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Competition and Trade Defence: Two Worlds Apart ? Also in Times of Economic Crisis ?

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"The focus of competition policy is competition, whereas the focus of trade policy is competitors"*

*Pr. Petros Mavroidis

"It must be remembered that the purpose of the antidumping and countervailing duty laws is not to protect consumers, but rather to protect producers. Inevitably, some cost is associated with this purpose. However, unlike the antitrust laws, which are designed to protect consumer interests, the function of AD/CVD law is, indeed, to protect firms and workers engaged in production activities in the United States."**

** Janet Nuzum and David Rohr, Commissioners of the USITC

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EU trade defence in a nutshell

- Three trade defence instruments: anti-dumping, anti-subsidy, safeguards
  - Anti-dumping: offsetting dumping by foreign producers exporting from one or more identified countries, causing injury to a domestic industry
  - Anti-subsidy: offsetting subsidization received by foreign producers exporting from one or more identified countries, causing injury to a domestic industry
  - Safeguards: protecting domestic industry against a rapid surge of imports, from all countries.
- Around 10-20 AD cases per year, for 1-2 AS cases. 0.5% of all imports affected. Only 8 safeguard investigations ever, and only 3 leading to measures.
- Cases investigated and controlled by the EU Commission's DG for Trade. Limited involvement of MS.
- Measures imposed: special duties on top of customs duties (quotas for safeguards)

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What is trade defence really about?

- Proclaimed objective:

  The EU has a duty to use TDIs to re-establish a competitive environment for the EU industry when harmed by dumped or subsidised imports.

- But (almost) everyone agrees that the EU's trade defence practice "*does not appear to be largely oriented towards preventing anti-competitive practices.*" (BKP report)
- The truth of the matter is that TDI is not about unfair behaviours at all, but about offsetting dumping and subsidization **as defined**
  - Dumping: selling below the "normal value", based on profitable domestic sales and/or cost of production + 'reasonable' profit.
  - Countervailable subsidization: any state support that is "specific"
- These behaviours are usually fine when taking place in the EU.
- Trade defence is about offering temporary protection to domestic industries injured by these practices, in a WTO compliant way.

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Trade defence is about this

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Why should there be trade defence at all?

- A small sacrifice of welfare in order to protect manufacturing industries and employment in the EU
- Trade defence was a small evil necessary to make trade liberalisation possible in the first place (GATT/WTO)
- As a result TDI became a fact. Council Regulations were adopted to implement the GATT/WTO Agreements, staff at DG Trade were appointed to run investigations.
- Once the conditions for initiation are met, an investigation must be opened, and injurious dumping or subsidization found must be countervailed
- Arguably, the use of TDIs could only be restricted by competition law if their use could be characterised as concerted practices captured by Article 101 TFEU, or an abuse of a dominant position under Article 102 TFEU. This has happened in the (distant) past, but only rarely

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The core of the matter: the impact of trade defence on competition

- Four main issues:
  - (1) Very high dumping margin sometimes reflect freak calculation methodologies (especially the normal value for China and other NMEs), more than any unfair behaviour, or even dumping as it was initially envisaged
  - (2) Standing: the bigger an undertaking, the more concentrated an industry, and the easier it is for that undertaking to obtain the imposition of duties on competing imports
  - (3) In practice, the way data is collected in trade defence investigations makes it more difficult for downstream industries to make themselves heard than is the case for complaining industries

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The core of the matter: the impact of trade defence on competition (continued)

- Four main issues:
  - (4) Reluctance on the part of the Commission's DG Trade to acknowledge the impact on trade defence investigations of demonstrated anti-competitive behaviours, to the point in some cases of being later sanctioned by the Courts of the EU.

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Reluctance to take competition arguments on board

- DG Trade's view:
  - *In assessing Community interest, the Community institutions have consistently maintained that the purpose of anti-dumping measures is to remove distortions of competition arising from unfair commercial practices, and thus re-establish effective competition on the Community market, and that it is fundamentally in the general Community interest to do so.*
- Case law of the EU Courts (Extramet, Mukand): Regulations imposing duties were annulled because of an inadequate injury analysis, not on the basis of any analysis of the merits of the competition arguments

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Suggestions as to how to address these issues

- The methodologies causing the biggest distortions of the injurious dumping/subsidisation found should be first acknowledged, and then removed; so that the duties imposed are never foreclosing imports entirely.
- The fact that an AD or AS complaint has been lodged should be publicised immediately, and not after 45 days.
- Formalise communications between DG Trade and DG Comp (system similar to what exists in Russia today)

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Thank you !

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