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Laurent Ruessmann

Laurent Ruessmann is a partner in the Brussels office of Crowell & Moring. He assists clients in a broad range of international trade and customs matters under EU and Member State legislation, as well as under the WTO agreements. Laurent's work involves advice and representation in connection with EU antidumping, anti-subsidy and safeguards procedures and litigation, as well as various other EU and WTO trade and customs matters.

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Introduction

International trade in telecommunications equipment and related products has grown substantially over the last decade, in parallel with the strong increase in consumer demand for telecommunications services, and with the growth of operators, especially those based in emerging markets. Add to that the fact that China has made the telecommunications sector one of an elite group of super-strategic industry sectors that receives preferential support from the government, and it is little wonder that there has been explosive growth in EU imports from China of telecommunications products, and that that phenomenon has gotten the attention of EU leaders.

In 2010, the European Commission opened an unprecedented trio of investigations with regard to one telecommunications product of which imports from China had exploded in quantities on the EU market in recent years, wireless WAN (“WWAN”) modems.¹ Those investigations were remarkable and ground-breaking for several reasons. Not only was it the first time in EU history that antidumping, anti-subsidy and safeguard investigations were opened in parallel for the same product, it was a set of cases which put the spotlight on the measures China has undertaken to support the spectacular growth of what have become major global actors in the telecoms sector.

This article examines a few of the EU law issues raised by the investigations of WWAN modem imports, and considers their implications for other products of the telecoms sector:

- 1) The way in which telecoms technology develops and the priority given in China to government support for the sector make it very possible that the issue will return of double- (or even triple-) counting in the application of trade-defence measures to a telecoms product.
- 2) The co-operating Chinese producers may have been facing difficulties in obtaining market economy treatment, and commission remarks cited three of the four areas mentioned earlier as ones where China had not yet fulfilled the conditions for market economy status.

- 3) With the wide-reaching and still expanding supply chains that accompany globalisation in the telecoms sector, the issue of how much domestic activity is required to qualify as an EU producer is one which may very well reappear in any future case involving the sector.
- 4) If EU producers in the telecoms sector do not bring forward a complaint out of “fear of possible retaliation” despite material injury by dumped imports, would that constitute “special circumstances” justifying *ex officio* commission initiation of an investigation?

Triple-counting?

Because it was unprecedented that a country undertake the three types of trade remedies investigations in parallel, much of the attention these cases generated focused on that fact, and questioned the legitimacy of acting in that way. In particular, as with the US antidumping case that China had submitted for World Trade Organization (WTO) dispute settlement, objections were made that the EU was double-counting, or in this case triple-counting, alleged subsidies of the Chinese government to domestic WWAN modem producers.

To begin with, safeguards are not aimed at unfair trade as such, but at a greatly increased volume of imports causing serious injury.² In this light, the use of the safeguards investigation of WWAN modems could address immediately the serious damage to the EU industry, allowing the commission additional time to arrive at findings in the antidumping and anti-subsidy investigations. Double-counting could arguably be avoided with regard to safeguard measures, then, as long as there were no overlap in the imposition of safeguard measures with other measures designed to counter unfair trade, e.g. provisional antidumping or anti-subsidy measures.³

Concerning the simultaneous imposition of antidumping and anti-subsidy measures, the Chinese government had already brought a concurrent WTO challenge to a similar practice in the US. The WTO Appellate Body report, issued in March 2011, did not rule out the simultaneous imposition of antidumping and anti-subsidy measures, but held that the US had not taken steps

to demonstrate that its methodology did not double-count the impact of Chinese subsidies.⁴ Because the US government had made no attempt to address the double-counting issue, there are many individual questions left to be addressed on this point.

Of particular importance in the EU context, and missing in the US, is the application of the “lesser duty rule,” which limits antidumping and anti-subsidy measures (and their total when imposed concurrently) to the level of the “injury margin.” When in May 2011 the EU imposed its first concurrent antidumping and anti-subsidy measures, on imports of coated fine paper from China, this “lesser duty” mechanism resulted in duties being imposed at a much lower level than they would otherwise have been.⁵

As the complaints for all three WWAN modem investigations were withdrawn and the investigations closed before any measures were imposed, there was no occasion to address allegations of double- or triple-counting in those cases. However, the very fast developments in telecoms technology and the massive investments taking place make for an explosive cocktail, and there are indications that the (r)evolution of the EU market for WWAN modems is not unique in the sector. Accordingly, that issue may very well return in future proceedings involving telecoms products.

Market economy treatment (MET) and market economy status (MES)

There were two Chinese exporting producers of WWAN modems that co-operated with the European Commission in the three investigations: Huawei and ZTE. Both applied for market economy treatment (“MET”) from the commission and, from the commission’s brief remarks, each may have been facing difficulties in obtaining MET.

The «General Disclosure Documents» for the antidumping and anti-subsidy investigations of WWAN modem imports from China, circulated by the commission on 1 February 2011, described verification visits carried out in the context of the antidumping investigation :

... the Commission focused on issues mentioned in Article 2(7)(c) [of the Basic Anti-Dumping Regulation] and in particular on distortions related to decision making, corporate governance, loans, financing of companies and export credits. Although some initial indications hinting at distortions were revealed, the termination of this anti-dumping proceeding meant that this issue was not pursued.

Given the global nature of telecoms trade, and the fact that those Chinese producers are best known for products other than WWAN modems, it would be worth taking a closer look at why they may not have obtained MET. However, as the commission did not complete its investigations and arrive at definitive findings, it is not clear how the commission would finally evaluate the position of Huawei and ZTE.

Also worth considering are the implications of the commission’s comments for the broader quest of the Chinese government, since shortly after joining the WTO, to obtain so-called “market economy status” (“MES”) from the EU. The EU considers the evaluation of whether or not to grant MES to be a technical analysis which essentially verifies that costs and prices of companies in the country in question can

be relied on for the purpose of trade investigations.⁶ An EU grant of MES to China would in principle obviate the need for Chinese producers faced with EU antidumping investigations to establish individually that they operate under market economy conditions in order to have applied to them the same dumping margin calculation methodology as is applied to producers from market economy countries.

In relation to the MET requests of the Chinese WWAN modem producers, the commission had found «some initial indications hinting at distortions» with regard to «decision making, corporate governance, loans, financing of companies and export credits». In this regard, China is not a member of the Organisation for Economic Co-operation and Development (OECD), and consequently China’s export credit agencies are under no obligation to follow the OECD arrangement on export credits, which sets the guidelines for official export credits by OECD member countries. As has been widely reported, Chinese government-controlled banks and agencies appear to be providing massive export credits on favourable terms for several key sectors, including the telecoms sector, with frequent mentions of the companies Huawei and ZTE by name.⁷

These points are highly relevant to the overall EU assessment of the economic conditions in China in the context of China’s request for MES recognition. In a summary of its preliminary assessment released in 2004, the commission noted that in four areas, China had not yet demonstrated that the MES conditions were met: state influence, corporate governance, property and bankruptcy law, and the financial sector. The preliminary commission findings in the WWAN modems investigations indicate ongoing issues in the Chinese telecoms sector in relation to three of these four areas.

It is little wonder that there has been explosive growth in EU imports of telecommunications products from China

Was the injured producer an EU producer?

In order to make use of trade remedies, there needs to be a “domestic industry” making the “like product” in relation to the exports that are causing injury.⁸ One issue which arose in the WWAN modem cases was the question of whether the sole EU complainant, Option, was actually an EU producer.

The argument centred on the extent to which Option outsourced production and assembly of the hardware making up its modems. The allegation was that the Option product was not in fact an EU product but a product of Chinese or other origin, and therefore that Option was not an EU producer. In this regard, the EU trade remedies legislation does not require that “domestic production” be carried out entirely in the EU. The EU antidumping legislation generally defines the term “Community industry” to mean «the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products».⁹

Under Article 5(4), an investigation shall not be initiated unless based on a complaint that «has been made by or on behalf of the Community industry», which is the case if

it is supported by those Community producers whose collective output constitutes more than 50 percent of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 percent of total production of the like product produced by the Community industry.

Although the Regulation repeatedly mentions the “Community industry” and “Community producers,” as well as of “production by the Community industry,” there is no further definition of those terms, and – in contrast to the provisions regarding exports to the Community¹⁰ – there is no reference to the origin of the product made by those producers.

Again, as the WWAN modem investigations did not reach the stage of definitive findings, the questions raised remain unanswered concerning the extent to which production needs to be in the EU in order for there to be a Community industry that can be injured and thereby justify the imposition of measures. As much of the hardware for telecoms products is assembled – if not made – in Asia, these questions appear certain to return in any future EU cases in the telecoms sector.

The telecoms elephant in the room

In February 2010, even before the investigations of WWAN modem imports began, workers for major telecoms manufacturers (via the European Metalworkers Federation (“EMF”)) brought a petition to the European Parliament, for help with alleged market distortions brought about by imports from China. In June 2011, the EMF issued a document which calls on the European institutions to take certain actions in the telecoms sector, in particular for the European Commission “to act *ex officio* even if companies do not request the use of trade defence instruments because of fear of possible retaliation.”¹¹

The EMF document cites the allegations of subsidies received by Huawei and ZTE and the commission’s preliminary findings in the WWAN modem investigations. The lack of specificity of those alleged subsidy arrangements makes it likely that the same ones would be cited in any complaint against other products made by those companies.¹²

While there are a number of points in the June 2011 document which are interesting from a trade law point of view, the question raised about standing and the possibility for the commission to open an *ex officio* review may be of particular relevance to further investigations in the telecoms sector.

This standing issue is different from the one mentioned above, the question of whether there is sufficient production in the EU to justify commission initiation of a trade investigation. Here, it is a question of whether in the absence of a request from EU industry – for whatever reason, though here the EMF evokes the “fear of possible retaliation” – the commission might launch an investigation (or investigations) on its own.

In this regard, Article 5(1) of the EU Basic Anti-Dumping Regulation speaks about the initiation of proceedings in these terms:

1. Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.

Paragraph 6 opens up the possibility of *ex officio* initiation by the commission :

6. If in special circumstances, it is decided to initiate an investigation without having received a written complaint by or on behalf of the Community industry for the initiation of such investigation, this shall be done on the basis of sufficient evidence of dumping, injury and a causal link, as described in paragraph 2, to justify such initiation.

The commission opened an unprecedented trio of investigations into one telecoms product: wireless WAN modems

While the commission has not often made use of this possibility,¹³ it has done so. The remaining question then is whether the commission would consider there to be “special circumstances” in a situation where it has information which indicates that imports of a given telecoms product are unfairly traded and causing material injury to EU producers, but the relevant EU producers – despite their injury – do not bring forward a complaint out of “fear of possible retaliation.”

Closing remarks

In the short time between the launching of the WWAN modem investigations and the withdrawal of the underlying complaints, those proceedings triggered strong reactions and raised a number of legal issues relevant to any future trade proceedings involving products in the telecoms sector.

As those investigations were not completed, it remains to be seen whether (and how soon) those issues, including “triple-counting”, MET/MES, and the definition of “Community industry,” will be resolved by other investigations involving products in that sector. Also open is the question of whether the commission will consider the circumstances in the EU telecoms sector justify *ex officio* initiation of one or more investigations of imports of telecoms products. ■

Laurent Ruessmann is a partner in the Brussels office of Crowell & Moring, heading up the firm’s EU international trade practice. He represented the EU producers during both the European Commission’s WWAN modem and coated fine paper trade investigations. The views expressed in this article are personal to the author and do not reflect the view of Crowell & Moring or any of its clients.

Footnotes

- 1 On 30 June 2010, the Commission opened a safeguard investigation of WWAN modem imports and an anti-dumping investigation of WWAN modem imports from China: see OJ 2010 C171, 30 June 2010, pp 9–13. On 16 September 2010, the Commission opened an anti-subsidy investigation of imports from China of the same product : see OJ 2010 C249 , 16 September 2010, pp 7–11.
- 2 See Article 16(1) of Council Regulation (EC) No 260/2009 of 26 February 2009, OJ 2009, L84, p 7, and Article 15(1) of Council Regulation (EC) No 625/2009 of 7 July 2009, OJ 2009, L185, p 7.
- 3 Although the Commission made imports subject to registration, potentially allowing anti-dumping and anti-subsidy measures to be imposed retroactively to the date registration began (see Commission Regulation (EU) No 570/2010 of 29 June 2010, OJ 2010, L163, p 34, and Commission Regulation (EU) No 811/2010 of 15 September 2010, OJ 2010, L243, p 37), it would have remained to be seen how soon and for how long safeguard measures might have been imposed and the effective date of other measures, if any. Even in the event of overlap, Council Regulation 452/2003 provides for the adoption of EU measures « with a view to ensuring that a combination of anti-dumping or antisubsidy measures with safeguard tariff measures on the same product does not « subject exporting producers to undesirably onerous burdens » and allows them to « continue to have access to the Community market ». See Council Regulation (EC) No 452/2003 of 6 March 2003, OJ 2003 L69/8.
- 4 See the Report of the Appellate Body in *United States – Definitive anti-dumping and countervailing duties on certain products from China*, WT/DS379/AB/R (11 March 2011), par. 606.
- 5 See Council Implementing Regulation (EU) No 451/2011 of 6 May 2011, and Council Implementing Regulation (EU) No 451/2011 of 6 May 2011, imposing anti-dumping and anti-subsidy measures on imports of CFP from China, OJ 2011 L128. In those cases, the injury margin established for the Chinese producers ranged from 20% to 39.1%, and was significantly lower than the dumping margin by itself.
- 6 See the summary of the Commission’s preliminary assessment of China’s MES request, dated 28 June 2004, at http://trade.ec.europa.eu/doclib/docs/2004/june/tradoc_117795.pdf.
- 7 See, for example, <http://www.bloomberg.com/news/2011-04-25/huawei-counts-on-30-billion-china-credit-to-open-doors-in-brazil-mexico.html>.

See also, the 2010 annual competitiveness report of the US Export-Import Bank : Export-Import Bank of the United States, Report to the U.S. Congress on Export Credit Competition and the Export-Import Bank of the United States, For the Period January 1, 2010 Through December 31, 2010, published in June 2011 available at http://www.exim.gov/about/reports/compet/documents/2010_Competitiveness_Report.pdf.

In the report of the U.S. Export-Import Bank, it is noted that

Each ECA/institution was given a copy of the Report sections relevant to their ECA with the opportunity to edit for accuracy. China Development Bank did not respond while Sinosure and China Eximbank did respond. China Eximbank made a number of points about the inaccuracy or unreliability of the information but did not provide the correct information that could replace the original data and information. As US Ex-Im Bank noted to China Eximbank, until we are provided with their accurate data, we have to rely on “best available” information.

In the anti-subsidy investigation of imports of coated fine paper (« CFP ») from China, the Commission considered that it did not receive adequate cooperation from the Government of China itself, and accordingly reached certain findings on the basis of « facts available ». See Council Implementing Regulation (EU) No 452/2011 of 6 May 2011, footnote 5 above, recitals 56-93.

- 8 See, for example, Articles 3.1 and 3.5 of the Agreement on Implementation of Art. VI of the GATT 1994 (the « WTO Anti-Dumping Agreement »), included in the WTO Final Act signed on 15th April 1994 (The Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, LT/UR/A/1, p. 145).
- 9 See Article 4(1) of Council Regulation (EC) No 1225/2009 of 30 November 2009, OJ 2009, L343, p 51 (« the Basic Anti-Dumping Regulation »). See also Article 9(1) of Council Regulation (EC) No 597/2009 of 11 June 2009, OJ 2009, L188, p 93 (« the Basic Anti-Subsidy Regulation »).
- 10 See, for example, Article 1(3) of the Basic Anti-Dumping Regulation.
- 11 See http://www.emf-fem.org/Industrial-Sectors/ICT/Resource-Centre/China/Fair-trade-in-the-telecoms-industry#_ftn3.
- 12 For a media report making exactly this point, see <http://www.mlex.com/TDI/Content.aspx?ID=128102>.
- 13 See, for example, the Notice of initiation of an expiry review and a partial interim review of the anti-dumping measures applicable to imports of okoumé plywood originating in the People’s Republic of China, OJ 2008, C270, p 24.