



# Kommerskollegium

*National Board of Trade*

## **The contribution of trade to a new EU growth strategy**

Ideas for a more open European economy

### Part 4

# Antitrust instead of antidumping in the Community's bilateral trade agreements

By  
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*The year 2010 is approaching and the Lisbon strategy will have to be replaced by a new strategy. The Foreign Ministry has asked the National Board of Trade to discuss ideas for external commercial policies to support the reforms carried out domestically to increase growth. This can be called an “external dimension” of a new strategy. For this purpose we have written eight reports, covering a range of areas, and a summary. You can find it all at [www.kommers.se/trade&growth](http://www.kommers.se/trade&growth)*

**The GLOBAL EUROPE Communication notes that:**

**”European economic openness is vital for creating jobs and growth in Europe and for our international competitiveness. Openness to global trade and investment increases our ability to exploit the benefits of an effective single market. It exposes the domestic economy to creative competitive pressures, spurring and rewarding innovation, providing access to new technologies and increasing incentives for investment”**

**To this end, the Commission mandated a review of the antidumping regulation that is protectionist in effect if not design. This review demonstrated that there was no support for unilateral reforms in this area.**

**This paper discusses an alternative route that may strike a better balance between different interests and also contribute to the objective of avoiding discrimination in third country markets for the benefit of the EU export industry.**

**Our proposal is to replace antidumping with antitrust in the Community’s bilateral trade agreements.**

**The proposal would not take away the possibility of counteracting truly anticompetitive practices of our trading partners, such as selling below the variable cost of production (dumping). On the contrary, it would expand the range of anti-competitive practices that would be actionable, including export cartels, price-fixing arrangements, refusal to deliver, state aid and merges that lead to a dominant position. However, since the legal standards are stricter in antitrust than in antidumping, it would become more difficult for the import-competing industries to gain protection in cases when there is no apparent abuse of a dominant market position. This would be a small “price” to pay in our view, considering the benefits to the Community’s exporters that would enjoy the same protection against abusive dumping allegations abroad.**

## 1. Introduction

Some eight years ago the Community set up a bold target for itself at the Lisbon Summit. By 2010 it would become “the most dynamic and competitive knowledge-based economy in the world”. This objective was to be achieved through a process of co-ordinated national reforms inspired by the best practices in the Community. Good examples in education, R&D policies, labour market regulations, and other areas of importance for growth and employment would be highlighted as a model for others in an annual benchmarking process. Over time, policies would converge towards the best practices and make the Community at large more competitive; indeed, the most competitive economy in the world.

As the mid term approached, the Commission asked an eminent group chaired by the former Prime Minister of the Netherlands, *Wim Kok*, to evaluate the progress. The report – *Facing the Challenge*<sup>1</sup> – did not have much to show for, although partly because of unfavourable external conditions. The growth gap to North America and Asia had if anything widened since the launch of the Lisbon Agenda. Wim Kok and his associates concluded that part of the problem was a lack of political commitment to the reform process and asked the Commission and the Member States to “re-double their efforts to make change happen”. One result that grew out of this call was the external dimension of the Lisbon Agenda, named GLOBAL EUROPE, with the subtitle “Competing in the World”.

The GE strategy rests on two legs: The *first leg* is to “re-double” the efforts to open up foreign markets for the benefit of the Community’s export industry, including a new generation of bilateral free trade agreements that will address not only conventional trade barriers (customs duties) but also regulations behind the border. The idea is to use the internal market regulation as a template for the regulatory provisions in the new trade agreements, giving the export industry the advantage of operating under “Community rules” in foreign markets as well.

The *second leg*, which is less articulated in terms of sharp policy proposals, is to open up the internal market for foreign competition:

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<sup>1</sup> FACING THE CHALLENGE - The Lisbon strategy for growth and employment, Report from the High Level Group chaired by Wim Kok, November 2004.

<sup>2</sup> Page 5, second paragraph.

The arguments used by the Commission for opening up the internal market have strong support in the new trade theory that stresses the catalytic role of foreign competition in the restructuring of the domestic industry.<sup>3</sup> The new trade theory is essentially a Darwinistic story of the survival of the fittest. It differs from traditional trade theory in that it acknowledges that some firms are more fit than others by effort if not birth. Some elements of the textile and apparel industry survive only because of the protection granted by the Community; other elements of the industry are able to compete successfully in the world market on their own merits. This is true for all kinds of industries; not just for the industries where the Community is believed to have a comparative disadvantage.

The commercial prospects of individual firms are determined by their unique blend of productivity, product quality, design, branding, managerial skills and other factors stressed in the business literature. The Community would like to have less firms in the low end of the skill distribution and more firms in the high end. This is exactly what it will get if the new trade theory is correct. Foreign competition leads to a Darwinistic selection process that raises the average productivity and hence the ability to pay higher wages. But it will not be an easy ride. It is based on the premise that one must allow unfit businesses to fail in order to pave the way for an expansion of the fit. This process could easily be short-circuited if the Community caves in to the inevitable pressure for protection by uncompetitive firms.

The Commission therefore rightly concludes that “Europe must reject protectionism” [in order to become the most competitive economy in the world].<sup>4</sup> The problem is that this insight is not shared by everyone in the Community, as demonstrated by the review of the the Community’s anti-dumping policies<sup>5</sup>, which led nowhere.

It is not entirely clear why the review failed to reach any results, although the mobilization of the import competition industry in defense of the trade defense instruments is certainly part of the answer. Hence it is not clear what it would take to revive the process. The public opinion is split on the broader issue of globalization and on the merits of further trade liberalization. Furthermore, antidumping is not viewed as a protectionist instrument by all.

To get out of this stalemate without compromising the basic insight that Europe must reject protectionism, we will offer an alternative route that may strike a better balance between different interests and also contribute to the objective of opening up foreign markets for the benefit of the export industry:

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<sup>3</sup> Melitz (2003), Fernandes (2007), De Loecker (2007), Bernard and Bradford (2004), Greenaway and Kneller (2004), Alvarez and López (2005) and Topalova1 (2004).

<sup>4</sup> Page 5.

<sup>5</sup> [http://ec.europa.eu/trade/issues/respectrules/anti\\_dumping/comu061206\\_en.htm](http://ec.europa.eu/trade/issues/respectrules/anti_dumping/comu061206_en.htm)

**Our proposal<sup>6</sup> is to replace antidumping with antitrust in the Community's bilateral trade agreements.**

The proposal would not take away the possibility of counteracting truly anticompetitive practices of our trading partners, such as selling below the variable cost of production (dumping). On the contrary, it would expand the range of anticompetitive practices that would be actionable, including export cartels, price-fixing arrangements, refusal to deliver, state aid and merges that lead to a dominant position. However, since the legal standards are stricter in antitrust than in antidumping, it would become more difficult for the import-competing industries to gain protection in cases when there is no apparent abuse of a dominant market position. This would be a small "price" to pay in our view, considering the benefits to the Community's exporters that would enjoy the same protection against abusive dumping allegations abroad.

Section 2 highlights the changing map of antidumping in the world where the Community nowadays finds itself as much on the defending side as on the complaining. Section 3 develops the rationale for using antitrust instead of antidumping in our bilateral free trade agreements. The conclusion can be found in Section 4.

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<sup>6</sup> This idea is not new. It has been tossed around in the academic literature for more than 10 years by Messerlin (1994), Hoekman and Mavroidis (1996), Hoekman (1998) among others. Who came up with the original idea is unknown to us.

## 2. The changing map of antidumping

Forty years ago, only four countries used antidumping measures on a regular basis: the EC, USA, Canada and Australia. That world no longer exists. According to the statistics of the WTO Antidumping Committee, the *four* has now become *forty plus*, and most other countries have adopted the necessary laws and institutions to follow suit in the near future.<sup>7</sup> The largest initiator of antidumping measures in the last decade is neither the USA nor the EC but *India*. *China*, which introduced its first AD measure as recent as 2000, is already a contender for the top position. Countries that used to be on the receiving end of antidumping are now turning the table.

**Table 1. Antidumping initiations by the 20 most active users**

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	1995-2006
<i>India</i>	6	21	13	28	64	41	78	81	46	21	28	34	<b>461</b>
<i>USA</i>	14	22	15	36	47	47	75	35	37	26	12	7	<b>373</b>
<i>EC</i>	33	25	41	22	65	32	28	20	7	30	25	35	<b>363</b>
<i>Argentina</i>	27	22	14	8	23	43	26	14	1	12	12	15	<b>217</b>
<i>South Africa</i>	16	33	23	41	16	21	6	4	8	6	23	3	<b>200</b>
<i>Australia</i>	5	17	42	13	24	15	23	16	8	9	7	10	<b>189</b>
<i>Canada</i>	11	5	14	8	18	21	25	5	15	11	1	7	<b>141</b>
<i>Brazil</i>	5	18	11	18	16	11	17	8	4	8	6	12	<b>134</b>
<i>China</i>	0	0	0	0	0	6	14	30	22	27	24	11	<b>134</b>
<i>Turkey</i>	0	0	4	1	8	7	15	18	11	25	12	8	<b>109</b>
<i>Mexico</i>	4	4	6	12	12	6	6	10	14	6	6	6	<b>92</b>
<i>Korea</i>	4	13	15	3	6	2	4	9	18	3	4	7	<b>88</b>
<i>Indonesia</i>	0	11	5	8	8	3	4	4	12	5	0	5	<b>65</b>
<i>Peru</i>	2	8	2	3	8	1	8	13	4	7	4	3	<b>63</b>
<i>Egypt</i>	0	0	7	14	5	1	7	3	1	0	12	8	<b>58</b>
<i>New Zeal.</i>	10	4	5	1	4	9	1	2	5	5	0	1	<b>47</b>
<i>Malaysia</i>	3	2	8	1	2	0	1	5	6	3	4	8	<b>43</b>
<i>Thailand</i>	0	1	3	0	0	0	3	21	3	3	0	3	<b>37</b>
<i>Colombia</i>	4	1	1	6	2	3	6	0	0	2	2	5	<b>32</b>
<i>Israel</i>	5	6	3	7	0	1	4	0	0	1	4	0	<b>31</b>
<i>Venezuela</i>	3	2	6	10	7	1	1	1	0	0	0	0	<b>31</b>
<i>Pakistan</i>	0	0	0	0	0	0	0	1	3	3	13	4	<b>24</b>
<i>Philippines</i>	1	1	2	3	6	2	0	1	1	0	0	0	<b>17</b>
<i>Chile</i>	4	3	0	2	0	5	0	0	0	0	0	1	<b>15</b>
<i>Taiwan</i>	0	0	0	0	0	3	3	0	2	0	0	5	<b>13</b>

Source: WTO

<sup>7</sup> [http://www.wto.org/english/tratop\\_e/adp\\_e/adp\\_e.htm](http://www.wto.org/english/tratop_e/adp_e/adp_e.htm)

The globalization of antidumping is a concern for the Community industry that increasingly has to respond to dumping allegations abroad. Some allegations are directed towards companies in the whole of the EC while others are directed towards companies in specific member states. The data for the Community is therefore difficult to compare with other members of the WTO. If the Community is more afflicted than others is difficult to say.

**Table 2. Antidumping initiations against producers in the EC and individual member states**

	1995	1996	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	1995-2006
<i>EC</i>	0	1	2	4	7	9	9	10	10	3	5	3	<b>63</b>
<i>Germany</i>	7	9	13	8	11	5	9	7	3	2	2	2	<b>78</b>
<i>Italy</i>	6	5	5	5	2	5	8	3	4	0	1	0	<b>44</b>
<i>Spain</i>	2	4	7	7	5	6	4	2	4	1	0	0	<b>42</b>
<i>UK</i>	6	4	6	4	2	9	6	2	0	1	1	0	<b>41</b>
<i>France</i>	0	4	4	10	7	2	3	2	3	1	1	1	<b>38</b>
<i>Romania</i>	1	2	1	5	4	4	5	8	2	0	2	0	<b>34</b>
<i>Netherland</i>	6	1	5	3	2	3	4	1	0	2	0	0	<b>27</b>
<i>Poland</i>	2	3	3	4	3	5	1	4	0	1	0	0	<b>26</b>
<i>Belgium</i>	1	2	3	3	1	0	5	1	3	1	0	0	<b>20</b>
<i>Czech Rep.</i>	1	1	0	2	7	3	2	1	1	0	0	0	<b>18</b>
<i>Sweden</i>	1	2	5	0	1	0	2	1	0	1	1	1	<b>15</b>
<i>Austria</i>	0	2	3	0	3	3	0	1	0	1	0	1	<b>14</b>
<i>Hungary</i>	2	0	2	2	4	0	3	1	0	0	0	0	<b>14</b>
<i>Bulgaria</i>	0	3	2	1	1	1	2	0	1	0	1	1	<b>13</b>
<i>Finland</i>	0	0	1	1	2	0	1	2	2	1	1	0	<b>11</b>
<i>Slovak Rep.</i>	0	1	1	1	3	1	2	1	0	0	0	0	<b>10</b>
<i>Lithuania</i>	0	0	1	0	4	1	1	3	0	0	0	0	<b>10</b>
<i>Denmark</i>	1	1	0	2	2	0	0	0	0	0	0	1	<b>7</b>
<i>Latvia</i>	0	0	2	1	1	3	0	0	0	0	0	0	<b>7</b>
<i>Greece</i>	0	0	3	0	0	1	1	0	1	0	0	0	<b>6</b>
<i>Ireland</i>	0	0	2	1	0	0	0	0	1	2	0	0	<b>6</b>
<i>Portugal</i>	0	2	0	2	0	1	1	0	0	0	0	0	<b>6</b>
<i>Estonia</i>	0	0	1	0	0	1	1	1	0	0	0	0	<b>4</b>
<i>Luxembourg</i>	0	0	0	0	0	0	2	0	0	1	0	0	<b>3</b>
<i>Slovenia</i>	1	0	0	1	0	0	0	0	0	0	0	0	<b>2</b>

Source: WTO

Nevertheless, the data is a reminder that the Community is also a target for antidumping allegations, which alters the traditional cost-benefit analysis. Consumers are harmed, downstream industries are harmed and the export industry suffers from reciprocal dumping allegations abroad. The question is what can be done at this stage when antidumping has already gone global and the WTO antidumping negotiations are back-tracking.

### 3. Antitrust instead of antidumping

Antidumping measures are not permitted between members of the Community. This does not mean that “undertakings” – the antitrust parlour for firms – in one member state cannot protect themselves against dumping by firms in other member states or indeed dumping by their national peers. It only means that they cannot invoke the antidumping regulation (384/96) that is reserved for dumping from outside the Community. What they have to do instead is to file a complaint under the Community’s competition policy, Article 82 (a), which prohibits the abuse of a dominant position, including “unfair purchase or selling prices or other unfair trading conditions”. (See box below.) Such complaints can be filed either with the national competition authority or to the Directorate-General for Competition. If a violation is found, the offender will be ordered to take corrective action subject to a fine.<sup>8</sup>

#### *Article 82*

Any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it shall be prohibited as incompatible with the common market in so far as it may affect trade between Member States.

Such abuse may, in particular, consist in:

- (a) directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions;
- (b) limiting production, markets or technical development to the prejudice of consumers;
- (c) applying dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;
- (d) making the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

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<sup>8</sup> The fine depends on the severity of the offence. The maximum penalty is 10% of the turnover of the company.

The main difference between antidumping and antitrust law, apart from the range of anticompetitive practices covered, is that the latter focuses on market behaviour that harms competition *per se*. Dumping, in the meaning of setting a lower price in the export market than in the home market (the definition used in antidumping proceedings), is not a violation *per se* under antitrust rules. Dumping is only condemned if the alleged offender has (i) a dominant position and (ii) if this position is abused, e.g., if the offender set a price below average variable cost in an effort to squeeze out the competitors from the market or pre-empt new firms from entering the market.

Any company whose activities affect the EU market is subject to the Community's competition law. It does not matter whether the business has its registered office, headquarters or shareholders inside or outside the EU.<sup>9</sup>

The competition policy is thus blind to the nationality of the offender. Dumping allegations against foreign firms could therefore equally well be tried under the competition rules. However, as long as the antidumping track is available to the domestic industry, they will choose this route since the legal standards are lower in antidumping proceedings than in antitrust. Moreover, were the Community to close the antidumping window in favour of the antitrust, it would have to secure cooperative agreements with foreign competition authorities. Antitrust cases are data intensive and may require on-spot surprise visits to collect evidence. This is not possible without the prior consent and cooperation of foreign competition authorities.

The Directorate-General for Competition (DG Competition) has dedicated cooperation agreements on competition policy with the EFTA Surveillance Authority, United States, Canada and Japan. Under these agreements, competition authorities on both sides exchange information and co-ordinate their enforcement activities. Each side may ask the other to take enforcement action (positive comity); and each side must take account of the other's significant interests when enforcing competition rules (traditional comity).<sup>10</sup> In addition, DG competition is a member of the International Competition Network (ICN) that includes competition authorities from some 100 countries.<sup>11</sup> However, since no formal agreements exist with these countries, co-operation and information exchange must be secured on a case-by-case basis.

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<sup>9</sup> The Wood Pulp case established that EC competition law is applicable to anti-competitive practices by third countries that have an effect on the Community market. (Joined Cases 89, 104, 114, 116, 117 and 125-129/85 Åhlström v Commission ("Wood Pulp"), [1988] ECR 5193, paragraph 16-18)

<sup>10</sup> <http://ec.europa.eu/comm/competition/international/bilateral/index.html>

<sup>11</sup> <http://www.internationalcompetitionnetwork.org/>

Many of the Community's bilateral trade agreements already include antitrust provisions. However, there is only *one* case where the Community has drawn the logical conclusion to phase out antidumping. The case in point is the European Economic Area (EEA) with Norway, Iceland and Lichtenstein, which involved the latter adopting the EC's *acquis communautaire* (the common market rules), including the competition rules. As a quid pro quo, antidumping is no longer permitted, with the exception of farm and fish products.<sup>12</sup> Of course, one could make the argument that the EEA is a special case and not extendable to other free trade agreements. The EEA partners are full members of the internal market (apart from the aforementioned areas) and the risk of dumping is therefore minimal since goods and services can circulate freely within the internal market.

This objection is, in our view, beside the point. The rationale for having antitrust instead of antidumping is not based on a risk assessment of dumping. The argument is based on a desire to encourage good forms of competition and discourage bad forms, which is exactly what antitrust is all about. Antidumping has no such ambitions and is, in effect if not intent, a tool for import-competing industries to block problematic competition from abroad under the pretext that it is not "fair". The free trade agreement between Canada and Chile, which prohibits antidumping between the parties in favour of antitrust co-operation, is a testimony that it is possible to abolish antidumping also in regular trade agreements. (See Annex I for details).

Of course, many questions remain. For example, are common competition rules a prerequisite? What kind of institutional structure is needed? These and other questions need to be analyzed in detail by the Commission in consultation with the Member States before we can make a final assessment. We hope that this brief note will stimulate the debate.

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<sup>12</sup> Article 26 EEA states: "Anti-dumping measures, countervailing duties and measures against illicit Commercial practices attributable to third countries shall not be applied in relations between the Contracting Parties, unless otherwise specified in this agreement." The exceptions are listed in a protocol. This states that it only applies to the areas covered by the provisions of the EEA in which the Community *acquis* is fully integrated (thus excluding agriculture and fish products); and that it is without prejudice to any measures which may be introduced to avoid circumvention of anti-dumping or similar measures by third countries.

#### **4. Concluding remarks**

The objectives of the Lisbon Agenda will not be reached without a political readiness to review long-standing practices, such as the Community's antidumping policies that are protectionist in effect if not design and therefore an obstacle that stands in the way of a more efficient economy. The proposal made in this paper of replacing antidumping with antitrust would not take away the possibility of counteracting truly anticompetitive practices of our trading partners, such as selling below the variable cost of production (dumping). On the contrary, it would expand the range of anticompetitive practices that would be actionable, including export cartels, price-fixing arrangements, refusal to deliver, state aid and merges that lead to a dominant position. However, since the legal standards are stricter in antitrust than in antidumping, it would become more difficult for the import-competing industries to gain protection in cases when there is no apparent abuse of a dominant market position. This would be a small "price" to pay in our view, considering the benefits to the Community's exporters that would enjoy the same protection against abusive dumping allegations abroad.

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## **Annex I - Excerpts from the Canada-Chile FTA**

### **Article J-01: Competition Law**

1. Each Party shall adopt or maintain measures to proscribe anti-competitive business conduct and take appropriate action with respect thereto, recognizing that such measures will enhance the fulfillment of the objectives of this Agreement. To this end the Parties shall consult from time to time about the effectiveness of measures undertaken by each Party.
2. Each Party recognizes the importance of cooperation and coordination among their authorities to further effective competition law enforcement in the free trade area. The Parties shall cooperate on issues of competition law enforcement policy, including mutual legal assistance, notification, consultation and exchange of information relating to the enforcement of competition laws and policies in the free trade area.
3. Neither Party may have recourse to dispute settlement under this Agreement for any matter arising under this Article.

### **Article M-01: Reciprocal Exemption from the Application of Anti-dumping**

1. Subject to Article M-03, as of the date of entry into force of this Agreement each Party agrees not to apply its domestic anti-dumping law to goods of the other Party. Specifically:
  - (a) neither Party shall initiate any anti-dumping investigations or reviews with respect to goods of the other Party;
  - (b) each Party shall terminate any ongoing anti-dumping investigations or inquiries in respect of such goods;
  - (c) neither Party shall impose new anti-dumping duties or other measures in respect of such goods; and
  - (d) each Party shall revoke all existing orders levying anti-dumping duties in respect of such goods.