade promotion authority in Congress. The House of Representatives has obliged, but what will happen in the Senate? Although many commentators have said that the steel safeguards will damage Bush’s free trade agenda, this is not necessarily so. He has his eye on the bigger prize of a broad trade promotion authority, otherwise known as “fast track”, or the requisite grant of authority from Congress for the Administration to negotiate trade deals. For that the President needs the votes of particular Senators in particular states.

So it is against this background that one has to view Bush’s steel announcement. The non-U.S. companies now facing U.S. tariffs on steel as high as 30 percent are the victims of what is essentially a domestically motivated political decision, albeit with global fallout.

Such a political decision would not have been necessary in 2002 if, over the last thirty years, the U.S. industry had been exposed by previous Administrations to market forces. But over the decades it has been consistently shielded by protectionist measures, estimated (by the American Institute for International Steel in 2000) to have totalled more than U.S. \$ 23 billion since 1975, in the form

of pension guarantees, loan guarantees, special tax and environmental exemptions, research and development grants and “Buy American” provisions.

### International Legal Response and Outcomes

The E.U. and other WTO Members have reacted to the U.S. measures using the international legal framework available under the auspices of the WTO. Broadly, a two-pronged attack has been mounted: a request for consultations with the United States under the WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), most likely leading to a panel and, at the same time, consultations under the WTO Agreement on Safeguards. Points of dispute under the latter which are not solved during consultations will no doubt be encompassed in a panel constituted under the DSU. A third way forward, while not directed against the United States specifically, would be for the Europeans to impose their own safeguards, if the diversion of imports from the U.S. now causes increased imports.

It will be a long process. We have already seen affected WTO Members demanding compensation from the United States, under the Safeguards Agreement, because the U.S. must endeavour to maintain a substantially equivalent level of trade concessions with those countries while the steel safeguards continue. Later, if a WTO panel finds that the safeguard measures were imposed illegally, the U.S. will have to bring its measures into conformity with WTO law—how this might be done is a matter of conjecture.

### Section 201 and GATT Article XIX

The United States has certainly given its new steel tariffs and tariff rate quotas a veneer of WTO-legality. The President’s decision to impose safeguard measures is the definitive step in what is known as a “Section 201” or “escape clause” proceeding. Section 201 of the United States Trade Act of 1974 is the provision which implements Article XIX of GATT and the WTO Safeguards Agreement in United States domestic law. Essentially, GATT Article XIX permits the suspension of tariff concessions and most favored nation (MFN) treatment if increased quantities of imports threaten or cause serious injury to a domestic industry.

Under Section 201, decisions on import adjustments are made by the President after recommendations by

the International Trade Commission (ITC). The ITC is responsible for investigating whether the increase in imports is a “substantial cause of serious injury” or threatens serious injury, to the domestic producers of the imported item in question.

Safeguard measures are “special” measures compared to countervailing and antidumping measures. For the latter two, WTO-sanctioned, trade protection remedies, one not only needs a finding of injury, but also that there is evidence of an unfair trade practice. But for safeguard relief, only a finding of serious injury or threat thereof is necessary. Safeguard remedies are simply a reaction to the fact of increased import competition.

### **Was there an Increase in Imports?**

U.S. law considers that imports have increased when the increase is “either actual or relative to domestic production.” But the WTO Appellate Body held in the *Argentina—Footwear* case that the increase in imports must be sudden, recent, sharp and significant. The E.U. has presented data for the first half of 2001 which shows that imports for almost all the products concerned decreased substantially and, if the period 1998–2000 is examined, imports of the two largest product groups, flat and long products, which represent almost 90 per cent of all steel imports into the U.S., decreased substantially.

### **Unforeseen?**

Even if there really was an increase in imports, Article XIX of GATT also requires that they be the result of “unforeseen developments.” No less than four WTO Appellate Body reports have found that “unforeseen developments” must be demonstrated as a matter of fact in the investigation report before the safeguard measure is applied. The negative situation in which certain U.S. steel companies find themselves today is in no way unforeseen. The December 2001 ITC Report on steel contains not a single overt reference to the “unforeseen developments” criteria, though the E.U. has now listed this as one of its points of dispute in its request for WTO consultations.

### **Double Protection and Causation**

Granted, the U.S. industry is in trouble. But were its difficulties caused by foreign imports, especially when, as of the end of 2001, there were already 156 U.S. antidumping and countervailing measures in place covering 79 percent of U.S. steel imports? For steel products hit with safeguard measures which are already covered by antidumping and countervailing measures, why should U.S. producers get double relief? Surely the antidumping and countervailing measures must already remedy some of the injury which the U.S. industry claims to be suffering, and the WTO Safeguards Agreement only allows safeguard measures to be applied “to the extent necessary to prevent or remedy serious injury and to facilitate adjustment.”

On causation, the U.S. has already been severely taken to task in the WTO, most recently in October 2001 in *Line Pipe from Korea*. In a safeguard investigation, the ITC must examine whether the subject article is being imported in such increased quantities as to be a “substantial

cause” of serious injury or threat. U.S. law defines “substantial cause” as meaning “a cause which is important and not less than any other cause.” In the words of the ITC, “increased imports must be both an important cause of the serious injury or threat and a cause that is equal to or greater than any other cause.” The ITC must, by law, take into account all economic factors that it considers relevant, and must examine factors other than imports.

Although the ITC did pay lip service to several alternate sources of injury to the domestic industry, including declining domestic demand, intra-industry competition, domestic capacity increases, buyer consolidation, excess leverage of domestic producers, and legacy costs, the thrust of its discussion on causation centers on the surges in imports and it was dismissive of these other factors. The various government subsidies the industry has received in recent years were not addressed as “other factors.” Interestingly, in *Line Pipe from Korea*, the WTO Panel found that the ITC did not adequately explain how it had separated the injurious effects of the decline in the oil and gas industry from the injurious effects of the increased imports. This was a breach of Article 4.2(b) of the Safeguards Agreement, which stipulates that injury caused by other factors cannot be attributed to the increased imports. It would not be hard to run a very similar argument in this case.

### **Trade Protection Injury Analysis Unsatisfactory by Definition**

The assumptions made by the ITC in its causation discussion reflect the limited nature of the injury discussion generally: by the ITC, in antidumping, countervailing and safeguard investigations, and of other administrative authorities around the world, including the European Commission when it makes its injury assessments in trade cases. Objective economic criteria should be spelled out in the law to assess whether domestic industry has been injured—economic analysis, not unlike that used in merger investigations, is needed. Domestic competitive behavior of the industry under examination should be crucial but injury analysis in these cases rarely adequately encompasses such factors. Why? Because, quite simply, antidumping, countervailing and safeguard remedies are protectionist instruments.

### **Domestic Anti-Competitive Conduct Now a Factor to Be Considered in European CVD Cases**

In September 2001, the Court of First Instance of the European Communities in Luxembourg sent out a cry of pragmatism against this entrenched state of affairs in *Mukand*, which went largely unnoticed on the international stage. In examining the 1998 imposition of European countervailing duties against Indian imports of stainless steel bright bars, it found that the subsidized imports must cause material injury to a Community industry and that any harm caused by other factors, in particular by anti-competitive conduct on the part of Community industry itself, must not be attributed to the imports in question.

In the background to that case, while officials in the European Commission’s Directorate-General for Trade

had been busying themselves with the countervailing investigation, their colleagues in D.G. Competition had been looking into whether European producers of stainless steel flat products were acting in a concerted manner to illegally fix pricing components and thus distort competition. In January 1998 the Commission found that these producers were guilty of anti-competitive behavior and six companies were fined a total of ECU 27 million.

The producers of flat stainless steel products in the antitrust investigation were not the same as those producing stainless steel bright bars comprising the domestic industry in the countervailing investigation, although they were sometimes related. Furthermore, a separate antitrust investigation by D.G. Competition into the behavior of the European bright bar producers was ultimately rejected. But the Indian bright bar producers were able to provide D.G. Trade with conclusive proof that Community producers of bright bars had, for at least a decade, applied the same alloy surcharge as that applied by the flats producers which had been found to breach competition rules.

The Court held that because the institutions had failed to take account of the uniform, consistent industrial practice of Community producers of bright bars, the objective effect of which was automatically to mirror, in the markets for those products, the artificial price increases achieved through concerted practices by producers of flat products, they had disregarded a known factor, other than subsidized imports, which might have been a concurrent cause of the injury sustained by the Community industry. The judgment goes further than the 1992 Extramet decision by the Court of Justice. There, the institutions had not examined the impact of the proven anti-competitive practice (a refusal to supply) at all. In Mukand, the institutions did examine the anti-competitive arguments, but did not properly take them into account and the CFI held that they had reached the wrong conclusion based on the facts.

### **Free Trade and Competition Policy Have Common Objectives—Should Safeguards, AD and CVD Measures be Allowed to Throw a Spanner in the Works?**

Trade liberalization and antitrust law and policy have the common objectives of increasing economic growth and lowering prices for consumers and business, but trade protective measures, even if carried out legally under WTO rules, are at odds with these objectives. The real question is whether any trade protection measures at all should be sanctioned under international trade law. Would it not be better to simply replace safeguards, antidumping and countervailing measures with adequate international antitrust rules in the longer term? Within the European Union, this has already been successfully achieved at a regional level. And it works in some free trade areas, such as between Australia and New Zealand, although not under NAFTA (North Atlantic Free Trade Agreement).

In the meantime, a Mukand approach in safeguard, antidumping and countervailing cases might at least make for a more rational injury assessment. In the Section 201

ITC findings on steel, imagine for a moment a hypothetical scenario in which previous specific government support to the U.S. industry had already been judged to be an illegal subsidy, or what we would term in European competition law, a prohibited state aid. It's pie in the sky stuff - but it shouldn't be. Antitrust considerations should play a role in trade policy. Because in the real world, markets are increasingly regional and global, and competitive behavior on a market affects international trading conditions.

## **Recent Anti-Trust Cases**

### **Carbonless Paper Cartel**

In December 2001, the Commission announced the second largest fines it has ever imposed in respect of a cartel. The illegal agreement was in the carbonless paper market, credit card slip paper, and, during the period 1992–95, the market was worth a huge 850 million Euros in the European Economic Area. Penalties totalling 313.7 million Euros were imposed on 10 companies from the United Kingdom, France, Germany and Spain, all members of the Association of European Manufacturers of Carbonless Paper (AEMCP).

The cartel was disclosed in 1996 by one of its members, South African company Sappi, which produced details of agreements on price increases and sales quotas, enforced by the exchange of confidential information. Evidence was furnished to the effect that cartel meetings were held from as early as 1989 and persisted after 1995 but, on advice given by the Hearing Officer, the Commission confined its investigations to the period 1992–95 for which it had firm evidence.

As a result of its cooperation, Sappi became the second firm to benefit from full immunity under the Leniency notice. United Kingdom firm Arjo Wiggins Appleton Plc which had a share of 32 percent in the European market and, along with Sappi and French company Bolloré SA, a far higher turnover than the other companies involved was given a stunning fine of 184.27 million Euros. For being the “main instigator” of the cartel, this sum included a 50 percent addition but a 35 percent reduction was given for the fact that the company provided information before the statement of objections was issued. For also providing information at this early stage, Bolloré was given a 20 percent reduction to a fine of 22.68 million Euros and the French Papeteries Mougeot SA, a 50 percent reduction to 3.64 million Euros.

German companies Zanders Feinpapiere AG and Mitsubishi HiTech Paper Bielefeld GmbH and United Kingdom company Carrs Paper Ltd were given a 10 percent reduction for their cooperation, receiving fines of 29.07 million Euros, 21.24 million Euros and 1.57 million Euros respectively. The second highest fine of 33.07 million Euros was given to Papierfabrik August Koehler AG. In addition three Spanish companies, Torraspapel SA, Distribuidora Vizcaina de Papeles SL and Papelera Guipuzcoana de Zicuñaga SA were fined 14.17 million Euros, 1.75 million Euros and 1.54 million Euros

respectively.

### **Zinc Phosphate Cartel**

A cartel on a smaller scale than that in carbonless paper, but one which attracted significant fines in relation to the turnover of the companies involved, was also ruled on last month, in the zinc phosphate sector. Six companies, holding 90 percent of the market for zinc phosphate, an anticorrosion agent used in industrial paints, were fined a total of 11.95 million Euros. The cartel, which involved price-fixing and market sharing, ran from 1994–98, the last planned meeting only being hastily cancelled after the Commission's investigation began.

Norwegian firm Waardals Kjemiske Fabrikker A/S came forward to cooperate with the Commission immediately after the investigation began and with the 50 per cent reduction this earned them, were fined 0.35 million Euros. United Kingdom's Trident Alloys Limited were next to give information and were fined 1.98 million Euros after a 40 percent reduction. The other four firms involved received 10 percent reductions, with France's *Société Nouvelle des Couleurs Zinciques S.A.* being fined 1.53 million Euros, German firm Dr. Hans Heubach GmbH & Co KG 3.78 million Euros and the two United Kingdom companies, Britannia Alloys & Chemicals Limited and James M. Brown Limited, receiving fines of 3.37 million Euros and 0.94 million Euros respectively.

The Commission viewed the cartel as a very serious infringement of competition rules, but while taking into account the limited size of the European market (16 million Euros annually during the period of the cartel) and the fact that the firms involved were SMEs, it stressed that the fines were set at a level sufficient to have a punitive effect.

### **Carlsberg And Heineken Accused Of Market Sharing**

The Commission, as part of its continuing investigation into the beer market, has issued a statement of objections to the Dutch brewer Heineken and its Danish rival Carlsberg, alleging that from 1993–96, they had an agreement to stay off each other's home turf. The agreement not to engage in "intensive activities," such as large-scale marketing, in the home market of the other, was uncovered in dawn raids carried out on the premises of the two companies in March and May 2000. Although it appears that the cartel activity has ceased, the Commission is pursuing the action to emphasize the very serious view it takes of such activity. Carlsberg, however, has denied that such an agreement existed, claiming that contacts between the two firms were nothing more than ordinary business relations.

In December last year, the Commission imposed fines in respect of cartel activity in the beer market in Belgium and Luxembourg (see *In Competition*, December 2001). There are also ongoing investigations concerning brewers in France, Italy and Portugal.

## **Commission Adopts New Leniency Policy**

The Commission is committed to continuing its crusade against cartel activity but is contenting itself with using the carrot of partial or full immunity from fines while the U.S. combines this with the stick of a jail sentence. To make the carrot more effective in encouraging price-fixers and market-sharers to blow the whistle on their fellow cartel members, a new leniency regime will be introduced on February 14, 2002.

Under the old 1996 rules, in order to get full immunity from the sweeping fines the Commission has the power to impose, a company had to provide "decisive" evidence and was excluded if it had been an "instigator" or played a determining role in the cartel. Under these rules, total immunity was granted in three cases and the Commission sees the policy as having been so instrumental in exposing an unprecedented number of cartels last year, that it wants to extend it to provide companies considering spilling the beans greater incentives and greater certainty as to the probable consequences.

The new regime provides that full immunity will be given to the first member of a cartel which provides information about an unknown cartel sufficient to allow the Commission to carry out a dawn raid. If no member comes forward before the cartel is discovered, the first company to provide evidence that enables the Commission to prove the infringement will benefit. Of course, the companies must also continue to cooperate fully and consistently throughout the investigation and must stop all illegal behavior immediately. The graduated reduction in fines for companies that do not qualify for full immunity but have "added significant value" by their evidence will continue. The precise reduction will depend on the timing and quality of the information given.

Another innovation, which gives whistle blowers advance warning of their likely fate, is that the Commission will send letters informing companies of their eligibility for immunity. Companies likely to be granted full immunity will receive such a letter as soon as possible; those qualifying for a reduction, no later than the day the statement of objections is notified.

## **European Court Of Justice**

### **The Wouters Case—The Return Of The Rule Of Reason Or A Public Policy Exemption**

In this judgment, the ECJ held that a ban on multi-disciplinary partnerships (MDPs) was not prohibited by E.U. competition law. While the commercial significance of the judgment is arguably reduced in the light of the Andersen/Enron saga, the Court's reasoning is of potentially great importance.

The Court found that prohibiting MDPs prevented and/or restricted competition as it is liable to "limit production and technical development" within the meaning of Article 81(1)(b). The Court found that lawyers and accountants have complementary expertise and MDPs would provide the advantages of a "one-stop shop." Since legal services frequently require recourse to accountants,

MDPs between members of the two professions would make it possible to offer a wider range of services, and indeed propose new ones. MDPs would be capable of satisfying the needs created by the increasing interpenetration of national markets (i.e. continuous adaptation to international legislation). Finally, the economies of scale resulting from MDPs might reduce the cost of services. A prohibition on MDPs might constitute a structural limit to concentration of law firms and therefore reduce the opportunities to benefit from economies of scale or to enter into association with members of highly concentrated professions.

The Court then reasoned that “unreserved and unlimited authorization” of MDPs between the decentralized legal profession and the highly concentrated accountancy profession could lead to “an overall decrease in the degree of competition prevailing on the market in legal services, as a result of the substantial reduction in the number of undertakings present on the market.” Nevertheless, the Court then applied a proportionality test, and found that the preservation of sufficient competition on the market for legal services could be guaranteed by less extreme measures than a blanket prohibition on all MDPs regardless of the respective size of the law firms and accountancy firms involved.

Thus competition was restricted / distorted. Moreover, intra-Community trade was affected, since the Dutch ban on MDPs reinforced the partitioning of national markets, and applied equally to Dutch lawyers and to visiting lawyers.

However, the Court then went on to find that, notwithstanding its conclusions above, the Dutch ban on MDPs did not infringe Article 81(1). In the words of the Court, “not every agreement between undertakings or any decision of an association of undertakings which restricts the freedom of action of the parties or one of them necessarily falls within the prohibition laid down in Article 81(1) ... account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects. More particularly, account must be taken of its objectives ... It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives.”

The Court referred to the duty of lawyers to act in their client’s sole best interest, to avoid all conflict of interest and to observe strict professional secrecy. These duties required that lawyers should be independent of public authorities, other operators and third parties. Accountants, in particular in The Netherlands, are not however subject to comparable requirements of professional conduct. Moreover, accountants’ audit functions, which are by necessity objective in order to give interested third parties a personal opinion concerning the reliability of the accounts, are to a degree incompatible with lawyers’ advisory activities. Dutch lawyers might not be able to advise and represent their clients independently and in the observance of strict professional secrecy if they were

to belong to an organization responsible for preparing and auditing those clients.

The Court therefore found that the ban on MDPs, while restrictive of competition, did not come within Article 81(1) because of public interest reasons. Until now, the “rule of reason” has been limited to pure competition criteria. Advocate General Léger had, in his Opinion, described the rule of reason as effectively “a purely competitive balance-sheet of the effects of the agreement. Where, taken as a whole, the agreement is capable of encouraging competition on the market, the clauses essential to its performance may escape the prohibition laid down in Article [81(1)] of the Treaty. The only ‘legitimate’ goal which may be pursued in accordance with that provision is therefore exclusively competitive in nature.” To hold that the ban on MDPs does not infringe Article 81(1) because it is necessary to protect the independence of the legal profession and its client loyalty “misconstrues the ratio legis and the structure of the Treaty provisions ... It implies that the Court should consider, in the light of Article [81(1)] of the Treaty exclusively, not only the question of determining whether a restriction of competition exists but also whether or not it might be justified. Such an interpretation is liable to negate a great part of the effectiveness of Article [81(3)] and [86(2)].”

A.G. Léger’s approach was approved by the CFI in *Metropole* shortly afterwards, as well as by the UK’s Competition Commission Appeal Tribunal in *GISC v. ABTA* (both judgments of September 2001). Yet no less than 13 judges of the ECJ ruled that the restriction of competition in this case did not fall within the prohibition of Article 81(1).

Was this a policy decision? After all, the ban on MDPs had not been notified and could not therefore have qualified for exemption, but even if it had, it would have taken a rather extensive interpretation of the criteria of Article 81(3) to allow the Commission to grant an exemption. And the Court could have come to the same result through less dramatic means, as Advocate Léger had proposed, by relying on the derogation contained in Article 86(2) for services of general economic interest. Yet the Court did not even consider the arguments raised in connection with Article 86(2).

Is the Court saying that not all restrictions of competition which affect intra-Community trade are incompatible with the Treaty? If that is the case, why is there no reference to the activities and goals of the Treaty? And why does the Court conclude that the decision does not fall within the prohibition after (and not before) it analyses its restrictive effects?

On any analysis, this judgment represents a shift in the jurisprudence of the Community Courts. So significant in fact that it may be something of a misnomer to call the ratio a “rule of reason” approach. Has the Court created a new public policy defence in Article 81(1)? Or an early (i.e. pre-modernization) decentralization of Article 81(3)? The current view is that the Court wanted to stress that Article 81 should not be used to interfere with legitimate

professional rules. But nowhere is the judgment so limited and, in taking a rather large sledgehammer to crack a rather small nut, the applications and implications of the Wouters judgment remain to be seen.

## Commission Proposal On Software Patents

Without much fanfare, on February 20 the European Commission published a proposal for a Directive setting out rules on the patentability of software inventions. The Commission's proposal is for a Directive to be adopted using the co-decision procedure which gives a role to both the European Council and the European Parliament. The proposal is not a final draft, but is being put forward for discussion. If approved, the Directive may be adopted as is or in amended form. Neither event is likely to occur before 2003. The proposal comes at a time of uncertainty as to where the laws on European software patents are heading. A proposal in the summer of 2000 to reform the European Patent Convention (EPC) to remove the express prohibition on inventions for computer programs "as such" was rejected in a Diplomatic Conference in November 2000. Although debate on that issue has continued, the Boards of Appeal of the European Patent Office (EPO) have meanwhile further developed their own thinking on the patentability of software and business method inventions.

The Commission's proposal defines a new class of inventions entitled "computer-implemented inventions" and goes on to define the conditions under which they

are patentable. The main focus is on whether an invention involves a technical inventive step or, in other words, makes a technical contribution to the art. The contribution is assessed by comparing the invention as a whole against the state of the art. Therefore, if the contribution has a purely economic character - as in some business method inventions - the invention is not patentable. This aspect of the proposal accords with the case law of the Boards of Appeal of the EPO. However, certain other aspects of the proposal appear not to follow the EPO's approach. In particular, the EPO maintains a clear distinction between inventions that are potentially patentable (patentable subject-matter) and the tests for novelty and inventive step. In contrast, the definition of computer-implemented invention in the proposal appears to combine the concepts of patentable subject-matter and novelty. According to the Commission, and again in contrast to recent EPO decisions, programs in isolation from the computer on which they are to be run or even programs recorded on a carrier should not be patentable. This conflict could be significant, as it is possible to envisage the EPO (which is not bound by the Directive) granting a European patent under the EPC which might later be held to be invalid in national courts, under the Directive. One way around this would be to amend the EPC to conform with the Directive; although as there are EPC contracting states which are not EU Member States (and therefore not bound by directives), further political steps are needed to achieve convergence.