

**UNICE POSITION PAPER
ON IMPROVED USE OF THE TRADE BARRIERS REGULATION (“TBR”)**

Executive Summary

UNICE has from the start actively supported the European Union strategy on market access to secure a tangible and permanent opening of world markets. To this end, UNICE considers the Trade Barriers Regulation¹ (TBR – Regulation on Obstacles to Trade) an improvement over its predecessor, the New Commercial Policy Instrument (NCPI) - which was seldom applied. TBR cases have led to meaningful results.

The low number of TBR cases is, however, a major issue of concern for European companies, notably in view of the numerous trade barriers they encounter. Two reasons could account for this situation: either companies are not sufficiently aware of the possibilities offered by the instrument, or there are problems with regard to its use. Indeed, the level of detailed evidence required on the part of European companies, together with the absence of a time limit for Commission / Member-State deliberations or for the Commission’s decision to launch a request for consultation with the WTO, may act as brakes on the submission of legitimate cases.

With a view to improving the use of the TBR, UNICE makes six concrete proposals:

1. Greater and systematic use of the “market access” database, pre-set time limits for urgent cases and the introduction by the EU and WTO of provisions for interim measures. This would enable the TBR to act as an offensive and quick instrument.
2. Companies should only be asked to provide prima facie evidence of the existence of trade barriers to alleviate the burden of submitting a complaint.
3. Consideration should be given as to how to curb any development by the accused country of alternative measures during the investigation.
4. Provision for the possibility of a negotiated solution with a clear timeframe, following the positive results of the inquiry, would improve the “performance” of the instrument in the eyes of manufacturers.
5. The Commission should be allowed to act “ex officio” against any third country applying a barrier if a TBR procedure against the same barrier applied in another country has been successful.
6. Different means should be put in place to enhance the knowledge and visibility of the TBR. UNICE favours investigation and progress reports of the TBR being placed on the Internet, together with statistics related to its use and results, and that a simple case-oriented user’s handbook on TBR be drawn up and made available.

UNICE and its experts look forward to pursuing the dialogue with all parties interested in making this instrument a more efficient one.

¹ Regulation 3286/94 published in Official Journal L49/94

INTRODUCTION

UNICE has from the beginning actively supported the European Union strategy on market access to secure a tangible and permanent opening of world markets. In this context, European Industry has always actively backed all measures and instruments that could be used to achieve this objective.

Following the recent Symposium on the European Union's market access strategy (Brussels, 28 November 2000), UNICE has initiated thinking to improve use of the Trade Barriers Regulation ²(TBR - Regulation on Obstacles to Trade).

UNICE considers this trade instrument an improvement over its predecessor, the New Commercial Policy Instrument (NCPI) which was rarely applied.

Hitherto 18 TBR cases have been launched against 9 countries, covering 11 different sectors of activity, which has led to a number of meaningful results. In view of the numerous barriers encountered by EU companies, this is a low number of cases. Two reasons could explain this situation: either companies are not sufficiently aware of the possibilities this instrument affords or there are problems with regard to its use.

The growing complexity of barriers has exponentially increased the cost (both financial and in terms of time) of eliminating them. This makes the dossiers more complex, increasing the frustration of companies and deterring SMEs from making effective use of this instrument. In fact, even if a complaint goes all the way through the TBR and the WTO process, more than three years could pass from the date of lodging until the WTO Dispute Settlement Body adopts a final decision.

PROBLEMS ENCOUNTERED WITH THE USE OF THE INSTRUMENT

- Evidence to be provided

Although the assistance and support of the Commission services is assessed positively, European firms consider the degree of detail required by the Commission to be close to the practices of classic trade defence instruments both when lodging the complaint and at the time of the investigation itself (double questionnaire, deadlines incompatible with the speed of business, related "costs" etc.).

In the opinion of UNICE, the increased effort to be made by companies resulting from the Commission's growing requirements may act as a brake on the submission of legitimate cases - despite the attraction of this instrument for the private sector.

In effect, the TBR cannot be used for the sole purpose of securing the initiation of proceedings with international authorities. Consequently, the putting together of the complaint should not be dictated, from the outset, by the need to prepare arguments with a view to "systematic"/"certain" recourse to the WTO Dispute Settlement Regulation.

² Regulation 3286/94 published in Official Journal L49/94

Moreover, the success of complaints hinges increasingly on the active collaboration of importers. In some cases this weakens the procedure, particularly in markets where the number of importers is small, owing to the impossibility of marketing imported products there (e.g. fear of reprisals, principle of confidentiality, etc.). In such cases, the European Union cannot always guarantee predictability and compliance with strict rules of confidentiality.

- Time limits prescribed in the TBR procedure:

The procedure comprises four phases. Time limits prescribed in the TBR are not excessively long: 45 days for admissibility review and five to seven month for the internal investigation. However, the deliberations of the Commission and the Member States following the conclusion of the internal examination are not subject to any time limit. Neither is there a deadline for a Commission decision to request consultations in the WTO. This means that the procedure can sometimes take up to three years.

SUGGESTIONS FOR IMPROVEMENT OF THE INSTRUMENT

It is on the basis of these experiences of industrial sectors that UNICE has intensified its efforts to identify proposals that could improve recourse to this instrument.

In the opinion of UNICE, the Trade Barriers Regulation must:

1. Recover its intrinsic function as an offensive and quick instrument to enable companies to act alone, where appropriate. This could be achieved by greater and more systematic use of information already available in the "market access" database. The Commission should also prescribe special time limits for urgent cases and both the EU and the WTO should consider introducing provisions for interim measures.
2. Limit the responsibility of Community industry. Companies should only provide prima facie evidence of the existence of trade barriers. They should not provide the burden of additional evidence. In the case of particularly closed markets, even collection of this prima facie evidence could be highly problematic, which requires an even more active role of the Commission.
3. Find a way to curb the development of alternative measures by the accused country during the investigation.
4. Not only provide for the possibility of a negotiated solution but set a clear timeframe for this following the positive results of the inquiry. This will improve the "performance" of the instrument in the eyes of manufacturers, and may help avoid systematic recourse to the Dispute Settlement Regulation.
5. Allow the Commission to act "ex officio" against any third country applying a barrier if a TBR procedure against the same barrier applied in another country has been successful.
6. Indicate that UNICE concurs with the Commission services on the need to increase the knowledge and visibility of this offensive instrument. European Industry welcomes the Commission's recent decision to make the TBR process much more transparent, by putting its investigation and progress reports on the Internet, together with statistics related to its use and its results.

As UNICE sees it, one of the keys to better knowledge and use of the TBR lies in the existence of a user's handbook that [a] is simple, [b] contains fictitious and/or real examples of submissions. A similar guide exists for the anti-dumping instrument and helps companies to draft a complaint in the format required by the Commission.

CONCLUSION

For the European business community is that the TBR is potentially a powerful instrument. However, UNICE believes that, to make it really effective, it is necessary to improve knowledge of it, to expedite the process, and to increase its predictability while reducing the burden companies bear when submitting the complaint.

UNICE and its experts are at the disposal all interested parties to discuss the different suggestions.
