

## GLOBAL EUROPE – 295

### Europe's Trade Defence Instruments in a changing global economy

#### A Green Paper for public consultation

#### Questionnaire

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Organisation/individual belonging to the following category	public administration <input checked="" type="checkbox"/> Community producers Users Consumers Importers Law firm University Other (please specify)
If organisation, please provide some economic key figures, e.g. turnover and employment and any other figure that you consider relevant.	

Replies to the questionnaire should reach the Commission by **31 March 2007** at: [Trade-tdi-green-paper@ec.europa.eu](mailto:Trade-tdi-green-paper@ec.europa.eu). Comments received will be made available on-line unless a specific request for confidentiality is made, in which case only an indication of the contributor will be given.

**Question 1: What is the role of trade defence instruments in the modern global economy? Do trade defence instruments remain essential in order to ensure respect for international trade rules and to protect European interests? Should the EU consider how they might be improved?**

“Trade defence instruments are a long-standing and integral part of the GATT/WTO trade system. They are equally an integral and long-standing feature of EU trade policy. For WTO and the EU, TDI represents the promotion and maintenance of “fair competition”

Periodically – and most appropriately in the Multilateral Trade Rounds – reflection processes typically start from unjustified negative assumptions with regard to “protectionism”. Upon closer understanding, governments in the WTO; Member States in the EU; and commercial operators conclude that refinements not major restructuring of the trade defence instruments are needed.

However, as competition intensifies with globalisation, new business realities such as the need to address shareholders and stakeholders’ interests and rights as well as conform with internationally recognised social and environmental norms need to become factors for consideration. Equally unfair business practices such as dual-pricing, artificial state fixing of resources and restrictive supply practices do need to be considered and addressed.

Fundamentally the EU regime works; it is fair and balanced to all parties. In fact, it is a model of best practice and WTO compliance.

Certain special features of the EU anti-dumping regime such as the lesser-duty rule and the Community Interest clause make the EU regime the most liberal regime in the world. By comparison the USA, Australia and Canada all have far tougher regimes and far tougher measures.

Under no circumstances, therefore, can the EU fertilizer industry operating in a global commodity marketplace accept that the EU anti-dumping regime is protectionist or that it merits any weakening of regime or methods setting up measures.”

**Question 2: Should the EU make greater use of Anti-Subsidy and Safeguard instruments alongside its Anti-Dumping actions? Should the Commission, in particular circumstances, be ready to initiate more trade defence investigations on its own initiative provided it is in possession of the required evidence?**

“Each instrument should be applied on its own merits according to WTO and EU laws.

When these instruments can not be worked to solve problems of unfair competition, the EU should endeavour to produce new instruments. In the case of energy intensive industries such as fertilizers, the correction of dual-pricing or artificial pricing of gas or restricted supply of gas is extremely problematic. Here consideration should be given to the development of new instruments especially a new TDI to address dual-pricing. All levels of potential application should be investigated, i.e. WTO; bi-lateral and unilateral as appropriate.

Ex-officio action by the Commission should be greater used. The burden on industry to produce a trade complaint is enormous.

It is notable that it takes EFMA 6 to 9 months to produce a trade complaint for DG Trade while it takes 2-10 days to produce a state aid complaint for DG Competition”

**Question 3: Are there alternatives to the use of trade defence instruments in the absence of internationally agreed competition rules?**

Today there are no practical alternatives to trade defence instruments. All attempts to date to address international competition rules in a WTO framework have failed.

The EU's stronger pursuit of an offensive trade policy in the Global Europe package is also not a real viable alternative.

Indeed, the EU promoting its new Global Europe trade policy must have a complete and comprehensive coherency between the offensive and defensive activities and instruments of the European Union. Gearing EU trade policy only toward the offensive side of trade policy defies objective realities in world markets.

Under no circumstances can EFMA accept a weakening of trade defence instruments and thereby the unilateral disarmament of the EU and its industries.

EFMA has already experience some very unconventional Commission proposals with regard to sunset proceedings on anti-dumping.

**Question 4: Should the EU review the current balance of interests between various economic operators in the Community interest test in trade defence investigations? Alongside the interests of producers and their employees in Europe, how should we take into account the interests of companies which have retained significant operations and employment in Europe, even though they have moved some part of their production out of the EU? How should we take into account the interests of importers or producers who process affected imports?**

EFMA supports maintenance of current system. All active interested parties including users, e.g. farmers have been able to put their political or economic interests into the investigation process. The introduction of opening test is yet another burden on the Community industry and it would probably lead to a further politicisation of the anti-dumping opening process.

Modulation of anti-dumping measures is not necessary when near uniquely in the EU regime, the lesser duty rule applies.

The system especially with regard to dumping, injury and causality criteria and evaluations is already heavily weighted on EU industry's interventions and workings. The Community interest test should remain a domain where other parties should make interventions within the relevant (and already generous) time periods.

The related party clause addresses all forms of company relationship inside and outside the EU. It is long established in customs and anti-dumping proceedings and we see no reason why EU customs and anti-dumping laws on "outside interests" should change.

Ultimately companies will define their interests and choose their positions.

Ultimately, anti-dumping law is WTO – international public law based.

In conclusion the existing rules especially with regard to related parties are well established – workable – and respected.

**Question 5: Do we need to review the way that consumer interests are taken**

**into account in trade defence investigations? Should the Commission be more proactive in soliciting input from consumer associations? How could such input be weighted? How could the impact of trade defence measures on consumers be assessed and monitored?**

Consumer organisations have the right to establish themselves as interested parties.

Consumer organisations should be treated equally according to their interested party status; there is absolutely no need to provide special or preferential rights or obligations.

There is a difference between industry users and wider consumer interests. This however can still be addressed and accommodated for within the existing investigation/consultation proceedings and of course within the Community Interest evaluation.

**Question 6: Should the EU include wider considerations in the Community interest assessments in trade defence investigations, such as coherence with other EU policies? With regard to development policy, should the EU make a formal distinction between least developed countries and developing countries in the application of trade defence measures?**

#### **Trade Policy Coherency**

There must, above all, with the EU promoting its new Global Europe trade policy, be a complete and comprehensive coherency between the offensive and defensive activities and instruments of the European Union. Gearing EU trade policy only toward the offensive side of trade policy defies objective realities in world markets.

Under no circumstances can EFMA accept the unilateral disarmament of the EU's trade defence instruments. EFMA has already experience some very unconventional Commission proposals with regard to sunset proceedings on anti-dumping.

We feel equally strongly that the EU should robustly pursue all multilateral – bi-lateral and unilateral means to promote and safeguard industrial success and growth in Europe.

It makes absolutely no sense for the offensive and defensive trade policy staff of the Commission to find the same “problems” and not agree the same “solutions” at the source country point or at the EU frontier.

It is therefore imperative that the EU understand specific sectors' international trade problems and address them with a coherent offensive and defensive set of options and solutions. To some extent, the EU has adopted this approach on nitrogen fertilizers with some success. However, the offensive solutions are slow moving while the EU industry continues to suffer from only partially effective trade defence measures based on traditional formats.

**Health – Safety and Environmental standards and expenditure**

The EU fertilizer industry significantly losing profits due to unfair trade will also be hampered from making investments in the environmental measures necessary to meet the desired Community goals on climate change and environmental standards

On the other hand, it must be recognised that the EU industry operating under the *acquis communautaire* is operating to HSE standards amongst the highest in the world. This and competitors' "free-riding" or abdication from widely prevalent multilateral environmental agreements, e.g. the Kyoto Convention should be factors for at least consideration when applying trade defence measures.

**Social factors:** as in the case already on the EU's System of Generalised Preferences for developing countries, there should be, at least, consideration in terms either of incentives or penalties for countries not complying or adhering to established ILO standards.

**Energy policy:** where the EU can identify non-compliance or rejection of standard supply conditions, e.g. Russian's refusal to ratify the Energy Charter then such overtly restrictive policies on the supply and development of supply should certainly be considered in the evaluation required for setting up trade defence measures.

#### **Correction of dual-pricing**

Firstly, the European fertilizer industry reliant upon natural gas for 40% to 70% of total manufacturing costs does support the re-enforcement of the EU trade defence instruments to address the injurious dual-pricing of gas benefiting major producers in those areas that supply gas to the European Union. Creative remedies must now be found by the EU to solve the dual – pricing problem. This is especially as the international institutions such as WTO are presently not fully competent or effective in handling energy supply issues.

EU authorities now should consider the establishment of a dedicated dual-pricing trade defence instrument in the delayed Doha Round of trade negotiations. Even more important – given difficulties that such an initiative may have in the WTO arena – the EU should address dual-pricing practices and the correction of dual-pricing within the EU's new bi-lateral treaty relations with "neighbours" in the Former Soviet Union and the Euro-Med region.

There is absolutely no doubt that the current employment of the anti-dumping instrument to correct dumping arising from dual-pricing must be maintained and even strengthened.

It is very timely given the growing unfair and unjustifiable difference between market prices for gas in the OECD with the state fixed gas prices in producer / supplier countries that the European Union actually strengthens its trade defence instruments. We request that the current "reflection process" take full account of the injurious impact of state fixed and dual-pricing of gas, feedstocks and energy supplies.

EFMA on behalf of the EU nitrogen fertilizer industry which has suffered predatory and constant dumping campaigns based off dual-pricing policies suggests that the appropriate counter to such related and dual pricing practices should be the

imposition of duties at the dumping rate and the removal, in these cases, of the lesser duty rule.

Similar gas and hydrocarbon practices such as artificial state fixing and dual-pricing prevail in other Former Soviet Union countries, North Africa and the Middle East. Whenever such energy or feedstock pricing actually injures EU manufacturing abilities and goods and employment, the EU must employ stronger and more effective trade defence instruments.

**Development policy:** as an industry dedicated to food supply and living standards, the EU fertilizer appreciates the need to assist developing countries truly in need of assistance.

It makes absolutely no sense to include hydrocarbon rich countries in the developing country status.

Equally important it makes no sense to categorise countries with state of the art (fertilizer) technology as developing when in fact they are “leading edge”.

**Question 7: What kinds of economic analysis might help in making these assessments?**

The Commission and Member States have existing resources that can be used to make comparative analyses on energy pricing policies; social – ILO standards; HSE standards and expenditure;

Within the Commission better analysis of the “root problems” can be done by desk officers and the Missions. This information can be used by TDI investigations.

Many Member State missions have commercial departments which can assist understanding local country distortions and / or artificial practices that promote unfair trading to the EU.

**Question 8: Should it be explicitly foreseen that the level of proposed measures might be adjusted downwards following the results of the Community interest test in trade defence investigations? Should the EU explicitly allow for exclusion of certain product types under Community interest considerations? If so, what criteria should be applied?**

The Community industry is almost uniquely in world terms subjected to a reduction of measures due to the lesser duty rule. It is not acceptable that there should be any further reduction.

Exclusion of product types is likely to lead to circumvention or other forms of malpractice.

**In general, better clarification and re-enforcement of ANTI-CIRCUMVENTION provisions**, e.g. the CEC has recently moved to use Product Scope proceedings to cover certain types of circumvention and malpractice proceedings are required.

However, these proceedings and others to correct circumvention are time-consuming and thus involve injury to the Community industry. Prevention rather than prosecution should be the norm. It should be made clear that circumvention by geographic origin or product is not correct or acceptable and that it will be severely punished.

**Better CEC – Member State relations on ENFORCEMENT.** There is a need to legally obliged Member States Customs Unions to co-operate with CEC Trade Defence service on enforcement of payments on AD duties; or other issues, e.g. compensation in price undertakings.

**Question 9: Should the EU seek to have WTO rules changed to allow Community interest tests to be used at the complaints stage in Anti-Dumping and Anti-Subsidy investigations? Are there other situations where the community interest test would be appropriate – for example before the initiation of expiry reviews?**

EFMA supports maintenance of current system. All active interested parties including users, e.g. farmers have been able to put their political or economic interests into the investigation process. The introduction of opening test is yet another burden on the Community industry and it would probably lead to a further politicisation of the anti-dumping opening process.

**Question 10: Are viability assessments relevant in reaching decisions on using trade defence instruments? If so, what criteria should be used in assessing the viability of EU industries in trade defence investigations, e.g. level of production, employment, market share?**

In reality viability in the marketplace is an evaluation and decision for a company Board often in consultation with shareholders and stakeholders, e.g. employees.

**Question 11: Should the EU consider consultations with exporting third countries after receiving complaints and prior to launching Anti-Dumping investigations?**

No. This can be commercially damaging in a transparent commodity market. It will simply result in more injury to the EU industry.

**Question 12: Should the EU more specifically foresee the use of the Anti-Subsidy instrument in cases involving companies in transition economies that receive market economy treatment?**

Each trade defence instrument should be applied as appropriate.

**Question 13: Should the EU review the 'standing requirements' for the definition of Community industry in Anti-Dumping and Anti-Subsidy cases? Is the level of support needed to endorse a complaint and thus launch an investigation appropriate? Should we review the possibility of excluding companies which they import or are related to exporters from standing assessments?**

The current rules and practice on "standing" have worked and are workable.

The current rules on "related party" are well established in customs and anti-dumping law.

**Question 14: Should the EU change the de-minimis thresholds (in percentage and absolute terms) that currently apply to dumping and injury in trade defence investigations?**

EFMA handling commodity product cases would oppose raising the 1% market share because even 1% can damage a market. A market can collapse if there is sufficient available export capacity to promise ever-increasing supplies and increasing market share. This is often the case.

To be efficient all the thresholds must be taken in relation to the available export capacity directed toward the EU.

**Question 15: Should the Commission refine the approach on "start-up costs" for dumping calculations in Anti-Dumping investigations in order to give a longer "grace period" to exporters in start-up situations?**

No. Start-ups for capital intensive industries often involve deliberate dumping campaigns in order to gain immediate sales and market positions.

**Question 16: Are there other changes to the dumping margin calculation methodology in Anti-Dumping investigations – for example existing rules on the "ordinary course of trade-test" – that need to be considered?**

EU practice on the ordinary course of trade follows the WTO reasoning. Any problems can be challenged in the investigations and ultimately in the EU Courts or at the WTO.

**Question 17: Should the EU refine the provisions on the treatment of new exporters in Anti-Dumping and Anti-Subsidy investigations? Should the EU introduce the possibility of dealing with newcomers that start to operate during the investigation of the main case more expeditiously?**

Newcomers – especially those artificially created to avoid trade defence actions must be addressed quickly and efficiently by the administering authorities.

In a transparent commodity market it is imperative that trade defence action is first time effective.

**Question 18: Is evidence of restructuring by an EU industry in any way relevant in Anti-Dumping and Anti-Subsidy investigations? If yes, in what way, and at what stage?**

It can be relevant when the EU industry has re-structured and proven that it is newly efficient and able to compete with greater productivity results.

It makes no sense that re-structuring and productivity gains should be lost to unfair trading practices.

**Question 19: What are the particular obstacles for SMEs to participate in trade defence investigations and how could they be addressed?**

Trade complaints are very time consuming for all involved. More specifically it can be very difficult to find dumping information and it can be difficult to supply product specific injury information.

**Question 20: Bearing in mind that any shortening of deadlines could impose limitations on the conduct and transparency of investigations, should the EU consider shortening the deadlines in Anti-Dumping and Anti-Subsidy investigations within which it must decide whether or not to impose provisional measures? Should these deadlines be made more flexible?**

**Faster investigations/Faster introduction of provisional anti-dumping measures, i.e. 6 not 9 months is essential.** Industry suffers one year injury; then puts complaint together for 6-9 months; then CEC takes 9-12 months to put provisional measures in. This is 2 years 3 months before any relief from injury. Injury can actually get worse during investigation as unfair trade floods the market before measures are applied.

**Sect oral solutions: the Nitrogen Case**

Where a whole sector's welfare and competitive position is under threat from obvious dumping or subsidy situations, there should be recourse to consideration of a sect oral type solution. The EU nitrogen fertilizer industry is fundamentally challenged by constant nitrogen dumping by countries in the Former Soviet Union – most notably Russia.

The constant resort to product specific solutions is piecemeal, limited and unsatisfactory. More constructive solutions relevant to each sector's character should be assessed. For the nitrogen fertilizer industry a nitrogen type solution

makes sense.

For the European Union it makes sense that the nitrogen fertilizer industry which currently greatly contributes to the food security, food quality and agricultural community's welfare should be defended against unfair trade. Policy makers and law enforcers in the EU must note that the fertilizer manufacturing industry in EU can only commit to the develop of new EU policy initiatives such as the promotion of bio-fuels with obvious energy security and agricultural economy benefits – if it can be assured that free and fair market conditions on its own EU Single Market are secured.

**Question 21: Should the EU make greater use of more flexible measures in Anti-Dumping and Anti-Subsidy investigations?**

- It is imperative that the EU understand specific sectors' international trade problems and address them with a coherent offensive and defensive set of options and solutions. To some extent, the EU has adopted this approach on nitrogen fertilizers with some success. However, the offensive solutions are slow moving while the EU industry continues to suffer from only partially effective trade defence measures based on traditional formats.

**Question 22: Do EU measures in Anti-Dumping and Anti-Subsidy investigations need to be adapted so as to take better account of products with a long order or shipment time? If yes, how?**

The time taken between opening an investigation and applying provisional anti-dumping duties is normally 9 months. This is quite adequate enough time for commercial operators to make logical decisions.

**Question 23: Should it be made explicitly possible for the duration of definitive measures in Anti-Dumping and Anti-Subsidy investigations to be shorter than 5 years? If yes, in what type of situations would a shorter duration of measures be justified?**

The WTO system stipulates five years as the reasonable time period. Given that EU industry can be suffering injury for over 2 to 3 years before the effective relief from injury the five year period is certainly not too long.

If there is justification for a shorter period of application then logically and legally the exporter/producer and /or importers can request a change circumstance review.

**Question 24: Should duties collected beyond the 5-year duration of the measures in Anti-Dumping and Anti-Subsidy investigations be reimbursed if the expiry review concludes that measures are not to be continued?**

The existing system allows for refunds and reviews when justified. There is no obvious need to change the current system here.

**Question 25: Should expiry reviews in Anti-Dumping and Anti-Subsidy investigations be timed to end on the fifth anniversary of measures rather than to start on that date?**

The current system is WTO based, i.e. all signatories apply the same basic rules. The Community industry typically suffers up to 2-3 years injury before anti-dumping measures actually start to provide relief from injurious dumping. This factor alone makes the shortening of the sunset timings unacceptable.

**The profound and deep Nature of Injury arising from Unfair Trade**

EU industry's sufferance of injury represents a significant loss of profits – profits lost forever! This is extremely harmful to the competitive position of the EU industry.

Profit reductions or losses mean that R&D, innovation and business development efforts of manufacturing companies committed to high quality agri-food development are harmed and cut-back. Traders and importers are rarely interested in promoting science, R&D and quality developments for European agriculture; the local manufacturers are.

The EU fertilizer industry significantly loosing profits due to unfair trade will also be hampered from making investments in the environmental measures necessary to meet the desired Community goals on climate change and environmental standards

Precise and appropriate consideration needs to be taken on the profitability issue with regard to allow the initiation of cases and also the setting up of measures which truly take account of the profit required to stay in the business long-term and satisfy all shareholders and stakeholders. The EU system must be revamped to take full account of contemporary financial realities.

**Question 26: Should the EU increase thresholds for expiry reviews in Anti-Dumping and Anti-Subsidy investigations? For example should the EU consider introducing the "threat of injury"- standard instead of the "likelihood of recurrence"?**

The current system is based on WTO rules. Why should the EU raise thresholds

here higher than other major economic blocs, e.g. USA, India etc.

The sunset application procedure is already very rigorous and demanding upon the Community industry. It typically takes 6-9 months to make up the formal Application and often involves a weighty world market evaluation.

The distinction made above between “threat of injury” and “likelihood of recurrence” is a nuanced one for a commodity industry. Small shipments or tonnages can be quoted many times over to create demand for dumped products.

**Question 27: The Commission is going to create the position of a hearing officer for trade defence investigations - what precise functions should such a person carry out?**

This is a welcome formalisation of the existing system.

**Question 28: Should the Commission conduct public hearings in Anti-Dumping investigations for decisions to award country-wide Market Economy Status to a country?**

The evaluation should be based on objective substantive grounds and best available information. Whether this is done by public or private means is immaterial. The objective criteria are established.

**Question 29: Should there be greater openness regarding the working of the Anti-Dumping Committee, e.g. publication of its agenda and/or the minutes of its meetings?**

This is a matter for governments to decide.

- **EFMA is opposed to any form of “politicization”** of the EU Basic Anti-dumping legislation. The established WTO and closely related EU laws together with verified economic facts of a case must be the determinant factors with regard to the establishment of all defensive measures.
- **Anti-dumping must remain a legal action – not a political one.** The “rule of law” respecting rights and obligations must prevail. Otherwise the “rule of

political power” will result in a regressive spiral of ill-feeling, protectionism and “beggar thy neighbour” trade policies and practices.

**Question 30: Would it be desirable for the non-confidential files in trade defence investigations to be accessible via the internet? Would intermediary solutions be more appropriate – for example the publication of a file index?**

It is desirable that non-confidential files are made easily available to the interested parties. There is no reason to make the files publicly available to parties outside the definition of interested party, e.g. media.

**Question 31: Should current institutional arrangements for adopting Anti-Dumping, Anti-Subsidy and Safeguard measures be maintained? Are there ways to improve the way those decisions are taken?**

The present system is heavily weighted upon the Commission’s powers of proposal and the Commission special administrative authority with regard to investigation.

EFMA proposes the following improvements:-

- Commission decisions on initiation/non-initiation should always be put to the Advisory Committee with 10 days (not 5 days) notification; any Member State should have the right to present complaints on behalf of industry.
- Commission proposals on measures announced in General Disclosure documents should allow for a consultation period of one month – at minimum. Presently review proceedings only typically allow for 10 days. For original proceedings especially at provisional stage the consultation period is better. In short, however, all consultation periods should be one month.
- EFMA welcomes the introduction of the Hearing Officer and hopes this post will be able to challenge the disclosed and undisclosed findings of the investigation, i.e. will be able to gain access to confidential information if this is necessary to confirm or contradict the Commission’s public disclosure.
- The timetable of investigation proceedings should be published to all interested parties with a view to optimising the best timing for Oral Hearings.
- Judicial review, i.e. Court actions need to be quicker to open and close;
- Consistent with its Treaty powers, the Commission has professionally administered the WTO/EU trade defence laws comparable to those in other major economies, e.g. USA, Australia, Canada etc.
- EFMA is totally opposed to the “politicisation” of anti-dumping cases and

policy. Thus while EU anti-dumping policy is part of the EU commercial trade policy its own legal nature and criteria must be protected and respected.

**Question 32:** Is there any other aspect of the EU's trade defence instruments that you would like to see addressed?

**Correction of dual-pricing**

Firstly, the European fertilizer industry reliant upon natural gas for 40% to 70% of total manufacturing costs does supports the re-enforcement of the EU trade defence instruments to address the injurious dual-pricing of gas benefiting major producers in those areas that supply gas to the European Union.

Creative remedies must now be found by the EU to solve the dual – pricing problem. This is especially as the international institutions such as WTO are presently not fully competent or effective in handling energy supply issues.

EU authorities now should consider the establishment of a dedicated dual-pricing trade defence instrument in the delayed Doha Round of trade negotiations. Even more important – given difficulties that such an initiative may have in the WTO arena – the EU should address dual-pricing practices and the correction of dual-pricing within the EU's new bi-lateral treaty relations with “neighbours” in the Former Soviet Union and the Euro-Med region.

There is absolutely no doubt that the current employment of the anti-dumping instrument to correct dumping arising from dual-pricing must be maintained and even strengthened.

It is very timely given the growing unfair and unjustifiable difference between market prices for gas in the OECD with the state fixed gas prices in producer / supplier countries that the European Union actually strengthens is trade defence instruments. We request that the current “reflection process” take full account of the injurious impact of state fixed and dual-pricing of gas, feedstocks and energy supplies.

EFMA on behalf of the EU nitrogen fertilizer industry which has suffered predatory and constant dumping campaigns based off dual-pricing policies suggests that the appropriate counter to such related and dual pricing practices should be the imposition of duties at the dumping rate and the removal, in these cases, of the lesser duty rule.

Similar gas and hydrocarbon practices such as artificial state fixing and dual-pricing prevail in other Former Soviet Union countries, North Africa and the Middle East. Whenever such energy or feedstock pricing actually injures EU manufacturing abilities and goods and employment, the EU must employ stronger and more effective trade defence instruments.

### **The profound and deep Nature of Injury arising from Unfair Trade**

EU industry's sufferance of injury represents a significant loss of profits – profits lost forever! This is extremely harmful to the competitive position of the EU industry.

Profit reductions or losses mean that R&D, innovation and business development efforts of manufacturing companies committed to high quality agri-food development are harmed and cut-back. Traders and importers are rarely interested in promoting science, R&D and quality developments for European agriculture; the local manufacturers are.

The EU fertilizer industry significantly losing profits due to unfair trade will also be hampered from making investments in the environmental measures necessary to meet the desired Community goals on climate change and environmental standards

Precise and appropriate consideration needs to be taken on the profitability issue with regard to allow the initiation of cases and also the setting up of measures which truly take account of the profit required to stay in the business long-term and satisfy all shareholders and stakeholders. The EU system must be revamped to take full account of contemporary financial realities.

### **Sectoral solutions: the Nitrogen Case**

Where a whole sector's welfare and competitive position is under threat from obvious dumping or subsidy situations, there should be recourse to consideration of a sectoral type solution. The EU nitrogen fertilizer industry is fundamentally challenged by constant nitrogen dumping by countries in the Former Soviet Union – most notably Russia.

The constant resort to product specific solutions is piecemeal, limited and unsatisfactory. More constructive solutions relevant to each sector's character should be assessed. For the nitrogen fertilizer industry a nitrogen type solution makes sense.

For the European Union it makes sense that the nitrogen fertilizer industry which currently greatly contributes to the food security, food quality and agricultural community's welfare should be defended against unfair trade. Policy makers and law enforcers in the EU must note that the fertilizer manufacturing industry in EU can only commit to the develop of new EU policy initiatives such as the promotion of bio-fuels with obvious energy security and agricultural economy benefits – if it can be assured that free and fair market conditions on its own EU Single Market are secured.

### **Profit Ratings: More Business Realism and Better Financial Methods**

Still today CEC makes a subjective and discretionary judgement on the normal level of profit of the Community industry. This normal profit is a key component part of the injury margin evaluation which under the lesser duty rule can set up the level of the measure.

The CEC should use corporate and financial data and analysis over the business

cycle or even several business cycles to assist the determination of the appropriate profit levels. The typical 4 year reference period is often not representative as it includes two years of injury caused by dumping.

Furthermore, independent and EU industry evidence should be sought by the Commission to make a proper profit rating. There have been improvements in the data and information requested by the Commission, i.e. ability to raise capital, return on investment indicator and profit required by the industry. A vital indicator for capital intensive industries however is the return on capital employed as a profit indicator (ROCE). This is the most appropriate profit indicator in a capital intensive business and it should therefore be fully incorporated into the Commission's profitability evaluation.

EFMA succeeded to go from 5 to 8 % but only after lengthy lost Court cases and heavy interventions in investigations. The better 8% return on sales (ROS) allocation by the CEC for the EU industry is still not a realistic normal profit level in the modern corporate world for capital intensive industry. Even more significantly, EFMA has presented empirical evidence to show ROS levels well above the Commission's 8% ROS benchmark. Such standard objective information should not be allowed to be discounted by the Commission's discretionary judgement.

The position paper is a complimentary contribution to the above questionnaire response.



## **EFMA POSITION ON THE FUTURE DEVELOPMENT OF EU BASIC ANTI-DUMPING REGULATION**

**29<sup>TH</sup> March 2007**



**Trade Defence is an Integral and Legitimate Feature of WTO & EU trade policy**  
Periodically reflection processes on anti-dumping and other Trade Defence Instruments typically start from unjustified negative assumptions with regard to “protectionist” workings and outcomes of anti-dumping and Trade Defence proceedings.

Invariably upon closer understanding, governments in the WTO; Member States in

the EU; and commercial operators everywhere conclude that refinement and improvements are warranted –mainly to up-date the regulations to contemporary economic realities.

Fundamentally the EU regime works; it is fair and balanced to all parties. In fact, it is a model of best practice and WTO compliance.

Certain special features of the EU anti-dumping regime such as the lesser-duty rule and the Community Interest clause make the EU regime the most liberal regime in the world. By comparison the USA, Australia and Canada all have far tougher regimes and far tougher measures.

Under no circumstances, therefore, can the EU fertilizer industry operating in a global commodity marketplace accept that the EU anti-dumping regime is protectionist or that it merits any weakening of regime or methods setting up measures.

On the contrary, EFMA calls for new perspectives and new drives to address issues of real contemporary business reality, i.e. a full appreciation of the “deep injury” suffered by industry from unfair trade; better consideration of industry’s profitability requirements; and a robust correction of dual-pricing practices including serious consideration of a dedicated trade defence instrument able to correct dual-pricing practices.

There must, above all, with the EU promoting its new Global Europe trade policy be a complete and comprehensive coherency between the offensive and defensive activities and instruments of the European Union. Gearing EU trade policy only toward the offensive side of trade policy defies objective realities in world markets.

Under no circumstances can EFMA accept the unilateral disarmament of the EU’s trade defence instruments. EFMA has already experience some very unconventional Commission proposals with regard to sunset proceedings on anti-dumping.

We feel equally strongly that the EU should robustly pursue all multilateral – bi-lateral and unilateral means to promote and safeguard industrial success and growth in Europe.

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EU authorities now should consider the establishment of a dedicated dual-pricing trade defence instrument in the delayed Doha Round of trade negotiations. Even more important – given difficulties that such an initiative may have in the WTO arena – the EU should address dual-pricing practices and the correction of dual-pricing within the EU’s new bi-lateral treaty relations with “neighbours” in the Former Soviet

Union and the Euro-Med region.

There is absolutely no doubt that the current employment of the anti-dumping instrument to correct dumping arising from dual-pricing must be maintained and even strengthened.

It is very timely given the growing unfair and unjustifiable difference between market prices for gas in the OECD with the state fixed gas prices in producer / supplier countries that the European Union actually strengthens is trade defence instruments. We request that the current “reflection process” take full account of the injurious impact of state fixed and dual-pricing of gas, feedstocks and energy supplies.

EFMA on behalf of the EU nitrogen fertilizer industry which has suffered predatory and constant dumping campaigns based off dual-pricing policies suggests that the appropriate counter to such related and dual pricing practices should be the imposition of duties at the dumping rate and the removal, in these cases, of the lesser duty rule.

Furthermore consideration should be given to finding a way to apply an anti-dumping duty to the nitrogen component of any fertilizer benefiting from dual-pricing of natural gas, rather than to a certain fertilizer product. This could be done in the form of “gas adjustment”, a duty reflecting the level of artificial and unfair pricing of natural gas.

Similar gas and hydrocarbon practices such as artificial state fixing and dual-pricing prevail in other Former Soviet Union countries, North Africa and the Middle East. Whenever such energy or feedstock pricing actually injures EU manufacturing abilities and goods and employment, the EU must employ stronger and more effective trade defence instruments.

### **The profound and deep Nature of Injury arising from Unfair Trade**

EU industry’s sufferance of injury represents a significant loss of profits – profits lost forever! This is extremely harmful to the competitive position of the EU industry.

Profit reductions or losses mean that R&D, innovation and business development efforts of manufacturing companies committed to high quality agri-food development are harmed and cut-back. Traders and importers are rarely interested in promoting science, R&D and quality developments for European agriculture; the local manufacturers are.

The EU fertilizer industry significantly loosing profits due to unfair trade will also be hampered from making investments in the environmental measures necessary to meet the desired Community goals on climate change and environmental standards

Precise and appropriate consideration needs to be taken on the profitability issue with regard to allow the initiation of cases and also the setting up of measures which truly take account of the profit required to stay in the business long-term and satisfy all shareholders and stakeholders. The EU system must be revamped to take full account of contemporary financial realities.

### **Sectoral solutions: the Nitrogen Case**

Where a whole sector's welfare and competitive position is under threat from obvious dumping or subsidy situations, there should be recourse to consideration of a sectoral type solution. The EU nitrogen fertilizer industry is fundamentally challenged by constant nitrogen dumping by countries in the Former Soviet Union – most notably Russia.

The constant resort to product specific solutions is piecemeal, limited and unsatisfactory. More constructive solutions relevant to each sector's character should be assessed. For the nitrogen fertilizer industry whereby nitrogen manufacturing operations are constructed and the nitrogen products are sold as nitrogen to farmers - a nitrogen type trade defence solution makes sense.

For the European Union it makes sense that the nitrogen fertilizer industry which currently greatly contributes to the food security, food quality and agricultural community's welfare should be defended against unfair trade. Policy makers and law enforcers in the EU must note that the fertilizer manufacturing industry in EU can only commit to the develop of new EU policy initiatives such as the promotion of bio-fuels with obvious energy security and agricultural economy benefits – if it can be assured that free and fair market conditions on its own EU Single Market are secured.

## **EFMA'S FUNDAMENTAL POSITIONS ON TRADE DEFENCE INSTRUMENTS**

### **TECHNICAL POINTS**

- **EFMA is opposed to any form of “politicization”** of the EU Basic Anti-dumping legislation. The established WTO and closely related EU laws together with verified economic facts of a case must be the determinant factors with regard to the establishment of all defensive measures.
- **Anti-dumping must remain a legal action – not a political one.** The “rule of law” respecting rights and obligations must prevail. Otherwise the “rule of political power” will result in a regressive spiral of ill-feeling, protectionism and “beggar thy neighbour” trade policies and practices.
- **The legal nature of anti-dumping actions is well established in WTO international public law and EU law. The legitimacy for fundamental reform is best secured at the WTO level.** This is however a long process and whenever the EU can apply better administrative action by recourse to contemporary modern economic and financial practices then it should do so.
- **It should always be understood that the trade defence instruments such as anti-dumping have been a fundamental cornerstone of the GATT/WTO liberal trading system.** The unfair nature of dumping and subsidization were confirmed at the very establishment of the GATT (1947) and the WTO (1994). The well defined GATT/WTO criteria allowing for a “safety” defensive

measures have actually assisted the GATT/WTO economic liberalization process.

- **Trade defensive instruments remain necessary simply because unfair dumping and subsidization do feature in international trade. European industry and EFMA have engaged with the Commission in offensive trade policy actions, i.e. tackling trade distortions and unfair practices at the “source” of the problems.** However, the active use of WTO Accessions, leverage from bi-lateral trade Treaties, WTO TBTs and EU Trade Barriers regulation can have limited impact – and industry therefore must have effective recourse to legitimate defence at the EU frontier.
- **It is therefore imperative that the EU understand specific sectors’ international trade problems and address them with a coherent offensive and defensive set of options and solutions.** To some extent, the EU has adopted this approach on nitrogen fertilizers with some success. However, the offensive solutions are slow moving while the EU industry continues to suffer from only partially effective trade defence measures based on traditional formats.
- **The EU, with the Commission as the administering authority, continues to conduct the most WTO compliant regulation and practice in the world. The EU is by far the greatest employer of the “lesser duty rule”.** Thereby the lowest possible defensive measure at the frontier is practically applied – not the highest as is the case with the USA and many other economies.
- **The rights and obligations of all interested parties are transparent and interventions by all parties readily accommodated in EU law and in CEC practice.** The whole investigation is based upon “best available information”. EU Anti-dumping proceedings are effectively a “battle of the best information”.
- **European industry as complainant is obliged to present convincing well documented prima facie evidence of dumping causing injury.** It cannot “invent” the dumping problem or the actual volume or prices recorded in import reports.
- **The burden on industry to prove 3 key factors, i.e. dumping, causality and injury is already a major financial and managerial effort.** It is not an exercise which industry readily or enthusiastically takes.
- **The normal process of reflection and reform for anti-dumping is that the multilateral trade round of negotiations, e.g. Tokyo, Uruguay, Doha agree the key reforms; and then the EU and CEC implements the newly agreed reforms.** If there is to be an EU reflection process – independent of the Doha Round – then EFMA wishes to put forward a number of issues for reflection.

## **PRECISE AREAS FOR TECHNICAL IMPROVEMENTS**

### **Profit Ratings: More Business Realism and Better Financial Methods**

Still today CEC makes a subjective and discretionary judgement on the normal level of profit of the Community industry. This normal profit is a key component part of the injury margin evaluation which under the lesser duty rule can set up the level of the measure.

The CEC should use corporate and financial data and analysis over the business cycle or even several business cycles to assist the determination of the appropriate profit levels. The typical 4 year reference period is often not representative as it includes two years of injury caused by dumping.

Furthermore, independent and EU industry evidence should be sought by the Commission to make a proper profit rating. There have been improvements in the data and information requested by the Commission, i.e. ability to raise capital, return on investment indicator and profit required by the industry. A vital indicator for capital intensive industries however is the return on capital employed as a profit indicator (ROCE). This is the most appropriate profit indicator in a capital intensive business and it should therefore be fully incorporated into the Commission's profitability evaluation.

EFMA succeeded to go from 5 to 8 % but only after lengthy lost Court cases and heavy interventions in investigations. The better 8% return on sales (ROS) allocation by the CEC for the EU industry is still not a realistic normal profit level in the modern corporate world for capital intensive industry. Even more significantly, EFMA has presented empirical evidence to show ROS levels well above the Commission's 8% ROS benchmark. Such standard objective information should not be allowed to be discounted by the Commission's discretionary judgement.

**Faster investigations/Faster introduction of provisional anti-dumping measures, i.e. 6 not 9 months.** Industry suffers one year injury; then puts complaint together for 6-9 months; then CEC takes 9-12 months to put provisional measures in. This is 2 years 3 months before any relief from injury. Injury can actually get worse during investigation as dumpers flood the market before measures are applied.

**Consideration of the "light" complaints on State Aid / Competition Model Vs "heavy" complaints of anti-dumping.** A state aid complaint can take EFMA 2 to 10 days; an anti-dumping complaint takes 6 to 9 months.

The basic difference is that state aid / competition complaints readily accept established market and normally / readily available industry (company) statistics. The burden of investigation is truly on the Competition authorities.

The anti-dumping system requires challenge/checking of established market and industry statistics including the financial results of each individual company. While prima facie evidence is required in law, in reality, very detailed company, industry and independent third party information is required before a case can be considered for opening.

**Better Clarification and re-enforcement of ANTI-CIRCUMVENTION provisions**, e.g. the CEC has recently moved to use Product Scope proceedings to cover certain types of circumvention and malpractice proceedings. However, these proceedings and others to correct circumvention are time-consuming and thus involve injury to the Community industry. Prevention rather than prosecution should be the norm. It should be made clear that circumvention by geographic origin or product is not correct or acceptable and that it will be severely punished.

**Better CEC – Member State relations on ENFORCEMENT.** There is a need to legally obliged Member States Customs Unions to co-operate with CEC Trade Defence service on enforcement of payments on AD duties; or other issues, e.g. compensation in price undertakings.

**Improved Consultation Periods on Disclosure Documents:** the current practice of only allowing, at least, 10 days for interested parties to comment upon the findings and recommendations of the Commission does not allow for proper analysis and reply time for all interested parties.

The absolute minimum time allowed should be 30 working days.

## **NEW PROPOSALS IN THE CEC GREEN PAPER**

### **Community Interest.**

The suggestion arising is that EU industry must prove that it is in Community interest to open proceedings and to prove that the measures proposed by the CEC are justified. This would reverse current situation where other interested parties must prove it is in Community interest not to apply measures. It would also introduce an additional test for the Community industry on how to open.

EFMA supports maintenance of current system. All active interested parties including farmers have been able to put their political or economic points into the investigation process. The introduction of opening test is yet another burden on the Community interest and it would probably lead to a further politicisation of the anti-dumping opening process.

The system especially with regard to dumping, injury and causality criteria and evaluations is already heavily weighted on EU industry's interventions and workings. The Community interest test should remain a domain where other parties should make interventions within the relevant (and already generous) time periods.

### **Economic analysis including a Chief Economist**

EFMA is not opposed to the appointment of a Chief Economist. But the investigations already involved very deep economic analysis.

It is probably more productive to have working economists and accountants rather than a “figurehead” Chief Economist.

Industry spends considerable time explaining the product’s economy and that of the exporters (especially in the case of sunset proceedings). Equally industry often uses independent expert economic analysis. This type of evidence does not necessarily need to be second guessed – but rather understood by a Commission economist.

### **Identifying the causes of Dumping**

EFMA can readily identify the causes of dumping, i.e. dual gas pricing; lost local markets; foreign currency dumping; cyclical dumping etc.

However, certain exporters simply choose to dump, i.e. price discriminate or sell below cost for marketing reasons. There can even be no obvious reason for dumping – just a series of opportunistic contracts that nevertheless can be very harmful to a market and the local industry therein.

### **Increase of de minimis rules for dumping, subsidy and injury**

The de minimis thresholds are presently (2% dumping margin); subsidy margin depending on economic status of exporting country; and injury is 1% market share.

The Commission in practice already applies higher thresholds.

EFMA handling commodity product cases would oppose raising the 1% market share because even 1% can damage a market. A market can collapse if there is sufficient available export capacity to promise ever-increasing supplies and increasing market share. This is often the case.

To be efficient all the thresholds must be taken in relation to the available export capacity directed toward the EU.

### **Require Business Plan for Complainants in AD cases**

EFMA oppose this. It is for the unfair dumpers and the subsidiser to revise their business plans.

The apparent assumption that the EU industry is the laggard or failing industry is not acceptable. The EU has several of the world’s top performing plants by economic and environmental standards.

## **CONCLUDING REMARKS**

The EU fertilizer industry has proven that it can compete with all international competitors when free and fair market conditions are secured. It has shown that it can re-structure, modernize and rationalize when necessary. However any future

failure to correct unfair dumping or subsidy or dual-pricing will threaten world class state of the art plants. These plants have environmental and other standards well above competitors exploiting lower operating standards and state fixed gas prices.

The EU authorities need to address the trade problems as they appear, i.e. dumping – subsidy – dual – pricing. Offensive as well as defensive trade instruments should be employed as appropriate to the established spirit and letter of WTO and EU rules.

**END**