

A PROMISING STEP TOWARDS A MORE EFFECTIVE USE OF THE EUROPEAN INSTRUMENT AGAINST UNFAIR SUBSIDIES?

A very recent Regulation published on 18th March 2016¹ might be interpreted as a new policy from the EU Commission in order to address, under the European anti-subsidy instrument, cases where trade distortions are exclusively or mainly the results of State interference.

In this particular case, the EU ductile iron pipe industry, severely impacted by unfair imports from India, requested the imposition of measures reflecting in particular the distorting effects of the high export tax applicable on iron ore, a raw material used in the manufacture of these pipes. The EU industry has provided evidence that this export tax provides access to this raw material at an artificially low price that is tantamount to a subsidy granted to the Indian ductile iron pipe producers. The Commission found during its anti-subsidy investigation that the Indian export tax on iron ore is a so-called “countervailable” subsidy within the meaning of the basic AS Regulation.

A FINANCIAL CONTRIBUTION AS AN ENTRUSTMENT AND DIRECTION BY THE INDIAN GOVERNMENT OF THE IRON ORE MINING COMPANIES TO PROVIDE GOODS FOR LESS THAN ADEQUATE REMUNERATION

With this case, the Commission can be seen as having adapted its interpretation on the notion of “entrustment” and “direction” of a private body under the relevant EU and WTO Subsidy rules.

In this respect, the Commission took the view that a financial contribution shall involve evidence of a government policy or programme to promote the industry under investigation (the Indian ductile iron pipe industry), by exercising authority over or giving responsibility to public or private bodies (the iron ore mining companies) to provide iron ore for less than adequate remuneration to the ductile iron pipe industry.

¹ Commission Implementing Regulation (EU) 2016/387 of 17 March 2016 imposing a definitive countervailing duty on imports of tubes and pipes of ductile cast iron (also known as spheroidal graphite cast iron), originating in India, 18.3.2016, L73, p.1

It specifically noted that:

- A number of documents show that the Government of India explicitly pursued as a policy objective the support of the ductile pipes industry. The specific policy objective of discouraging the export of iron ore is supported by the implementation of an export tax on iron ore and a Dual Freight Policy which created a freight charge differential between the transportation of iron ore for domestic consumption and for export;
- By imposing such targeted export restraints, the Government of India is putting Indian iron ore mining companies into an economically irrational situation, which induces them into selling their goods for a lower price than they could obtain in the absence of this policy. The Government of India has taken a more active role than mere acts of encouragement as it is restricting the freedom of action of the iron ore mining companies by limiting in practice their business decision as to where to sell their product and at what price;
- In this sense, the input producers are entrusted by the government to provide goods to the domestic users of iron ore for less than adequate remuneration. The investigation has shown that the Government of India's interventions on iron ore led to a drastic reduction of exports of iron ore and to an excess supply in India, and have also had an impact on the domestic prices of iron ore as domestic prices of iron ore in India are constantly lower than international prices.

The EU Commission concluded that the Government had entrusted the mining companies (privately-owned iron ore mining companies) to carry out its policy to create “*a compartmentalized domestic market and to provide iron ore to the domestic iron and steel industry for less than adequate remuneration*”. The measures at issue achieved the desired effect of distorting the domestic iron ore market in India and of depressing the price to an artificially low level, to the advantage of the downstream industry. It thus concluded that the Government of India provided an indirect financial contribution within the meaning of the EU and WTO rules.

A FINANCIAL CONTRIBUTION THAT PROVIDES A BENEFIT TO THE INDIAN DUCTILE IRON PIPES INDUSTRY AND WHICH IS SPECIFIC

Since the prevailing market terms and conditions in India are all affected by the Government's targeted export restraints, there were no domestic prices in India which could be used as an appropriate benchmark.

The Commission was also unable to adjust the terms and conditions prevailing in India on the basis of actual costs, prices and other factors available in India in order to obtain the price of iron ore in India in the absence of the government's targeted export restraints as such costs are determined by a series of other factors of which the Commission is unaware.

For an appropriate benchmark, the Commission thus relied on a price of iron ore produced in the mine of a representative other country and to simulate that said mine would actually be located in India. It hence used as a benchmark a proxy FOB price in Australia as the majority of iron ore worldwide is exported from Australia to China and because Australia represents approximately 50% of the world's exports of iron ore. This Australian FOB price is considered to reflect the terms and conditions that would have been available to Indian iron ore users, as if the iron ore would have been delivered from an India mine to a factory in the absence of the targeted export restraints.

The Commission also concluded that the Government of India's export restraints only benefit the iron and steel industry and are therefore specific. In addition, the inherent characteristics of iron ore limit the possible use of the subsidy to a certain industry.

A PROMISING STEP IN THE EUROPEAN COMMISSION'S ANTI-SUBSIDY PRACTICE

Despite its far-reaching potential, the anti-subsidy instrument has so far been only used in a limited way by EU industries. This is due to the fact that anti-subsidy investigations generally lead to results less favourable than anti-dumping ones, and to the high burden of proof required by the Commission in order to evidence prima facie subsidization, to the absence of transparency of countervailable schemes in the targeted countries, and to what can be viewed as the Commission's unwillingness and over-cautiousness to use it regularly and efficiently to capture new forms of trade distortions.

The move taken by the Commission in this case opens perspectives for EU industries which face unfair imports resulting from the distortive effects of an export tax or other type of subsidies. It also provides an indication that the Commission seems to be responding to the EU industry and to be looking into this instrument in order to challenge more sophisticated ways of subsidization and new forms of distortions resulting from state intervention, especially in former State economy and emerging countries.

However, as seen in this case, in order to benefit from this instrument fully, the Commission might have to recruit more staff specializing in anti-subsidy matters and may have to recourse more often, just like the United States, to the Best Facts Available Provisions (BFA) in order to convince governments and/or companies from other countries to cooperate and to open their books. This path seems to be crucial for the long-term viability of EU industries. This is also the right direction to make sure that European companies are not the only ones in the world subject to a rigorous control of State aids.

CONTACT PARTNER

OLIVIER PROST
prost@gide.com

TEAM MEMBERS

MARIE-SOPHIE DIBLING
ANNA COELHO DIAS
STEPHANIE SEEUWS
CLEMENT BOUVAREL

OF COUNSEL

MOGENS PETER CARL
ROLAND VAN THUYNE

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