





This Study is produced for the European Commission's Directorate General for Trade and in particular for Directorate H - Trade Defence Instruments.

The Study was drafted on the basis of answers obtained from various stakeholders during interviews or in reply to a questionnaire. Data has been collected from primary sources, i.e. directly from Small and Medium-sized Enterprises and national/European industry associations, having SMEs as members, that have participated in Trade Defence Investigations (TDIs) as well as relevant officials working in both Member States and European Institution administrations.

The Study takes account of developments in the relevant EU (and WTO) laws and jurisprudence, as well as in the practice of the Commission's Anti-dumping services, that have taken place up until the end of June 2010.

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## 1. INTRODUCTION

### 1.1 Study's Objective and Scope

1. The objective of this Study is to identify the difficulties that Small and Medium-sized Enterprises (*hereinafter referred to as "SMEs"*) face, in all twenty-seven Member States of the European Union (*hereinafter referred to as "Europe" or "EU"*), when involved in trade defence investigations (*hereinafter referred to as "TDIs"*) and to make recommendations as to possible solutions that could facilitate the participation of SMEs in such investigations.<sup>1</sup>
2. The idea for this study came from the transparency exercise that was launched in 2009 under the Czech Presidency. This exercise had inter alia concluded that the situation of SMEs with regards to TDIs needed to be improved and that a study needed to be carried out to identify the difficulties that they face and to suggest improvements.
3. With regard to the Study's scope, the following should be mentioned:
  - The Study's purpose is not to examine the legitimacy of using TDIs, or the possible interpretations of the provisions contained in the current legal framework with a view to either "strengthening" or "weakening" the use of TDI instruments;
  - The Study's purpose is strictly limited to examining whether, and if so which, difficulties are faced by SMEs, as result of their SME status, when they are involved in TDIs;
  - The Study covers all categories of SMEs (e.g. producers, importers and users) and care has been taken to ensure that all interests are specifically addressed in the relevant parts of the report;
  - The Study covers difficulties faced by SMEs when participating in TDIs initiated by either the European Commission or third countries;<sup>2</sup>
  - The Study is trying to propose realistic solutions to facilitate the role of SMEs in TDI proceedings, having in mind the need for impartiality and non-discrimination on the part of the relevant authorities;

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<sup>1</sup> Cf. Invitation to tender related to a contract to carry out a Study on the difficulties encountered by SMEs in trade defence investigations and possible solutions thereto (thereafter "Terms of Reference"), p. 6, Brussels, 2 October 2009.

<sup>2</sup> A number of third countries, including so-called "emerging countries", have, over the last years, resorted increasingly to TDI against EU exporters. It falls within the Study's remit to examine the extent to which the European Commission's new policy regarding TDI proceedings initiated by third countries takes account of the needs of SMEs involved in such proceedings.

- The Study proposes short-, medium- or long-term solutions that the Commission could adopt without amending the current legal framework, though possibly through the adoption of “best practices”.<sup>3</sup>
4. For the purposes of the Study, a direct dialogue between the authors and various stakeholders from almost all of the twenty-seven Member States has taken place. The stakeholders, who agreed to be interviewed or to submit their views in writing, constitute a representative group including a wide range of geographic coverage, interested party positions (producers/importers/users), public administrations, and private businesses.<sup>4</sup> This group thus consisted of SMEs from various Member States, of European associations of various interest groups, and of officials from the European institutions and national authorities, all familiar with TDIs problems.

## 1.2 Trade Defence Instruments

5. The TDIs covered by this Study are all instruments that could be used - either by the EU or by third country governments, - to compensate injury resulting from either dumping practices by private companies (so-called "antidumping" proceedings), subsidies granted by governments (so-called "countervailing" (or CVD) proceedings) or massive and disruptive imports (so called "safeguard" proceedings).
6. In Europe, the aforesaid instruments are contained in the following legal texts:
- *Antidumping proceedings* (EU basic anti-dumping Regulation 1225/2009)
  - *CVD proceedings* (EU basic anti-subsidy Regulation 597/2009)
  - *Safeguard proceedings* (EU Regulation 260/2009 on the common rules for imports [imports from WTO countries]; EU Regulation 625/2009 on the common rules for imports from certain countries [imports from non-WTO countries]; EU Regulation 427/2003 on a transitional product-specific safeguard mechanism for imports originating from the People's Republic of China)

## 1.3 Small and Medium-Sized Enterprises

7. The SME concept has been defined in Article 2.1 of the European Commission's Recommendation 2003/361/EC as follows:
- "Enterprises must be considered as micro, small and medium-sized enterprises if they employ fewer than 250 persons and have either an annual turnover not exceeding EUR 50 million, and/or an annual balance sheet total not exceeding EUR 43 million".*
8. This study has been drafted on the basis of information collected from and relating to this category of companies.

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<sup>3</sup> DG Competition's "Best Practices on the conduct of proceedings concerning Articles 101 and 102 TFEU" could act as a source of inspiration for DG Trade in this regard.

<sup>4</sup> This group consisted of about 120 interviewed persons who had already had some experience with TDIs.



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## 2. SPECIFIC SME FEATURES

### 2.1 SMEs Play a Major Role in the European Economy

9. SMEs are usually referred to as the “backbone of the European economy”.<sup>5</sup> According to recent data, there are 23 million SMEs in Europe who make up 99% of EU27 companies, employ more than 100 million people, and accounting for 60% of the EU GDP.<sup>6</sup>
10. What is even more striking is that 92% of the SME sector consists of micro-enterprises, employing fewer than 10 people<sup>7</sup>. As a significant source of job-creation, SMEs account for 67% of jobs in the private, non-financial sector<sup>8</sup> and have overtaken large firms by creating 9.4 million jobs between 2002 and 2008.<sup>9</sup> Several studies have established the direct link between SMEs and overall economic growth rates,<sup>10</sup> as well as specifically those in the years 2004 - 2006.<sup>11</sup> SMEs are also often particularly innovative, with strong, efficient and close links with universities in the form of spin-offs.
11. SMEs producers are mainly active within the European internal market. In contrast to their contribution to the intra-EU trade, the internationalisation of SMEs outside the EU is fairly limited as only 14% of them purchase their supplies overseas, and as only 13% of them export beyond the EU’s borders.<sup>12</sup>
12. It results from these figures that for SMEs producers, any initiatives taken to facilitate their participation in TDI proceedings would mainly concern their involvement in European proceedings, although their interest in the context of proceedings initiated by third countries is likely to become increasingly important to them.

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<sup>5</sup> [http://ec.europa.eu/enterprise/e\\_i/news/article\\_8750\\_en.htm](http://ec.europa.eu/enterprise/e_i/news/article_8750_en.htm), last viewed 2 July 2010.

<sup>6</sup> Cf. European Commission, DG-Competition, Handbook on Community State Aid Rules for SMEs, p. 3. This Handbook was published on 25 February 2009 and was accessible as last viewed on 9 June 2010 by clicking on the following web link: [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/sme\\_handbook.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/sme_handbook.pdf).

<sup>7</sup> First section of the Annual Report on EU Small and Medium-sized Enterprises, D. AUDRESTSCH, R. VAN DER HORST, T. KWAAK and R. THURIK, EIM Business & Policy Research, see p. 5. Zoetermeer, January 12, 2009, as last viewed on 14 June 2010 by clicking on the following web link: [http://ec.europa.eu/enterprise/policies/sme/files/craft/sme\\_perf\\_review/doc\\_08/spr08\\_annual\\_reporten.pdf](http://ec.europa.eu/enterprise/policies/sme/files/craft/sme_perf_review/doc_08/spr08_annual_reporten.pdf).

<sup>8</sup> See supra fn 6, p. 19. Upon SMEs' high rate of the contribution to the creation of new employment, see also p. 37 of the same report.

<sup>9</sup> See SME Performance Review, Annual report 2010 published on 11 June 2010, p. 6, as last viewed on 14 June 2010 by clicking on the following web link: [http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/pdf/dgentr\\_annual\\_report2010\\_100511.pdf](http://ec.europa.eu/enterprise/policies/sme/facts-figures-analysis/performance-review/pdf/dgentr_annual_report2010_100511.pdf).

<sup>10</sup> See supra fn 6, see p. 39.

<sup>11</sup> *SMEs were the main drivers of economic growth*, M. SCHMIEMANN, Issue number 71/2009 released on 10 September 2009 the website of Eurostat: [http://epp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-SF-09-071/EN/KS-SF-09-071-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-09-071/EN/KS-SF-09-071-EN.PDF).

<sup>12</sup> Study “Internationalisation of European SMEs”, 2010, page 5, available at: [http://ec.europa.eu/enterprise/policies/sme/market-access/internationalisation/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/market-access/internationalisation/index_en.htm).





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13. European SMEs importers or users which are logically exposed to international trade will likely be active in EU proceedings as well, in order to reduce as much as possible alterations to their flow of imports from third countries.

## 2.2 **Inherent SME Handicaps**

14. The basic premise, which has been repeatedly confirmed by all interviewees in the context of this Study, is that, due to their size, SMEs face a series of handicaps: difficult access to financing, limited resources, difficulties in attracting qualified personnel, or in entering new markets. In addition, SMEs' knowledge of the environment (economic, legal and administrative) in which they operate is usually limited to what they need to know for functioning on a daily basis and to meet their immediate needs. Consequently, they tend to concentrate on their core businesses: the development, production and marketing of their products.
15. In most cases, they are often unaware of the rights and opportunities of which they could avail themselves, including the right to use instruments against unfair trade or to oppose the use of such instruments. Unless they are sufficiently aware of these instruments and receive appropriate guidance, SMEs are likely to be reluctant to devote time and resources - human and financial - to matters that do not require their immediate attention, such as TDIs the rules and consequences of which remain somewhat obscure to them. This is complicated by the fact that, for the vast majority of SMEs in Europe, except for those located in the UK and Ireland, their personnel do not speak English.

### 3. EU RULES AND SMES

#### 3.1 Overview of the EU Policy on SMEs

16. Due to their importance to the EU economy and in line with the twin goals of fostering competitiveness and growth in Europe, the particular situation of SMEs has been largely recognized throughout most of the EU's policies.
17. The Lisbon Strategy,<sup>13</sup> launched by the European Council in March 2000, acknowledged that Europe's competitiveness depended heavily on its small businesses and set as an objective the creation of an SME-friendly environment, by introducing several initiatives and putting in place an SME-specific regulatory framework. Following the launch of the Lisbon Strategy, the Council adopted the European Charter for Small Enterprises declaring that SMEs were the "*backbone of the European economy*"<sup>14</sup> and that "*policy-makers [would] take due consideration of small business needs and direct commitment in ten key policy areas*,"<sup>15</sup> The Council then reaffirmed in following meetings = the SME-specific objective of implementing a regulatory environment that was "*simple, transparent and easy to apply*"<sup>16</sup> aiming at the creation of "*the best possible environment*"<sup>17</sup> for SMEs.
18. Another important element was the new definition of SMEs,<sup>18</sup> where the Commission indirectly accepted the legitimacy of a differentiated treatment of SMEs, as it stated that this new definition aimed "*at ensuring that larger enterprises that do not share the same concerns, do not benefit from support actions specifically intended for SMEs*"<sup>19</sup> (our emphasis).
19. In 2005, another Commission Communication acknowledged that it was "*vital to simplify the regulatory and administrative constraints weighing on SMEs*" as well as to integrate the "*Think Small First*" principle into all EU policies, stating that: "*Better regulation is of particular importance to SMEs, as they have limited resources and insufficient expertise to comply with often complex rules and regulations. Evidence suggests that SMEs may also suffer disproportionately from administrative burdens.*" [...] "*Both at national and EU level, appropriate measures to lighten the legislative*

<sup>13</sup> Lisbon European Council, Lisbon, 23 and 24 March 2000

<sup>14</sup> Ibidem, p.1, reaffirmed in the Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the regions, "SMEs - Key for delivering more growth and jobs. A mid-term review of Modern SME policy", COM (2007) 592 final, Brussels 4 October 2007, p.1

<sup>15</sup> For more details, see the website of the European Commission, DG Enterprise and Industry as last viewed on 11 June 2010 in clicking on the following web link: [http://ec.europa.eu/enterprise/policies/sme/best-practices/charter/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/best-practices/charter/index_en.htm).

<sup>16</sup> Council of the European Union, Presidency conclusions, 23-24 March 2006, Para 26

<sup>17</sup> European Charter for Small Enterprises

<sup>18</sup> See above Section 1.3, referring to the Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [Official Journal L 124 of 20/05/2003].

<sup>19</sup> See the summary of the Commission Recommendation 2003/361/EC of 6 May 2003 concerning the definition of micro, small and medium-sized enterprises [Official Journal L 124 of 20/05/2003], at: [http://europa.eu/legislation\\_summaries/enterprise/business\\_environment/n26026\\_en.htm](http://europa.eu/legislation_summaries/enterprise/business_environment/n26026_en.htm)

*burden on SMEs should always be considered and it may be useful to introduce specific provisions for SMEs. These could include longer transition periods, reduced fees, simplified reporting requirements, even exemptions, or assistance, such as helpdesks. [...] Both the Commission and Member States should take action in specific policy areas to alleviate burden on SMEs and to take better into account their particular needs".<sup>20</sup>*

20. The above was reaffirmed by the Commission in its 2007 mid-term review of a Modern SME policy, stating that "[W]here SMEs are covered by EU legislation, special measures should be designed to help them" (our emphasis).<sup>21</sup>
21. Hailed as the cornerstone of EU policy on SMEs, the 2008 Small Business Act for Europe,<sup>22</sup> aimed "irreversibly to anchor the "Think Small first" principle in policy-making from regulation to public service, and to promote SMEs' growth by helping them to tackle the remaining problems that hamper their development" (emphasis added).<sup>23</sup>
22. Finally, special guidelines on impact assessment were introduced in 2009, in order to assess the impact of all major legislative and policy proposals on SMEs.<sup>24</sup>

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<sup>20</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Implementing the Community Lisbon programme's modern SME policy for growth and employment", COM(2005) 551 final, Brussels, 10 November 2005, see p. 7 - 8.

<sup>21</sup> Communication from the Commission to the Council, the European Parliament, The European Economic and Social Committee and the Committee of the regions, "SMEs - Key for delivering more growth and jobs. A mid-term review of Modern SME policy", COM (2007) 592 final, Brussels 4 October 2007. The Communication also stated that SMEs bear a "disproportionate regulatory and administrative burden" in comparison with larger businesses. See, p. 11

<sup>22</sup> Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the regions, "Think Small First, A Small Business Act for Europe", COM (2008) 394 final, Brussels, 25 June 2008

<sup>23</sup> Ibidem, p. 3. The Act contains a set of 10 principles guiding the creation and the implementation of SMEs policies, a set of legislative proposals and new measures which are guided by the "Think Small First" principle and a set of new policy measures that implement these ten principles according to SME needs. Upon the implementation of the Small Business Act for Europe in 2009, see Report on the implementation of the SBA, Commission working document, p.2, COM(2009)680, Brussels, last viewed on 10 June 2010, at: [http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/index_en.htm) and also see Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Think Small First" A "Small Business Act" for Europe, SEC (2008) 2101 and SEC(2008) 2102, especially p. 3, Brussels, 25/06/2008, as last viewed on 10 June 2010, at: [http://ec.europa.eu/enterprise/policies/sme/small-business-act/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/small-business-act/index_en.htm).

<sup>24</sup> Impact Assessment Guidelines, 15 January 2009, SEC(2009) 92. This assessment is based on a three-step test: preliminary assessment of businesses likely to be affected, measurement of the impact on SMEs (cost/benefit analysis), and use of mitigating measures, if appropriate.

### 3.1.1 SME-Specific Legislative Initiatives

23. Up to now, 83 pieces of EU legislation contain SME-specific policy measures.<sup>25</sup> Some contain size-related exemptions, special treatment for SMEs, temporal exemptions or simplified national legislative requirements.<sup>26</sup> Although reference to all such legislative texts is outside the scope of this Study, it is useful to mention a few of them by way of example.

(a) Competition law: specific treatment in "State aid" rules

24. In 2005, the Commission simplified the Community State Aid rules on innovation so as to encourage innovation by SMEs. In 2007, the Commission increased the *de minimis* threshold under which aid need not be reported, included proposals for increasing the aid to SMEs. Furthermore, the Commission introduced a new framework for State Aid for research and innovation with more funding available to SMEs and flexible rules for SME costs relating to Intellectual Property Rights. In 2009, a general Block Exemption Regulation was adopted according to which State Aid measures supporting SMEs would be exempt from the notification obligation.<sup>27</sup> All of the above and other SME-specific measures in relation to State Aid were outlined in the "Handbook on European State Aid Rules for SMEs", adopted in 2009.<sup>28</sup>

(b) Taxation law: special measures to reduce VAT

25. Forming part of the Small Business Act, the Commission's (DG TAXUD) proposal on reduced VAT rates in many sectors where SMEs operate (notably labour-intensive services) came into force in 2009.<sup>29</sup> In addition, a proposed reworking of

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<sup>25</sup> Evaluation of the application of the Think Small First principle in EU legislation and programmes, Final Report submitted by GHK, Executive Summary, p.3

<sup>26</sup> Ibidem, p.4

<sup>27</sup> Upon the implementation of the Small Business Act for Europe in 2009, see Report on the implementation of the SBA, Commission working document, p.2, COM(2009)680, Brussels, as last viewed on 10 June 2010, at: [http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/index_en.htm) and Commission regulation (EC) NR800/2008 of 6 August 2008 declaring certain categories of aid compatible with the common market in application of Articles 87 and 88 of the Treaty (General block exemption Regulation), OJ L214, 09/08/2008, especially (54), last viewed on 10 June 2010, at: [http://ec.europa.eu/competition/state\\_aid/legislation/block.html](http://ec.europa.eu/competition/state_aid/legislation/block.html).

<sup>28</sup> Cf. European Commission, DG-Competition, Handbook on Community State Aid rules for SMEs, p.5. This Handbook was published on 25 February 2009 and is accessible (last viewed on 9 June 2009) at: [http://ec.europa.eu/competition/state\\_aid/studies\\_reports/sme\\_handbook.pdf](http://ec.europa.eu/competition/state_aid/studies_reports/sme_handbook.pdf).

<sup>29</sup> See Report on the implementation of the SBA, Commission working document, p.2, COM(2009)680, Brussels, last viewed on 10 June 2010, at: [http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/index\\_en.htm](http://ec.europa.eu/enterprise/policies/sme/small-business-act/implementation/index_en.htm) and also, Proposal for a Council Directive amending Directive 2006/112/EC as regards reduced rates of value added tax, SEC(2008) 2190 and SEC (2008)2191, COM(2008)428 final, Brussels, 07/07/2008, p.3 and 4, as last viewed on 10 June 2010 by clicking on the following web link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2008:0428:FIN:EN:PDF>. This proposal led to the adoption of Council Directive 2009/47/EC of 5 May 2009 amending Directive 2006/112/EC as regards reduced rates of value added tax, OJ L116, 09/05/2009 as last viewed on 10 June 2010, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:116:0018:0020:EN:PDF>.

the Late Payments Directive is aimed at improving SME cash flow.<sup>30</sup> Another proposal on VAT Invoicing complements the Small Business Act by widening the scope for using simplified invoices that may relate to smaller amounts, particularly important for SMEs, and enables Member States to allow SMEs to account for VAT on a cash basis under a cash accounting scheme.<sup>31</sup>

(c) Company law: SME-friendly European Private Company Statute

26. As a part of the Small Business Act, the Commission's proposal on a "European Private Company Statute" intends to make the Single Market more accessible to SMEs by creating a new European legal form for SMEs aiming at improving their competitiveness.<sup>32</sup>

### 3.1.2 Practical Measures Supporting Schemes for SMEs

27. In line with the EU policy on SMEs and with the many legislative texts providing for specific treatment of SMEs, the European Institutions, in co-ordination also with Member States, have adopted various practical measures for assisting SMEs. By way of example, one may mention the following:

(a) European SME Week

28. First contemplated in the Small Business Act for Europe, the European SME Week<sup>33</sup> is an umbrella for many campaign-type events that take place throughout Europe,<sup>34</sup> which supply information to SMEs about the help and support granted to SMEs by European, national, regional and local authorities.

(b) Enterprise Europe Network

29. The Enterprise Europe Network is a business support network encompassing 600 partner organisations acting in 44 countries. Up to December 2009, this network had achieved a certain success in involving about 3,000 professional staff of and assisting about 3 million SMEs.<sup>35</sup>

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<sup>30</sup> Proposal for a Directive of the European Parliament and of the Council on combating late payment in commercial transactions (Recast) Implementing the Small Business Act, especially see p. 2 and 4, COM(2009) 126 final, Brussels, 08/04/2009, as last viewed on 11 June 2010, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0126:FIN:en:PDF>.

<sup>31</sup> See Proposal for a Council Directive amending Directive 2006/112/EC on the common system of value added tax as regards the rules on invoicing, p.3, as last viewed on 11 June 2010, at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2009:0021:FIN:EN:PDF>.

<sup>32</sup> See Proposal for a Council Regulation on the Statute for a European private company, especially see p. 2 and 3 SEC(2008) 2098 and SEC(2008) 2099, COM(2008) 396/3, Brussels, 2008/xxxx (CNS), as last viewed on 11 June 2010, at: [http://ec.europa.eu/internal\\_market/company/docs/epc/proposal\\_en.pdf](http://ec.europa.eu/internal_market/company/docs/epc/proposal_en.pdf).

<sup>33</sup> Cf. the website of the European Commission, DG Enterprise and Industry, European SME week, as last viewed on 20 May 2010, at: [http://ec.europa.eu/enterprise/policies/entrepreneurship/sme-week/index\\_en.htm](http://ec.europa.eu/enterprise/policies/entrepreneurship/sme-week/index_en.htm)

<sup>34</sup> Ibid.

<sup>35</sup> This extended network also actually means more than 10,000 organised events that have enabled roughly 400,000 SMES to intervene and enter into 1,400 business and technology partnership agreements; see in

(c) European SME Portal, Access2finance, Your Europe Business Portal

30. In addition to the websites of the two aforementioned schemes, i.e. “European SME Week” and “Enterprise Europe Network”, the European Commission further disseminates information about EU policies on SMEs through websites such as European SME Portal, Access2finance and Your Europe business portal.<sup>36</sup>

### **3.2 SME-specific Initiatives in TDIs Procedures: Still Marginal**

31. Despite the EU’s general intention to facilitate the activities and development of SMEs, such initiatives remain marginal within the Trade Defence services of the European Commission.
32. This may be due to the fact that the Commission’s services in charge of Trade Defence Investigations apply fundamentally - except perhaps for exceptional cases - an undifferentiated treatment to all companies involved in European TDIs, regardless of their size or their interest in the case (producer, importer, user) for the benefit of non-discrimination, neutrality, and objectivity.
33. However providing the same treatment to all may put some firms, especially SMEs, at a practical disadvantage.
34. One concrete initiative that has actually been undertaken over the recent years is the SME Trade Defence Helpdesk,<sup>37</sup> which was created in 2007.<sup>38</sup> Its contact details are available on DG Trade’s website,<sup>39</sup> in order to assist companies that may be facing technical difficulties on account of their small size or their sector’s fragmentation.<sup>40</sup> The Helpdesk should be able to reply to questions and problems related to both TDIs,

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Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, "Think Small First", "A Small Business Act", COM(2008) 394 final, 25 June 2008, p. 7.

<sup>36</sup> To access the European SME Portal, as last viewed on 11 June 2010, please click on the following web link: [http://ec.europa.eu/small-business/index\\_en.htm](http://ec.europa.eu/small-business/index_en.htm), to access to Access2finance, as last viewed on 11 June 2010, please click on the following web link: <http://www.access2finance.eu/> and to access your European business portal, last viewed on 11 June 2010, at: [http://ec.europa.eu/youreurope/business/index\\_en.htm](http://ec.europa.eu/youreurope/business/index_en.htm).

<sup>37</sup> Awareness campaigns carried out by the European Commission in the capitals of Member States or in third countries over the last years were, to the best of the author’s knowledge, not addressing particularly SME-related issues.

<sup>38</sup> See document accompanying the 26<sup>th</sup> Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping, Anti-Subsidy and Safeguards Activities (2007), p.18, [COM(2008) 877 final], Commission Staff Working Document.

<sup>39</sup> Cf. As last viewed on 09 June 2010 by clicking on the following web link: [http://ec.europa.eu/trade/contact/#\\_trade-defence-contacts](http://ec.europa.eu/trade/contact/#_trade-defence-contacts).

<sup>40</sup> See document accompanying the 26<sup>th</sup> Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping, Anti-Subsidy and Safeguards Activities (2007), p.18, [COM(2008) 877 final], Commission Staff Working Document.

either case-specific or of a general nature, and the procedures or the content of TDI proceedings.<sup>41</sup>

35. However, it has been found, from the interviews that took place with SMEs, industry associations, and Commission and national authorities' officials that SMEs seem to be oblivious of the Helpdesk's existence.<sup>42</sup>
36. In addition, it was also found that the SME Helpdesk, in its current set-up, does not seem to be a truly separate unit with a clear mandate to provide support for SMEs, but rather an additional administrative layer whose added value is not immediately clear. SMEs that have contacted the Helpdesk have reported that it operates more as a call-centre through which companies are transferred to a case-handler of the Trade Defence Unit who is not, however, specifically trained or dedicated to working with and for SMEs within the context of a truly separate and functional SME Helpdesk.

### 3.3 Possible Initiatives for the Benefit of SMEs

#### 3.3.1 Guiding legal principles

37. Practically all of the SMEs that were interviewed, whether on the producer side or on the importer and user side, felt that the Commission, in the way that it treated them, was not really taking their particular handicaps into account, and as a consequence, the burden imposed on them in such procedures was unreasonable and disproportionately heavy. For instance, they pointed out that a requirement for a particular category of information that would be well within the capacities of larger firms could pose insurmountable difficulties for smaller ones. The treatment of SMEs in TDIs procedures is thus somewhat at odds with the EU's general policy towards SMEs, as defined in its communication of 10 November 2005, and the specific rules applied in a variety of sectors.
38. Furthermore, there are a number of principles on the basis of which any measure which would impose a disproportionate burden on a certain category of operators could not be justified. Among useful guiding principles, the following should be emphasized:

(a) Guiding WTO principles

39. Article 6.13 of the WTO Antidumping Agreement provides that:

*"The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying the information requested, and shall provide any assistance practicable"* (emphasis added).

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<sup>41</sup> Document accompanying the 27<sup>th</sup> Annual Report from the Commission to the European Parliament on the Community's Anti-Dumping, Anti-Subsidy and Safeguards Activities (2008), p.18, COM (2009573), Commission Staff Working Document, 26 October 2009, Brussels.

<sup>42</sup> As will be shown in this study, there is a recurring pattern that lack of awareness is a major obstacle in making any progress in and/or facilitating SME involvement in TDIs.

40. This provision is a relevant indicator that particular difficulties of certain interested parties in TDI proceedings, such as SME producers, importers or users, should be taken into account.
41. It is also worth referring to the WTO dispute *US - Hot-Rolled Steel*,<sup>43</sup> where the Appellate Body reviewed the Panel's interpretation of the obligation of co-operation by stakeholders implied by Paragraph 7 of Annex II of the Anti-Dumping Agreement. The Appellate Body recalled Article 6.13 of the Anti-Dumping Agreement and, although not referring to small companies specifically, it noted that investigating authorities must:
- "Make certain allowances for, or take action to assist, stakeholders in supplying information" and "take due account of genuine 'difficulties' experienced by interested parties".*<sup>44</sup>
42. The Appellate Body found that the principle of good faith (expressed in Paragraph 2 of Annex II) informed the Agreement and should restrain authorities from insisting upon "*absolute standards*" or from imposing "*unreasonable burdens*" upon interested parties.<sup>45</sup>
43. The test applied by the Appellate Body was one of proportionality, balancing the interests of investigating authorities with those of interested parties and aiming to avoid disproportionate situations.

(b) Guiding EU Principles

44. The need to avoid disproportionate situations is also reflected in the jurisprudence of the European Union Court of Justice. Specific initiatives for SMEs could firstly be viewed in light of the fundamental principles of European law according to which "*the principle of proportionality requires that the acts of the Community institutions do not exceed the limits that are appropriate and necessary in order to achieve the aim pursued whilst, discrimination is [...] the treatment of different situations identically.*"<sup>46</sup> The Court has also stated that "*where there is a choice between several appropriate measures, recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.*"<sup>47</sup>
45. Particular initiatives for SMEs could also be viewed in the light of another fundamental principle of European law, the principle of equality, recognized as "*a general principle of law to be observed by any court*".<sup>48</sup> As a general principle, it

<sup>43</sup> Appellate Body Report, *United States – Antidumping Measures on Certain Hot-Rolled Steel Products from Japan*, WT/DS184/AB/R, 24 July 2001.

<sup>44</sup> Ibidem, Paras. 102 and 104.

<sup>45</sup> Ibidem, Paras. 01 - 104 .

<sup>46</sup> General Court's judgment of 23 October 2003, in case T-65/98, *Van den Bergh Foods v. Commission*, ECR II-4653, paras. 201, 203-205.

<sup>47</sup> General Court's judgment of 11 September 2002, in case T-13/99, *Pfizer Animal Health v. Council*, ECR II-3305, paras. 411-412.

<sup>48</sup> Case 8/78 Milac [1978] ECR 1721, Para. 8



requires that comparable situations should not be treated differently unless the difference in treatment is objectively justified. A breach of the principle of equal treatment presumes that the situations concerned are comparable or the difference in treatment is not objectively justified, with regard to all the elements which characterise them. These elements and their comparability must be determined and assessed both in light of the subject-matter and purpose, as well as the principles and objectives of the field.<sup>49</sup>

### 3.3.2 Recommended Initiative Types

46. In the authors' view, improvement of the SME situation in the context of TDI proceedings could be achieved, in the following ways:

- *Improving SMEs' awareness of TDIs*

47. Such an exercise should, firstly, improve the knowledge of SMEs in general about the existence, use and procedures of TDIs. Secondly, it should aim to provide information and to explain, upon request, the technical and procedural aspects of a specific investigation to SMEs involved in a particular TDI proceeding (whether producers, importers or users).

- *Facilitation of SMEs' participation in a specific TDI*

48. Depending on the degree of disproportionate burden from which an SME could suffer, some actions to consider taking include: *simplifying certain aspects of a specific investigation* (e.g. accepting replies to a questionnaire in a non-standardised form) or *assisting SMEs in the context of a specific investigation* (e.g. explaining, even through actual visits, how the SME could reconcile its own data with the specific requirements of the TDI proceedings; it being understood that such initiatives should be limited to technical and procedural aspects that would not be tantamount to advising an SME in terms of strategy or tactics). The existence of a disproportionate burden upon SMEs should be demonstrated on the basis of objective and verifiable elements, such as:

- The number of employees;
- The level of turnover;
- The profit/loss situation;
- The economic impact of the investigation on the SME's activities;
- The level of development of the region where it is based;
- The economic contribution of the SME in the local economy;
- and others.

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<sup>49</sup> Case C-127/07, *Société Arcelor Atlantique et Lorraine and Other v. Prime Minister and Others*, 16 December 2008, Para. 26. See also as cited: Case 6/71, *Rheinmühlen Düsseldorf* [1971] ECR 823, Para. 14; Joined Cases 117/76 and 16/77 *Ruckdeschel and Others* [1977] ECR 1753, Para. 8; Cases C-364/95 and C-365/95 *T. Port* [1998] ECR I-1023, Para. 83



49. As each case presents unique problems due to the particularities of the different sector and market affected, it is suggested that the Commission maintains a margin of appreciation in deciding the best way to facilitate the role of SMEs involved in an investigation, subject to the possible control of the General Court or the European Court of Justice.

## **4. DIFFICULTIES ENCOUNTERED BY SMES IN EU TRADE DEFENCE PROCEEDINGS**

50. This section identifies the difficulties faced by EU SMEs (be they producers, importers or users), in relation to EU trade defence proceedings. Some of these difficulties are encountered by big and small companies alike, but their impact on SMEs is far greater and sometimes disproportionate to their size. In the following developments, we will successively address some overarching, common difficulties, and then some more specific ones, which SMEs encounter at the various stages of a trade defence proceeding. When necessary, distinction is made between the specific difficulties encountered only by producers or only by importers/users at each stage.

### **4.1 General Difficulties**

51. Although it may vary, depending on the level of organisation of the sector and of the national environment, SMEs usually know little, if anything, as to the existence and functioning of TDIs. Even when they are aware of TDIs' existence, they usually do not know the implications and the benefits that they can derive from their participation in particular proceedings, or the importance, for companies, of being actively involved in such proceedings.

#### **4.1.1 Lack of General Awareness**

52. It has been confirmed by the majority of stakeholders interviewed that the lack of awareness of TDIs by SMEs is the most important issue to be addressed.

53. It has been regularly repeated by various stakeholders that SMEs suffer from a general lack of knowledge of anti-dumping, anti-subsidy or safeguard rules and procedures.<sup>50</sup> This has been confirmed by both national<sup>51</sup> and European<sup>52</sup> associations, industry federations<sup>53</sup> and individual SMEs. More specifically, some of the SMEs that were interviewed stated that they only became aware of TDIs when they were confronted by unfair trade practices or by a sudden imposition of provisional measures, while others pointed out that even a well-informed SME manager would have a limited knowledge of TDIs.<sup>54</sup> They all highlighted that this lack of knowledge on matters such as trade policy was to a large extent because of their lack of time and resources for matters beyond their core businesses,<sup>55</sup> as

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<sup>50</sup> Cf. Turkish citizen's, 05 February 2007, response to Question 19 Global Europe, Europe's Trade Defence Instruments in a changing global economy, A Green Paper for public consultation and a questionnaire. Questionnaire available at (last viewed 14 June 2010): [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_131986.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131986.pdf).

<sup>51</sup> Extract of an interview with an Italian Association's Member.

<sup>52</sup> Extract of an interview with a European association official.

<sup>53</sup> Extract of an interview with an Italian Federation's Member.

<sup>54</sup> Extract of an interview with an Austrian Company, involved in a trade defence investigation, as an European Community manufacturer; Extract of an interview with the President of a French SME, which was involved in a trade defence investigation; Extract of an interview with the in-house counsel of a French SME.

<sup>55</sup> Extract of an interview with an Italian Federation's Member.

explained earlier. Similarly, officials from Member States largely confirmed that most of their SMEs were unaware of the TDIs' very existence,<sup>56</sup> or did not know or understand the basic notions of TDIs, such as dumping.<sup>57</sup> They did not know how TDIs function, did not understand the measures that were adopted as a result of a TDI procedure, or how they could react if an investigation was likely to affect their interests.

54. However, there are, differences in the levels of SME awareness and two distinct factors play a role in this respect: one being the national environment and the other being the level of organisation within the sector.
55. With regard to the first factor, some interviewees emphasized the fact that some Member States would be reluctant to provide any substantial or practical (or even political) support to their manufacturers for lodging a complaint.<sup>58</sup> This was confirmed by some Member State officials declaring their preference to support other interested parties than manufacturers. Some of them even stated that they were not in favour of any "awareness" or other campaign that could encourage the use of TDIs by manufacturers.<sup>59</sup>
56. The level of knowledge and awareness may also depend on the sector to which an SME belongs. An SME belonging to a sector having a European association stated that it was fully aware of TDI issues.<sup>60</sup> Other SMEs also confirmed that they had benefited from the expertise of industry associations, active in related sectors, which had filed complaints on their behalf and/or supported them throughout the course of the trade defence proceedings.<sup>61</sup> A Member State official also mentioned that SMEs operating in sectors that were often affected by TDIs had accumulated a thorough knowledge of TDIs.<sup>62</sup> More specifically, a national association explained that, contrary to one sector covered by the association that was comprised of several small firms, in the other sector also covered by the association, there were only large companies. In this case, the SMEs benefited from the presence of large companies within the association and were more aware of TDI procedures. They also used the federation as a support for their actions and were able to bear the financial cost of expert legal assistance. Conversely, in some countries, there is no culture of being member of an association (e.g. in a Baltic Member State, SMEs seem to not want to pay a fee to be member of the association). It was noted that non-traditional sectors are usually not well organised, while some SMEs believe that associations may not be reliable because of their lack of professionalism. Sometimes, European SMEs have no association at all. This lack of organisation may result from the small number of SMEs that are manufacturing/importing/using a specific product.<sup>63</sup>

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<sup>56</sup> Extract of Member States' interviews.

<sup>57</sup> Extract of Member States' interviews. .

<sup>58</sup> Extract of an interview with the Secretary General of a European Association.

<sup>59</sup> Extract of an interview with a Member of the anti-dumping Committee.

<sup>60</sup> Extract of an interview with a Bulgarian company.

<sup>61</sup> Extract of an interview with a French SME; extract from an interview with the President of a French SME which was involved in a trade defence investigation.

<sup>62</sup> Extract of an interview with a Member of the Anti-dumping Committee.

<sup>63</sup> Extract of an interview with a member of the DG-Trade investigation. .



#### 4.1.2 Lack of Knowledge When Considering Participation in a Proceeding

57. It has been argued during the interview process that SMEs are not only handicapped by their lack of awareness of TDIs in general, but also, once participation to a case is envisaged, that they lack sufficient knowledge as to the possibilities that this offers for reacting to unfair trade.<sup>64</sup> This stems from a lack of understanding of what is at stake, of the kind of result that they could expect and in which timeframe, and of the kind of information that they would need to provide in the course of TDIs.<sup>65</sup> Such issues could be potentially organized into the following categories of difficulties:

(a) Interests at stake and expected results

58. Most of the SMEs interviewed stated that there was a need for companies to be better informed of their interest in participating in TDIs.<sup>66</sup> However, there was logically a better understanding of the importance of participating in such procedures among those who had already benefited from the imposition of duties and recognised that this had enabled them to survive or those who had successfully participated in a coalition against the imposition of measures.

59. Some industry associations also confirmed the lack of awareness about what is at stake for companies, in particular SMEs, in TDI proceedings, and argued that associations should intensify their efforts to explain to SMEs the benefits - and the implications - of co-operating in a procedure.<sup>67</sup> In this regard, one SME explained how it had received, a few years ago, in the context of a specific case, a package of standard letters/questionnaires and how, in the absence of any more individualized initiatives by the relevant authorities, it did not even look at them.

60. Based on feedback from interviews with Member State officials, some SMEs do not seem to understand that being passive could in the future result in their being forced out of the market, while others were sceptical as to whether they could obtain any positive results from their participation in TDIs, at least sufficiently quickly.

(b) Duration of the investigation and early/late application of measures

61. This is a common concern for all SMEs, which are only ready to get involved in TDIs if there is a practical interest and if the proceedings are not too long.<sup>68</sup>

62. Numerous manufacturers criticized the length of the procedures and the timing of the imposition of provisional duties<sup>69</sup> which are such that some of the complainants can be forced out of business by the time that the measures have taken effect. These comments underline the particular vulnerability of SMEs to import trade flows.

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<sup>64</sup> Extract of an interview with a Trade Adviser in the European Parliament; Extract of an interview with a European Commission official.

<sup>65</sup> Extract of an interview with a European Commission official.

<sup>66</sup> Extract of an interview with the in-house lawyer of a French SME.

<sup>67</sup> Extract of an interview with a Member of an Italian Association.

<sup>68</sup> Extract of an interview with a DG-Enterprise and Industry official.

<sup>69</sup> Extract of an interview with the Secretary General of a European Association; Extract of an interview with a Member of a European Association.



63. Conversely, some interviewed SME importers, criticized the uncertainty as to the adoption time of measures when goods are in the process of being shipped into Europe.

(c) "Distance" between SMEs and the relevant administrations

64. Some SMEs claimed that they did not perceive the European administration (and sometimes even their national administrations) as “close” to them and alleged a lack of "assistance" from the Commission<sup>70</sup> or from Member States.<sup>71</sup>

65. Some national associations said that Member States should play a more active role in Trade Defence Investigations;<sup>72</sup> a few claimed that some Member States rarely made the effort to monitor individual TDIs cases.

66. In their defence, some Member States that were interviewed pointed out the difficulty of gathering the information that would be useful to their SME manufacturers for lodging complaints, or to their SME importers/users for defending their opposition to the possible imposition of duties.<sup>73</sup>

67. The view of some DG Trade officials was that the alleged “distance” between SMEs and the national and European authorities could arguably originate from the frequent lack of SME co-operation.<sup>74</sup> At the same time, some Member States<sup>75</sup> pointed out that the low level of SME co-operation might be due to the complexity of the investigation and, in particular, of the questionnaires sent to companies in the context of those investigations.

(d) Other factors

68. There are a number of more specific issues that are also perceived by certain SMEs as an obstacle to their participation in TDIs procedures. Such as, in particular, the following:

- Language barrier
- Fear of leaks of confidential information
- Fear of information-sharing with competitors
- Fear of retaliation (e.g. by the government of the exporting country concerned or other interests groups).

69. With regard to the language issue, SMEs conceded that conducting the entire investigation in English could be a deterrent and could also be a source of mistakes

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<sup>70</sup> Extract of an interview with a European Commission official.

<sup>71</sup> Extract of an interview with a UK Department of Trade official.

<sup>72</sup> Extract of an interview with a Member of an Italian Association.

<sup>73</sup> Extract of an interview with an Italian Ministry official.

<sup>74</sup> Extract of an interview with a Member of a DG-Trade investigation official; Extract of interview with DG Enterprise and Industry officials.

<sup>75</sup> Extract of an interview with a Belgian official.

in the information communicated to the Commission.<sup>76</sup> Some SMEs argued that the use of their own national language should have been accepted during European trade defence procedures.<sup>77</sup> The above was further confirmed by European associations,<sup>78</sup> and national associations which have to translate the submissions of their members and other interested parties. This demonstrates that language is an obstacle. Most of the interviewed Member State officials accepted that the use of English as the standard language of TDIs may indeed constitute a barrier to SME participation in procedures.<sup>79</sup> A few considered this to be a strong deterrent. Surprisingly, this comment was also made by officials from North European countries, the companies of which are deemed to have good knowledge of the English language. They claimed that SMEs speak “everyday commercial” English and are not competent to use the technical terms required for participating in a procedure. European institutions’ officials also recognized that the language used in TDIs may be an issue for SMEs,<sup>80</sup> considering that many small firms only understand their own national language.<sup>81</sup>

70. With regard to the submission of confidential information, some SMEs fear that the information they provide to the investigating authorities could be leaked to their competitors or to the other side. Even after the confidentiality rules and procedural safeguards have been explained to them, there is still a concern about confidential data reaching the tax or customs authorities. Unless the Commission provides explicit assurances for the protection of confidential data (or explain the matter better), this factor may continue to be a deterrent to SME participation in TDIs.
71. With regard to the fear of information-sharing with competitors, it is a fact that different companies that operate in the same sector and have similar activities compete against each other. According to some stakeholders, this can deter some SMEs from co-ordinating with other companies in the preparation of the information necessary for the lodging of a complaint.<sup>82</sup> This is all the more true when the market is fragmented between a limited number of SMEs as well as when there is no association in the sector.
72. Finally, with regard to the risks of retaliation, all the SMEs that were interviewed, but in particular SME producers, mentioned that they took the possibility of retaliation very seriously, either from the third country targeted by the investigation, in so far as any part of their activity may have a relationship with that country, or from their own customers when such customers are either large distributors or importers or large users also purchasing from the Community industry. In such cases,

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<sup>76</sup> Extract of an interview with a French SME.

<sup>77</sup> Extract of an interview with de Marketing Director of a French SME, involved in a third country procedure that has also lodged a complaint before the European Commission.

<sup>78</sup> Extract of an interview with the Secretary-General of a European Association.

<sup>79</sup> Extract of an interview with a Member of the Anti-dumping Committee.

<sup>80</sup> Extract of an interview with a European Commission official.

<sup>81</sup> Extract of an interview with a European Commission's official.

<sup>82</sup> Cf. a Turkish citizen's, 05 February 2007, response to Question 19 Global Europe, Europe's Trade Defence Instruments in a changing global economy, A Green Paper for public consultation and a questionnaire. Global Europe, Europe's Trade Defence Instruments in a changing global economy, A Green Paper for public consultation and a questionnaire was accessible as last viewed on 14 June 2010 in clicking on the following link: [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_131986.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131986.pdf).

SMEs are very concerned that they might suddenly lose their customers if it is known that they have contributed to the initiation of a trade defence procedure.

## 4.2 Difficulties at the Pre-Initiation Stage

### 4.2.1 Faced by EU SME Producers

#### (a) Lengthy process of complaint

73. It has been confirmed through the interviews that the process of lodging a complaint is a lengthy one, where the average time of discussion between potential complainants and the Commission prior to a complaint's official submission is six months. In addition to this period, the Complaint Office usually requires potential complainants to show that they have been suffering injury for a year. As a result, the time necessary for responding to unfair trade practices is extremely long, amounting to at least a year and a half.<sup>83</sup> Moreover, once the Complaint has been filed, the Commission usually waits for 45 days before initiating the case. It then takes another nine months before it imposes provisional measures, a period during which the complainant remains unprotected. While the Commission could, through the registration of imports, apply measures retroactively and thus reduce the impact of this period, it is reluctant to do so.

74. More generally, most interviewees stated<sup>84</sup> that the length, the complexity and the cost of preparing a complaint discouraged SMEs from doing so.<sup>85</sup>

#### (b) Disproportionate burden as to the type of evidence required for the Complaint

75. Besides the time required for a complaint to be officially accepted, most of the SME manufacturers interviewed considered that the type of evidence that the Commission required them to provide in their complaint did not take account of their particular status. This placed a disproportionately heavy burden on them and put them at a serious disadvantage when they wanted to resort to TDIs. Many SMEs argued that although "*prima facie* evidence available to the company" should be sufficient, the Commission had much tougher demands.<sup>86</sup>

76. Considering that the Commission requires evidence of dumping and/or subsidisation (or of a sudden surge of imports), there is a need for information about the practices

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<sup>83</sup> Extract of an interview with a Bulgarian Company; extract from an interview with the Secretary-General of a European Association.

<sup>84</sup> See a Member State's response to Question 19, Global Europe-247, Europe's Trade Defence Instruments in a changing global economy, A Green Paper for public consultation and a questionnaire. Global Europe, Europe's Trade Defence Instruments in a changing global economy, A Green Paper for public consultation and a questionnaire were accessible as last viewed on 14 June 2010 by clicking on the following link: [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_131986.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131986.pdf).

<sup>85</sup> See a Member State's contribution to the public consultation for a Green Paper, Global Europe-161, Europe's Trade Defence Instruments in a changing global economy, A Green Paper for public consultation and a questionnaire were accessible as last viewed on 14 June 2010 by clicking on the following link: [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_131986.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131986.pdf).

<sup>86</sup> Extract of an interview with the Secretary-General of a European Association.



of third country's government and companies that may be extremely difficult for SMEs to obtain. It was argued by some of the interviewees that it was, in reality, practically impossible for an SME to obtain evidence of unfair practices (dumping, etc.) in third countries. When faced with such demands, SMEs sometimes try to call upon the assistance of their national embassy, or upon that of the local European Delegation. In a particular instance, a national federation was compelled to travel anonymously within third countries in order to collect comparative price information. Several interviewees said that it was difficult for SMEs to obtain evidence of injury. Finally, several interviewees stressed the difficulty for SMEs in providing evidence of a causal link.

(c) Standing

77. A number of interviewees made the point that the 25% threshold, by virtue of which the complainant should represent at least 25% of the Community industry production, was too high a threshold for SMEs, particularly in cases where they could not count on the support of larger firms. While this is a requirement of the WTO for which there is little prospect of change, the SMEs that were interviewed felt that the way in which the Commission calculated this threshold made it harder for them to meet it.

#### **4.2.2 Faced by EU SME Importers/Users**

78. All the SME importers and users that were interviewed for this Study expressed frustrations concerning their difficulties in defending their interests in TDI procedures. These frustrations stem in the first place from a widespread perception among importers, users, and retailers, whether large or small, that the procedure is biased against them and that their views carry little weight compared to those of producers.
79. However, irrespective of whether this perception is or is not founded - a debate that is outside the scope of this Study - it remains that SME importers, and, even more so, users and retailers, suffer, in TDI procedures, from handicaps that are linked to their SME condition.
80. Among these handicaps, there is the need for SMEs to find out, or to be promptly informed, about the initiation of procedures. Indeed, unlike the producers, SMEs importers / users do not control the timetable of the investigation and have to suffer from the negative consequences of this fact. Several importers and users have highlighted their need for having some predictability in particular when an SME specialises in a narrow product range and does not have the financial ability or the time to either sustain higher import duties or cancel its order respectively.<sup>87</sup> For most SMEs, being kept, at all times, informed about cases that could affect their interests is beyond their capabilities and resources and they rarely have advanced warnings regarding the initiation of new cases.

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<sup>87</sup> Extract from interview with European association

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### 4.3 Early Stages of Investigation

#### 4.3.1 Difficulties Faced by EU SME Producers

##### (a) Sampling Questionnaire

81. Several interviewees complained that not only did the Commission allow too little time for SMEs to reply to the sampling questionnaire and to make comments on the sample selection, but also that it rarely included SMEs in its samples. The underlying reasoning for this practice is that the Commission considers that the sample should be representative at least quantitatively, i.e. covering the largest possible volume of the domestically manufactured product concerned. However, this practice results in the Commission selecting the largest five or six manufacturers, and thus excluding SMEs from the sample based on which the injury would, in principle, be quantified. This may lead to remedies that do not take full account of the SME situation, often more vulnerable to foreign competition than larger businesses.

##### (b) Main Questionnaire

82. Almost all of the SMEs that were interviewed argued that there was a wide disparity between the questionnaire requirements and the SMEs' capabilities. Their accounting system did not always enable them to answer the Commission's questionnaire in the required manner (i.e. PCN break down, TbyT table, etc), in particular it did not always enable them to provide information such as their manufacturing cost or their profit margin for each transaction during the one-year investigation period. As to SMEs manufacturing or importing multiple products, they have a different accounting system, including their own method of cost allocation,<sup>88</sup> and the investigation period may not tally with their financial year.<sup>89</sup> The same SMEs also stated that the Commission requested excessively broad information, without offering sufficient explanation as to its practical use and impact. They also objected to the requirement to provide the Commission with all invoices issued within one or two years.<sup>90</sup> The amount of financial information required from SMEs leads companies to wonder about the relevance of some of this information for the investigation. They also object to the excessively short deadlines within which such information has to be supplied.

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<sup>88</sup> Extract of an interview with the Secretary-General of a European Association.

<sup>89</sup> Extract of an interview with a French SME; extract from an interview with the chair of a French SME; who was involved in a trade defence investigation; extract from an interview with an Austrian Company; extract from an interview with a French SME, which has not been able to lodge a complaint.

<sup>90</sup> Cf. Extract of an interview with a French SME; extract from an interview with a Spanish SME.

### 4.3.2 Difficulties Faced by EU SME Importers/Users

#### (a) Making themselves known to the Commission

83. In the case of importers, information required by the Commission from the complainants includes the names of known importers of the product, who are sent a questionnaire by the Commission. They are consequently informed and in a position to present their views.
84. But the same is not true of users, retailers or consumer organisations, whose views are particularly relevant for the determination of the Community interest. It is indeed left to them to identify themselves, to request information about the proceeding, and to request the possibility of presenting their views. In addition, to be considered an interested party and to be admitted to participate to the procedure, they have to make themselves known within a time period specified in the notice of initiation of the procedure. Article 5.10 reads: *“the notice of initiation... shall state the period within which stakeholders may make themselves known, present their views in writing and submit information if such views and information are to be taken into account during the investigation; it shall also state the period within which stakeholders may apply to be heard by the Commission in accordance with Article 6 (5).”* Article 6.5 reads *“The stakeholders which have made themselves known in accordance with Article 5(10) shall be heard 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 are an interested party likely to be affected by the result of the proceeding and that there are particular reasons why they should be heard.”*
85. Overall, SMEs importers and users often become belatedly aware that an investigation proceeding has been initiated, thus missing deadlines to notify their interest in being a party to the investigation.

#### (b) Sampling Questionnaire

86. Similarly to what has been mentioned above for SME producers, importing SMEs considered that a sample of importers should also include SMEs in order to reflect more faithfully the impact of potential measures on their interests. The issue of SMEs representation in such a sampling process, mentioned above in the context of producers, is also relevant for importers/users.

#### (c) Main Questionnaire

87. Like SME producers, the majority of SME importers believe that the questionnaire that they receive is too demanding in terms of data and details. They believe that the Commission should only ask importers, in particular SMEs, two or three fundamental questions relating to the price at which they have purchased the product from the foreign supplier: the selling price on the EU market and the impact of any duties on their company's activities.

(d) Lack of transparency as to how the Community interest test is applied

88. SME importers/users also complained during the interviews that, while they were willing to provide information to the Commission in order for it to evaluate whether measures were, or not, in the Community interest, the Commission did not provide them with any explanation as to how it weighed the various economic elements against each other. Almost all importers stated that they considered that their contribution had no significant influence on the Commission's decision-making process and that the Community interest test was not a transparent or objective criterion in the investigatory process.
89. They point to the fact that, not only are the provisions of Article 21 general, and thus open to different interpretations, but that they involve, in most cases, a sophisticated economic analysis. Most SMEs do not have the expertise and resources to put together the precise and sophisticated argument that could have some influence on the Commission's decision to resort, or not, to measures that would otherwise be justified.
90. There is also a problem of size and economic weight that naturally puts small firms at a disadvantage in a process that requires the weighing of negative effects of measures in relation to their benefits, and in which, the size of the interests represented by those expressing views consequently matters.

(e) Lack of means for monitoring the investigation

91. To be able to argue effectively their case on the Community interest, SME importers and users would need to have precise knowledge of the key factual elements that have emerged from the earlier stages of the investigation. In each case, depending on the specificity of the situation at issue, the arguments to be made regarding the Community interest can vary significantly. For instance, in some cases the most decisive argument against measures would be the effects on users; in others, it would be the limited benefits to be expected from measures, due, for instance, to the lack of EU industry's competitiveness, in terms of their high costs to users and consumers. Mounting an efficient defence would thus imply that the firms concerned would be in a position to monitor the procedure closely, something that is beyond the capacity of most of them. Only in cases where the sector has a strong trade organisation is that conceivable.

#### **4.4 Late Stage of the Investigation**

##### **4.4.1 Monitoring the Procedure**

92. As the investigation advances to its conclusion, it becomes all the more crucial for the parties to remain informed about the procedure and to react quickly, failing which their views could be ignored. This requires a presence in Brussels so as to be able to physically monitor on a regular basis the non-confidential version of the file and to address comments made by other interested parties. It was stated by interviewees that, even for a European association already based in Brussels, having

access to the non-confidential file (which can only occur on the Commission's premises), submitting "rebuttal arguments" in response to other parties' submissions, or requesting a hearing with the Commission, were unnecessarily complicated.

#### **4.4.2 Communication with Member States**

93. SMEs complain of the lack of transparency of the decision-making process leading to the adoption of measures. SMEs suffer particularly, and more so than larger companies, from this lack of transparency. One European association stated that it was difficult for them to have access to the EU Anti-dumping Committee's Members. This is particularly so in the case of sectors which are fragmented and/or consist mostly of SMEs.
94. Other SMEs expressed their feeling that their voice had no weight in the Council and that Member States did not follow, in the positions they take, the commercial interests of their national companies; rather, they followed their own political agenda.

#### **4.5 At the Implementation Stage**

##### **4.5.1 Faced by EU SME Producers**

95. SME producers also stated that it was very difficult for them to monitor the full compliance of the measures by the exporters concerned and that, in the event that the measures were circumvented, SMEs had to face - once again - all of the aforementioned difficulties relating to the initiation of a new (anti-circumvention) complaint.

##### **4.5.2 Faced by EU SME Importers/Users**

96. For SME importers, the uncertainty as to when duties would be imposed and for how long is a serious problem in their trading activities. Their financial capacity is limited and the impact of sudden measures affecting products that they have already purchased and which are on their way to the EU market can be devastating.
97. The ability of SMEs to influence Commission decisions is even more reduced once the measures have been imposed, during interim or sunset reviews, refund procedures and anti-circumvention investigations. They are often unaware of such subsequent developments, and will have little say, if any, in the Commission's decisions.
98. The possibility for refund is often unknown to importers in general and even more so to SMEs importers. Beyond the lack of awareness and knowledge of this procedure, its complexity also presents difficulties for SME importers wishing to use it.



#### **4.6 Interim Conclusion**

99. The above-mentioned difficulties faced by the interviewees in their previous experience with EU TDI investigations calls for such proceedings to become more SME-friendly.
100. It is worth noting that all interviewees, both SME producers and importers/users, expressed their interest to be more actively involved in such proceedings, provided the European Commission, the European Parliament and the Member States take positive actions to facilitate their participation in TDIs.

## 5. RECOMMENDATIONS ADDRESSING THE DIFFICULTIES IDENTIFIED ABOVE

101. As previously seen, the EU TDI services do not, with the limited exception of the Helpdesk, grant SMEs any special treatment in TDI investigations. As a result, SMEs which want to make use of TDIs to protect themselves from foreign unfair trade practices, or which oppose abusive use of such instruments, are placed at a significant handicap.
102. SMEs, in exchanges that we had with those we interviewed – whether they were producers or importers/users, said they were willing to be more active in TDI procedures, but needed more information and support from the Commission and the Member States.
103. Responding to such needs would require that the particular handicaps of SMEs be taken into account in TDI procedures. In doing so, the EU TDI services would align their policy towards these companies with that followed, in accordance with the general principles laid down by the Commission, in a number of other sectors.
104. Two main kinds of recommendations may be considered in response to the challenges identified above:
- Solutions addressing the lack of sufficient SME *awareness* of TDIs in general and lack of understanding in specific cases;
  - Solutions providing SME *facilitation*, such as *simplification* of procedures and/or *assistance*.

### 5.1 Raising Awareness of TDIs in General

#### (a) Regional Workshops

105. Efforts to raise awareness should be balanced between SME producers and SME importers'/users' interests in order to ensure that all the interests and sensitivities concerned are equally addressed. The Commission, in co-operation with the Member States and possibly, the European Parliament (INTA Committee), could organize workshops, designed to encourage the dissemination of information about TDIs. Such workshops should be primarily regional, in order to reach those SMEs located away from the capitals, which are often the least well informed about TDIs.
106. In this regard, the Commission could co-operate with the "Enterprise Europe Network". One specific suggestion concerns the possibility of organising information sessions on TDIs during the Enterprise Europe Network's Annual Conference or as part of the regular meetings (three per year) with national representatives of the Network, during which Enterprise Europe Network presents EU policy themes to SMEs.



107. The Commission could also organise workshops during the "European SME Week" and hold, once a year in each Member State, at least one decentralized event (meeting, working group, practical seminars, examination of questionnaires etc.) in order to inform SMEs about TDIs. It should be noted that the European Parliament praised the European SME Week and proposed that this event be used to provide information to SMEs on how to export outside the European Union.<sup>91</sup>

(b) Increased involvement of Member States as "interface"

108. Member States could also undertake various initiatives complementing those of the Commission. An SME-dedicated officer within the ministerial department dealing with TDIs, or at least one official dedicating part of his time to SMEs could organise, together with private bodies within the Member state, informative sessions or seminars about TDIs, or could draft informative material on TDIs, which would serve as a complement to the regional workshops that the Commission could organise. Such support could also go beyond providing information to liaising with relevant business associations of SMEs, or with SMEs located in other Member States or with the Commission.

109. Member States could also have an SME/TDI-dedicated website in their national language (with links to the Commission's website) that could provide both basic substantive/technical and procedural advice and contact information.

110. Basically, the national authorities concerned should act as interfaces between DG Trade and the SMEs from their own countries.

(c) Improving the functioning of the DG Trade's Helpdesk

111. The SME Trade Defence Helpdesk already constitutes a positive initiative designed to help SMEs navigate the intricacies of TDIs.

112. However, it lacks visibility and interviews have demonstrated that very few SMEs are even aware of its existence. For example, reaching that particular page on the DG Trade website can sometimes be difficult. Reading this page in English may also present an insurmountable challenge to many European SMEs.

113. It would therefore be important to raise the visibility of the SME Trade Defence Helpdesk by improving awareness of this tool.

114. One suggestion could be to create links between national websites and DG Trade's website so that SMEs can access the Helpdesk more easily. This national relay could also help to address the question of language, which is a problem for SMEs. SMEs often request the possibility of accessing important information in their national language, thus helping to reduce the distance between SMEs and the EU Institutions.

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<sup>91</sup> Enhancing the role of European SMEs in international trade, European Parliament Resolution of 05 February 2009 on enhancing the role of European SMEs in international trade (2008/2205(INI)), see especially Nr 43, P6\_TA(2009)0048, as last viewed on 09 June 2010 per clicking on the following link: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2010:067E:0101:0111:EN:PDF>.



However, it is not sufficient that an SME can find out about the existence of the Helpdesk through its Member State's national trade ministry's website; it would be most useful that the website of the DG Trade SME Helpdesk is also available in all official languages.

115. Another idea to improve the efficiency of the DG Trade Helpdesk would be to propose that officials dedicated to this desk are not only experts in terms of the European TDI rules and regulations but are also sufficiently aware of the particularities of SMEs. In this regard, one possible action that could be explored - in the context of the continuous training that is mandatory for Commission officials - is for the latter to have a one-week "secondment" within SMEs, in particular those that encountered difficulties with TDI instruments in the past and who were interviewed for this Study.

(d) Publicising the Hearing Officer's report in order to increase transparency and improve SME knowledge

116. Although not specific to SMEs, it would be useful to all companies, and in particular to SMEs, to be informed about the Hearing Officer's observations about TDI procedures, especially those describing the problems regarding which his intervention was requested and the solutions that were eventually found. Although some solutions may be truly ad hoc based on the specific circumstances of the case or the company/companies involved, they may still provide some inspiration about similar issues that could be raised in future cases and constitutes a useful additional element of SME awareness. More generally, in the context of the various initiatives that may be taken by the Commission in order to improve SME participation in TDI proceedings, the Hearing Officer could be in an effective position to insure that these initiatives are correctly implemented, assuming that such initiatives are summarized, for example in the form of "best practices".<sup>92</sup>

## **5.2 Providing Information and Explanations in Specific TDI Cases**

117. Improving awareness of TDIs among SMEs in general would however not be sufficient. In order to be able to participate in TDI procedures, interested parties, whether as producers or importers/users, need to be sufficiently aware as to how TDIs procedures should apply to specific cases.

### **5.2.1 European Commission**

118. Most SMEs involved in TDIs agree that the European Commission could, without getting involved in a company's defence strategy, help an SME better understand TDIs proceedings in a specific case. SMEs should, in particular, be given sufficient explanations to understand what is at stake, what the options are, and whether or not they have an interest in actively participating in the proceedings. In this respect, one possibility would be for the Commission to identify the SMEs involved in an EU TDI and to organise a more individualized follow-up with them. For example, at the

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<sup>92</sup> See above, fn. 3.

time the questionnaire is sent to an SME producer or importer/user, the Commission could make sure that those companies have understood the reasons and the possible consequences of the Commission's questions, leaving to the companies the role of defining their own strategies in line with their own interests. This may in particular be accomplished by combining the transmission of the questionnaire for producers with telephone calls from the Commission to the managing directors of the SMEs concerned. Subsequently, the SMEs concerned may consider that the interests at stake justify their investment in the defence of the case. For the smallest SMEs, however, such investment may still be potentially disproportionate. In such a case, and in addition to other means of facilitating the SME role, the European Commission might, exceptionally, be more proactive.

119. Another way of helping SMEs – of direct relevance for the European Commission – concerns access to the non-confidential files. Indeed, SMEs do not necessarily have the ability either to access the non-confidential files (cost, distance, etc.) or to translate them if needed. In this respect, solutions must be envisaged. The first that comes to mind would be that the Commission provides electronic access to these non-confidential files. Having complete computerized access to the files should be of paramount importance for SMEs. It is our understanding that the Commission is already working in this direction and electronic access of non-confidential files might be available as of 2011.

### **5.2.2 Member States**

120. As said earlier, Member States could act as interfaces/intermediaries with the Commission, and thus alleviate the problem of the perceived distance between SMEs and the latter. In this respect, a practical solution would be to organise "Train the Trainer" seminars, where the European Commission would train the Member States' officials in charge of assisting SMEs in the aforementioned context.
121. Member States could in particular help SMEs understand the basic substantial or procedural elements involved in an investigation, such as the implications on the product scope.
122. Regardless of their trade policy agenda/ideology, Member States should assist SME producers, importers/users equally in relation to answering elementary legal or technical questions.

### **5.2.3 Trade Associations**

123. Most stakeholders, including some Member States and some European Associations,<sup>93</sup> emphasized that only those SMEs that are members of an association

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<sup>93</sup> See transcript of interview with a Member State. This interview took place on Friday 21 May 2010. See also views of an Association under its response to Question 19, Europe's Trade Defence Instruments in a Changing Global Economy, A Green Paper for public consultation and a questionnaire. Global Europe, Europe's Trade Defence Instruments in a Changing Global Economy, A Green Paper for public consultation and a questionnaire was accessible as last viewed on 14 June 2010 by clicking on the following link: [http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc\\_131986.pdf](http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_131986.pdf). See an association's views under its



would be able to participate in TDIs investigations and argue their case effectively. However, the fact is that not all sectors have trade organisations and that a significant number of SMEs are isolated and would be unable to participate meaningfully in TDIs procedures.

124. Such SMEs should be encouraged to create ad hoc associations, which could occur through the existing network of European and national associations and would allow information- and cost-sharing between several SMEs and to combine their resources with other companies of the sectors that are their competitors. Such encouragement should be given, in particular, on the occasion of the regional workshops.

### 5.3 Facilitation for SMEs

#### 5.3.1 At the Pre-Initiation Stage

(a) For SME producers

125. Preparing and lodging a complaint is a task that most SMEs, for the reasons explained above, are rarely in a position to handle. In most cases, they do not have the capacity or the resources to carry out this task to the full extent. Consequently, all stakeholders agree that the relevant authorities should take into account, in determining the adequacy of the evidence of dumping, injury, and causality, the capabilities of the SME(s) lodging the complaint. Existing rules leave the Commission sufficient leeway to adapt its practice accordingly, by simplifying it.
126. In particular, there could be a margin of interpretation to adapt the type of evidence that is required by the Commission for the lodging of the Complaint and the Commission could show more flexibility in what type of evidence it accepts and from which source.
127. For example, the extent to which aggregated and macro-economic statistical data could be accepted, instead of microeconomic, should be explored, as long as the SMEs concerned are able to provide supporting and verifiable evidence, such as micro data (e.g. price undercutting, profits/losses) that can be adequately commented on by the interested parties.
128. Such macro data (e.g. production, consumption, market shares, and employment), could also, instead of being collected from SME complainants, be obtained from sources which do not specifically require the active participation of SMEs, e.g. trade associations or other reputable sources.
129. Another example could be the increased use of sampling. Most SME cases involve a significant number of parties and sampling is always used in the actual investigation. Since sampling is used in the actual investigation, there is no reason why it should

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response to Question 19, Europe's Trade Defence Instruments in a Changing Global Economy, A Green Paper for public consultation and a questionnaire. See also the transcript of an Association's interview that took place on Thursday 22 April 2010 at 9:30am.

not be used at the Complaint stage, which has less explicit legal standard requirements.

130. It is noted that the two above proposed solutions could also be implemented in a combined way, i.e. that the Commission could retrieve macro/micro data from a sample of SMEs.
131. Such simplification initiatives (macro data and sampling) could significantly reduce the burden for SMEs. It should also be noted that as a result of using sampling, it would be much more manageable for the Commission and Member States (see above) to provide the necessary help to the smaller number of parties involved when sampling is used.
132. Another means of facilitating SME producers would be to keep the name of the Complainant confidential, should the latter so request. We understand though that the Commission has already used, at least twice, this tool at the request of complainants who were afraid of retaliation.
  - (b) For SME importers, users and traders
133. The Commission could require that, in addition to importers, the Complaint identifies major users, traders and consumers' organisations, so that they can be alerted to the initiation of the investigation and to the deadlines imposed for companies that wish to participate in the procedure as interested parties.
134. To that effect, the Commission, together with the Member States, should establish a procedure ensuring that all SMEs likely to be effected by a new procedure are promptly identified and informed of the initiation of the procedure and of the deadlines for registering as an interested party, when required.
135. SMEs importers, users, traders and consumer organisations should be included in the proposed Commission and Member states information campaign to improve SMEs knowledge of TDIs, of what is at stake for them in these procedures, and of their rights.

## **5.4 At the Investigation Stage**

### **5.4.1 For SMEs Producers**

#### **(a) Sampling**

136. Sampling should be used systematically when the manufacturing industry is fragmented and made up essentially of SMEs to reduce to the maximum extent possible the burden on individual SMEs (see above). However, in the use of sampling, account should be taken of the risk of distortion in cases where the complaining industry consists, to a large extent, of SMEs. Indeed, basing the sample – as is currently the case under EU practice – exclusively on the biggest volumes of

production (“largest representative volume of production”)<sup>94</sup> has, in most cases, the effect of excluding SMEs which normally produce smaller volumes. Although the Commission indicated in the Footwear case that: “*there is no legal obligation to include small and medium-sized enterprises (...) in the sample as follows from the wording of Article 17(1) of the basic Regulation*”, when sampling is carried out in a case where both large and smaller companies are involved, it would be more balanced and representative if it also included SMEs.

(b) Main Questionnaire

137. Replying to a questionnaire represents a considerable, although unavoidable, burden for the parties concerned. SMEs in particular, are often ill-equipped and do not have the necessary resources for responding, within the time limits, to these questionnaires. Certain solutions ought to be considered in order to facilitate SME participation in TDI investigations and to prevent their being subject to excessive burdens. These solutions must strike a balance between the legal obligations resting on the Commission to provide adequate factual and legal justifications for its decisions and the constraints faced by SMEs.

- “Tailor-made” questionnaires, for SMEs, taking into consideration the particular difficulties encountered by those companies. Many of the SMEs that were interviewed criticized the fact that they had received a large number of standard documents/questionnaires from the Commission. In this respect, the possibility could be explored that questionnaires for SMEs be more customised in order, for example, to match their accounting systems more closely and formulated after exchanges between the case handlers and the SMEs concerned before the initiation of the case. According to our information, this is the way in which the US helpdesk for SMEs proceeds.
- The Commission should also grant additional flexibility to SMEs, such as extended periods of time, for answering questionnaires and submitting other communications, information or comments on proposed decisions which fully reflect their particular situation.
- The Commission, together with the Member States, should also explore the possibility - when the burden for the SMEs concerned would be too high - of delegating an official to visit the company and to help it to reconcile its own data with the requirement of the TDI regulations and practices, without though actually completing the questionnaire, which is a task that should remain an obligation of the companies wishing to participate in an investigation.

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<sup>94</sup> Article 17.1 of Council Regulation (EC) N° 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community and Article 27.1 of Council Regulation (EC) N° 2026/97 of 06 October 1997 on protection against subsidised imports from countries not members of the European Community

#### **5.4.2 For SME Importers and Users**

138. In addition to the above comments relating to the questionnaire that are equally applicable to this section, the difficulties for SMEs in arguing their case regarding the Community interest test, in part due to the insufficient transparency of the procedure, should also be mentioned.
139. SMEs importers, users and traders consider that they play little, if any, role in the assessment of the Community interest. This should be remedied and some possible actions could be the following:
- The Commission should give special consideration to the views of SMEs in the assessment of the Community interest;
  - When there is a large number of SMEs likely to be affected by measures, the Commission should consider the use of sampling to assess the possible negative effects of measures on the firms concerned;
  - While in its cost/benefit assessment of possible measures it has to take into account the relative economic weights of the parties expressing views, it should also take account of the particular vulnerability of SMEs. It should, when SMEs are involved, always address their views and arguments in its findings, and it should do so separately from considerations relating to larger interests.
140. The large majority of interviewed SMEs that made comments about increasing transparency on the application of the Community interest test were importers and users. However, SME producers have also made the argument that the above-mentioned points about the assessment of the Community interest are also applicable to them, in particular when SME producers not only suffer injury but where their survival is at stake.

#### **5.4.3 Monitoring the Procedure**

141. Electronic access to the non-confidential file, which as mentioned earlier the Commission intends to have as a future function of the new DG Trade website, would be of great help to many SMEs in monitoring the procedure without having to incur the extra costs of sending an employee to Brussels or of engaging a local representative to inspect the non-confidential file.

#### **5.4.4 Communication with Member States**

142. The difficulty for SMEs in having access to Member States is a reality. The only way this could be partially remedied is through the action of the association at European and national level. For these and other broader reasons, the development of associations and membership of SMEs in such associations should be strongly encouraged by the Commission and Member States.

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## 5.5 At the Implementation Stage

### 5.5.1 For SME Producers

(a) Registration and retroactive application of duties could limit circumvention

143. SME producers may be more encouraged to participate in TDI proceedings if they knew that the possibility of obtaining registration of the imports was much more probable. Registration functions as a rather persuasive tool for dissuading market players from stocking up imported products between the initiation of an investigation and the adoption of provisional measures. Usually such a period may last around six months and it may prove sufficient for increasing levels of imported product stocks to the extent that the provisional and definitive duties would not have the same effect as from their adoption.
144. At the same time, registration would be effective only if it also resulted in the application of measures on the goods that have been already imported and registered. The combined effect of registration and retroactive application should be particularly helpful to SME producers.

### 5.5.2 For SME Importers and Users

145. The request by importers/users that a compulsory period of 30 days between publication of provisional measures and their implementation be observed; that provisional measures should not apply to merchandise for which a contract has been signed before provisional measures, or to merchandise shipped before such measures but still at sea at the time of adoption of these measures, raise serious practical difficulties: difficulty of control, risks of circumvention, and continuation of importation of dumped product for an indefinite period of time after the imposition of provisional measures. While the request regarding the first two situations referred to above would appear impossible to satisfy, the one regarding the third situation i.e. treatment of merchandise at sea at the time of provisional measures deserves further reflections by the Commission.
146. Importing SMEs could also be assisted in handling the last stages of an investigation if they could easily acquire guidance on the possibility and conditions under which they could achieve a review or refund of the measures. The Commission and Member States could include specific advice to this effect in their websites as well as train officials dealing directly with SMEs better so that they could assist the SME importers more efficiently. Such guidance could be also included as a topic in the regional workshops that could be organised by the Commission in co-operation with the European or national parliaments and national administrations. In addition, specific brochures informing importers/users of all such rights could be distributed to industry associations and Chambers of Commerce throughout the EU for better dissemination of the relevant information.



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## **5.6 Interim Conclusion**

147. The above recommendations are not exhaustive and are limited to measures that can be applied within the current legal framework. However, the Commission TDI services could make a real contribution in facilitating SMEs' participation in TDIs by making such facilitation a policy priority and by adopting specific measures to that effect, such as those suggested in this chapter.





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## **6. THIRD COUNTRY PROCEEDINGS AND EUROPEAN SMES**

### **6.1 Limited involvement of EU companies for the time being, but this may change**

148. While SMEs are less export-oriented than larger companies – only 13% of them export, and their exports, according to estimates, represent only 10% of EU exports – they still face a significant statistical risk of being involved in TDIs cases initiated by third countries.
149. There are indeed approximately 1.6 million SMEs that export to foreign markets, and the number of anti-dumping cases brought against EU exporters, whilst it has declined since the 90s, remains significant; in the last three years, (2007 to 2009 included) 41 cases total, of which 9 were against the EU as a whole and 32 against individual Member States, have been brought against EU exports.<sup>95</sup>
150. In addition, where SMEs are involved in cases, it can have particularly disastrous consequences for them, as most of them, because of their limited resources, tend to concentrate their exports on a limited number of markets, unlike large firms that export to a greater number of destinations.
151. Exports to given markets may consequently represent for them a vital part of their turnover and constitute the difference between profit and loss, and even, at times, between survival and demise. In such circumstances, active participation from these firms in investigations launched against their exports can be crucial.

### **6.2 Difficulties of SME exporters involved in third country proceedings**

152. Due to their lack of expertise and resources, participating in foreign procedures is particularly challenging for EU SME exporters. The difficulties they face are of a similar nature to those identified regarding general SME participation in EU procedures, but are made more acute by the distance and differences in language and procedures between those of the countries concerned and those of the EU.

#### **6.2.1 Lack of Awareness**

153. First, even if informed in good time, they may not always realize the danger that such procedures represent for their exports to the market concerned.
154. If they do, they still, given their lack of resources and expertise, might often be tempted not to answer requests for information of the administering authority, on the

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<sup>95</sup> Some countries initiate cases against the EU as a whole; others initiate against individual Member States. The WTO statistics count a case against the EU on product X as one investigation, while it would count investigations against France, Germany and the UK on product X as three investigations. This gives a somewhat distorted view of the number of cases against the EU, which are less than the addition of cases against the EU plus individual cases, and of the number of cases against individual Member States, which are more than those listed for individual countries. For example, to have an accurate picture of the number of cases involving German exports, one should add to the eight cases against Germany at least some of the nine cases against the EU as a whole.



ground that the amount of business they do on the market concerned would not justify the costs involved in defending themselves.

## **6.2.2 Practical Difficulties that SME Exporters Can Face**

155. Several difficulties they face:

- Language barrier necessitating interpretation and translation costs;
- Delays in communication that will make deadlines more difficult to meet;
- Peculiarities of antidumping procedures in other countries which can add complications; sometimes arbitrary practice of TDIs procedures in countries that are new users of these instruments, and which can lead to unfair results for the exporters concerned;
- Distance that precludes direct contact and participation to the procedure, and which would often require an external assistance as well as the support of local customers.

## **6.2.3 Currently Available Support and Its Limitations**

156. The Commission, which has a Unit in charge of monitoring investigations initiated by third countries, can be of great help to SMEs, although there is no SME-specific policy priority or tool within that Unit.

157. While the latter cannot substitute itself for the companies, it can answer requests for factual information, provide guidance and ensure that the administering authority concerned fully complies with WTO requirements or otherwise put pressure on it to do so.

158. Experience shows that Commission's interventions which are well prepared and properly co-ordinated with the Member States and the companies concerned carry considerable weight with third countries' authorities. In so doing, the Commission can not only considerably reduce the burden on EU companies, but also place them in a stronger position to defend their interests vis-à-vis the authorities concerned.

159. While the Commission has been active and present in a number of recent cases, its role could be significantly enhanced if local EU Delegations – in countries where it has one - and Member State Embassies were more actively and directly involved than is currently the case. To that effect, officials, who should receive adequate training from the Commission, should be named as contact points in the Delegations, and in the Member State Embassies (at least those of which their exporters are the most frequent targets of foreign investigations), which are located in countries resorting frequently to TDIs.



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160. This would seem all the more desirable as it is likely that one will see a continuation of the increase in the number of cases initiated by new users of these instruments. While most will be directed at exports from other emerging or developing countries, a number, probably increasing, will concern exports from the EU.
161. By reinforcing its network of officials with expertise in TDIs, the EU would give itself the possibility of monitoring foreign country practices more closely, and of putting increased pressure on their authorities to conform to WTO requirements. It would also enable more direct support to be provided to companies involved in such procedures, and in particular to those that need it the most, i.e. the SMEs.
162. However, whatever support they may receive from the Commission and Member States will not eliminate the need for individual firms to participate directly in the procedure. Thus SME's are at a particular disadvantage in this regard because of their lack of resources and expertise.
163. The solution might be then, if several firms of the sector are involved, to share the costs of cooperation in the proceeding between them, which can be done under the aegis of a trade/industry organisation or chamber of commerce. Generally, the latter can be of great help to individual firms and should be encouraged to intervene and assist firms in such cases. If properly organised, a combination of such support with that of the Commission services, Member States and locally-based EU officials may considerably reduce the difficulties of SMEs in third-country procedures and ensure that they effectively defend themselves in these cases.

### **6.3 Proposed Solutions for the Difficulties Encountered by SME Exporters in Third Countries**

#### **6.3.1 Increasing General SME Awareness**

164. An important tool for providing general information to SMEs that are either interested to learn more about third-country TDIs, or are actually affected by an initiated investigation, is the new "Guide to EU Exporters" which was published at the beginning of October 2010 by the Commission (in all official EU languages) and which should particularly help SMEs in view of their difficulty in obtaining such information by themselves. This Guide, which is available on DG Trade's website, has been distributed to Member States and to EU/National Associations, and will be distributed to EU Chambers abroad as well as to Delegations of the EU in third countries.
165. SMEs can also obtain additional information on the DG Trade's website which now also includes a summary of the main characteristics of trade defense legislation of the most important non-EU TDI user countries, as well as a searchable list of ongoing investigations by third countries and measures in force abroad. Moreover, this list is directly linked to the Market Access Database (MADB - <http://madb.europa.eu/mkacddb2/indexPubli.htm>) and SMEs searching for more general information on the MADB will also be automatically informed of any TDI measures applicable to exports of a given product to a selected third country.

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166. Another tool which has already been suggested for raising awareness of EU TDIs is the organisation of regional workshops. The workshops' agenda should also cover third-country investigations by explaining to SMEs how they can receive timely information on such TDIs and what the Commission or Member States could do to assist SMEs.
  167. Trade/industry associations and Chambers of Commerce could also play a major role in raising awareness, organising co-operation and cost-sharing, especially for their SME members that are exporting outside of the EU.
  168. A general role in providing information could also be played by the various Members of the European Parliament that could inform the SMEs in their constituencies of the appropriate contact points in the Member States/Commission for receiving further support on technical matters.

### **6.3.2 Providing Information to SMEs in Relation to a Specific Investigation**

169. Currently, as soon as, in accordance with WTO prescriptions, the Commission is notified by a third country's authority of the initiation of an investigation, the Commission transmits the information to contact points in the Member States concerned, while companies can receive automated e-mail updates by the Commission through an RSS feed system.
170. The system appears to be working well between the Commission and the Member States, but it is less than clear how the information is subsequently disseminated to all of the exporters concerned. As mentioned earlier, identification of the exporters covered by an investigation often raises problems, in particular when the exporters are small. The contacts to whom we have spoken in Member States and Chambers of Commerce did not give us the sense that the system of information was totally foolproof. A firm that would learn about the initiation of a case belatedly could be at a serious disadvantage. It is thus imperative that information about the initiation of an investigation against a given product be communicated in good time to all the firms concerned by the investigation and adequate practical arrangements are made to ensure the systematic and prompt information of firms.
171. It is therefore suggested that a permanent, clear, and easily accessible network of contacts, in the Commission, Member States administrations, local EU Delegations, Member States' Embassies and in industry organisations, be set up so as to provide effective assistance to SMEs that are involved in foreign procedures. There should be clear reference points to which EU companies could turn to find information and advice as to how they could best defend themselves and obtain help in doing so. There should also be a simple, straightforward procedure, agreed at the EU level, specifying the steps to be taken by the various actors concerned when an EU company is the target of a foreign procedure, ensuring that it receives proper assistance and that there is adequate co-ordination between the competent services.
172. This role could be played, specifically for SMEs, by the SME Helpdesk which could be a centralised system in DG Trade that could coordinate all SME-related questions/issues by:



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- Ensuring that all the firms concerned are well informed and fully aware of what is at stake for them in those procedures, and that they understand the investigation process, which varies sometimes significantly from one country to another;
  - Encouraging firms that have significant interests in the market concerned to co-operate in the investigation and to actively argue their case;
  - Providing - when justified by the circumstances of the case - explanations how to reply to the third country's questionnaire.

### **6.3.3 Other Possible Initiatives, Including Simplification**

173. The Commission's relevant services could also assist SMEs by having frequent contacts with the third countries' authorities on technical points that could include transparency of procedures, protection of confidential data, language to be used, etc. Such close co-operation could create a channel of communication that could easily be activated on behalf of an SME when necessary. For example, the Commission currently has a Working Group with third-country authorities, under the auspices of which the Commission was able to - in the context of a specific investigation - mention to their counterparts that certain questionnaires were overly burdensome for EU SMEs.

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## 7. CONCLUDING REMARKS

174. The large series of interviews that the authors conducted in the framework of this study clearly shows that SMEs suffer from serious handicaps when participating in TDIs procedures, whether as complainants or as importers or users.
175. To start, SMEs usually know little, if anything, about the existence and functioning of TDIs. Furthermore, even when they are aware of TDIs' existence, they usually do not know the implications and/or the benefits that they can derive from their participation in particular proceedings, or the importance, for companies, of being actively involved in such proceedings. In addition, SMEs face particular difficulties in the course of investigations, such as the burdensome and lengthy process for lodging a complaint, the complexity of questionnaires, or the difficulties for them in arguing their case in the Community interest test.
176. These particular difficulties make it justified and desirable that - contrary to existing practice - SMEs benefit in TDI proceedings from a treatment adapted to their special needs. Firstly, this is necessary so that they are not subject to a disproportionate burden in these procedures. Secondly, it would also be consistent with the general policy of the Union towards SMEs and with general principles of WTO and EU law under which consideration must be given for special situations and handicaps in the treatment of economic operators.
177. Such special treatment could consist of the following actions or measures:

### *Raising awareness (in general)*

- Regional workshops
- Increased involvement of Member States as "interface"
- Improving the functioning of the DG Trade's helpdesk

### *Providing information and explanations (in specific TDI's cases)*

- European Commission
- Member States
- Trade Associations

### *Facilitation*

#### *SME producers*

- Nature of evidence required for lodging a complaint (macro data)
- Sampling
- Main questionnaire (tailor-made)
- Transparency in implementing the EU interest test
- Better access to the non-confidential file

*SME importers and users*

- Better information about the proceeding
- Main questionnaire (tailor made)
- Transparency in the implementation of the EU interest test
- Better access to the non confidential file
- Better predictability for goods en route

**THIRD COUNTRY PROCEEDINGS**

- Increasing general awareness
- Providing information to SMEs in relation to specific investigations
- Benefit from bilateral EU/Third Countries contacts

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