Chapter 5
Commercial Law and Policy

[5.05] Introduction

The common external tariff is only one aspect of the EU’s commercial policy. This Chapter discusses another plank of this policy, namely measures which may be taken by the EU to protect trade, in particular the imposition of anti-dumping and countervailing duties.

Provisions against the dumping of goods by non-Member States have been adopted as part of the common commercial policy. If the export price is below the normal price, the goods are considered to be dumped. If the dumped goods are causing or threatening to cause injury, an anti-dumping duty may be imposed.

If goods have been the subject of a direct or indirect subsidy in the country of manufacture, a countervailing duty may be imposed to offset the effect of the subsidy, where the subsidy causes injury in the EU. A subsidy is (1) a financial contribution by government in the country of origin or any form of income or price support (2) by which a benefit is conferred.

[5.06] Common Commercial Policy

Under the TFEU the EU pursues a common commercial policy. The Member States must conform to EU measures adopted under that policy when they exercise their retained competences, including those relating to foreign and security policy. See R v HM Treasury; Ex parte Centro-COM Srl (C-124/95) [1997] ECR I-81 at [24]–[27], [30]; [1997] 1 CMLR 555.

The common commercial policy of the European Union is based upon Arts 206 and 207 TFEU. Art 206 reads as follows:

By establishing a customs union . . ., the Union shall contribute, in the common interest, to the harmonious development of world trade, the progressive abolition of restrictions on international trade and on foreign direct investment, and the lowering of customs and other barriers.
This Article seems to indicate that the commercial policy of the EU is essentially concerned with the import and export of goods. However, a reading of Art 207 TFEU suggests that the scope of the commercial policy is much wider.

Art 207(1) TFEU contains a non-exhaustive list of matters that come within the scope of the policy:

The common commercial policy shall be based on uniform principles, particularly with regard to changes in tariff rates, the conclusion of tariff and trade agreements relating to trade in goods and services, and the commercial aspects of intellectual property, foreign direct investment, the achievement of uniformity in measures of liberalisation, export policy and measures to protect trade such as those to be taken in the event of dumping or subsidies. The common commercial policy shall be conducted in the context of the principles and objectives of the Union’s external action.

[5.10] Broad Interpretation of Art 207

In Re International Agreement on Natural Rubber (Opinion 1/78) [1979] ECR 2871; [1979] 3 CMLR 639 it was held that that the international commodity agreement regarding rubber fell within the common commercial policy. The Court argued that Art 113 (now Art 207 TFEU) must be accorded a wide interpretation. The Court stated:

Article 113 empowers the Community to formulate a commercial ‘policy’, based on ‘uniform principles’ thus showing that the question of external trade must be governed from a wide point of view and not only having regard to the administration of precise systems such as customs and quantitative restrictions. The same conclusion may be deduced from the fact that the enumeration in Article 113 of the subjects covered by commercial policy…is conceived as a non-exhaustive enumeration which must not, as such, close the door to the application in a Community context of any other process intended to regulate external trade. A restrictive interpretation of the concept of common commercial policy would risk causing disturbances in intra-Community trade by reason of the disparities which would then exist in certain sectors of economic relations with non-member countries (at [45]).

The EU may thus harmonize measures beyond the direct import and export of goods.

In OTO SpA v Ministero delle Finanze (C-130/92) [1994] ECR I-3281; [1995] 1 CMLR 84 the Court indicated that “although Article 113 [now Art 207 TFEU] confers upon the Community powers which enable it to take any appropriate measure concerning the common commercial policy, it nevertheless does not in itself contain any legal criterion which is sufficiently precise to enable assessment of the contested national rules to be made” (at [20]). See similarly, Società Italiana per l’Oleodotto Transalpino v Ministero delle Finanze (266/81) [1983] ECR 731 at [29]; [1984] 2 CMLR 231.