AD586 – Anti-dumping proceeding concerning imports of ceramic tableware and kitchenware originating in the People's Republic of China

Response by FTA to General Disclosure Document proposing definitive duties

Failure to satisfy conditions within Article 5(4) of the basic Regulation[1] (standing)

In the FTA's response to Regulation 1072/2012[2] we gave a detailed argument why the complainants fail to meet the 25% standing requirement within Article 5(4) of the basic Regulation. We showed that PRODCOM data for total EU production of the product concerned during the IP was 355.348.650 kilos[3]. We subsequently applied the complainants own estimate, stated within Annex B.3.3 of the complaint, that conservatively 80% of the products within CN codes 6912 00 10, 6912 00 30, 6912 00 50 and 6912 00 90 covered the product concerned (the remaining 20% falling outside the product scope of the investigation) to reach a figure of 313.186.920 kilos.

By comparing this to the updated figure supplied by the complainants that represented their total production (74.126.624 kilos) it could be seen that the standing of the complainants was in fact 23.67%.

We further noted that applying the same calculations to data for the years 2008, 2009 and 2010 resulted in figures that corresponded to those seen in Regulation 1072/2012[4], drawing the reasonable conclusion that the Commission had agreed with the complainants "80%" estimate and that it had considered PRODCOM data to be reliable.

However, under recitals (78 and 79) of the General Disclosure Document (GDD) the Commission rejects the FTA's argument, stating that *"The disparity between the PRODCOM statistics and the 240.200 figure derives from the fact that the product scope of this investigation does not fully match with the PRODCOM statistical data codes, i.e. it is much narrower."*

As we pointed out in our response to Regulation 1072/2012, in order for the figure of 240.200 tonnes total EU production to be true, it would require that only 45% of the products within CN Codes 6912 00 10, 6912 00 30, 6912 0050 and 6912 00 90 produced in the EU consists of the product concerned. At the time we concluded that such a claim was ludicrous and we repeat that claim here.

Under recital (81) of the GDD the Commission confirms recital (107) of Regulation 1072/2012 which says *"The total Union production of the like product was estimated by extrapolating data provided by the European and national associations, cross-checked with data provided by individual producers and also with research and statistical sources."* It has subsequently claimed[5] that the sources for arriving at the 240.200 tonnes figure are specified within that recital. The FTA would respectfully submit that the sources are not "specified" at all. Furthermore, despite repeated requests (most recently on 26 February 2013[6]), the Commission has not provided specifics as to the sources used.

[1] *Commission Regulation (EC) No 1225/2011 on protection against dumped imports from countries not members of the European Community*
[2] *Commission Regulation (EU) No 1072/2012 imposing a provisional anti-dumping duty on imports of ceramic tableware and kitchenware originating in the People's Republic of China*
[3] Data for EU production "total" (i.e. sold production plus any production placed into stock at the end of the year) is not available.
[4] Recitals (113) and (167)
[5] Hearing of 14 January 2013
[6] Hearing with at which the FTA was a participant

Therefore, the FTA maintains that the total EU production figure of 240.200 is inaccurate, that the true figure is 313.186.920 kilos and that the complainants do not have sufficient standing. We therefore maintain our statement that the investigation should be terminated.

Situation of the EU industry: Profitability

In the FTA's response to Regulation 1072/2012 we noted profitability figures for the tableware sector for Villeroy & Boch (a suitable example of an EU producer). The figures obtained from that company's annual reports for the years leading up to the period under consideration (1999 to 2007) ranged from 0.7% in 2003 to a maximum 3.3% in 2007. With this in mind we submitted that, rather than the Commission's claim that the 4.2% profit realised by the Community producer in 2008 "*cannot be considered as a normal profit*"[7] (i.e. too low) it was in fact healthy.

However, in recital (113) of the GDD, the Commission rejects this argument stating that data used to obtain the profit figure concerned *"not only manufacturing activities of ceramic tableware and kitchenware, but also other important segments."*

Whilst this may be true, the tableware sector of the company is predominated by the product concerned whereas other products such as cutlery and glassware are purchased from other companies. Therefore, we submit that our point is still valid.

In our response to Regulation 1072/2012 we claimed that the Commission erred by assigning a 6% profit margin as a valid benchmark for the product concerned on the basis of the benchmark profit margin it assigned to leather footwear in its investigation involving that product. We submitted that as the two products are wholly different, the comparison was not credible. We also noted that the 6% benchmark profit margin it set for leather footwear was itself open to doubt as it consisted of a figure imposed by the Commission itself, rather than by independent verification. We concluded that a more reasonable comparison would be the acceptable profit of 3.9% that was assigned to ceramic tiles in the anti-dumping investigation of 2010/11[8].

However, under recital (115) of the GDD the Commission rejects this claim on the basis that *"...the rate at which households buy or replace ceramic tableware items is closer to leather footwear than to ceramic tiles."*

Whilst this statement may be true, it is hardly a credible argument to determine that the target profit of the product in question should be the same as that of leather footwear; profit is not achieved simply by the number of people buying a product. Since the basic raw material used in ceramic tiles and ceramic tableware is the same, we maintain our previous statement.

Finally, and the above notwithstanding, the FTA further proposed that figures presented in Regulation 1072/2012 showed that the EU industry actually had a profit of 6.36% during the IP. This was calculated simply by adding the total EU and export sales and deducting the total cost of production for those sales.

In recital (117) of the GDD the Commission rejects this claim claiming it to be *"erroneous as it combined data from different sources"*.

It is indeed true that the calculation was made using data from different sources; the sources were the EU producers and Eurostat – as presented in Regulation 1072/2012. However, in order for the

[7] Recital (135)

[8] *Council Implementing Regulation (EU) No 917/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tiles originating in the People's Republic of China*

Commission claim of an "erroneous" calculation to stand up, one or all of those data sources must also be erroneous. If that is so, the investigation is inherently flawed. If not, our calculation is accurate. Moreover, if one were to use data taken from the same source (the EU industry) as presented in recitals (131) and (138) of Regulation 1072/2012 – respectively the average EU sales, and the cost of production – one would find a profit of 10%.

Causation: Effect of other factors – Consumption and demand

Under recital (137) of the GDD the Commission disputes our claim in our response to Regulation 1072/2012 that the EU industry has been suffering a long term decline in the demand for its products by stating that its investigation *"...did not confirm such trend..."* and notes this was explained in recital (112) of Regulation 1072/2012.

This is somewhat disingenuous; the quoted recital refers only to a decline in demand following the economic crisis of 2009. The claim by the FTA is that the decline in demand is considerably longer. To back up this claim we quoted extracts from Annual Reports of Villeroy & Boch dating from 2000 (the earliest available report) to 2004 which clearly stated there was a decline in demand – and that this was occurring during the period when imports of the product in question from China were under stringent quotas. One has to assume that the industry itself is best disposed to determine whether there is a decline in demand for its own product.

Therefore, the FTA stands by its claim that the EU industry has been suffering a long term decline in demand for the product concerned.

Causation: Effect of other factors – Exports by Union industry

Under recital (139) of the GDD, the Commission rejects our suggestion that the lower sales prices of the EU product on the export market could have injured the EU industry. It backs up this rejection by claiming that there is a different mix of the product for the EU market as compared with the export market. It also notes that exports account for less than 37% of overall sales.

The FTA maintains its arguments that lower prices for the exported product could have injured the EU industry. Firstly, it is highly unlikely that the product mix for the export market differed so widely from that of the domestic market; it is more likely that the EU industry is able to sell its products in the EU at a higher price than third countries. Secondly, 37% is still a major proportion of an industry's volume of sales. Any negative effect on such would certainly cause a significant amount of injury.

Therefore, we cannot accept the Commission's dismissal of our claim.

Causation: Effect of other factors – Anti-competitive practices on the Union market

The Commission also dismisses our claim that the cartel investigation by the Bundeskartellamt currently underway affects the investigation. It does so, under recital (144), by stating *"However, it can be confirmed that none of the sampled Union producers is subject to this on-going investigation."*

When we originally raised this issue, we were of the opinion that since Germany is by far the largest producer of the product concerned the cartel investigation must involve one or more companies that, if not one of the companies sampled by the Commission, was almost certainly one of the complainants. If that were so, the Commission would be at fault, as established by jurisprudence:

> *"... the simple fact that it could not be proved that the final sale prices of SSBBs were fixed by Community producers acting in concert does not mean that those prices were to be regarded as reliable and consistent with normal market conditions in the determination of the injury sustained by*

those producers…[the Commission] ought to have accepted that the anti-competitive conduct of producers of flat products could have had significant repercussions on SSBB prices, most likely increasing them artificially, even though SSBB prices themselves were not directly the subject of any unlawful concerted practice on the part of producers.

[…]

Thus, by failing to take account of the uniform, consistent industrial practice of Community producers of SSBBs and hot-rolled bars, the objective effect of which was automatically to mirror, in the markets for those products, the artificial price increases achieved through concertation by producers of flat products, the institutions disregarded a known factor, other than the subsidised imports, which might have been a concurrent cause of the injury sustained by the Community industry."[9]

At the time, it was known that Rosenthal was subject to the Bundeskartellamt investigation. Since then we have discovered that the same company is one of the sampled EU producers whose data has been used by the Commission in order to reach the conclusion presented within the GDD.

With this mind, the Commission cannot consider the data collected from Rosenthal as reliable.

Furthermore, as we also claimed, once the investigation by the Bundeskartellamt was opened it was highly likely that the companies involved would have immediately ceased any illegal activity. This would have inevitably had injurious consequences. The Commission does not address this directly within the GDD and appears to have rejected it outright.

The FTA submits that the Commission is at fault in this regard.

Causation: Effect of other factors – EU health and safety requirements / counterfeiting / trade barriers
In its response to Regulation 1072/2012, the FTA also put forward arguments that the above three factors may have attributed to the injury suffered by the EU industry. However, the Commission has failed to address these arguments in the GDD. Therefore, we reproduce them in full below. Needless to say, our position on each remains the same and we respectfully insist that the Commission addresses them in full.

Causation (other factors): EU health and safety requirements
In its submission following the initiation of the investigation, the FTA noted that the EU has health and safety requirements which are far more stringent than those in China. We suggested that EU producers are faced with increased production costs as a consequence of implementing the necessary improvements in safety and environmental procedures that will not be encountered by producers in China. We provided the (non-exhaustive) list of examples: Directive 2003/10/EC (which concerns the exposure of workers to the risks arising from physical agents), requirements to remove lead from waste water, standards for materials that come into contact with food and the REACH Regulation.

In recital (186), the Commission says *"As to Union safety and health requirements, it is noted that they are applicable to Union-made and imported products, thus impact prices of all operators."* This is simply not true; for example, Directive 2003/10/EC does not apply to Chinese workers. In addition, it is fair to say that changes to production methods in the EU are more expensive than changes to production methods in China. Therefore, our initial argument remains valid and should be addressed.

[9] T-58/99 – *Mukand and Others v Council*

Causation (other factors): counterfeiting

Under recital (186) the Commission claims that *"Given that no information to substantiate the counterfeiting claim [submitted by the FTA] was submitted, the effects of that claim could not be analysed."*

The FTA freely admits that no supporting documentation was submitted to support its claim that counterfeiting of EU produced products could cause an injurious effect to the EU industry. However, we are surprised that the Commission is unable to assess the effects and that such substantiation was necessary. In this regard we direct the Commission to the website of Cerame-Unie (the EU association with overall responsibility for the EU ceramics trade) where it is stated:

> *"EU ceramic manufacturers are increasingly faced with counterfeiting of their products. This causes serious damage to the EU industry."*

also:

> *"Often it is extremely important to register IPR not only in the EU, but also in other jurisdictions, particularly in China, in order to be able to fight counterfeiting at the source."*

The same website also mentions:

> *"...Cerame-Unie has established a long-term cooperation with the China IPR SME Helpdesk of the European Commission."* [10]

and goes on to talk about European-wide workshops that were conducted in 2009 and a ceramic specific guide on IPR[11] that was prepared by the Helpdesk. So it would seem that the Commission is not only is fully aware of the counterfeiting situation in this area but also has ample information at its disposal. Admittedly, it is DG Enterprise that is responsible in this regard, but the FTA fails to see how DG Trade is unable to adequately analyse the effects.

Whilst the FTA in no way condones counterfeiting activities such as those described by the EU producers, it is clear that it exists and is having an injurious effect. In addition, since the Commission is clearly aware that counterfeiting exists (not least because the FTA raised the issue) it is, evidently, a "known" factor that is causing injury to the EU industry and one that the Commission is obliged to analyse – as confirmed by the WTO: *"We consider that other "known" factors would include those causal factors that are clearly raised before the investigating authorities by interested parties in the course of an AD investigation."* and *"Article 3.5 therefore mandates the investigating authorities to examine other known factors..."*[12]

Causation (other factors): trade barriers

Within the same recital the Commission accepts the claim by the FTA that *"...trade barriers could prevent Union producers from exploiting their export potential..."*

Cerame-Unie also stresses this point:

> *"...it is often difficult for ceramic products to access third country markets due to a large number of trade barriers...many relevant markets for EU exports have been applying disproportionately high import duties and are increasingly putting into place technical*

[10] http://www.cerameunie.eu/en/policy-issues/trade/ipr-patent-legislation
[11] http://www.china-iprhelpdesk.eu/docs/publications/China_IPR_Guide_for_the_Ceramics_Industry.pdf
[12] WT/DS122/R: *Thailand – H-Beams from Poland*

barriers to trade, thereby making it increasingly difficult for EU manufacturers to export their products. Such practices are particularly harmful to the exports in ceramic tiles, tableware and refractory products."[13]

However, the Commission then makes the confusing conclusion *"…however it has no impact on decreasing sales on the Union market, i.e. where injury is being suffered."*

Whilst this statement is technically accurate, it would appear that the Commission is limiting "injury" to sales on the Union market. The basic Regulation in no way contains such a limitation: *"…the term 'injury' shall, unless otherwise specified, be taken to mean material injury to the Community industry…"*[14] In addition, Article 3(7) of the basic Regulation, specifically mentions "export performance" in the non-exhaustive list of "other factors" that may be causing injury to the EU industry. Therefore we fail to see why the Commission has dismissed the claim in such a manner.

The Commission has admitted, in effect, that trade barriers in third countries could affect the export performance of the EU industry. The EU industry makes special mention of the injury caused in this regard. Therefore, the Commission should assess the injurious effect of trade barriers on the EU industry.

Causation: Effect of other factors – Other factors

Under recital (155) the Commission refers to the FTA's claim that it failed to consider the cumulative effect of other factors causing injury to the EU industry, saying *"…given the results of the investigation in relation to the various other factors invoked, it is not conceivable that their cumulative effect could have broken the causal link. Indeed, for most of the other factors raised, their impact was small, if any."*

In our opinion this does not adequately address our claim[15]. Indeed, it could be said to avoid it as it does not specifically state that the cumulative effect was calculated. In addition, it is evident that the Commission considered certain "other factor" as significant.

With that in mind the FTA seeks a written assurance from the Commission that it calculated the cumulative effect of all other factors in drawing its conclusion that definitive duties should be imposed.

Union interest: Interest of unrelated importers – employment

Under recital (170) of the GDD the Commission makes a somewhat confusing statement that its ascertain under recital (200) of Regulation 1072/2012, that the five sampled importers employed 350 personnel in the importation and resale of the product concerned is correct, by claiming that the figure was calculated by extrapolating data received from the three companies with no retail activities.

The FTA disputes this statement and reiterates its statement that the five sampled companies employ more than 10.000 personnel in the importation and resale of the product concerned. It also does not agree with the explanation provided by the Commission at the Hearing with the FTA in the presence of the Hearing Officer on 13 December 2012. The Commission cannot restrict the employment figures of the companies within the sample – more specifically the two companies with retailing activities – to those personnel involved solely in the importation and resale of the product concerned unless it

[13] http://www.cerameunie.eu/en/policy-issues/trade/market-access-trade-barriers
[14] Article 3(1)
[15] The basis of our argument was that the whilst each other factor may have had a limited injurious effect on the EU industry that, in isolation may not have broken the causal link, the combined effect of all these other factors could have done so. We also claimed that the wording of Article 3(7) of the basic Regulation envisaged such a cumulative calculation.

similarly applies the same restriction to its calculation for the number of personnel employed by the EU industry; i.e. only to those personnel directly manufacturing the product concerned. In this regard, the fact that recital (198) of Regulation 1072/2012 states *"The Union industry consists of more than 200 producers…directly employing more than 25000 people in the IP in the production and sale of the like product."* indicates this restriction has not been applied.

This difference in calculation methods misrepresents the importance of the EU importers. This misrepresentation is exacerbated by the fact that the figure for the EU producer covers more than 200 companies whilst that of the EU importers only five companies; obviously the true employment figure of EU importers as a whole is significantly higher.

Union interest: Interest of unrelated importers – gross margins

Whilst it would seem the Commission is no longer relying upon the CBI report upon which it placed such importance in Regulation 1072/2012 to determine the profit margins of EU importers[16], it is still insisting, under recital (171), that EU importers achieve gross margins of between 50% and 200%. It supports this statement by claiming that the *"vast majority"* of importers' data submitted to the Commission indicates such and that information supplied by the complainants confirms such.

In the first instance, whilst it may be true that a 200% gross margin can be achieved, this is to be found only in extremely limited examples of the product concerned. In the second, the FTA submits that supporting data from the EU industry must be taken with some scepticism since it serves its own purpose to do so.

Finally, and with respect to the Commission's dismissal of such an argument under recital (172), it must again be stated that such gross margins are, in effect, worthless; significant costs, the details of which have provided to the Commission, must be subsequently borne by any importer before a net margin can be realised.

Union interest: Interest of unrelated importers – profit data

It is clear from recital (173) of the GDD that the Commission has considered the net profit data of the three sampled importers only (i.e. it has rejected that of Metro and Ikea). It admits that these importers account for only 3% of the product concerned.

Under recital (176) it concludes that the imposition of measures at the levels proposed would not have a significantly adverse effect on the situation of EU importers. One has to assume that it bases this conclusion on its calculation within recital (173) that the three EU importers realised *"healthy"* net profits of between 6% and 10%.

Firstly, the FTA finds it somewhat convenient that the Commission has found a minimum profit level of 6% when it has announced the same figure is to be the acceptable profit level for EU producers, especially when none of the importers in question – with whom the FTA has been in contact – has indicated a more usual figure is circa 3%.

Secondly, by rejecting the data provided by Metro and Ikea the Commission has diminished the already limited sample to a mere 3% of imports. The FTA submits that such a sample size is too small from which to draw a credible conclusion; for example, the sample size used for the EU producers accounted for circa 23%[17] of EU production.

[16] In our response we pointed out that the data used consisted of, at best, one third of the product concerned and possible none at all.

[17] See our argument presented on page one of this submission.

Union interest: Interest of unrelated importers – EU production of coloured stoneware
The FTA is concerned by the careful wording within recital (174) of the GDD where the Commission rejects a claim by an importer that there is insufficient production of coloured stoneware in the EU to meet demand and that procurement from China is therefore necessary. Specifically, it is stated *"…coloured stoneware can be procured from several sources…Union producers have the production capacity to sell more on the Union market."*

Both statements are true. However, the Commission falls short of addressing the matter in hand; can EU producers meet demand and/or can demand be met by third countries – and more particularly at prices that the average EU consumer can afford. The FTA requests that the Commission confirms specifically these points.

Union interest: Interest of unrelated importers – EU production of bone china
The FTA has the same concerns regarding the wording of recital (184). The Commission rejects the claim by an importer that there is insufficient production of bone china in the EU to meet demand and that procurement from China is therefore necessary. Again, it states *"…these products can be procured from several sources…Union producers have the production capacity to sell more on the Union market."*

Again, both statements are true. However, the Commission once more falls short of addressing the matter in hand; can EU producers meet demand and/or can demand be met by third countries – and more particularly at prices that the average EU consumer can afford. The FTA requests that the Commission confirms specifically these points.

Union interest: Interest of unrelated importers – SME retailers, distributors and promotion companies
The FTA cannot accept the glib ascertain by the Commission within recital (187) that *"…there is no evidence that the level of measures imposed will have a significant negative effect…"* on such companies. Profit margins for such concerns are extremely tight and the market is extremely competitive. This was explained at the Hearing between the Commission and the FTA, accompanied by several importers and retailers (including SMEs) of 22 August 2012.

Union interest: Interest of consumers (households)
In a similar vein to its statements under recitals (174) and (184), the Commission rejects the claim that measures would cause a shortfall of cheaper tableware by stating *"…the Union industry serves all markets (including cheaper tableware)."*

Again, this statement is true but neglects to consider whether the demand for cheaper tableware within the EU, which has been pointed out to the Commission on several occasions is increasing, can be met by the EU industry. Indeed, recital (122) of Regulation 1072/2012 noted that <u>total</u> (i.e. of all types) EU production capacity is 324.072 tonnes whereas recital (83) of the GDD notes total EU consumption as 727.411 tonnes).

This being so, we reiterate our claim that the EU industry cannot meet the demand for cheaper tableware within the EU and that imports from China, which will inevitably be affected should the measures proposed be imposed, are essential to meet this demand.