

**Evaluation of the responses to the public consultation on Europe's trade
defence instruments in a changing global economy**

December 2006 – March 2007

Brussels, 19 November 2007

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1. The Green Paper consultation on the EU's Trade Defence Instruments

In December 2006 the European Commission launched a public consultation on the future of the EU's trade defence instruments. It is over a decade since the functioning of the EU's trade defence instruments was last reviewed. In that time, the global economy - and the EU - have changed. The interests of Member States are now more diverse. Determining where the balance of European economic interests lies has become more complicated – and yet this is an important criterion for determining the need for trade defence action. As a result it has become more difficult to achieve consensus in Europe – as a number of controversial cases in 2005 and 2006 indicated. Yet maintaining a consensus is vital, and that means that we have to be able to show that Europe's trade defence system is as transparent and rigorous as possible and provides effectively the defence we need in the new circumstances we face. There was a wide agreement in 2006 that a review was necessary to help build a strong consensus. This consultation was part of that review. The responses will inform the proposals that the Commission plans to put forward for strengthening the EU's trade defence system in December 2007.

Assessing the responses

This was the largest public consultation ever organised on the subject. It generated strong interest in the EU and beyond. The Commission organised a public hearing on the Green Paper on 13 March 2007 in Brussels, which was well-attended and produced a lively debate. 542 replies to the consultation were received, both replying to questions asked in the Green Paper directly and setting out a wide range of additional ideas. The European Commission would like to thank all those who contributed to this public consultation.

The consultation produced a detailed picture of the range of views among respondents on Europe's trade defence instruments. Inevitably, analysis of the responses to the Green Paper requires an element of interpretation. Respondents were not always asked for direct answers to specific questions and did not always respond to every question - in some cases less than half responded or gave a clear position. Respondents were also invited to raise additional issues at the end of the consultation and many did so in some depth. Nevertheless, the picture that emerges can be described with some confidence. Where possible, views have been expressed in quantitative terms. Annexed to this paper is a quantitative table of responses to direct questions in the Green Paper.

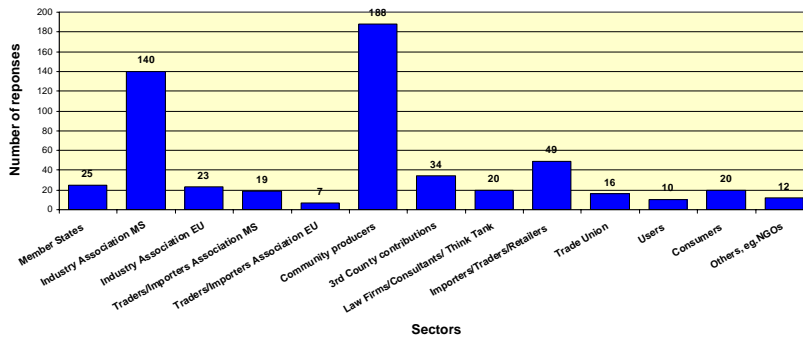
Respondents

Responses were received from a diverse range of manufacturers, retailer and import organisations, consumer groups and trade unions. As might be expected, almost two-third of the replies (351 out of 542) came from European manufacturers or from their representative organisations at the national or European level, and this is reflected in the balance of views expressed.

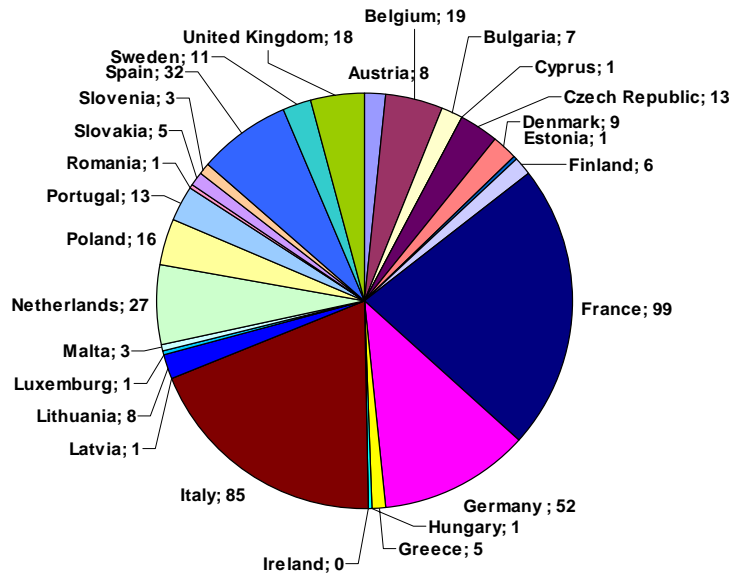
All but two Member State governments submitted responses. There were also 34 submissions from third countries, eight of which came from third country governments¹. Within the European Union, responses were received from almost all EU Member States, with French, Italian and German respondents the most active.

¹ China, Chinese-Taipei, Japan, Ukraine, Korea, Vietnam, Turkey, and Norway

Absolute numbers of responses sorted by sector
 A reply may appear in more than once if sent as coming from several sectors.



Distribution of respondent replies by Member States



2. Responses to issues raised by the Green Paper consultation

Role of trade defence instruments in a changing global economy

Almost all respondents saw no alternative to the continued use of trade defence instruments to counter anti-competitive practices in international trade (81% of respondents and 21 Member States). Most respondents were clear that trade defence should only be applied within the confines of clearly defined rules which avoid abuse but are effective in countering trade-distorting practices. The need to maintain a community interest test to ensure that measures are justified in economic terms and to take account of all the various interests of those parties directly involved was not questioned.

Respondents identified foreign subsidies as a significant source of competitive distortions which can injure EU industries. Many respondents also highlighted the fact that, unlike the United States, which has recently reversed its policy on this issue, the EU does not apply the anti-subsidy instrument against transition economies. On the specific question of whether more use should be made of the anti-subsidy instrument 30% of respondents and 12 Member States were in favour (24% of respondents and 2 Member States were opposed). A similar level of support was expressed for the *ex officio* launch of cases by the Commission where the appropriate evidence was available.

The Green Paper also asked whether more use of the anti-subsidy instrument should be made in non-market economy countries. Although almost a quarter of respondents did not comment on this question, 35% of respondents and 9 Member States were opposed and 28% of respondents and 6 Member States were in favour. Some argued that subsidy investigations should be opened against the individual firms in transition economies who had obtained market economy status.

Weighting of different EU interests in trade defence investigations

One of the major issues addressed in the Green Paper was whether the community interest test struck the right balance in weighing the interests of different parties in trade defence cases. It was also asked if the community interest test should be expanded so that issues other than narrowly defined economic considerations could be taken into account.

A majority of respondents (68% of respondents and 12 Member States) took the view that there was no need fundamentally to change the current balance of interests between the various European economic operators in the community interest test. There was however a wide range of views on possible changes to the community interest test (17% of respondents and 11 Member States favoured changing the current balance in some way) – including the possibility of greater weight for consumer interests and the use of the community interest test to justify modulation of the level of trade defence measures. Where they expressed an opinion, respondents were generally sceptical about the usefulness and feasibility of greater use of economic analysis in trade defence investigations, including use of econometric models in the community interest test (54% of respondents and 9 Member States opposed).

Most respondents also favoured retaining a relatively narrow economic test for measuring community interest (65% of respondents and 16 Member States), although some believed the scope should be broader (19% of respondents and 7 Member States).

Some respondents and Member States also favoured the development of guidelines on these issues to ensure legal certainty and increased transparency.

Initiation and conduct of trade defence investigations

Current rules require that more than 50% of those expressing an opinion must support the initiation of a trade defence case and that those expressing support must constitute at least 25% of total EU production for the product in question. Although some pressed for higher standing requirements, most responses indicated a reluctance to consider changing the current rules (72% of respondents and 16 Member States).

Some respondents felt that the current definition of community production should be reviewed to accommodate to some degree producers who have outsourced part of their

production outside the EU (11% of respondents and 8 Member States, with 51% of respondents and 9 Member States favouring no change, and more than a third of respondents and 8 Member states inconclusive or taking no position). Respondents favouring change argued that some account could be taken of the contribution made by such producers to the welfare of the Community via the value they add to products within the EU or through other activities within Europe. Currently, EU legislation is not clear on how to treat such producers, with the relevant text only noting that such producers "may" be excluded from community industry. The recent energy saving light bulbs case has highlighted the problems which can result from the lack of clarity in EU law. During this case there were further calls for guidelines to increase predictability and legal certainty.

Most respondents (69% of respondents and 16 Member States) opposed the introduction of a community interest test at the initiation stage of investigations. A majority of respondents (64% of respondents and 10 Member States) also did not favour the formal introduction of a community interest test in expiry reviews, although it is required in normal investigations, and currently used in expiry reviews, although not explicitly required.

Most respondents also opposed the introduction of higher *de minimis* standards with regard to dumping and injury (73% of respondents and 17 Member States). Currently, initiations and measures are not considered where the dumping alleged or found is below 2% or when imports from an individual country are less than 1% of consumption. Some pointed to the fact that the EU's standards were already higher than required under WTO rules.

The majority of respondents (59% of respondents and 9 Member States) were in favour of imposing provisional trade defence measures faster than the current 9 month period. However, 13 Member States opposed faster provisional measures. Some respondents emphasised the need to maintain the quality of the analysis which is a positive feature of the EU's system, especially when compared to the practice of other members of the WTO.

There was also broad agreement on the need to improve the current level of assistance given to SMEs. The general view expressed was that SMEs involved in these investigations should receive more support from the Commission and Member States (83% of respondents and 25 Member States). For example, some respondents highlighted the considerable difficulties encountered by SMEs in preparing complaints, especially where there is no pan-European association which can carry out this work. Many respondents highlighted the fact that SMEs are particularly vulnerable to competition-distorting practices by third countries

Form, level, duration and timing of trade defence measures

Most respondents (51% of respondents and 16 Member States) did not favour greater flexibility in the range of measures available to the EU in trade defence cases. There was however, some support (27% of respondents and 9 Member States) for allowing some flexibility in certain circumstances. In this respect, the *duration* of measures was identified by some respondents as an area where flexibility had been used in the past – in fact, where it had been instrumental in generating the necessary support for measures. Asked if they favoured an explicit new rule establishing flexibility on the duration of trade defence measures in certain circumstances, 12 Member States were in favour and 13 opposed. Most other respondents (72%) were opposed.

The Green Paper asked whether the treatment of new exporters should be refined in trade defence investigations. A majority of respondents (36% of respondents and 12 Member States) were opposed, concerned that better treatment of new exporters would lead to increased circumvention of measures. Others pointed out that these new exporters were usually very small companies and did not deserve the high punitive duties which are imposed at present (34% of respondents and 6 Member States favoured better terms for new importers; 21% of respondents did not answer this question).

Most respondents (70% of respondents and 18 Member States) opposed the use of viability and restructuring tests in trade defence investigations, noting that the Commission's role was not to judge whether an industry was inherently viable or not. Some respondents pointed out that restructuring plans were applied in safeguard investigations only because they are aimed at addressing dramatic shifts in the import volume of fairly traded goods, unlike the anti-dumping and anti-subsidy instruments which address competitive distortions.

Most respondents felt that duties paid after the expiry of the original five year measure should be reimbursed if an expiry review concluded that measures should not be continued (50% of respondents and 20 member States). Asked whether expiry reviews should be completed before the end of the normal 5 year period of measures, most respondents were against (63% of respondents against; 12 Member States in favour and 13 against).

Most respondents did not favour tougher standards for deciding whether to retain measures in expiry reviews (67% of respondents and 14 Member States). Changing the current 'likelihood of recurrence' test, which determines whether injury is likely to recur if measures are removed, to require that a more clear 'threat of injury' is demonstrated, was opposed by a majority.

Transparency of trade defence investigations

Few respondents questioned the value of greater transparency in trade defence investigations, though not all commented on the specific suggestions highlighted in the Green Paper.

A majority favoured the widening of the role of hearing officer (61% of respondents and 23 Member States in favour). A majority also favoured ensuring more openness in the functioning of the Anti-dumping Committee (56% of respondents and 14 Member States). Many approved of facilitating access for interested parties to all relevant information which is important for the defence of their interests, including making non-confidential files available on the internet (49% of respondents and 15 Member States). However, public hearings were opposed by most respondents (59% of respondents and 14 Member States) as were consultations with third countries prior to the initiation of measures.

Although many respondents were willing to consider in certain circumstances wider access to confidential data in trade defence cases, they were clear that great care would have to be taken to ensure that this confidentiality was preserved. Other Members of the WTO make such confidential information available to the legal representatives of interested parties throughout the investigation. Some did express concern that the increased costs of any such system should not be unreasonable, in particular for SMEs.

Institutional structure of trade defence investigations

There were a wide range of opinions among respondents on the question of whether the EU should consider changing the institutional structure for trade defence investigations. 40% of respondents and 9 Member States were satisfied with the current arrangements, while 38% of respondents and 9 Member States favoured some changes. The preferences of those favouring change varied considerably, from a small number who advocated the creation of an independent agency to those who argued that more predictability and certainty could, and should, be introduced through the drafting of guidelines to help clarify more clearly than at present the criteria that should be taken into account in trade defence cases, guide decisions, reduce uncertainty and promote consensus.

3. Other issues raised by respondents

The Green Paper consultation also asked respondents and Member States to raise other issues that the review should address.

Fraud, circumvention and IPR

Some respondents raised the issue of fraud, circumvention of measures, and the theft of intellectual property rights, and asked if they might be further discouraged via the trade defence system. Respondents argued that parties implicated in trade defence investigations should be penalised more harshly than at present if they do not participate in the investigation in a full and transparent manner, for example, by giving incorrect or misleading replies to EU investigators. Respondents argued that the same should apply to parties who illegally avoid the cost of measures or who dump goods in part through abuse of EU intellectual property rights.

Selection of normal value for non-MET companies in transition economies

When investigating companies operating in economies that have not yet obtained Market Economy Status, the EU currently uses data from a so-called analogue country to determine the appropriate value of exported goods. Some respondents pointed out that the analogue country approach – while allowed by WTO rules - may not always provide the most credible basis for determining normal value in such investigations. Some highlighted the difficulties of selecting an appropriate market economy at a similar stage of development to the country under investigation and in persuading such analogue countries to participate in the investigations. Some respondents suggested that where some individual firms in transition economies were granted market economy status because their prices and costs reflected normal market economy behaviour, these companies should be used – after having been appropriately adjusted – to determine normal value.

Faster recourse to European Courts

Some respondents advocated faster access to European Courts on the grounds that the current waiting time of two or three years for court decisions was unacceptable. One possibility suggested that an additional chamber to the Court of First Instance could be created for this purpose.

4. Conclusions

Almost all respondents to the Commission's Green Paper agreed that trade defence instruments are a vital tool for countering anti-competitive practices in international trade. The picture produced is of a trade defence system that is both necessary and, for the most part, sound, durable and effective. However, the Green Paper consultation identified a number of areas in which adaptations to EU trade defence practice would be generally recognised as useful. These related chiefly to questions of transparency, accessibility and effectiveness. A second set of issues can be identified in the Green Paper responses which are more controversial, relating chiefly to how to assess and measure the overall European interest in trade defence cases. Although these issues attract debate, the Green Paper responses made it clear that they are also central to the perception of the EU trade defence system as effective, legitimate and economically rational.

Annex: Statistical data on responses to individual questions

ALL RESPONDENTS (figures in Percentages)

| | QUESTION | Yes | No | Inconclusive | No response |
|-----|---|-----|-----|--------------|-------------|
| 1 | Do Trade Defence Instruments remain essential? | 91 | 3,7 | 2,03 | 3,14 |
| 2a | Do you favour greater use of the anti-subsidy instrument? | 30 | 24 | 33,03 | 12,18 |
| 2b | Should the Commission consider more <i>ex officio</i> launches of anti-subsidy investigations? | 30 | 24 | 33,03 | 12,18 |
| 3 | Are there any credible alternatives to trade defence instruments? | 5 | 81 | 7,01 | 7,01 |
| 4 | Do we need to review balance of interests in community interest test? | 17 | 68 | 4,8 | 10,15 |
| 5 | Do we need to review the current weighting of consumer interests? | 18 | 70 | 4,24 | 7,75 |
| 6a | Do we need to broaden the current scope of community interest test? | 19 | 65 | 4,24 | 11,99 |
| 6b | Should we distinguish between least developed and developing countries in trade defence investigations? | 9,2 | 65 | 6,83 | 18,63 |
| 7 | Is greater economic analysis required in the community interest test? | 15 | 54 | 10,15 | 20,3 |
| 8a | Should the EU have greater flexibility in setting the level of measures to reflect the community interest test? | 11 | 60 | 4,43 | 24,35 |
| 8b | Should the EU have the possibility of excluding certain product types to reflect the community interest test? | 9 | 70 | 4,06 | 16,79 |
| 9a | Should the community interest test be applied at the complaints stage? | 16 | 69 | 3,14 | 12,18 |
| 9b | Are there other situations in which the community interest test should be applied? | 15 | 64 | 4,24 | 17,16 |
| 10 | Are viability assessments relevant in trade defence investigations? | 17 | 65 | 5,54 | 12,36 |
| 11 | Should the EU consult with third countries prior to launching trade defence investigations? | 16 | 72 | 1,66 | 10,15 |
| 12 | Should the EU use the anti-subsidy instrument against MET companies in economies in transition? | 28 | 35 | 14,76 | 22,14 |
| 13a | Do we need to review the existing "standing requirements"? | 12 | 72 | 3,14 | 12,92 |
| 13b | Do we need to review the current treatment of importing firms or those related to exporters? | 11 | 51 | 4,43 | 33,21 |
| 14 | Do we need to change the <i>de-minimis</i> thresholds? | 11 | 73 | 2,21 | 14,21 |
| 15 | Do we need to refine the approach to "start-up costs" in AD investigations? | 10 | 66 | 4,24 | 20,3 |

| | | | | | |
|----|--|----|----|-------|-------|
| 16 | Are other changes required in the current calculations made in anti-dumping cases? | 14 | 56 | 3,14 | 26,01 |
| 17 | Do we need to refine the current treatment of new exporters? | 34 | 36 | 9,41 | 21,03 |
| 18 | Is evidence of restructuring in EU industry relevant in trade defence investigations? | 10 | 70 | 3,87 | 15,5 |
| 19 | Are there obstacles to SME participation in trade defence investigations and how should we address them? | 83 | 3 | 1,48 | 12,92 |
| 20 | Should provisional measures be adopted earlier? | 59 | 21 | 6,09 | 13,1 |
| 21 | Is there a need for more flexible measures in trade defence investigations? | 27 | 51 | 5,9 | 15,87 |
| 22 | Could investigations take better account of products with a longer order or shipment time? | 13 | 70 | 1,48 | 15,31 |
| 23 | Should rules explicitly allow the EU to apply trade defence measures for less than 5 years? | 19 | 72 | 2,21 | 6,83 |
| 24 | Should the EU refund of duties beyond the fifth year if a measure is repealed in expiry? | 50 | 20 | 15,68 | 14,58 |
| 25 | Should expiry reviews be concluded by the end of the fifth year of application? | 19 | 63 | 4,98 | 13,47 |
| 26 | Should there be increased thresholds for expiry reviews in trade defence investigations? | 16 | 67 | 2,77 | 14,76 |
| 27 | Should the role of the Hearing Officer be strengthened? | 61 | 18 | 4,24 | 16,05 |
| 28 | Should there be public hearings in AD investigations on country-wide MES treatment? | 13 | 59 | 9,41 | 17,71 |
| 29 | Should there be more openness regarding the working of the AD Committee? | 56 | 30 | 5,72 | 8,49 |
| 30 | Should there be internet access to non-confidential files? | 49 | 37 | 7,01 | 7,2 |
| 31 | Should we maintain the current institutional framework for TDI? | 38 | 40 | 6,09 | 15,68 |

MEMBER STATES (absolute number of replies)

| | QUESTION | Yes | No | Inconclusive | No response |
|----|--|-----|----|--------------|-------------|
| 1 | Do Trade Defence Instruments remain essential? | 22 | 0 | 3 | 0 |
| 2a | Do you favour greater use of the anti-subsidy instrument? | 12 | 2 | 10 | 1 |
| 2b | Should the Commission consider more <i>ex officio</i> launches of anti-subsidy investigations? | 13 | 6 | 4 | 2 |
| 3 | Are there any credible alternatives to trade defence instruments? | 1 | 21 | 3 | 0 |
| 4 | Do we need to review balance of interests in community interest test? | 11 | 12 | 1 | 1 |
| 5 | Do we need to review the current weighting of consumer interests? | 10 | 15 | 0 | 0 |
| 6a | Do we need to broaden the current scope of community interest test? | 7 | 16 | 0 | 2 |

| | | | | | |
|-----|---|----|----|---|---|
| 6b | Should we distinguish between least developed and developing countries in trade defence investigations? | 5 | 7 | 4 | 9 |
| 7 | Is greater economic analysis required in the community interest test? | 7 | 9 | 3 | 6 |
| 8a | Should the EU have greater flexibility in setting the level of measures to reflect the community interest test? | 8 | 14 | 1 | 2 |
| 8b | Should the EU have the possibility of excluding certain product types to reflect the community interest test? | 7 | 16 | 2 | 0 |
| 9a | Should the community interest test be applied at the complaints stage? | 3 | 16 | 3 | 3 |
| 9b | Are there other situations in which the community interest test should be applied? | 8 | 10 | 1 | 6 |
| 10 | Are viability assessments relevant in trade defence investigations? | 5 | 16 | 2 | 2 |
| 11 | Should the EU consult with third countries prior to launching trade defence investigations? | 7 | 15 | 3 | 0 |
| 12 | Should the EU use the anti-subsidy instrument against MET companies in economies in transition? | 6 | 9 | 7 | 3 |
| 13a | Do we need to review the existing "standing requirements"? | 7 | 16 | 1 | 1 |
| 13b | Do we need to review the current treatment of importing firms or those related to exporters? | 8 | 9 | 2 | 6 |
| 14 | Do we need to change the <i>de-minimis</i> thresholds? | 7 | 17 | 0 | 1 |
| 15 | Do we need to refine the approach to "start-up costs" in AD investigations? | 4 | 15 | 2 | 4 |
| 16 | Are other changes required in the current calculations made in anti-dumping cases? | 6 | 14 | 2 | 3 |
| 17 | Do we need to refine the current treatment of new exporters? | 6 | 12 | 3 | 4 |
| 18 | Is evidence of restructuring in EU industry relevant in trade defence investigations? | 4 | 18 | 3 | 0 |
| 19 | Are there obstacles to SME participation in trade defence investigations and how should we address them? | 25 | 0 | 0 | 0 |
| 20 | Should provisional measures be adopted earlier? | 9 | 13 | 3 | 0 |
| 21 | Is there a need for more flexible measures in trade defence investigations? | 9 | 16 | 0 | 0 |
| 22 | Could investigations take better account of products with a longer order or shipment time? | 9 | 14 | 1 | 1 |
| 23 | Should rules explicitly allow the EU to apply trade defence measures for less than 5 years? | 12 | 13 | 0 | 0 |
| 24 | Should the EU refund of duties beyond the fifth year if a measure is repealed in expiry? | 20 | 2 | 2 | 1 |
| 25 | Should expiry reviews be concluded by the end of the fifth year of application? | 12 | 13 | 0 | 0 |
| 26 | Should there be increased thresholds for expiry reviews in trade defence investigations? | 7 | 14 | 3 | 1 |

| | | | | | |
|----|---|----|----|---|---|
| 27 | Should the role of the Hearing Officer be strengthened? | 23 | 2 | 0 | 0 |
| 28 | Should there be public hearings in AD investigations on country-wide MES treatment? | 5 | 14 | 3 | 3 |
| 29 | Should there be more openness regarding the working of the AD Committee? | 14 | 11 | 0 | 0 |
| 30 | Should there be internet access to non-confidential files? | 15 | 8 | 2 | 0 |
| 31 | Should we maintain the current institutional framework for TDI? | 9 | 9 | 4 | 3 |