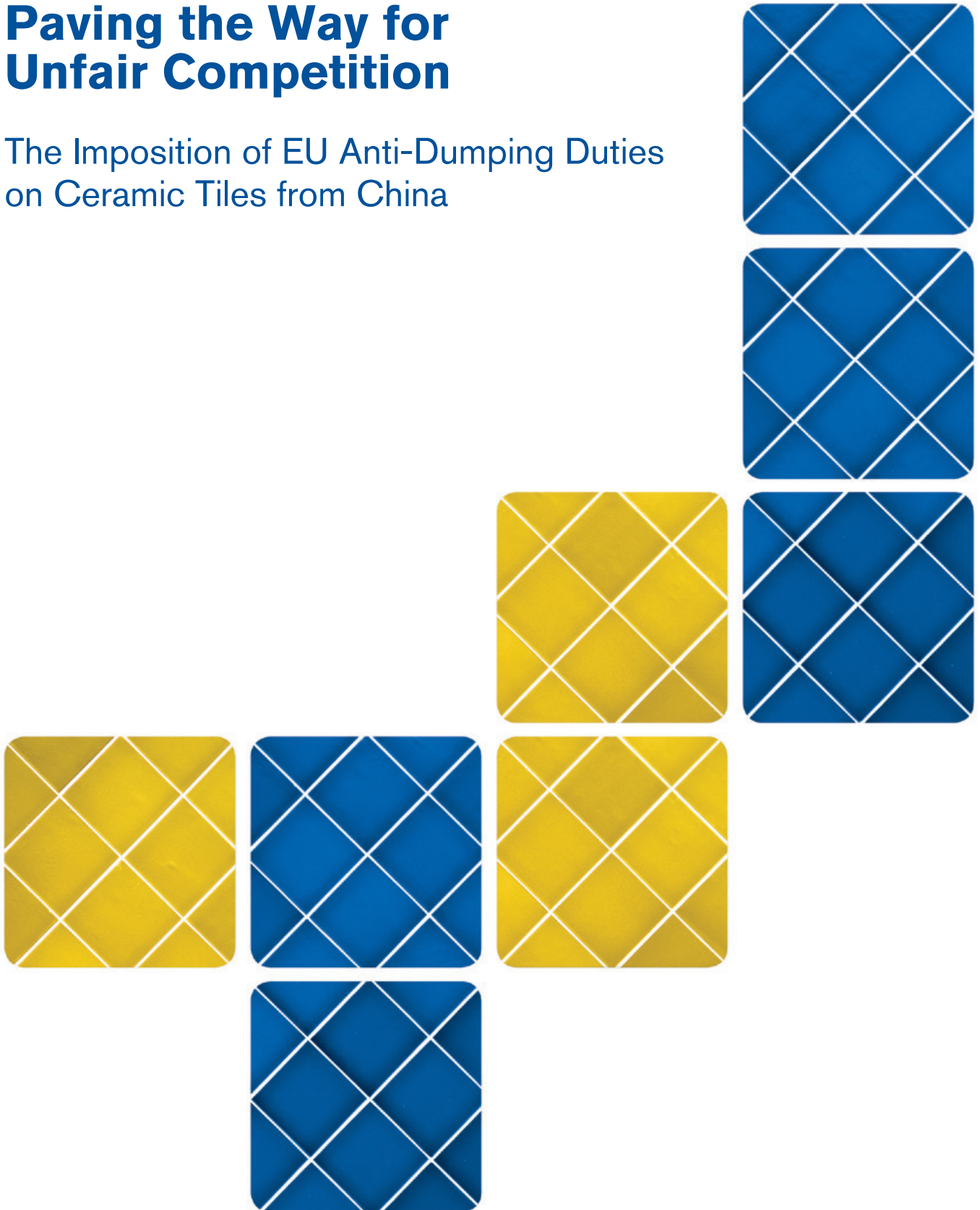


Paving the Way for Unfair Competition

The Imposition of EU Anti-Dumping Duties
on Ceramic Tiles from China



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Executive Summary

This report identifies problems and concerns with the European Union (EU) anti-dumping instrument, as applied today, regardless of the fact that the investigation procedures and methods might be in line with the current regulation and practice. The arguments are based on the recent anti-dumping investigation – and imposition of anti-dumping measures – on imports of ceramic tiles from China, but the observations and conclusions from the analysis are valid for most EU anti-dumping investigations. This report is aimed as a contribution to the modernisation review of the EU trade defence instruments that is due to take place in 2012.

In order for the EU to use the anti-dumping instrument, four requirements must be fulfilled. There must be (i) dumped imports originating from a third country that cause an (ii) injury to the domestic production of a similar product, i.e. there must be a (iii) causal link, and it must not be against the (iv) EU's public interest to impose the measures. In this report, it is claimed that the anti-dumping measures on ceramic tiles from China are inappropriate since these requirements are not fulfilled. It is not an obvious case of dumping and it is not an obvious case of injury, and the injury that is claimed is unlikely to be caused by the alleged “dumping”. Accordingly, it is difficult to identify causality. In addition, it is not likely that it would be in the EU's interest to impose the anti-dumping measures.

- Considering the claim for *dumping*, it should be noted that the export prices from China are highly differentiated and that most Chinese exporters of high-end ceramic tiles are selling ceramic tiles at a price that is as high as or higher than in many EU Member States. The average import prices of ceramic tiles from China are highly differentiated among the EU Member States, something that implies that the alleged “dumping” is not apparent in all countries. The average prices on Chinese imports, as well as the average EU domestic prices, on ceramic tiles tend to increase. Finally, it is relevant to observe that the dumping margin is based on the domestic sales price of only one producer in the US.
- Considering the claim for *injury*, it should be noted that the EU producers dominate the ceramic tile market, with a 90% market share, while the Chinese market share is only approximately 6.5%, and the Chinese imports are decreasing in absolute terms. The volume of imports of ceramic tiles from China is highly differentiated among the EU Member States, something that implies that the alleged “injury” also varies between countries. The negative effects of the economic crisis were more pronounced in some countries than others, and small producers were affected to a greater extent than the large producers that maintained their profitability, i.e. the choice of companies and countries in the sample might have affected the calculation of the injury margin, and the injury indicators might not be fully representative of the actual situation.
- Considering the EU *interest test*, it should be noted that this criteria is not applied in a proactive manner; only the interested parties that manage to contact the anti-dumping investigation team within specific time limits and are accepted as cooperating parties are entitled certain procedural rights, i.e. there is an underlying presumption that measures to counteract dumping are in the interest of the EU, unless the opposite is proven. It is difficult for fragmented importers to balance the coordinated efforts of the EU producers, and the possibility of influencing the outcome is particularly difficult on consumer products such as ceramic tiles. The EU interest test analysis concluded that a “short-term price increase might have beneficial long term effects for consumers in ensuring competition in the market. Lack of competition in the long run might lead to even higher price increase and disappearance of low priced imports.”

The European Commission argued in the announcement of its modernization review of its trade defence instruments that it makes use of the anti-dumping instrument to ensure “fair competition and a level playing-field for all businesses”. The EU anti-dumping regulation states that “the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration”. In the anti-dumping investigation on ceramic tiles, it is stated that “the aim of the anti-dumping duties is not to seal off specific trade channels, but to restore the level playing field and counter-act unfair competition”. Considering the above, this report questions the fact that the concepts of “fair” and “competition” are not considered or analysed in the EU anti-dumping regulation or in any anti-dumping investigation.

If the EU competition rules would apply in anti-dumping cases, the exporters would need to have a (i) dominant position in the market, i.e. a market share of at least 40–50%, and they must (ii) abuse their dominant position in some way, such as “unfair purchasing and selling price or other unfair trading conditions”. In the EU anti-dumping regulation, it is only stated that the imports – from a country as a whole, not just a company – must constitute more than 1% of the EU market share. In order for price discrimination to be considered according to the competition rules, the price-level must undercut the average *variable* cost of production. In anti-dumping investigations, a price-level undercutting the calculated average sales price (e.g. average *total* costs and a profit margin) can also be considered as price discrimination (i.e. “dumping”). This indicates that the criteria for anti-dumping rules and competition rules are not comparable in practice, even though their foundations are based on the same idea.

In order to highlight that what is considered to be “dumping” according to the anti-dumping rules, could be considered to be “fair competition” according to the competition rules, an example from the EU internal market is provided. In the case of the intra-EU production and sales of ceramic tiles, intra-EU “dumping”, according to the World Trade Organization (WTO) definition and the EU rules towards third countries, is identified but no remedies are taken; this phenomenon is at the same time considered to be “fair competition” according to the EU competition rules. In this context it is also observed that prior to the EU enlargements in 2004 and 2007, anti-dumping measures were applied towards countries that are current members of the EU and vice versa; today, the same performance in these countries is regarded as fair competition. The above is due to the fact that spatial price differentiation within the EU is covered by competition rules – and the competition rules have higher requirements than the anti-dumping legislation with regard to market share and price undercutting.

As a conclusion, if competition aspects really did matter also towards third countries, the anti-dumping legislation would need to be revised to comply with these higher standards. If “dumping” is regarded as fair competition, according to the EU rules of competition, the imposition of anti-dumping measures must be regarded as unfair competition, unless the opposite is proven.

Introduction

In autumn 2011, the European Commission launched a modernisation review of its trade defence instruments in law and practice (EC, 2011c). An extensive evaluation of the trade defence instruments will take place in 2012. This report aims to contribute to this process by identifying problems and concerns with the EU anti-dumping instrument, as applied today, regardless of the fact that the investigation procedures and methods might be in line with the current regulation and practice. The report focuses on the recent anti-dumping investigation – and imposition of anti-dumping measures – on imports of ceramic tiles from China (see Box I), but the observations and conclusions from this analysis are valid for most anti-dumping investigations.

In Part I, it is claimed that the anti-dumping measures on ceramic tiles from China are inappropriate. It is not an obvious case of dumping and it is not an obvious case of injury, and the injury that is claimed is unlikely to be caused by the alleged “dumping”. Accordingly, it is difficult to identify causality. In addition, it is not likely that it would be in the EU’s interest to impose the anti-dumping measures. These claims are contrasted to the current EU methodology to identify and impose anti-dumping measures.

The advocates of anti-dumping measures mostly argue that the measures are justified to guarantee fair competition. The concepts of “fair” and “competition” are, however, not considered in the EU anti-dumping regulation or in the anti-dumping investigations. In this context, it is interesting to observe that the European Commission makes explicit and implicit use of the arguments of fair trade and fair competition in legitimising the use of the anti-dumping instrument in the announcement of the modernisation review of the EU anti-dumping instrument instead of legitimising the use of the anti-dumping instrument on its own merits.

*“Open trade based upon a global system of rules, **fair competition** and a level playing field for all businesses are the very foundations of EU trade policy. Our trade defence system is vital to ensure that this is maintained in the face of **unfair practices**. ... In today’s globalised economy, with a general tendency to remove obstacles to trade, these instruments are often the only means that companies have in order to restore **fair trading conditions**.”*

European Commissioner for Trade, Karel De Gucht, in a press release launching the modernisation review of the EU Trade Defence Instruments, on 28 October 2011

In Part II, the performance of the EU ceramic tiles industry in the EU Member States will be analysed in line with the dumping criteria in order to highlight what is considered to be “dumping”, according to the anti-dumping rules, and what is considered to be “fair competition”, according to the competition rules. The objective is to estimate if “dumping” is taking place within the EU, and if this intra-EU “dumping”, is considered as a case of normal competition instead of a cause of injury to the domestic industry.

It will be argued that the phenomenon of “dumping”, according to the WTO definition and the EU rules towards third countries, is taking place within the EU today, but no remedies are taken. Prior to the EU enlargements in 2004 and 2007, anti-dumping measures were applied towards countries that are current members of the EU and vice versa; today, the same performance in these countries is regarded as fair competition. This is due to the fact that spatial price differentiation within the EU is covered by competition rules – and the competition rules have higher requirements than the anti-dumping legislation with regard to market share and price undercutting.

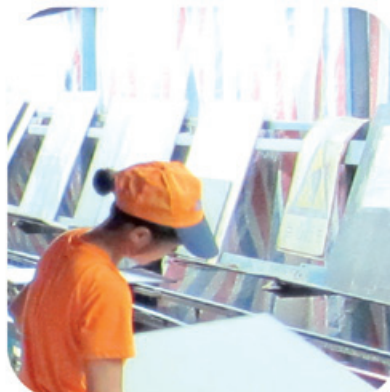
If competition aspects really did matter, the anti-dumping legislation would need to be revised to comply with these higher standards. Hopefully, this is one aspect that could be seriously considered in the evaluation of the EU anti-dumping instrument.

Box I: Background to the anti-dumping investigation

The EU anti-dumping proceeding on imports of ceramic tiles from China was initiated following a complaint lodged by the European Ceramic Tile Manufacturers Association on behalf of 69 producers representing approximately 30% of the total EU production of ceramic tiles. The complainant argued that Chinese exports of ceramic tiles to the EU were sold at dumped prices and that this behaviour caused injury to EU producers of ceramic tiles.

The products covered in the anti-dumping investigation and subject to anti-dumping measures are: glazed and unglazed ceramic flags and paving, hearth or wall tiles; glazed and unglazed ceramic mosaic cubes and the like, whether or not on a backing (CN codes: 69071000, 69079020, 69079080, 69081000, 69089011, 69089020, 69089031, 69089051, 69089091, 69089093, 69089099).

The investigation period was defined as April 2009 to March 2010, while injury indicators were examined from 2007 to the end of the investigation period. Provisional anti-dumping measures in the range of 26.2–73.0% were imposed on 1 June 2011 and definitive anti-dumping measures in the range of 29.3–69.7% were imposed on 16 September 2011 (European Council, 2011).



Part I
Anti-Dumping or
Unjustified Protection?

Why this is an Inappropriate Use of the Anti-Dumping Instrument

In the EU anti-dumping case against imports of ceramic tiles from China, it is hard to argue that anti-dumping measures are justified (see Box II). It is not an obvious case of dumping and it is not an obvious case of injury, and the injury that is claimed is unlikely to be caused by the alleged “dumping”. Accordingly, it is difficult to identify causality. In addition, it is not likely that it would be in the EU’s interest to impose the anti-dumping measures.

In the following, arguments will be presented to substantiate the claims that the measures imposed in the ceramic tiles case constitute an inappropriate use of the anti-dumping instrument. The argument against dumping and injury caused by dumping will be compared to the methodology used in the anti-dumping investigations in order to impose anti-dumping measures. This exercise will identify many weaknesses of the current anti-dumping proceedings that should be considered and amended in the modernisation review of the anti-dumping instrument.

Box II: Introduction to the anti-dumping instrument

The anti-dumping instrument is a so-called “trade defence instrument” which is used to protect an industry in a country, or, in this case, the EU, from dumped imports originating from a third country. The most frequently used anti-dumping measures are ad valorem duties, i.e. duties based on the value of the dumped product. The other trade defence instruments are anti-subsidy measures against imports that are subsidised by a third country and safeguard measures that are used against a sudden and rapid increase in imports of a certain product against imports from all countries.

Making use of differentiated pricing is normally a company-based decision. In order for the EU to use the anti-dumping instrument, four requirements must be fulfilled. There must be (i) *dumped imports* originating from a third country that cause an (ii) *injury* to the domestic production of a similar product, i.e. there must be a (iii) *causal link*, and it must be in the (iv) EU’s *public interest* to impose these measures. The complaining companies must constitute at least 25% of the domestic production of the similar product in order to ensure a minimum level of representation.

Dumping, as defined by the WTO, occurs when exports take place at a price that is lower than the domestic price (or a constructed normal value) of the exporting country; the difference is defined as the *dumping margin*. Anti-dumping measures can be imposed if the dumping margin is above the de minimis level of 2%. When a country is not considered to be a market economy, i.e. the domestic prices are not considered to be representative, the “domestic price” is normally calculated based on another “analogue” country where similar conditions are claimed to be prevalent. In the case of China, which is not recognised as a market economy country by the EU, the US is normally used as an analogue country, i.e. if the Chinese export price is lower than the US production cost, dumping is, by definition, taking place.

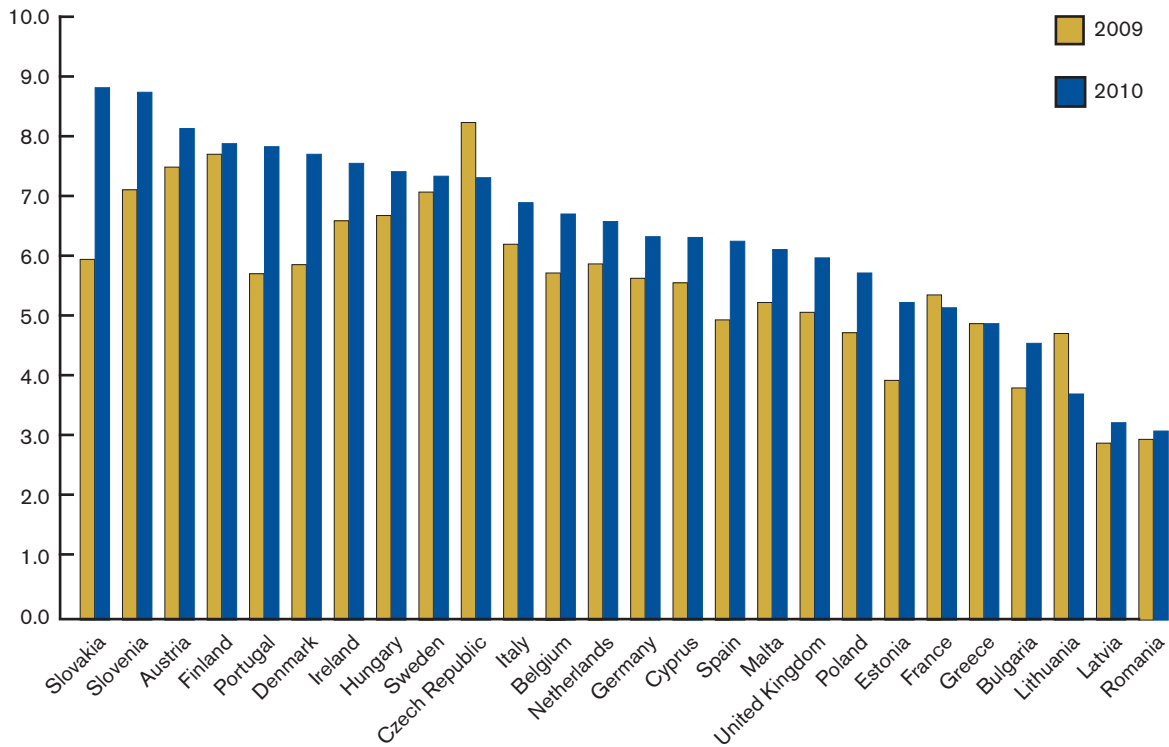
According to the WTO, dumping in itself is not actionable, only dumping that causes injury. There are various indicators of injury, but the final decision is based on an overall evaluation of the indicators. The *injury margin* is calculated as the difference between the export price and the non-injurious domestic price, i.e. the theoretical price at which producers would be able to sell in the absence of injurious dumping. It is, accordingly, in the interest of the producers to identify a high, non-injurious domestic price in order to identify a high-injury margin. According to the EU rules, the anti-dumping measures should be equal to the lowest of the dumping margin and the injury margin.

In anti-dumping investigations, the dumped imports do not need to have been the sole cause of injury. The injury margin that is subsequently calculated, however, compensates for all injury suffered by the EU industry, and not just the injury caused by the dumped imports.

The public interest test – in the EU this is referred to as the Union interest test – is, in general, not as influential, due to the difficulties of interested parties, such as importers, user industry and consumers, to influence the proceedings. If all of the information were available, anti-dumping measures should not be imposed if the negative effects of the measures on importers, user industry and consumers are more pronounced than the positive effects for the domestic producers by imposing the anti-dumping measures.

Anti-dumping measures are, in general, imposed for five years and can be prolonged for additional five-year periods following subsequent expiry review investigations (WTO, 1994; European Council, 2009).

Figure 1: Average import prices (euro/m²) of Chinese ceramic tiles to EU Member States 2009-2010



Source: Eurostat (Comext)

Did dumping take place?

The anti-dumping duties that were imposed cover all kinds of ceramic tiles from China. The difference in the level of duties is only related to the exporters and not to the products considered.¹ It is hard to claim that all Chinese producers of ceramic tiles are dumping their produce of ceramic tiles on the EU market and that they should face anti-dumping duties.

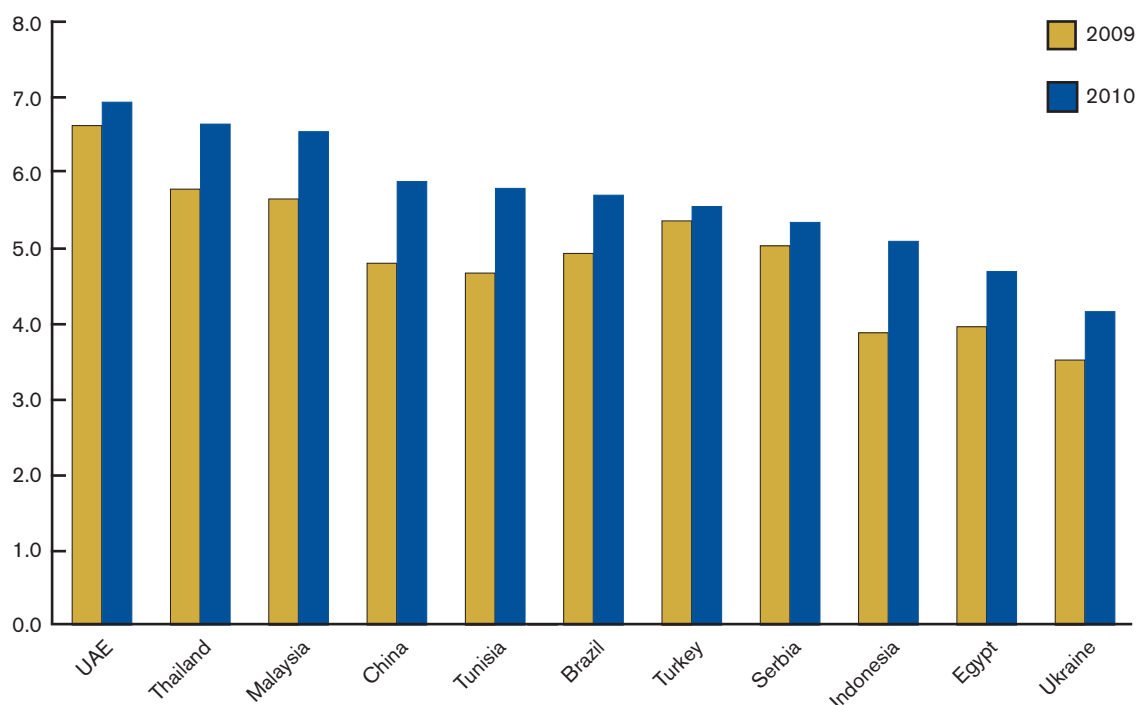
Only a fraction of Chinese ceramic tile producers export to the EU market. For most Chinese producers, the domestic market is their main priority and the EU market is not particularly important.² Even though the total number of Chinese exporters is high (there are estimations of approximately 300–400 exporters), due to the high fragmentation of the industry and the fact that most Chinese exporters are small companies, most indicators show that the exported quantities are ad hoc and limited. The largest Chinese exporters of ceramic tiles are trading companies, and not the producers themselves. Trading companies are not allowed to register as interested parties and cannot influence the anti-dumping investigation (Confidential exporter).

The price of exports from China is highly differentiated, and most Chinese exporters of high-end ceramic tiles are selling for a price that is as high as

or higher than in many EU Member States.³ The claim of dumping is due to the fact that dumping is not defined in relation to the price in the EU, but to the individual relationship between prices in the exporting country, i.e. the domestic sales price and the price of exports. In this particular case, due to the fact that China is not recognized as a market economy by the EU, the dumping margin is defined as the difference between the price on exports in China and the domestic sales price in the US, which is chosen as a comparable analogue country.

The average price of imports of ceramic tiles from China is highly differentiated in the EU27 Member States, something that implies that the price level differs between EU Member States and/or that the impact of Chinese imports varies depending on the country (see Figure 1). In 2010, the average price of imports ranged from 3.1 euro/m² in Romania to 8.8 euro/m² in Slovakia. The average import price in the main producing country, Italy, was 6.9 euro/m². This is an aspect that has not been fully considered in the anti-dumping investigation, due to the fact that dumping is only identified on the basis of the average of the EU as a whole, not considering the variations in import price in different Member States. Accordingly, the alleged dumping did not occur in most EU Member States.⁴

Figure 2: Average import prices (euro/m²) of ceramic tiles to the EU 2009-2010



Source: Eurostat (Comext)

A final observation in relation to “dumping” is that the average total import price of ceramic tiles to the EU has increased from 5.2 euro/m² in 2009 to 5.9 euro/m² in 2010. The corresponding import price from China has increased from approximately 4.8 euro/m² to 5.9 euro/m² in 2010, which makes China the country with the fourth highest average price⁵ (see Figure 2). In addition, China is one of the exporting countries where the price has increased the most. It was actually the high share of imports from China that contributed to the higher total average import price to the EU.

Even the anti-dumping investigation team did present facts that the unit sales price of domestic producers on the EU market increased (by 10%) during the period considered, from 8.0 euro/m² in 2007 to 8.8 euro/m² in the investigation period (EC, 2011b). This would normally imply that the so-called negative effects from price dumping have not been that significant.

Conclusion on dumping: There are only a few significant Chinese exporters of ceramic tiles to the EU. The main exporters of ceramic tiles to the EU sell at prices that are as high as or higher than the price levels in most EU Member States. In addition, the Chinese import prices, as well as the domestic prices, on ceramic tiles tend to increase.

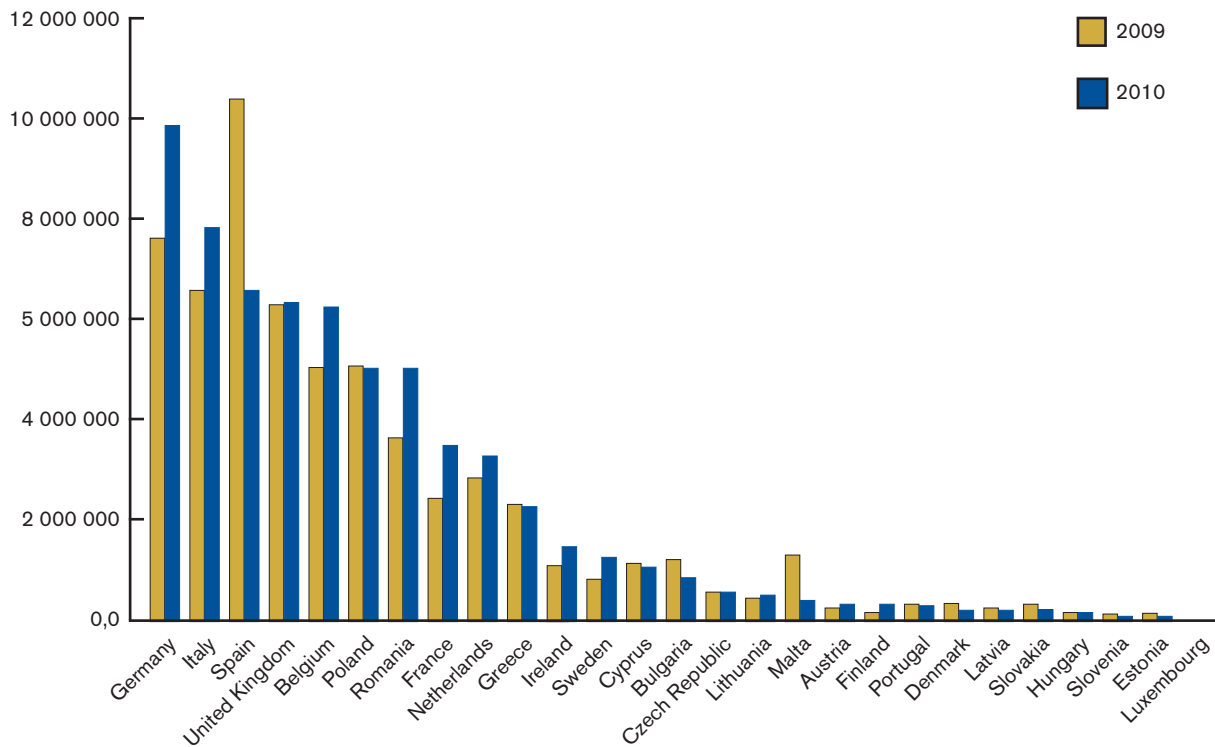
Examining the EU methodology to identify dumping

Due to the fact that the US is selected as an analogue country for the calculation of the Chinese “domestic price”, all Chinese exports that are sold under the price level of the US are, by definition, dumped on the EU market. It could generally be expected that the cost of production in the US is higher than the cost of production in China. In any case, interested parties that came forward in the investigation claimed that the production level and level of competition is lower in the US than in China (European Council, 2011). Accordingly, the dumping margin will also be higher than if the conditions of traditional low-cost economies were used.⁶

In this particular case, the calculation of the US price of ceramic tiles is based on the production of one company. Due to the fact that the identity of the company is confidential, for fear of retaliation, it is unclear if the production volume, value and quality are representative. In addition, the normal value calculation was never disclosed due to the claim that “disclosure would be of significant competitive advantage to a competitor” (European Council, 2011).

The EU industry complaint against imports of ceramic tiles from China is most likely to be related to the suspicion that Chinese subsidies might be involved in the production process. However, even

Figure 3: Total import volumes (m²) of Chinese ceramic tiles to EU Member States 2009-2010



Source: Eurostat (Comext)

though subsidies would be involved, the anti-dumping instrument is not the adequate instrument to address this problem. Due to the complexities in using the anti-subsidy instrument – in particular against non-market economies where it is presumed that prices are not market-based – an anti-dumping investigation is normally initiated if the domestic industry requests this kind of investigation (and the price effects of subsidisation are treated as if they were caused by dumping).

Was “injury” caused by “dumping”?

In this case, the arguments for injury are not easy to substantiate, given the huge market share of EU producers and the small levels of Chinese imports. The EU industry of ceramic tiles has a market share of approximately 90%, while the Chinese market share in the EU is only approximately 6.5% (European Council, 2011).

The EU imports of ceramic tiles from China have decreased, in absolute terms, by 3% since 2007, from 68 million m² in 2007 to 66 million m² in the investigation period. In this context, it has been argued that the Chinese market share of imports increased, in relative terms, from 4.8% to 6.5% in the same period (EC, 2011b). In the injury analysis it

was stated that “[t]he market share held by the Union industry decreased by 1 percentage point over the period considered” (EC, 2011b), from 89% in 2007 to 88% in the investigation period. However, it cannot possibly be expected that the EU market share would need to remain constant or increase in order not to be considered to be injured.

The injury experienced by the EU ceramic tile industry seems to originate from a decrease in EU demand rather than from increased Chinese imports. Imports of ceramic tiles, in general, decreased from 157 million m² in 2007 to 119 million m² in the investigation period. The production of the EU industry decreased by 32% (from 1,615 million m² to 1,095 million m²) following a decrease in consumption of 29% (from 1,433 million m² to 1,015 million m²) during the same period.⁷ The EU production sold on the EU market decreased from 1,275 million m² in 2007 to 895 million m² in the investigation period. This decrease in demand is, among other things, due to the downturn of the construction sector in the wake of the recent economic crisis. The anti-dumping investigation team admits that “it cannot be disregarded that the negative evolution of consumption has had a negative effect on the Union industry” (EC, 2011b).

The volume of imports of ceramic tiles from China differs between the EU Member States,

which implies that the level of injury also varies (see Figure 3). The main producing countries are the largest importers of ceramic tiles from China.⁸ The main injury due to the economic crisis was experienced in Spain and Italy, due to the decrease in consumption. The Spanish imports of ceramic tiles from China decreased by as much as 37% between 2009 and 2010, something that might weaken the argument for injurious dumping.

Conclusion on injury: The EU producers dominate (up to 90%) the EU market of ceramic tiles. The Chinese market share is only approximately 6.5% and the imports are decreasing in absolute terms. The injury experienced by EU producers is most likely due to the economic crisis and its subsequent effects on demand, production and employment in the sector. The negative effects of the crisis were most pronounced in Spain and Italy, and small producers were affected to a greater extent than the large producers, as they maintained their profitability.

Examining the EU methodology to identify injury

It is stipulated that the anti-dumping investigation should consider the EU as a whole, and not the individual Member States, when assessing the need for imposing EU-wide anti-dumping measures. However, if companies from certain countries and/or of certain sizes are selected in the sample, it might be easier for the anti-dumping investigation to present a claim, depending on which countries and which companies are selected, as will become apparent below.

In the anti-dumping investigation, it was argued that the fact that EU Member States were affected differently by the economic crisis – which, in turn, affected the demand and employment opportunities – was “not supported by any substantiated evidence” (European Council, 2011) and that the imports from China – as well as its negative effects – were evenly spread out across the EU. The anti-dumping investigation team also claimed that the injury analysis was made in relation to the EU industry as a whole and not just a part of it.⁹

In this context, it is important to note that while the Chinese exporters were identified on basis of export volume only, the EU producers were divided into different segments – small, medium-sized and large companies – as well as geographic distribution, and each segment was analysed in order to consider the particular situation of each group (European Council, 2011).¹⁰ The choice of companies and countries in the sample might, accordingly, have affected the calculation of the injury margin in the anti-dumping investigation.

It has been confirmed in the anti-dumping investigation that only the segment of small producers of ceramic tiles were making a loss during the investigation period, while medium-sized and large producers maintained their profitability. The anti-dumping investigation team states that “[i]n order to ensure that the results of large companies did not dominate the injury analysis but that the situation of the small companies, collectively accounting for the biggest share of the Union production, was properly reflected, it was considered that all segments, i.e. small, medium-sized and large companies, should be represented in the sample” (European Council, 2011). However, by only including one large company in the sample, the calculated average profit cannot be regarded as being representative for the average profit of the EU industry. Factories producing more than 10 million m² annually produce goods at significantly lower costs than smaller factories, and smaller companies have a completely different cost/sales structure and organisation than larger production companies (European Council, 2011). If only the largest producers were considered in the analysis, it might have been hard to claim any form of injury.¹¹

In the anti-dumping investigation, it was argued that if only the largest EU producers were sampled, the data and analysis would only be representative of 5% of the EU industry and 23% of its production volume, and the result would most likely have been based on only one EU member country (EC, 2011d). In this context, the anti-dumping investigation team emphasised the importance of taking into consideration “the weight of the respective production countries” (EC, 2011d) in order to represent the whole EU industry.

As a comparison, the production structure of exporters was not considered and the analysis was based only on the largest exporters (EC, 2011b). It could be questioned why the need to ensure a proper representation by sector was not necessary for the Chinese producers, which is also highly fragmented. Using a standard or a consequent approach would leave no room for manoeuvre, with the advantage that there would be less reason to suspect a manipulation of the sample. The standard method was, for some reason, not used in the ceramic tiles case.

It has also been criticised that EU Member States with low production costs and/or sales prices were not considered in the sample of EU producers. This means that the average sample sales prices, and the injury indicators, might not be representative of the actual situation. Poland was initially included in the sample, but the Polish company

involved decided to pull out of the sample and discontinue its cooperation and no other Polish company agreed to be a replacement (EC, 2011b). In this context, the anti-dumping investigation team argues that the Polish produce “would have had a very limited weight on the overall undercutting calculation” and it “would have not changed the overall picture in view of the relative low sales volumes ... in any meaningful way” (EC, 2011b). However, the Polish share of the EU market of 3% should be considered in relation to the Chinese market share of 6.5%, which is the reason for the entire anti-dumping investigation¹² (European Council, 2011).

The information from the sample was later used for the calculation of the non-injurious domestic price¹³ and the injury margin suffered by the domestic industry, as well as in the establishment of injury indicators. In order to indicate the complexity of this particular case, it should be mentioned that, for fear of retaliation, information on the EU industry that presented the complaint on dumping is also confidential. As a result, the interested parties are unable to verify and comment on how accurate the specific arguments of the complaint were.

With regard to importers, it has been claimed that the anti-dumping investigation did not take into account the higher price of certain imports in spite of the fact that the information presented by the companies selected in the sample, for example small importers, should be representative for the companies in a similar situation that are not included in the sample¹⁴ (Confidential importer).

Was the Union interest test assessed?

In the EU, it is according to the anti-dumping regulation compulsory to take the Union interest test into account before the imposition of anti-dumping measures. The EU interest test should be based on an appreciation of all the various interests, including the interests of the domestic industry, importers, user industry and consumer organisations, after all parties have been given the opportunity to make their views known. Anti-dumping measures may not be imposed if they contravene the interests of the EU.¹⁵

Dismissing negative effects of imposing anti-dumping duties

In the ceramic tiles case, the anti-dumping investigation team argued that “the rather low level of cooperation of unrelated importers could suggest that the imposition of measures would not have a significant impact on their activity” (EC, 2011b). In addition, it was claimed that “only one importer submitted evidence on the difficulties in switching to a different source of supply” and this is “no conclusive evidence” (EC, 2011d). On the contrary, it was argued that “it is possible for importers and users to switch to products sourced in third parties or in the Union” and that “[t]his change can occur quite easily” (EC, 2011b).

The anti-dumping investigation team argued that claims that “duties would lead to an increase in consumer prices and a switch to other sources of supply would trigger a high cost, both for distributors and customers ... have not been substantiated” (European Council, 2011). In any case, “[t]he impact of anti-dumping duties on consumers is likely to be limited, since the mark-up applied by resellers is normally very high. Even in case of price increases, these would rather have a limited impact on consumers given that the cost increase would range between EUR 1.5 and EUR 3 per m²” (EC, 2011b).

The anti-dumping investigation team claimed that there is a “possibility to pass on at least a part of potential cost increases to their customers” (EC, 2011b). It also argued that “the value can be diluted in the various steps (importers, wholesalers and retailers) before reaching the final customer” (EC, 2011b). In addition, “[i]ndividual consumers buy limited quantities of tiles and not too frequently” (EC, 2011b).¹⁶

The anti-dumping investigation team admitted that “[i]t cannot be excluded that some importers are negatively affected by measures and that they could have some difficulties in supplying particular categories of product” (EC, 2011d). In addition, it admitted that “small specialist shops would be significantly affected” but “the Commission could not obtain any conclusive data that would confirm the magnitude and the extent of impact” (EC, 2011b). With regard to the user industry, it was claimed that “in the construction sector ... ceramic tiles have a marginal bearing on final costs” (EC, 2011b).



Advocating positive effects of imposing anti-dumping duties

The anti-dumping investigation team claimed that a “short-term price increase might have beneficial long term effects for consumers in ensuring competition in the market. Lack of competition in the long run might lead to even higher price increase and disappearance of low priced imports” (EC, 2011b). The anti-dumping investigation team also argued that “it should be remembered that ceramic tiles are produced in the Union” and that “there is a large offer of products in the market not subject to measures ... by Union producers” (European Council, 2011).¹⁷

In the anti-dumping investigation on ceramic tiles, it was finally stated that “it cannot be clearly concluded that the imposition of measures would go against the Union interest” (European Council, 2011).

Examining the EU methodology to disregard the Union interest test

The EU interest test is not applied in a proactive manner, only the interested parties that manage to contact the anti-dumping investigation team within specific time limits and are accepted as cooperating interested parties will be considered in the EU interest test analysis, i.e. they are entitled to certain procedural rights. However, there is an underlying presumption that measures to counteract dumping are in the interest of the EU, unless the opposite is proved. The possibility of influencing the outcome is particularly difficult on consumer products such as ceramic tiles.

In practice, it is difficult for the importers, user industry and consumer organisations to make use of the opportunity to be heard in an anti-dumping investigation. There are various reasons behind this. The interested parties – other than the EU producers that complained about alleged dumping – are nor-

mally unaware of the anti-dumping investigation. In most cases, interested parties have never heard about the anti-dumping instrument. Even if they know about the investigation and want to make themselves known and influence the process, it is a costly and time-consuming process with very short deadlines to register and present detailed information in order to be considered. The anti-dumping process is particularly complex for small and medium-sized companies, but also large diversified companies have difficulties in specifying the effects related to the anti-dumping duties on one particular product.

In addition, it is difficult for cooperating interested parties to influence the outcome of the investigation due to the fact that there is no objective procedure that means the investigators are obliged to include the arguments of the interested parties. Furthermore, today’s Union interest test tends to be qualitative in nature, as it does not affect the product scope, the levels of the dumping or injury margins, or the anti-dumping measures that are finally imposed. A number of replies are rejected, as they are not considered to contain sufficient factual evidence. The fact that importers, user industry, wholesalers, retailers and consumers make themselves known does not affect the assessment of the EU interest test significantly.

Conclusion on Union interest test: Interested parties cooperated with the European Commission in the anti-dumping investigation, but it is difficult for fragmented importers to balance the coordinated efforts of the EU producers, and there is no proactive effort of quantification and/or cost-benefit analysis in the anti-dumping investigation. Only the arguments put forward by the interested parties in each individual anti-dumping case are taken into account in the investigation.

Part II
Dumping or Competition?

Why this is a Case of Normal Competition

“In the absence of international competition rules and of other rules associated with well functioning markets, trade defence instruments are the only possible means of protecting our industry against unfairly traded goods.”

European Commissioner for Trade, Karel De Gucht, in his speech “Anti-dumping cases – state of play and perspectives” to the European Parliament on 24 November 2010.

Anti-dumping measures are, according to their advocates, aimed at restoring and ensuring fair trade and fair competition. In the anti-dumping investigation on ceramic tiles, it was stated that “the aim of the anti-dumping duties is not to seal off specific trade channels but to restore the level playing field and counter-act unfair competition” (EC, 2011a). The anti-dumping investigation team also argued that a “short-term price increase might have beneficial long term effects for consumers in ensuring competition on the market. Lack of competition in the long run might lead to even higher price increase and disappearance of low priced imports” (EC, 2011b). In this context, it is relevant to observe that the European Commission, as recently as in its announcement of its modernisation review of the EU anti-dumping instrument, makes explicit and implicit use of the arguments of fair trade and fair competition in legitimising the use of the anti-dumping instrument.

However, in most cases it is inappropriate to discuss issues of competition in relation to anti-dumping measures, since the instruments, as they are applied today, have nothing in common. It is important to observe that the concepts of “fair” and “competition” are not considered or analysed in the EU anti-dumping regulation or in any anti-dumping investigation. Only in relation to the Union interest test in the EU anti-dumping regulation, it is stated that “the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration” (European Council, 2009). If fair trade, fair competition and/or “effective competition” are among the main arguments for legitimizing the use of anti-dumping measures, why are competition rules not considered in the anti-dumping regulation and why are competition aspects not applied in the anti-dumping investigations?

In the following it is argued that the phenomenon of “dumping”, according to the WTO definition

and the EU rules towards third countries, is taking place within the EU today without remedies. This is due to the fact that spatial price differentiation within the EU is covered by competition rules – and the competition rules have higher requirements than the anti-dumping legislation with regard to market share and price undercutting.

The background: Anti-dumping rules versus competition rules within the EU

Prior to the EU enlargements in 2004 and 2007, the EU15 and EU25 made use of the anti-dumping instrument against current EU27 members, such as Bulgaria, Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Romania and Slovakia.¹⁸ In addition, these countries made use of the anti-dumping instrument against the EU15 and EU25, respectively. However, after the EU enlargements, the anti-dumping rules have, in practice, been “replaced” by competition rules.¹⁹

The production process and trade among the EU Member States have not changed dramatically after the accessions, but what was perceived as a problem and “injury” before is now integrated into the same internal market without any remedial action. The performance that was previously regarded as dumping is now regarded as fair competition.

The EU is actually the only customs union in the world that has managed to abolish the application of all three trade defence instruments on intra-regional trade. The creation of a single market seems to be a critical element in phasing out the use of the anti-dumping instrument. The EU has also phased out the use of the anti-dumping instrument in the European Economic Area, with the exception of agriculture and fish products.²⁰

The result: “Dumping” within the EU is not remedied

It is apparent that the cost of production and/or sales prices varies in different EU Member States, and not all EU Member States export their products at the same price. There is, accordingly, a high degree of price differentiation on the same product on the EU internal market.

If the issue of “dumping” really would constitute a problem for the EU industry, the situation would be quite problematic on the EU internal market, due to the fact that many producing countries within the EU export to other EU Member States at a price lower than their domestic sales price. This could be a cause of alleged “injury” in line with the imports from China. Actually, in the anti-dumping investigation on ceramic tiles, “[o]ne importer claimed that the main cause of injury was low-priced sales by Polish tiles producers” (EC, 2011b).

An analysis of the domestic sales prices in EU Member States compared with the export prices to the EU27 indicates that the phenomenon of “dumping” on the EU internal market is likely to be occurring with regard to ceramic tiles (see Appendix I for a detailed description of the methodology and data used). It is normally argued that the risk of “dumping” within the EU is minimal, since goods and services can circulate freely within the internal market

and price variations should be levelled out, but this seems not always to be the case.

Ceramic tile product categories – produced in certain EU Member States, where data is available – are, in a number of cases, exported to other EU Member States at below the domestic sales prices (see Table 1 and Appendix II). This is a phenomenon equal to dumping, according to the definition of the concept, and the effects with regard to “injury” to the EU producers are all the same. In addition, the domestic sales prices, as well as the export prices, on ceramic tiles produced in different EU Member States, varies quite significantly between the countries.

The statistical conclusions presented above imply that “dumped” ceramic tiles from various EU Member States could be a cause of “injury” to a similar or greater extent than the imports from China. If differentiated prices were a problem, then the price differentiation on the EU internal market would also need to be remedied. However, no

Table 1: Dumping of ceramic tiles within the EU

EU Member State	Domestic price (euro/m ²)	Export price to EU27 (euro/m ²)	Dumping margin
Unglazed ceramic mosaic tiles, etc. (surface area <49 cm²) [Prodcom code: 23311010/CN code: 69071000]			
Italy	19.7	2.4	17.3
Spain	6.5	4.8	1.7
Glazed ceramic mosaic tiles, etc. (surface area <49 cm²) [Prodcom code: 23311020/CN code: 69081010, 69081090]			
Italy	13.9	6.5	7.4
Spain	20.4	5.8	14.6
Unglazed stoneware flags and pavings, etc. (excluding double tiles of the Spaltplatten type) [Prodcom code: 23311053/CN code: 69079091]			
Denmark	46.6	38.7	7.9
France	8.3	6.6	1.7
Poland	5.8	3.8	2.0
Earthenware or fine pottery and other unglazed ceramic flags and pavings, etc [Prodcom code: 23311057/CN code: 69079093, 69079099, 69079010]			
France	13.7	6.1	7.6
Germany	28.2	8.7	19.5
Glazed stoneware flags and pavings, etc., with a face of >90 cm² [Prodcom code: 23311073/CN code: 69089021, 69089091]			
Denmark	52.2	10.5	41.7
Italy	9.2	6.8	2.4
Germany	12.1	8.0	4.1
Glazed earthenware or fine pottery ceramic flags and pavings, etc., with a face of >90 cm² [Prodcom code: 23311075/CN code: 69089093]			
Bulgaria	4.4	3.6	0.8
France	7.3	6.5	0.8
Poland	6.1	5.4	0.7
Glazed ceramic flags and pavings, etc. with a face of not >90 cm² [Prodcom code: 23311079/CN code: 69089021, 69089029, 69089051, 69089099]			
Hungary	8.2	5.7	2.5
Italy	13.0	7.4	5.6
Portugal	7.3	6.7	0.6
Romania	21.9	7.9	14.0

Source: Author’s calculation based on Eurostat (Prodcom and Comext) where data is available (see Appendix I and Appendix II)

competition measures are taken against EU Member States that export products at a price below their domestic price or at prices below their competitors in other EU Member States if the company concerned does not have a dominant position. This is due to the fact that the rules of competition demand higher requirements than the anti-dumping rules. This market-based behaviour is, on the contrary, considered to be a case of normal competition to the benefit of the consumers.

The conclusion: “Dumping” is not unfair competition

Price undercutting, according to competition rules, is only condemned if the alleged offender has (i) a dominant position²¹ and (ii) if this position is abused, i.e. if the offender sets a price below the average variable cost of production in an effort to squeeze out the competitors from the market and/or to pre-empt new firms from entering the market (Swedish National Board of Trade, 2009). Competition policy is often concerned with consumer protection, but the anti-dumping rules, as they are applied today, are only concerned with the protection of the complaining industry (Hoekman, 2003). In other words, dumping, as defined by the WTO, is setting a lower price in the export market than in the home market, but it is not a violation, per se, according to the competition law.

In order for the EU competition rules to apply in anti-dumping cases, the exporters would need to have a dominant position in the market, i.e. a market share of at least 40–50% (EC, 2009; Swedish Competition Authority, 2010), and they must abuse their dominant position in some way, such as “unfair purchase or selling prices or other unfair trading conditions” (Article 102, Treaty of the Functioning of the European Union). However, it would not be necessary to identify injury – the abuse of the dominant position is in itself prohibited. In the anti-dumping regulation, it is only stated that the imports (from a country as a whole, not just a company) must constitute more than 1% of the EU market share. In the expiry review investigations, no criteria on the market share of imports exist, and it could, accordingly, be under 1% (European Council, 2009).

Price discrimination is only one of several illegal practices in competition law, i.e. if the company concerned has a dominant position. In order for price discrimination to be considered according to competition rules, the sales price must undercut the average *variable* cost of production.²² As a comparison, in anti-dumping investigations a price-level of

exports undercutting the domestic sales price, i.e. the average *total* cost of production (e.g. average fixed costs and average variable costs) in addition to a reasonable profit margin²³, can be considered as dumping, something that is not in line with the competition law concept. In today’s anti-dumping investigations, spatial price differentiation of any kind is actionable as an “unfair” abuse of market power, regardless of the market share of the company. The fundamental insights of trade theory, such as specialisation and comparative advantage, are, accordingly, disputed and/or ignored.

Predatory dumping is one extreme form of price discrimination, in which a dominating company lowers its prices in order to put competitors out of business (Wooton & Zanardi, 2002). Today’s anti-dumping measures have little to do with predatory dumping, which is the only economic justification for anti-dumping measures to be applied, due to the fact that the criteria of dominant position is not considered and the export price must not be below the average variable cost of production in order to be actionable.

The main argument behind anti-dumping investigations is that exporters are dumping their products on the EU market in order to put the EU industry out of business. Eventually, the exporters will be able to raise prices and harm users and consumers when there is no remaining competition.²⁴ However, in anti-dumping cases, the risk that any exporter would be able to obtain such a dominant position in the EU market is limited. For this scenario to be realistic, the exporters from the country being subject to an anti-dumping investigation should have a dominant position in the market and cooperate, not compete, with each other, and there should be no imports from firms in other countries.²⁵ However, the number of competing exporters in most anti-dumping investigations is normally large and there are frequently other third country imports involved.

If the competition aspect was really important in anti-dumping proceedings also towards third countries – as it is claimed to be in order to legitimise the use of the anti-dumping instrument – the anti-dumping legislation would need to be revised in order to comply with these higher standards. An intermediate option would be to redesign the application of anti-dumping measures to target only anti-competitive practices by introducing a two-tier system – adjusted to accommodate competition law concepts – where an anti-dumping case would first be judged using the competition law criteria and then proceed with the anti-dumping investigation. If unfair competition is a problem, this proceeding could be part of a solution.

Implications on Competition of Anti-Dumping Duties on Ceramic Tiles

The anti-dumping investigation on ceramic tiles is an example of how anti-dumping measures are used against consumer goods. Anti-dumping measures on consumer goods directly affect the consumers by increasing the prices and limiting their choices. However, there are more problems than higher prices; for example the fact that some competitive, flexible and innovative exporters of ceramic tiles from third countries can no longer compete on the EU market. This implies that anti-dumping measures limit the competition and the incentive for innovation with regard to products and production processes in the EU market.²⁶

The recently imposed anti-dumping duties on ceramic tiles are a particular problem for importers that might have found a new business opportunity in China in order to be able to offer ceramic tiles in a full range of sizes to their customers. Importers argue that the EU ceramic tile producers are inflexible with regard to design and quantities, i.e. they tend to not accommodate specific requests outside their standard product range. According to information provided by importers, it is not possible for buyers to order ceramic tiles of certain characteris-

tics (e.g. form, size, design, logotype and packaging) from EU producers, nor certain third country producers, if they are not ordered in sufficiently large quantities (Confidential importer). The impression is that the EU industry has been in the market for many decades without any competition, and it decides what it wants to produce and at what price.

The imports, and corresponding competition, from China have contributed to a shift in production in the EU, where EU producers have had to adapt to the customers' demands. It should not be correct to argue, like in the anti-dumping investigation, that China "forced" the EU industry to produce smaller batches and larger varieties in terms of colour and size²⁷ (European Council, 2011). Instead of being considered to be a problem, having to adapt to demand should be considered to be an example of normal competition. This is what is demanded from customers – and this is why there are imports of ceramic tiles from China. On the contrary to what is being claimed, anti-dumping duties are likely to affect trade and competition negatively, due to the fact that fair competition is likely to be limited.



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Interviews

[Confidential] Exporting producer of ceramic tiles (as of July 2011).

[Confidential] Importer of ceramic tiles (as of June 2010–December 2011).

Appendix I: Methodology Used for the Calculation of the Intra-EU Dumping Margins

The calculations of the intra-EU dumping margins use data provided by Eurostat on EU production (Prodcom) and EU internal and external trade (Comext) for the year 2010, as it closely corresponds to the investigation period. The calculations are based on the data publicly available in these databases for the selected year, with all its inherent limitations. The intra-EU dumping margins that are presented in this report are only claimed to be an approximation, and/or an indication, of the reality.

The “domestic price” calculation is based on the Prodcom codes (NACE Rev. 2) on the production value for ceramic tiles²⁸, i.e. the value of production (PRODVAL) of the individual EU Member State, divided by the production quantity in square meters (PRODQNT) of the individual EU Member State, where data is available. The “export price” is based on the Comext data on the Combined Nomenclature (CN) codes on an 8-digit level that correspond to the above-mentioned Prodcom codes²⁹, i.e. the value in euros (VALUE_IN_EUROS) of imports of the individual EU Member State, divided by the corresponding supplementary quantity (SUPPLEMENTARY_QUANTITY) in square meters of the individual EU Member State. Import statistics are used to obtain the Cost, Insurance and Freight (CIF) price of the product³⁰, as this is commonly used in anti-dumping calculations.

Due to the fact that the production value only is available on an annual basis, and not available for all EU Member States, Prodcom codes – where data is available – serve as the basis for the calculation of the dumping margin, and the CN codes are accordingly identified to match the Prodcom codes. In some cases, the Prodcom code and the CN code correspond perfectly; in other cases, several CN codes correspond to one Prodcom code. In these cases, the average price for each product is calculated, weighted (based on value), and aggregated in order to obtain a representative average price (euro/m²) for each Prodcom code.

In the calculations of the “domestic price”, only the EU Member States where production data is publicly available in the Prodcom database are presented in the tables. This explains why only a cer-

tain number of EU Member States are found in the tables, and why the number of countries varies with regard to the Prodcom codes that are analyzed. As the calculation of the production value is based on yearly reporting, it has not been possible to verify the statistics, and possible outliers, in further detail.³¹ In addition, it has to be recognized that the production value in the Prodcom database refers to the sales value in the country concerned and it does not distinguish between domestic sales and foreign sales, something that might be influencing the average numbers.

In the calculations of the “export price” for the EU Member States where Prodcom data is available, the calculations have been based on EU27 import statistics from the EU Member State concerned in order to obtain the CIF value, instead of using the export statistics of the country concerned to EU27. Depending on the data used (e.g. import statistics or export statistics), the numbers might vary. In this report it has been considered that the import statistics are more comparable across the countries, due to the fact that the same sources are used for the data for all EU Member States. It has to be recognized that countries that only export small ad hoc quantities are more likely to present less representative prices per square meters than countries with high export volumes, due to the fact that each transaction in these cases constitutes a higher share of the total value. In addition, it is important to be aware of the fact that not only the countries of origin are considered in the Comext statistics; it is accordingly inevitable that price-levels of re-exports, i.e. products that are not produced in the EU Member State concerned, might influence the average prices (euro/m²) that are presented.

The calculations of the intra-EU dumping margins in the report are not claiming to be detailed and/or comprehensive. On the contrary, they need to be further verified at a more detailed and product-specific level. In any case, the calculations of the intra-EU dumping margins provide an indication of a market-based behaviour that might be prevalent on the EU internal market. This behaviour might be referred to as either “dumping” or fair competition.

Appendix II: Examples of Intra-EU “Dumping” of Ceramic Tiles

Unglazed ceramic mosaic tiles, cubes and similar articles, with a surface area < 49 cm²

Prodcom code: 23311010

CN code: 69071000

EU Member State	Domestic price (euro/m ²)	Export price to EU27 (euro/m ²)	Dumping
Italy	19.7	2.4	X
Portugal	10.4	14.5	-
Spain	6,5	4,8	X

Glazed ceramic mosaic tiles, cubes and similar articles, with a surface area < 49 cm²

Prodcom code: 23311020

CN code: 69081010, 69081090

EU Member State	Domestic price (euro/m ²)	Export price to EU27 (euro/m ²)	Dumping
Italy	13.9	6.5	X
Spain	20.4	5.8	X
United Kingdom	128.4	15.9	X

Unglazed stoneware flags and paving, hearth or wall tiles (excluding double tiles of the Spaltplatten type)

Prodcom code: 23311053

CN code: 69079091

EU Member State	Domestic price (euro/m ²)	Export price to EU27 (euro/m ²)	Dumping
Denmark	46.6	38.7	X
France	8.3	6.6	X
Germany	11.9	12.7	-
Ireland	12.9	15.4	-
Italy	10.9	11.3	-
Lithuania	6.4	11.2	-
Poland	5.8	3.8	X
Portugal	8.9	8.9	-
Spain	10.8	12.0	-

Earthenware or fine pottery and other unglazed ceramic flags and paving, hearth or wall tiles (excluding of siliceous fossil meals or similar siliceous earths, refractory ceramic goods, articles of stoneware, double tiles of the “Spaltplatten” type, tiles made into stands, ornamental articles and tiles specifically manufactured for stoves)

Prodcom code: 23311057

CN code: 69079010, 69079093, 69079099

EU Member State	Domestic price (euro/m ²)	Export price to EU27 (euro/m ²)	Dumping
France	13.7	6.1	X
Germany	28.2	8.7	X
Greece	6.7	7.8	-
Italy	6.3	11.8	-
Lithuania	62.7	13.2	-
Spain	3.3	9.8	-

Glazed ceramic double tiles of the Spaltplatten type**Prodcom code: 23311071****CN code: 69089011, 69089031**

EU Member State	Domestic price (euro/m ²)	Export price to EU27 (euro/m ²)	Dumping
Germany	8.2	13.1	-
Italy	9.0	25.9	-
Spain	8.6	17.4	-

Glazed stoneware flags and paving, hearth or wall tiles, with a face of > 90 cm²**Prodcom code: 23311073****CN code: 69089021, 69089091**

EU Member State	Domestic price (euro/m ²)	Export price to EU27 (euro/m ²)	Dumping
Denmark	52.2	10.5	X
Finland	11.9	15.1	-
France	6.2	7.1	-
Germany	12.1	8.0	X
Italy	9.2	6.8	X
Poland	4.4	4.8	-
Portugal	6.5	6.7	-
Spain	6.2	7.6	-

Glazed earthenware or fine pottery ceramic flags and paving, hearth or wall tiles, with a face of > 90 cm²**Prodcom code: 23311075****CN code: 69089093**

EU Member State	Domestic price (euro/m ²)	Export price to EU27 (euro/m ²)	Dumping
Bulgaria	4.4	3.6	X
Estonia	80.0	12.2	X
Finland	9.3	9.5	-
France	7.3	6.5	X
Germany	6.9	10.6	-
Italy	6.3	7.3	-
Poland	6.1	5.4	X
Portugal	4.1	5.9	-
Spain	5.0	8.3	-

Glazed ceramic flags and paving, hearth or wall tiles excluding double tiles of the spaltplatten type, stoneware, earthenware or fine pottery flags, paving or tiles with a face of not > 90 cm²**Prodcom code: 23311079****CN code: 69089021, 69089029, 69089051, 69089099**

EU Member State	Domestic price (euro/m ²)	Export price to EU27 (euro/m ²)	Dumping
Germany	6.9	13.3	-
Greece	5.9	8.3	-
Hungary	8.2	5.7	X
Italy	13.0	7.4	X
Lithuania	5.0	6.0	-
Portugal	7.3	6.7	X
Romania	21.9	7.9	X
Spain	6.6	7.9	-

Endnotes

- 1 The anti-dumping investigation team argues that ceramic tiles of all kinds “were found to have the same basic physical and technical characteristics as well as the same base uses” (EC, 2011b). However, it could be claimed that this reasoning is too broad to target certain “dumped” products.
- 2 In fact, one of the reasons why measures could be imposed without large opposition from China was due to the lack of activity and/or support on behalf of relevant Chinese chambers of commerce and/or industrial associations, given the fact that most Chinese producers are not as dependent on exports to the EU (Confidential importer).
- 3 The five main exporters of ceramic tiles to the EU are selling their produce at average prices that are in line with or above the average EU price level. It is estimated that only about half of the smaller ad hoc exporters of ceramic tiles to the EU sell ceramic tiles of poor quality and lower price levels, but low quality and low prices is, in general, not a sustainable business idea for a long time (Confidential importer).
- 4 The EU industry complaint against imports of ceramic tiles from China is not exclusively related to the price, even though the price is the easiest thing to challenge. Another important aspect to consider is intellectual property rights. The view on behalf of parts of the ceramic tile industry in the EU is that the Chinese producers are imitating their products, with regard to the design, and producing copied products at a lower cost. In any case, intellectual property rights have nothing to do with the anti-dumping instrument. There are specific WTO rules on intellectual property rights, and these rules should be adhered to when relevant.
- 5 In the anti-dumping investigation, the price of Chinese imports was, on the contrary, said to have decreased from 4.7 euro/m² in 2007 to 4.5 euro/m² in the investigation period (EC, 2011b). This difference in average import price compared to the Eurostat statistics is due to the fact that the calculations in the anti-dumping investigations are based only on the sample and not on all trade that took place in reality.
- 6 Countries such as Brazil, Indonesia, Nigeria, Thailand and Turkey were suggested as possible analogue countries (EC, 2011b). However, it is an inherent problem in anti-dumping investigations that exporting countries competing with Chinese exports would not voluntarily make the effort that is required to participate in an anti-dumping investigation that would offer no benefit to their business activities. On the contrary, if Chinese exports to the EU were limited, the remaining third country exporters would most likely benefit from a higher demand on their products. In addition, certain interested parties claimed that producers in potential analogue countries experienced “undue pressure by Union producers associations” in order not to participate in the anti-dumping investigation (European Council, 2011).
- 7 In this context, it is relevant to consider the competitiveness of the EU industry. As apparent from the anti-dumping investigation, exports of ceramic tiles from the EU decreased by 44% during the investigation period (EC, 2011b). The decrease in demand of EU ceramic tiles is noted both within and outside of the EU.
- 8 It was claimed by interested parties in the course of the anti-dumping investigation that half of the imports of ceramic tiles from China were imported by the EU industry and rebranded to be resold on the EU market (Confidential importer). Accordingly, the EU industry imports of ceramic tiles from China could possibly account only for 3% of sales on the EU market (Confidential importer). If Chinese imports constitute a problem for the EU industry, this would be a clear case of self-inflicted injury.
- 9 According to Article 4.1 of the EU Anti-dumping Regulation, the anti-dumping analysis should be made to the EU industry as a whole and not to certain groups or types of companies (European Council, 2009). However, the anti-dumping investigation team argues that, according to Article 17 of the EU Anti-dumping Regulation, “investigations may be limited to ... samples which are statistically valid ... or to the largest representative volume of production, sales or exports which can reasonably be investigated” (European Council, 2009). As a result, there are doubts regarding the statistical validity of the sampling exercise.
- 10 Small companies [<5 million m²] account for 80% of the companies and 52% of the EU production; medium-sized companies [5–10 million m²] account for 10% of the number of companies and 24% of the EU production; and large companies [> 10 million m²] account for 5% of the number of companies and 24% of the EU production (EC, 2011b; EC, 2011d). There are approximately 350 small companies, 40 medium-sized companies and 20 large companies in the EU (EC, 2011b). The anti-dumping investigation team selected only 10 out of 500 companies – of which 1 large, 4 medium and 5 small – from Italy, Spain, Portugal, Germany and France, representing 7% of the total EU production (EC, 2011b). As a comparison, only 10 out of 400 exporting producers, accounting for 14% of the total volume of exports from China to the EU, were considered in the sample (EC, 2011b).
- 11 According to interested parties, the profit of the EU industry had gone up significantly during the last quarter of the investigation period, something that indicated that the EU industry had recovered from the economic crisis (European Council, 2011). If profits of ceramic tile producers in the EU increase further during the months following the investigation period, this is not considered in the anti-dumping investigation, which is limited to the predefined investigation period but important to recall, since the anti-dumping measures affect future imports.
- 12 In Part II, the performance of the EU Member States on the internal market will be analysed in line with the dumping criteria in order to estimate if this phenomenon is taking place within the EU, and if this intra-EU “dumping” is considered as a case of normal competition instead of a cause of injury to the domestic industry.
- 13 In the ceramic tiles case, the “reasonable” profit was based on the profit that should be achieved by an industry of this type under “normal conditions of competition”, and in particular the profitability of 3.9% that the EU industry achieved in 2007. In the investigation, it was concluded that the EU industry operated below this “target profit” (European Council, 2011). The injury margin was,

- accordingly, estimated to be in the range of 52.6–95.8% (European Council, 2011).
- 14 The anti-dumping investigation team selected only 7 unrelated importers, which accounted for 6% of the total imports from China in the anti-dumping investigation, but received only replies from 5 sampled importers (EC, 2011b).
 - 15 In certain cases, it is simply stated that the EU industry might disappear if anti-dumping measures are not be imposed. Whether this would be of harm to anyone but the EU industry itself is not discussed in the analysis.
 - 16 The current anti-dumping investigation practice, which compares the benefits of the total EU industry with the cost to each individual user or consumer, makes the measures seem less important to the users/consumers and more important to the EU industry. The total value of trade of the anti-dumping measures would be 297 million euros if the anti-dumping investigation data on volume and price of the EU imports of ceramic tiles from China was used (EC, 2011b). As a result, the accumulated extra cost to consumers would be 33 million euros if the levels of imports remained constant. This is the extra cost to the importers, user industry and consumers that demand the product to be imported.
 - 17 This use of a “buy European” aspect should not be a part of the Union interest test analysis in the anti-dumping investigation.
 - 18 The number of EU15 and/or EU25 anti-dumping measures against current EU27 members in decreasing order: Poland (20), Romania (12), Czech Republic (11), Lithuania (10), Bulgaria (8), Slovakia (8), Hungary (7), Estonia (3) and Latvia (2) (based on European Commission Directorate-General for Trade webpage). The measures were in force until the accession of the countries to the EU.
 - 19 Anti-dumping measures are not permitted between members of the EU. The anti-dumping regulation is reserved for dumping from outside the EU. In a strict WTO legal sense, it is not possible to discuss dumping within a customs union, such as the EU. Paragraph 8(b) of GATT Article XXIV requires WTO members who form a preferential trade area to eliminate duties and other regulations, substantially restricting all the trade in order to achieve a common market (Budetta et al., 2007). The Treaty of Rome prohibited the use of anti-dumping measures on intra-area trade once the transition period for full implementation of the treaty had expired. “If, during the transitional period, the Commission ... finds that dumping is being practised within the common market, it shall address recommendations to the person or persons with whom such practices originate for the purpose of putting an end to them. Should the practices continue, the Commission shall authorise the injured Member State to take protective measures. ... As soon as this Treaty enters into force, products which originate in or are in free circulation in one Member State and which have been exported to another Member State shall, on reimportation, be admitted into the territory of the first-mentioned State free of all customs duties, quantitative restrictions or measures having equivalent effect.” No formal linkage was established between the application of common competition rules and the elimination of anti-dumping measures, and the antitrust criteria are very different from those applied in anti-dumping. However, the section on dumping (Article 91) is found in the chapter on competition in the Treaty of Rome (European Commission webpage).
 - 20 The next task for the EU should be to continue this progressive approach in the negotiation of bilateral and regional free trade agreements with third countries. In support of this approach, it should be mentioned that, in recent years, a number of countries and regions have decided to bilaterally, or on a regional basis, exclude the use of the anti-dumping instrument in their free trade agreements, for example: Australia New Zealand Closer Economic Relations Free Trade Agreement (ANZCERTA), Canada–Chile, China–Hong Kong, China–Macao, European Free Trade Association (EFTA), EFTA–Chile, EFTA–Singapore (Budetta et al., 2007).
 - 21 The concept of dominant position refers to either no competitor or no substantial competition. In addition to a market share of 40–50%, other criteria, such as financial strength, access to procurement and distribution channels, links with other companies, legal and de facto market entrance barriers, are considered on a case-by-case basis (Knorr, 2004).
 - 22 In this context, it is also relevant to note that some experts argue that the undercutting of the average variable production cost should not be considered as an abuse of dominant position in competition law. There might be some reasons to sell for less than the average variable cost of production than trying to gain market shares from competitors, e.g. loss-minimisation by selling an outdated product at below cost. In addition, it is impossible to exactly determine short-run average variable costs, i.e. it is a static concept that can only be determined ex-post if economies of scale persist; multi-product firms pose enormous difficulties in the proper allocation of joint costs; competitors do not have the same average variable costs, i.e. the calculation is based only on the dominant competitor which might be more efficient, something that protects other companies from normal competition; and the calculation is based only on profit in the short run, not on the maximisation of intertemporal profit (Nielsen, 1994; Knorr, 2004). In light of the difficulties in condemning price undercutting if a dominant company is selling below the average variable cost of production (non-dominant companies are, according to competition law, allowed to use price undercutting), it is important to note that in the case of anti-dumping investigations, a non-dominant company (or a number of companies in a single country) might be selling for above the average total cost of production, including a profit, and still be condemned.
 - 23 In anti-dumping investigations, the constructed sales price is based on the following three elements: (i) cost of manufacturing; (ii) selling, administrative and general expenses; and (iii) profit. The profit levels are artificially assigned in an anti-dumping investigation. The “reasonable” profit calculation is based on the profitable sales (and not on the unprofitable sales) on the domestic market. The profit level in the constructed normal value is mostly higher than the profit levels achieved by the EU industry, indicating that it would be defined as dumping and causing injury on the EU market if this method of defining dumped prices would be used against the EU industry.
 - 24 The anti-dumping investigation team is convinced that the Chinese exporters of ceramic tiles to the EU have a common price strategy in order to be able to compete with the EU producers. In the anti-dumping investigation, it was argued that the fact that the “price differential ... between Chinese imports and the prices of the Union industry was very significant ... already in 2007 ... suggest that the price strategy by the Chinese exporting producers started before the economic crisis” (EC, 2011b).

- 25 The competition authorities could, in line with this argument, investigate the effects of the anti-dumping legislation, e.g. the cooperation between domestic producers (i.e. competitors), with an imminent risk of creating cartels, in order to present a complaint; the cooperation between importers and the user industry (also competitors), in order to present evidence against a complaint; and the protection of monopolistic or oligopolistic situations on an EU and/or worldwide basis. There is also a risk that dissemination of information, voluntarily or involuntarily, in relation to the anti-dumping investigation might affect price decisions and the level of competition. Current anti-dumping rules allow exporters to restrict competition in their favour by making use of price undertakings, i.e. a way of colluding with their domestic competitors. Accordingly, anti-dumping rules can be considered to be a trigger for dumping with the aim of forming unlawful cross-border cartels (Knorr, 2004).
- 26 It has been claimed that the EU industry is in need of restructuring its production processes. The process of restructuring and consolidation that has been going on over the past two decades should be allowed to continue, as the EU ceramic tile industry is still highly fragmented (EC, 2011b).
- 27 The anti-dumping investigation team claims that the "Union industry had to focus on small batches of the product concerned where demand was more fragmented with lower quantities and a bigger variety" (EC, 2011b). It was also argued that "the Union industry was able to maintain its presence on the whole market by the means of compression of its sales prices and the production of a costlier product mix" (European Council, 2011). As a result, "Union producers have a highly diversified production and ... they are more and more dealing with small bulk orders" (EC, 2011d).
- 28 Prodcom codes that serve as a basis for the intra-EU dumping margin calculations: 23311010, 23311020, 23311053, 23311057, 23311071, 23311073, 23311075, and 23311079.
- 29 Prodcom codes and corresponding CN codes: 23311010 (CN 69071000), 23311020 (CN 69081010, CN 69081090), 23311053 (CN 69079091), 23311057 (CN 69079010, CN 69079093, CN 69079099), 23311071 (CN 69089011, CN 69089031), 23311073 (CN 69089021, CN 69089091), 23311075 (CN 69089093), and 23311079 (CN 69089021, CN 69089029, CN 69089051, CN 69089099).
- 30 The international commercial term "CIF" provides the cargo insurance and delivery of goods to the destination at the seller's expense. The buyer is responsible for the import customs clearance and other costs and risks.
- 31 Due to the aggregated level of the statistics, it is impossible to verify exceptionally high "domestic price" values, in relation to the "export price", for certain EU Member States (e.g. United Kingdom, 128.4 euro/m², with regard to the Prodcom code 23311020 and Estonia, 80.0 euro/m², with regard to the Prodcom code 23311075). Given the possibility for outliers in these rather extreme cases, these "dumping margins" are not presented in Table 1.



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