

COMMISSION RECOMMENDATION

of 15 April 1977

on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Coal and Steel Community

(77/329/ECSC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Coal and Steel Community, and in particular Articles 74 and 86 thereof,

Whereas by virtue of Article 74 of the Treaty the Commission is empowered, in cases of dumping or the granting of bounties or subsidies by countries which are not members of the Community, to take any measures which are in accordance with the Treaty and to make any necessary recommendations to Member States ;

Whereas by virtue of Article 86 of the Treaty the Member States have undertaken to facilitate the performance of the Community's tasks ;

Whereas, in view of the existence of a common market in coal and steel, the taking of rational measures would not in general, and even in the case of mutual cooperation, constitute an effective and adequate protection against dumping or the granting of bounties or subsidies but would, on the contrary, entail a risk of hindering the working of the common market and of compromising its achievements, and in particular the unified customs tariff applicable to third countries ;

Whereas, therefore, the Commission will normally use the powers given to it under Article 74 and will, in suitable cases, recommend Community defensive measures ;

Whereas to enable the Commission to exercise its powers rapidly and effectively it is necessary to establish certain rules of procedure and to organize the cooperation with the Member States ;

Whereas with a view both to avoiding contradictions between the actions of the Commission and those of

the Member States and to ensuring that, in cases where there is no Community interest involved, Member States can take appropriate measures to protect a national industry, it is necessary to provide that, in the absence of Community action, national investigations and protective measures may be initiated, after consultation ;

Whereas, for the European Economic Community, protection against dumping or the granting of bounties or subsidies by countries which are not members is governed by Regulation (EEC) No 459/68⁽¹⁾, as amended by Regulation (EEC) No 2011/73⁽²⁾ ; whereas it is appropriate to ensure that the legislation governing external trade should be as homogeneous as possible in the two Communities ; whereas, therefore, it is appropriate to provide for analogous application to coal and steel products of the principles and definitions contained in Regulation (EEC) No 459/68, in its present version, which moreover result from the international obligations of the two Communities and their Member States ;

Whereas rules of procedure should be established which take account of the different conceptions of the two Treaties, but which, nevertheless, are as close as possible to the provisions of Regulation (EEC) No 459/68, as amended,

MAKES THE FOLLOWING RECOMMENDATION :

Article 1

The provisions of this recommendation shall apply for the purpose of protection against dumping or the granting of bounties or subsidies by countries which are not members of the Community, in respect of products covered by the Treaty establishing the ECSC. They shall not derogate from any special rules laid down in agreements concluded with such countries.

⁽¹⁾ OJ No L 93, 17. 4. 1968, p. 1.

⁽²⁾ OJ No L 206, 27. 7. 1973, p. 3.

TITLE I

Dumping and anti-dumping measures

Article 2

1. An anti-dumping duty may be applied to any dumped product whose introduction into Community commerce causes, or threatens to cause, material injury to an established Community industry or materially retards the setting up of an industry whose early establishment in the Community is envisaged.

2. Where in this recommendation the term 'injury' is used without qualification, it shall be interpreted as referring to the three cases mentioned above.

Article 3

1. (a) A product introduced into Community commerce shall be considered to have been dumped if the price of the product when exported to the Community is less than the comparable price, in the ordinary course of trade, of the like product within the meaning of Article 5 when destined for consumption in the exporting country of origin.

(b) Where a product is not imported directly from the country of origin but is exported to the Community from an intermediate country, the prices to be compared for the purpose of determining whether dumping within the meaning of this paragraph has occurred shall normally be the price of the product when exported to the Community and the comparable price of the like product on the domestic market of the country of export.

However, comparison may be made with the price in the country of origin if, for example, the product is merely transhipped through the country of export or such products are not produced in the country of export, or there is no comparable price for it in the country of export.

2. When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, a product shall be considered to have been dumped if the price of the product when exported to the Community is less than :

— the comparable price of the like product when exported to any third country, which may be the

highest such export price but should be a representative price ; or

— the cost of production in the country of origin plus a reasonable amount for administration, selling and any other costs and for profits ; as a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.

3. In cases where there is no export price or, where it appears that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may, for the purposes of paragraphs 1 and 2, be constructed on the basis of the price at which the imported product is first resold to an independent buyer, or if the product is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis.

4. (a) The comparison between the export price and the domestic price in the country of origin or the exporting country or, if applicable, the price of the product when sold to a third country, or the cost of production referred to in paragraph 2, shall be based on the prices ruling at the same level of trade, normally at the ex-factory level, and in respect of sales made as nearly as possible at the same time.

(b) 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 prices comparability. In the cases referred to in paragraph 3, allowance for costs incurred between importation and resale, and for profits accruing, should also be made.

5. No product shall be considered to have been dumped by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or exportation, or by reason of the refund of such duties or taxes.

6. In the case of imports from countries where trade is on a basis of near or total monopoly and where domestic prices are fixed by the State, account may be taken of the fact that an exact comparison between the export price of a product to the Community and the domestic prices in that country may not always be appropriate, since in such cases special difficulties may arise in determining the comparability of prices.

7. 'Margin of dumping' means the price difference determined in accordance with the foregoing provisions.

Article 4

1. (a) A determination of injury shall be made only, when the dumped imports are demonstrably the principal cause of such injury. For the purpose of establishing whether injury exists, the consequences of the dumping positively found to be as such shall be weighed against all other factors taken together which may be adversely affecting the Community industry in question.

(b) A determination of threat of injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which dumping would cause injury must be clearly foreseen and imminent.

2. The evaluation of injury shall be based on examination of all factors having a bearing on the states of the industry in question, such as developments and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered, duty-paid price is lower or higher than the most representative comparable price of the like product prevailing in the ordinary course of trade within the Community), export performance, employment, volume of dumped and other imports, utilization of capacity of Community industry, productivity; and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

3. In order to establish whether dumped imports are causing injury, all other factors which individually or in combination may be adversely affecting the Community industry shall be examined. The factors to be considered are, among others, the volume and prices of undumped imports of the product in question, competition between the Community producers themselves, contraction in demand due to substitution of other products or to changes in consumer tastes.

4. The effect of the dumped imports shall be assessed in relation to the Community production of the like product when available data permit the separate identification of production on the basis of such criteria as the production process, the producers'

realizations and profits. When the Community production of the like product has no separate identity in these terms the effect of the dumped imports shall be assessed by the examination of the production of the narrowest group or range of products which includes the like product for which the necessary information can be obtained.

5. (a) For the purposes of this title, the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total Community production of those products except that:

— when producers are also importers of the allegedly dumped product the term 'Community industry' may be interpreted as referring only to the rest of the producers;

— in exceptional circumstances the Community may, for the product in question, be divided into two or more competitive markets and the producers within each market regarded as a Community industry, if, because of transport costs, all the producers within such a market sell all or almost all their production of the product in question in that market and none, or almost none, of the product in question produced elsewhere in the Community is sold in that market or if there exist special regional marketing conditions which result in an equal degree of isolation of the producers in such a market from the rest of the industry, provided, however, that injury may be found in such circumstances only if there is injury to all or almost all of the total production of the product in the market as defined.

(b) The provisions of paragraph 4 shall be applicable to this paragraph.

Article 5

For the purposes of this title, the term 'like product' shall be interpreted to mean a product which is identical, i.e. alike in all respects, to the product under consideration, or in the absence of such product, another product which has characteristics closely resembling those of the product under consideration.

Article 6

1. Any natural or legal person, or any association not having legal personality, acting on behalf of a Community industry which considers itself injured or threatened by dumping may lodge a complaint, which shall fulfil the conditions set out below. Such complaints shall be submitted in writing.

2. The complaint shall be submitted either to the Commission or to the Member State in which the Community industry in question is carried on, irrespective of which Member State may be affected by the dumping complained of. A copy of the complaint shall be sent to the Commission by each Member State receiving such complaint. If a complaint is submitted to the Commission, the latter shall forward it to the Member State forthwith.

Article 7

The complaint shall give :

- (a) a description of the allegedly dumped product ;
- (b) the name of the exporting country ;
- (c) where possible, the names of the country of origin, the producer and the exporter of the product in question ;
- (d) evidence both of dumping and of injury resulting therefrom for the industry which considers itself injured or threatened.

Article 8

1. Where a Member State is satisfied that a complaint contains the particulars specified in Article 7, it shall at once inform the Commission, either by letter or orally during the consultations provided for in Article 10. It shall forward to the Commission any other information it considers necessary for an examination of the matter at Community level.

2. Where, in the absence of any complaint, a Member State is in possession of sufficient evidence both of dumping and of injury resulting therefrom for a Community industry, it shall immediately communicate such evidence to the Commission.

3. The Commission shall in either case forward the information received to the other Member States forthwith.

Article 9

Where a Member State finds that the complaint does not contain the particulars specified in Article 7 or that the margin of dumping, the volume of dumped imports, actual or potential, or the injury is negligible, it shall so inform the Commission, either by letter or

orally during the consultations provided for in Article 10. If, within a period of 10 working days from the date on which the Commission was informed, the latter has not raised any objection, whether at the request of a Member State or on its own initiative, the complaint shall be rejected forthwith by the Member State to whom it was sent, or by the Commission if the complaint was submitted to the Commission under Article 6 (2).

Article 10

1. Consultations between the Member States and the Commission covering, in particular :

- (a) the existence of the margin of dumping,
- (b) the existence and extent of injury,
- (c) the measures to be introduced, having regard to all the circumstances,

must be held prior to any enquiry or defensive measures by the Community or the Member States.

2. Consultation shall take place within an advisory committee (hereinafter called 'the Committee'), which shall consist of representatives of each Member State, with a representative of the Commission as chairman.

3. The Committee shall meet when convened by its chairman. He shall provide the Member States, as promptly as possible, with all relevant information.

4. Where necessary, consultation may be in writing only; in such case the Commission shall notify the Member States and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation.

Article 11

1. Where the information received by the Commission shows that protective measures against dumping may be necessary the Commission, in cooperation with the Member States, shall immediately commence examination of the matter at Community level. Such examination shall cover both dumping and injury.

2. The Commission shall advise the representatives of the exporting country and the exporters and importers known to be concerned. It shall at the same time publish a notice in the *Official Journal of the European Communities*. Such notice shall indicate the product in question and the country of origin or of export, as the case may be. The notice shall also state that all relevant information is to be communicated to the Commission and shall set the period within which interested parties may apply to be heard by the Commission in accordance with the provisions of paragraph 6.

3. (a) In carrying out its duties under paragraph 1, the Commission is authorized to obtain all necessary information.
- (b) However, when it is necessary to carry out investigations in countries which are not members of the Community in order to verify information collected or to obtain further details, the investigations of the Commission may be carried out only if the undertakings concerned give their consent and the government of the country in question has been officially notified and raises no objection. The Commission may be assisted by officials of one or more Member States if the latter have so requested, in all investigations conducted on the spot.
4. The Commission shall provide opportunities for the complainant and the importers and exporters known to be concerned, and the representatives of the exporting country, to see all information that is relevant to the defence of their interests and not confidential within the meaning of Article 13, and that it is used by the Commission in the anti-dumping investigation.
5. (a) For the purposes of determining correctly the margin of dumping and the injury caused, the Commission may request Member States:
- to supply information,
 - to carry out all necessary checks and inspections,
 - to carry out investigations in countries which are not members of the Community; where the purpose of such investigations is to verify information provided or to obtain further details from within the undertakings concerned; they may be carried out only if the undertakings concerned give their consent and the government of the country in question has been officially notified and raises no objection;
- (b) Member States shall take whatever steps are necessary in order to give effects to requests from the Commission. They shall send to the Commission the information requested together with the results of all inspections, checks or investigations carried out;
- (c) The Commission shall forward this information to the other Member States forthwith;
- (d) Officials of the Commission shall be authorized, if the Commission or a Member State so requests, to assist the officials of Member States in carrying out their duties.
6. (a) The Commission may hear the interested parties. It shall so hear them if they have,

within the period prescribed in the notice published in the *Official Journal of the European Communities*, made a written request for a hearing showing that they may be directly affected by the result of the examination of the matter. In such case, the Commission shall give the parties an opportunity to make known their views in writing within a period which it shall set. The Commission shall, furthermore, give the parties directly interested who have so requested in writing and can show a sufficient interest, an opportunity to express their views orally;

- (b) Furthermore, the Commission shall, on request, give the parties directly concerned an opportunity to meet, so that opposing views may be presented and any rebuttal argument put forward. In providing this opportunity the Commission shall take account of the need to preserve confidentiality and of the convenience of the parties. There shall be no obligation on any party to attend a meeting and failure to do so shall not be prejudicial to that party's case.
7. (a) The provisions of this Article shall not preclude the Commission from reaching preliminary determinations, or from taking an expedited decision applying provisional measures under Article 15.
- (b) In cases in which any interested party withholds the necessary information or where the government of a country, which is not a member of the Community objects to an investigation within the meaning of paragraph 5 (a) being held in its territory, a final finding may be made on the basis of the facts available.

Article 12

Where there is no enquiry at Community level, a Member State may have an examination of the matter at national level; it shall so inform the Commission and send the results of such an investigation to the Commission. The provisions of Article 10 of this recommendation shall apply.

Article 13

1. Information received in pursuance of this recommendation shall be used only for the purpose for which it was requested.
2. Neither the Commission nor Member States, nor the officials of any of these, shall reveal any information of a confidential nature received in pursuance of this recommendation, or any information provided on a confidential basis by a party to an anti-dumping investigation, without specific permission from the party submitting such information.

3. However, if it appears that a request for confidentiality is not warranted and if the supplier is either unwilling to make the information public or to authorize its disclosure in generalized or summary form, the information in question may be disregarded, unless it can be satisfactorily demonstrated from appropriate sources that the information is correct.

4. The provisions of paragraphs 1 to 3 shall not preclude the publication of general information pursuant to Article 11 (2), and of the reasons for measures taken in pursuance of this recommendation. Such publication must take into account the legitimate interest of the interested parties that their commercial secrets should not be divulged.

Article 14

1. (a) If after consultation as provided for in Article 10 the Commission considers that protective measures are unnecessary, it shall immediately terminate the proceeding.

(b) The Commission shall inform the representatives of the exporting country and the parties directly concerned of the termination of the proceeding, it shall inform them of the reasons for termination and of the criteria applied. Unless there are special reasons against so doing, the Commission shall publish a notice of termination of the proceeding in the *Official Journal of the European Communities* if a notice opening the proceeding had been published therein.

2. (a) The provisions of the foregoing paragraph shall also apply where, during examination of the matter, the exporters give a voluntary undertaking to revise their prices so that the margin of dumping is eliminated or to cease to export the product in question to the Community, provided that the Commission, after consultations as provided for in Article 10, considers this acceptable.

(b) Where the Commission, acting in accordance with the provisions of the foregoing subparagraph, accepts the undertaking referred to therein, the investigation of injury shall nevertheless be completed if the exporters so desire or if, after consultations as provided for in Article 10, the Commission so decides. If the Commission makes a determination of no injury, the undertaking given by the exporters shall automatically lapse unless the exporters confirm it.

(c) The fact that exporters do not offer to give such undertakings, or do not accept an invitation

made by the Commission to do so, shall in no way be prejudicial to the consideration of the case. However, the Commission shall be free to determine that a threat of injury is more likely to be realized if the dumped imports continue.

(d) Where the Commission finds that the undertaking of exporters is being evaded or no longer observed or has been withdrawn and that, as a result, protective measures might be necessary, it shall forthwith so inform the Member States and shall recommence the examination of the facts in accordance with Article 11.

(e) The provisions of Article 18 (1) shall apply *mutatis mutandis* to the undertakings given by exporters on the basis of this Article. Any modification of such undertakings shall be made in accordance with the procedure laid down in this Article.

Article 15

(a) Where preliminary examination of the matter shows that there is dumping and there is sufficient evidence of injury and the interests of the Community call for immediate intervention, the Commission shall:

— having due regard to the provisions of Article 19 (3), fix an amount to be secured by way of provisional anti-dumping duty, collection of which shall be determined by the subsequent recommendation of the Commission under Article 17;

— indicate, using the description required under Article 20, the products covered by this measure;

— recommend that entry of such products for Community consumption shall be conditional upon the provision of security for the aforementioned amount.

(b) The Commission shall take such provisional action after hearing the opinions expressed in the Committee or, in cases of extreme urgency, after informing the Member States. In this latter case consultations shall take place within the Committee 10 days at the latest after notification to the Member States of the action taken by the Commission.

(c) Where a Member State requests immediate intervention by the Commission, the Commission shall, within a maximum of five working days of receipt of the request, recommend whether a provisional anti-dumping duty should be imposed.

Article 16

1. Without prejudice to the provisions of Article 18, provisional measures shall continue to operate for a period of three months; before this period expires, the Commission shall either decide on Community intervention within the meaning of Article 17 or, if so requested by the importers and exporters and if the examination of facts were still not terminated, decide on the extension of the provisional measures for a maximum of three months.

2. After the period of validity of such measures has expired, the security shall be released, to the extent of the amount secured, the definitive collection of which has not been recommended by the Commission under Article 17. Where the provisional duty is retroactively cancelled or reduced under Article 18, the security unduly obtained shall be released as promptly as possible.

Article 17

1. Where the facts as finally established show that there is dumping and injury, and the interests of the Community call for Community intervention, the Commission shall, after consultation as provided for in Article 10, address the necessary recommendation to Member States. Such recommendations shall also cover the matters set out in paragraph 2.

2. (a) Where Article 15 has been applied, the Commission shall recommend, subject to the provisions of Article 16, what proportion of the amounts secured by way of provisional duty is to be definitively collected.

(b) The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there is material injury (and not merely threat of material injury or of material retardation of the establishment of a Community industry) or that such injury would have been caused if provisional action had not been taken.

Article 18

1. (a) While the measures referred to in Article 15, 16 and 17 are in operation the Commission, at the request of a Member State or on its own initiative:

- shall examine the effects of the said measures;
- shall ascertain whether the conditions for their application are satisfied;

— if necessary, hold consultations as provided for in Article 10.

(b) Requests for such consultations to be held, accompanied by supporting evidence, may be made by exporters or by importers of the product in question, either directly to the Commission or by way of a Member State. Where the Commission receives the request, it shall inform the Member States thereof.

2. If, the Commission decides that the measures in question should be amended, revoked or annulled it shall itself forthwith amend, revoke or annul them without delay.

Article 19

1. Anti-dumping measures, whether provisional or definitive, shall normally be imposed by way of duties, on a Commission recommendation.

2. (a) Without prejudice to the provisions of Article 17 (2), such duties shall be neither imposed nor increased with retroactive effect.

(b) Such duties shall apply to all products specified in the Commission measure which, after entry into force of such measure, are entered for Community consumption. For this purpose, the date of acceptance by the customs authorities of the declarant's statement of his intention to enter the goods for consumption shall be determinant.

(c) Where a product is imported into the Community from more than one country, duty shall be levied at an appropriate amount on a nondiscriminatory basis on all imports of such product found to be dumped and causing injury.

3. The amount of an anti-dumping duty, whether definitive or provisional, shall not exceed the margin of dumping established, or, in the case of a provisional duty, the margin of dumping provisionally determined; it should be less than the margin if such lesser duty would be adequate to remove the injury.

4. (a) Where an importer can show that the products which he has entered for Community consumption were not dumped, or where the margin of dumping is lower than that on which the Commission recommendation was based, the anti-dumping duties collected on those products shall be returned to him in whole or in part; where provisional measures were taken, the same shall apply in respect of the release of securities.

(b) For this purpose the importer may, within three months of the date on which the products were entered for consumption, submit an application to the Member State in whose territory they were so entered. That Member State shall forward the application to the Commission as soon as possible, together with an opinion as to its merits. The Commission shall inform the other Member States forthwith. If within one month of receipt of this communication the Commission has not, on its own initiative or at the request of another Member State, raised any objection, the Member State in question shall decide upon the matter in accordance with the opinion which it communicated to the Commission. In all other cases the Commission shall, after hearing the opinions expressed within the Committee, decide whether and to what extent the Member State should grant the application.

5. Where the second indent of Article 4 (5) has been applied, the Commission shall, after consultation as provided for in Article 10, give exporters an opportunity to cease dumping on the competitive market concerned. In such cases, if an adequate undertaking is promptly given, the Commission shall not take provisional measures. However, if such an undertaking is not given promptly or is not fulfilled, the Commission may, in respect of the Community as a whole, impose a provisional or definitive duty.

6. Anti-dumping proceedings shall not constitute a bar to customs clearance of the product concerned.

Article 20

1. The description of any product covered by a measure provided for in the foregoing Article shall include:

- (a) tariff description ;
- (b) commercial description ;
- (c) country of origin or export ;
- (d) name of supplier.

2. If several suppliers from the same country are involved, and it is impracticable to name them all, the product may be described by the particulars referred to in (a), (b) and (c) of the foregoing paragraph. If several suppliers from more than one country are involved, it shall be sufficient to give, in addition to the particulars set out in (a) and (b), details either of all the suppliers involved, or, if this is impracticable, of all the supplying countries involved.

3. In the absence of any special provisions to the contrary adopted when a definitive or provisional anti-dumping duty was imposed, the rules on the common definition of the concept of origin and the relevant common implementing provisions shall apply.

Article 21

Anti-dumping duties shall be collected by Member States in the form, at the rate and according to the other criteria laid down when the duties were imposed, and independently of the customs duties, taxes and other charges normally imposed on imports.

TITLE II

Bounties, subsidies and countervailing duties

Article 22

Countervailing measures, normally in the form of duties, on a Commission recommendation may be imposed on products in respect of which bounties or subsidies are granted in their country of origin or export if their introduction into Community commerce causes or threatens material injury to an established Community industry or materially retards the establishment of such an industry. The provisions of Article 3 (5) shall apply correspondingly.

Article 23

The amount of any countervailing duty, whether definitive or provisional, shall not exceed an amount equal to the estimated, or, in the case of a provisional duty, the provisionally estimated, bounty or subsidy granted directly or indirectly in the country of origin or export on the manufacture, production or export of the product concerned, including any special subsidy to the transportation of the product.

Article 24

No product shall be subject to both anti-dumping and countervailing duties for the purpose of dealing with one and the same situation arising from dumping or from the granting of any bounty or subsidy.

Article 25

The provisions of Article 6 to 21 shall apply correspondingly to this Title.

TITLE III

Final provisions

Article 26

Member States shall take all appropriate measures to allow governments to implement, within the time limits laid down, the obligations which devolve upon them concerning protection against dumping, or the granting of bounties or subsidies, under the terms of this recommendation. They shall accordingly inform the Commission forthwith. The Commission shall immediately communicate this information to the other Member States.

Article 27

This recommendation shall be notified to the Governments of the Member States and published in the *Official Journal of the European Communities*.

It shall enter into force in respect of each Member State with effect from the date of its publication in the *Official Journal of the European Communities*.

Done at Brussels, 15 April 1977.

For the Commission

The President

Roy JENKINS