

# Cumulation in anti-dumping and anti-subsidy investigations by the European Commission

## Table of contents

<b>I. INTRODUCTION .....</b>	<b>2</b>
<b>II. CONDITIONS FOR CUMULATION.....</b>	<b>3</b>
1. IMPORTS SIMULTANEOUSLY SUBJECT TO ANTI-DUMPING INVESTIGATIONS .....	3
2. DUMPING MARGINS ABOVE DE MINIMIS .....	5
3. VOLUME OF IMPORTS NOT NEGLIGIBLE .....	5
4. APPROPRIATENESS OF A CUMULATIVE ASSESSMENT IN VIEW OF THE CONDITIONS OF COMPETITION .....	6
4.1. <i>Like product finding</i> .....	6
4.2. <i>Level of import volume</i> .....	7
4.3. <i>Development and level of prices of imports</i> .....	9
4.4. <i>Similar sales channels</i> .....	10
<b>III. CONCLUSION .....</b>	<b>11</b>

## I. Introduction

An anti-dumping / anti-subsidy investigation (hereinafter "anti-dumping investigation") requires an objective examination of both :

- the volume of the dumped / subsidised imports and the effect of those imports on prices in the Community market for like products,
- the consequent impact of those imports on the Community industry.

In cases where imports of a product originating from more than one country are simultaneously subject to an investigation, it is necessary to assess whether the injury and causation analysis should be performed for each country individually or on a cumulated basis. Cumulation is only allowed if a number of conditions are fulfilled. These are set out in, respectively, Article 3(4) of the basic anti-dumping Regulation<sup>1</sup> and Article 8(4) of the basic anti-subsidy Regulation<sup>2</sup>. These provisions are in full conformity with the applicable WTO anti-dumping and anti-subsidies Agreements.

The underlying rationale behind cumulation is that, under the circumstances set out by the basic Regulations, all dumped imports under investigation have a joint and simultaneous effect on the situation of the Community industry. Consequently, the contribution to injury from each country, provided it is significant, should be assessed on a cumulated basis. Indeed, under these circumstances, a country-by-country specific examination would be meaningless. It may also be contrary to the principle of non discrimination, as non cumulation may result in a different treatment of the various imports considered, despite their similar characteristics (dumped, having similar effects on the Community industry). Moreover, a domestic industry which suffers from the combined impact of dumped imports from various countries should have the same chances of relief as a domestic industry which suffers from dumped imports originating in only one country.

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The purpose of this paper is to explain the relevant provisions of Articles 3(4) and 8(4) of the two basic Regulations and to outline the consistent practice followed by the Community Institutions with regard to cumulation<sup>3</sup>.

The Institutions' practice has never been challenged, as such, before the European Courts. However, in *Technointorg*<sup>4</sup>, the Court clearly confirmed the basic rationale of

<sup>1</sup> Council Regulation (EC) No 384/96 (OJ L 56, 6.3.96, p.1), as last amended by Council Regulation (EC) No 905/98 (OJ L 128, 30.4.98 p.18)

<sup>2</sup> Council Regulation (EC) No 2026/97, OJ L 288, 21.10.97, p.1

<sup>3</sup> Cumulation of imports from different exporters from the same country is not dealt with here. This type of cumulation is always performed, since, as it was confirmed by the Court of Justice in several instances, it is generally not possible to individualise the part of the injury caused by each of the exporters involved.

cumulation, even though cumulation was not among the grounds invoked by the applicant, by stating that: "*Where the dumped products come from different countries, it is in principle necessary to assess the combined effects of such imports. It is consistent with the objectives of the [basic] Regulation that Community authorities should be able to examine the effect on Community industry of all such imports and consequently take appropriate action [...]*".

Cumulation is used in the vast majority of multi country investigations. Attachment 1 shows that, between 1998 and February 2000, imports were assessed cumulatively in 20 out of 25 new (Art 5) investigations.

## II. Conditions for cumulation

Four conditions must be met for a cumulated analysis of exports from different countries:

1. The imports in question must be simultaneously subject to investigations,
2. The margin of dumping / subsidisation established for each country is more than *de minimis*,
3. The volume of imports is not negligible,
4. The cumulative assessment is appropriate in the light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product.

If any of these conditions is not met for any of the countries under consideration, then the imports originating in that country(ies) must be assessed separately. The investigation will be terminated if either of the two *de minimis* thresholds are not reached (conditions 2 and 3). In the other cases, a separate ad-hoc injury and causation analysis would be made, which would obviously take into careful account the findings which lead to non cumulation. This separate analysis might then either lead to termination or to the impositions of measures.

### 1. Imports simultaneously subject to anti-dumping investigations

Cumulation can only be used for imports that are simultaneously under investigation, i.e. under the same investigation or under two different investigations running simultaneously and having the same or largely overlapping investigation periods (minimum six months in common). The "investigation period" in this context is the time covered by the dumping investigation (generally a 12 month period, covering at least six months immediately prior to initiation of the investigation<sup>5</sup>).

Cumulation of imports under investigation and imports for which an investigation has already been completed is not allowed<sup>6</sup>.

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<sup>4</sup> Judgment of the Court (Fifth Chamber) of 5 October 1988. *Technointorg v Commission and Council*, *European Court Reports 1988 page 6077*

<sup>5</sup> See Article 6(1) of the Basic anti-dumping investigation

<sup>6</sup> It should however be remembered that Article 3(5) of the basic Anti-dumping Regulation specifically includes the evaluation of the impact of past dumping practices on the Community industry as part of the injury analysis.

For example, in *Bicycles from Indonesia, Malaysia and Thailand*<sup>7</sup>, the imports concerned by the investigation were cumulated, but the imports originating in China, which were subject to previous anti-dumping measures and for which no investigation was pending at the time, were and could not be included in the cumulated analysis.

The same was done in *Polyester staple fibres (PSF) from Australia, Indonesia and Thailand (provisionals)*<sup>8</sup>. Imports from the countries concerned were cumulated, but imports from Belarus and Taiwan, for which previous investigations had already been terminated, were not included in the cumulated analysis. The impact of the imports originating in these two latter countries was examined separately in the causation assessment under « other factors ».

The "simultaneous" criterion could also be met if a new investigation runs in parallel with a review and vice-versa. The criterion also applies for two simultaneous sunset and interim reviews.

However, expiry reviews require a somewhat different analysis (likelihood of continuation or recurrence of injury) from that of new investigations (occurrence of injury and causation). Therefore, it can sometimes be neither necessary nor opportune to cumulate imports under new investigation with imports under review. It is important to note that non cumulation of a country, e.g. covered by an expiry review, will not undermine as such a finding of likelihood of recurrence of injury. As stated above, the non cumulated imports will have to be analysed separately<sup>9</sup>.

When a new investigation is conducted simultaneously with a review (or two reviews are being carried out simultaneously) and cumulation is applied, the cases will generally be presented jointly (practice of "packaging"). However, "packaging" may also be proposed in instances of no cumulation, because of the degree of reliance of the findings of one investigation on those of the other one (e.g. the "likelihood of recurrence" aspect being assessed by reference to the analysis of the situation of the Community industry and the causation analysis already performed for the new investigation).

In *seamless steel pipes and tubes from Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic*<sup>10</sup>, an interim review concerning Croatia, Hungary and Poland was initiated in parallel with a new proceeding concerning the Czech Republic, Romania, Russia and the Slovak Republic. All imports concerned by these two simultaneous investigations were cumulated in the definitive determination (except for Croatia, for which a *de minimis* dumping margin and no likelihood of recurrence of injury was found).

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<sup>7</sup> OJ L 248, 14.10.95, p.12

<sup>8</sup> OJ L 16, 21.1.2000, p.30

<sup>9</sup> In view of the nature of review investigations, the two « *de minimis* » conditions referred to above are not directly applicable as such. For instance, one could still have a finding of likelihood of recurrence of injury with low – below the *de minimis* threshold – import volume.

<sup>10</sup> OJ L 322, 25.11.97, p.1

However, in *Monosodium glutamate from Brazil, Vietnam, Republic of Korea and Taiwan*<sup>11</sup>, in view of the circumstances of imports from the countries under review (Republic of Korea and Taiwan), the Institutions did not cumulate all imports subject to the two investigations. Recurrence of injury aspects were investigated for the imports under review, while an injury and causation analysis was made for the imports from the countries subject to the new investigation (Brazil, Vietnam), on a cumulated basis.

## **2. Dumping margins above de minimis**

Pursuant to Article 9(3), a *de minimis* dumping margin is defined as being less than 2% of the CIF net community frontier price<sup>12</sup>. Non dumped imports (or imports with a dumping margin below *de minimis*) are thus not cumulated. While in a new proceeding *de minimis* dumping margins result in termination without imposition of measures, it should be noted that e.g. in expiry reviews a likelihood of recurrence of dumping test must nevertheless be made before a conclusion leading to termination can be reached.

## **3. Volume of imports not negligible**

Negligible levels of imports are established by reference to Article 5(7) of the basic anti-dumping Regulation and Article 10(11) of the basic anti-subsidy Regulation. Accordingly, imports are to be considered negligible when their market share is below 1%, unless, in cases of multi-country investigations, the collective market share of such countries is 3% or more<sup>13</sup>. Negligible imports are deemed not to have caused injury and are therefore excluded from the analysis. As above, this does not apply to expiry reviews, in which a recurrence of injury test must nevertheless be performed. It should be noted that the WTO Anti-dumping Agreement established the thresholds on a different basis (volume of imports instead of market shares). The Community therefore also examines the volume of imports on the basis of the criteria set out in Article 5.8 of the WTO Anti-Dumping Agreement.<sup>14</sup> If the imports concerned are found to be negligible under either of the two criteria (the one set by the Basic anti-dumping Regulation and the one set by the WTO Agreement), then they are excluded from the analysis and the investigation is terminated with respect to the countr(y)ies concerned. In other words, both the Basic anti-dumping Regulation and the WTO Agreement must be complied with at the same time. More details about the application of the "de minimis" rule are provided for in a separate clarification paper.

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<sup>11</sup> OJ L 264, 29.9.98, p.1

<sup>12</sup> The *de minimis* thresholds for countervailable subsidies are slightly different (see Article 14(5) of the basic anti-subsidy Regulation).

<sup>13</sup> In anti-subsidy investigations, different thresholds apply for imports originating in developing countries. Article 14(4) establishes that volume of subsidised imports from developing countries shall be negligible if they represent less than 4% of total imports, unless they collectively account for more than 9% of total imports.

<sup>14</sup> See for example *microdisks from Canada* (OJ L 63 4.3.98 p.32) where the proceeding was terminated on grounds of *de minimis* imports computed by reference to the WTO thresholds.

#### **4. Appropriateness of a cumulative assessment in view of the conditions of competition**

Two "similar conditions of competition" have to be examined: those between the imports concerned themselves and those between the (cumulated) imports and the like Community product. In practice, these aspects refer to the same criteria (see below).

The rationale behind this condition is that imports under consideration must be competing with each other and with the products of the Community industry before their cause of the injury can be analysed jointly.

This requirement would appear to leave more scope for judgement than the other requirements, especially since the notion of "similarity of conditions of competition" is not explained in the Basic Regulations as such. Nevertheless, the Institutions have built and applied a consistent practice for this rule, which, as stated above, has never been challenged in the Courts.

The Institutions have consistently referred to the following parameters to assess the similarity in the conditions of competition:

- Like product finding,
- Similarity of exporters' behaviour, by reference to one or more of the following :
  - the significance of the import volume level,
  - the development and level of the prices of imports and their undercutting or not of prices of the Community industry,
  - similarity of sales channels.

##### **4.1. Like product finding**

The practice followed with regard to the like product determination is explained in a previous clarification paper presented to the Commercial Questions Group.

Two main criteria are relevant for a like product finding:

- The imported and the Community produced products must share the same basic physical and/or chemical characteristics (main rule),
- They must have similar end uses (ancillary rule).

When products imported from different countries share the same basic physical and / or chemical characteristics, then they are most probably going to be competing with each other. This is even more true if, in addition, these products have similar end uses and they are interchangeable. . The same is true with regard to the comparison between the imported and the Community produced goods.

No additional requirement is needed to fulfil this first condition for similarity of competition. Thus, in practice, the Institutions will essentially refer to the analysis of the product concerned and the like product, which is always presented before the findings on dumping and injury.

In certain investigations concerning multi-type products, one or several exporting countries may export a product type (within the like product definition) that is not produced or sold by the Community industry. The Institutions would then mainly look at the share of that product type in the total imports into the Community from the country(ies) concerned and on the Community market. If the exporting country(ies) only export that particular product type and the Community industry produces all other product types but that one, then cumulation would probably not be opportune and the causation analysis would have to consider this situation very carefully. On the other hand, if the product type in question is only one among several different exported types then this would generally not be an impediment to cumulation.

#### **4.2 Level of import volume**

The most prominent criteria regarding volume of imports is their level, which should be significant. This means that imports should all be above *de minimis* levels, but also that when the import levels are close to these *de minimis* thresholds (up to one percentage point in market shares and up to two percentage points in the share of total imports), a case by case analysis would be necessary, e.g. taking into account the relative position of the subject imports on the market.

The significance of the imports concerned will often be established by reference to market shares or to shares in the total volume of imports. However, a fixed rule as to what percentage is the minimum required for imports to be considered "significant" cannot be provided. The case by case consideration will depend on several factors, notably the number of the countries concerned, the total market share of the imports concerned, the distribution of the imports from the various countries concerned, the market share held by the Community industry.

In any event, the assessment of import volume levels is to be closely linked with the assessment of pricing behaviour, in particular the findings on undercutting (see below).

In addition, comparable evolution of the import volume over the period considered for the injury assessment and similarity in the absolute levels of such imports would also be an additional indication that these imports have a joint impact on the situation of the Community industry, to be assessed cumulatively.

The Community Institutions have generally held that import trends need not necessarily be equal. Declining or erratic imports from certain countries could still be cumulated with increasing ones from other countries. Indeed, several dumping countries may be in competition with each other on the Community market, at the expense of the Community industry. The fact that some may lose, and their imports fall, is not an indication in itself that they should not be assessed cumulatively. This is

even more true if the falling imports remain nevertheless at significant levels and present similarity in pricing with the increasing ones.

In *Ferro-silico-manganese from Brazil, Russia, Ukraine and South Africa*<sup>15</sup>, cumulation was made, even though South African imports remained stable over the period considered, while imports originating in the other three countries increased sharply. It was argued that South African imports remained considerable and did not show an opposite trend compared to that of the other imports. In addition, other conditions for similarity of competition were met (similar trends in prices, « like product » determination).

However, in *Pipe and tube fittings from China, Croatia, Slovakia, Taiwan and Thailand - provisional*<sup>16</sup>, imports from Slovakia and Taiwan were not cumulated with the other countries' imports. Indeed, it was found that the imports of these two countries during the IP could not be considered significant (at market shares of respectively 1.5% and 1.6%), even though they were above de minimis thresholds, when compared to imports from the other countries concerned. In addition, imports from Slovakia and Taiwan presented sharply declining trends, while the other imports grew, albeit by different degrees, over the period considered. Thus, the effects of imports from Slovakia and Taiwan were assessed separately.

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<sup>15</sup> OJ L 248 14.10.95 p. 1

<sup>16</sup> OJ L 234 3.10.95 p.4



### 4.3 Development and level of prices of imports

Similarity in pricing behaviour from the exporters would tend to indicate similar conditions of competition. As stated above, considerations on pricing and on import levels should be made jointly, given the inherent interdependence of these two parameters.

Pricing behaviour is above all based on data from the Community industry and the co-operating exporters for the investigation period. These data are the most precise, the most detailed and subject to verification. Pricing behaviour would thus primarily be assessed by reference to undercutting / underselling margins found (calculated separately for each exporting country). In addition, trends observed over the period considered would also be taken into account.

In *monosodium glutamate*, imports from the USA, Brazil and Vietnam were cumulated because, among others, the prices of these imports were within the same range during the investigation period.

In *unbleached cotton fabrics from China, Egypt, India, Indonesia, Pakistan and Turkey* (provisionals)<sup>17</sup> a request for non cumulation from Egypt was rejected on the grounds that, inter alia, all imports concerned followed a similar pricing pattern.

However, in *ammonium nitrate from Russia and Lithuania*<sup>18</sup>, it was found that the respective market shares of the imports originating in these two countries had an opposite evolution (respectively an increase by 55% and a decrease of 28% over the period considered) and that, in addition, the selling prices of Lithuanian imports were significantly higher than those of the Russian ones. Moreover, the imports from Lithuania were essentially concentrated in one Member State (the UK), while Russian imports penetrated the whole Community. As a result of this different concentration, the market share of Lithuanian imports in the rest of the Community was 2%, while that of the Russian imports was double (at approximately 4.5%). For all these reasons, imports were not cumulated.

It is interesting to note that in an earlier regional proceeding concerning ammonium nitrate imports into the UK originating in inter alia Russia and Lithuania<sup>19</sup>, it was considered appropriate to proceed to a cumulated analysis. The arguments retained in favour of cumulation were the like product finding, the fact that imports from both countries were significant and the fact that the imported and the Community produced products were sold through the same type of distribution channels in the UK.

In *Tungsten Carbide from China and the Republic of Korea*<sup>20</sup>, the price undercutting levels for the two countries were very dissimilar (respectively 35% and 3.5% for China and Korea) and price developments over the period considered were almost opposite (Korean prices remained steady, while Chinese prices declined considerably).

<sup>17</sup> OJ L 111 9.4.98 p. 19

<sup>18</sup> OJ L 198 23.08.95 p.1

<sup>19</sup> OJ L 129 21.05.94 p. 24

<sup>20</sup> OJ L 83 30.3.1990 p.36

These elements, including the fact that market shares and import volume had a diametrically opposed evolution, prompted for a non cumulation of the Korean imports.

In *dihydrostreptomycin from China and Japan*<sup>21</sup>, imports were not cumulated since it was found that the exporters' conduct differed widely in terms of pricing and market strategy. In particular the Japanese exporting producers were found to sell at prices much higher than those of the Chinese exporting producers: undercutting with respect to China was 33%, while no undercutting was found for Japan.

Finally, an interesting example is given by *Hardboard from Brazil, Bulgaria, Estonia, Latvia, Lithuania, Poland and Russia*<sup>22</sup>. At the provisional stage, it was concluded that all conditions for cumulation of the imports from all the countries concerned were met. However, the final determination held that almost all eucalyptus hardboard produced and exported by Brazilian exporting producers were destined for particular end uses, where high prices were obtained and to which the other countries concerned did not sell. In addition, Brazilian price levels were substantially above those of other imports. For all these reasons, imports from Brazil were excluded from the provisional cumulated analysis and were assessed separately. It should be noted that the definitive determination concluded that Brazilian eucalyptus hardboard was "alike" to the other types of eucalyptus (see recital (21) of the relevant Regulation). Thus, the decision not to cumulate imports originating from Brazil with other imports was taken on the basis of important differences in pricing behaviour, not because of a negative finding concerning the like product.

Also, in accordance with the consistent practice of the Institutions, models classified in different product segments will be considered as forming one product unless there are clear dividing lines between the various segments<sup>23</sup>. However, different concentrations in different segments may, under certain conditions, result in significant differences in pricing. If these differences are significant, then a non cumulated analysis might be more appropriate.

#### **4.4 Similar sales channels**

Imported products sold through the same or similar sales channels to those of the Community industry would tend to indicate similar conditions of competition. This is even more likely if, for instance, imported products and Community produced products have common customers (users/consumers).

Similar channels of distribution were invoked in several cases. In *Steel ropes and cables (SWR) from China, India, Mexico, South Africa and Ukraine*<sup>24</sup>, it was held that one of the reasons justifying cumulation was the fact that SWR were marketed in the

<sup>21</sup> OJ L 187 13.7.91 p.23

<sup>22</sup> Provisionals: OJ L218, 6.8.98 p.16. Definitives : OJ L 22 29.1.99 p. 16

<sup>23</sup> See previous clarification paper on « like products »

<sup>24</sup> OJ L 45 19.2.1999 p.8

Community through similar sales channels under similar commercial conditions. The same was held in *personal fax machines*<sup>25</sup> or in *monosodium glutamate*.

Differences in the geographical concentration of sales between the imports concerned and / or the Community industry would not be an obstacle *by themselves* to cumulation. However, such geographical differences might result in significantly different market shares in the rest of the Community (see example of ammonium nitrate above), in significant differences in pricing and / or in sales channels. Such differences might then reveal the existence of different competition conditions, which would then call for a non cumulated analysis.

### III. Conclusion

In investigations concerning imports originating in more than one country, cumulation is a method to assess the joint impact of these imports on the Community industry. Cumulation is possible only if four conditions are met. While three of these are relatively self explanatory and therefore straightforward, the last, concerning "conditions of competition" would appear to leave more scope for judgement. Nevertheless, the Institutions have built and applied a consistent practice for this rule, based on the following.

- « like product » determination,
- levels of imports,
- similar pricing behaviour and
- similar channels of distribution.

The three last conditions need not necessarily all be met for cumulation, nor would it be sufficient if only one is present in a specific case. Indeed, in practical terms these elements are interlinked: for example, the fact that there is no product type overlap will also result in striking differences in the pricing behaviour or in the sales channels used. On the other hand, significant levels of imports with similar pricing strategies and similar price levels would clearly show a degree of joint and simultaneous effects on the Community industry.

Finally, non cumulation does not automatically lead to termination. The effects of non cumulated imports must be assessed separately and only after such separate assessment can a conclusion on injury and causation be made in respect of these imports.

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<sup>25</sup> OJ L 297 31.10.1997 p. 61

Attachment: Cumulation 1998 – 2000

1998 - Provisionals	Potassium permanganate	India Ukraine	Y
	Cotton fabric (unbleached)	P.R. China Egypt India Indonesia Pakistan Turkey	Y
	Hardboard	Brazil Bulgaria Estonia Latvia Lithuania Poland Russia	Y
	Large electrolytic aluminium capacitors	USA Thailand	Y
	Polypropylene binder or baler twine	Poland Czech Republic Hungary Saudi Arabia	Y
1998- Definitive	Stainless steel fasteners	P.R. China India Rep. of Korea Malaysia Taiwan Thailand	Y
	Footwear with uppers of leather or plastics	P.R. China Indonesia Thailand	Y
	Personal fax machines	P.R. China Japan Rep. of Korea Malaysia Singapore Taiwan Thailand	Y
	Potassium permanganate	India Ukraine	Y
	Monosodium glutamate	Brazil Vietnam	Y

1999 - provisionals	Steel ropes and cables	R.P. China Hungary India Mexico Poland South Africa Ukraine	Y
	Stainless steel wire (< 1 mm) (AS)	India Rep. of Korea	Y
	Stainless steel wire (= or > 1 mm) (AS)	India Rep. of Korea	Y
	Seamless pipes and tubes	Croatia Ukraine	Y
1999 Definitives	Hardboard	Bulgaria Estonia Latvia Lithuania Poland Russia Brazil	N for Brazil
	Polypropylene binder or baler twine	Poland Czech Rep. Hungary	Y
	Steel ropes and cables	P.R. China Hungary India Mexico Poland South Africa Ukraine	Y
(proposal)	Cotton fabric (unbleached)	P.R. China Egypt India Indonesia Pakistan Turkey	N for Turkey

2000 – provisionals	Polyester Staple fibre	Australia Indonesia Thailand	Y
	Quarto Plates	China India Romania	Y
	Malleable fittings	Brazil Czech republic Japan China Korea Thailand Croatia Yugoslavia	N for Croatia and Yugoslavia
	Solutions of Urea and Ammonium Nitrate	Algeria Belarus Lithuania Russia Ukraine Slovak Republic	N for Slovak Republic
2000 – definitives	Seamless pipes and tubes	Croatia Ukraine	Y
	Hot Rolled Coils (AD)	Bulgaria S. Africa Yugoslavia India Taiwan Iran	N for Iran
	Hot Rolled Coils (AD)	S. Africa India Taiwan	Y