COMMISSION DECISION

of 17 March 1999

under the provisions of Council Regulation (EC) No 3286/94 concerning the Brazilian non-automatic import licensing system and its operation

(notified under document number C(1999) 607)

(1999/234/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 3286/94 of 22 December 1994 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation (WTO) ([1]), as amended by Regulation (EC) No 356/95 ([2]), and in particular Articles 13 and 14 thereof,

After consulting the Advisory Committee,

Whereas:

A. PROCEDURE

(1) On 12 January 1998 the Commission received a complaint pursuant to Article 4 of Council Regulation (EC) No 3286/94 (herafter the 'Regulation'). The complaint was lodged by Febeltex (Fédération belge du textile — Belgian Textile Federation).

(2) The complainant alleged that the Brazilian non-automatic import licensing and in particular its enforcement through the imposition of compulsory payment terms and compulsory minimum prices are inconsistent with several provisions of the Agreement establishing the World Trade Organisation (hereafter 'the WTO Agreement') and its annexes. On that basis the complainant asked the Commission to take the necessary actions to convince Brazil to repeal these measures.

(3) The complaint contained sufficient *prima facie* evidence to justify the initiation of a Community examination procedure pursuant to Article 8 of the Regulation. Consequently, such procedure was initiated on 27 February 1998 ([3]).

(4) Following the initiation of the examination procedure the Commission conducted an in-depth legal and factual investigation into the Brazilian import licensing system as applied to textile products. Based on the findings of this investigation the Commission reached the conclusions which are indicated below.

B. FINDINGS REGARDING THE EXISTENCE OF AN OBSTACLE TO TRADE

(5) The investigation established that the Brazilian system is a licensing system within the meaning of Article 3(1) of the WTO Agreement on import licensing procedures (ILP) and should therefore comply with the rules laid down by this Agreement as well as by GATT 1994.

(6) The relevant Brazilian legislation concerning the non-automatic import licensing system is composed of:

— *Decreto* 660, of 25 September 1992 (which established the *Sistema Integrado de Comércio Exterior*, Siscomex),

— *Portaria Interministerial* 291 (Ministry of the Treasury/Ministry of Industry and Trade), of 12 December 1996 (concerning the processing of import operations by means of the Siscomex),

— *Portaria Secex* 21, of 12 December 1996 (concerning the implementation of import operations by means of the Siscomex, including price control) and

— *Comunicados Decex* listing the goods subject to non-automatic import licensing, which have been consolidated by *Comunicado Decex* 37 of 17 December 1997.

However, the Brazilian system is very flexible: new products can be added to the list of those for which a non-automatic import license is required by simple decision of the Ministry of Industry, Trade and Tourism.

([1]) OJ L 349, 31. 12. 1994, p. 71.
([2]) OJ L 41, 23. 2. 1995, p. 3.
([3]) Notice of initiation of an examination procedure concerning an obstacle to trade, within the meaning of Council Regulation (EC) No 3286/94, consisting of trade practices maintained by Brazil in relation to trade in textile products (OJ C 63, 27. 2. 98, p. 2).

(7) The Brazilian licensing system is operated via a computerised instrument called Siscomex. The granting of import licenses for imports of textile products originating in the Community is directly linked to a set of compulsory minimum prices and compulsory payment terms. Should these date of an import declaration not be in accordance with those decided and included by the Brazilian authorities in the Siscomex, applications for import licences are not processed and the importer is asked to contact the local agency of the Foreign Trade Department of the Ministry of Industry, Trade and Tourism (Decex).

(8) The Brazilian legislation introducing this system does not include any indication of the measure being implemented through the licensing procedure. The Commission services have found the existence of internal administrative rules or guidelines concerning compulsory payment terms and minimum import prices that are used in the administration of Brazil's import licensing system. Such rules are not published. As a consequence, governments and traders cannot become acquainted to them. Furthermore, there is no possibility of appeal against such unofficial regulations.

(9) When Siscomex does not process import licence applications which do not comply with the requirements on payment terms and minimum prices, no formal decision is taken on the importer's application. It remains indefinitely pending.

(10) The Brazilian system does not appear to serve to the implementation of any GATT compatible measure, its sole function being the application and administration of import procedures as trade policy tool in order to restrict flows of imports of textile products into Brazil. The examination also demonstrated that this system allows Brazilian authorities to decide in a discretionary and arbitrary manner on the basis of unofficial and not published grounds, the non-granting of import licences. By imposing compulsory payment terms and minimum prices as conditions for the issuance of the licence, Brazil has substantially restricted imports of certain textile products originating in the Community and has discouraged a large number of possible clients for Community producers.

(11) Brazil has not yet notified part of the relevant legislation *(Comunicado Decex* 37, of 17 December 1997); the remaining part has been notified with a delay of more than one year, only after the initiation by the Commission of the present examination under the Regulation and in this notification some essential information was omitted (for example: the list of products subject to licensing procedures).

(12) Under these circumstances the Commission considers that the complainant's allegations are well founded and that the Brazilian practices constitute an obstacle to trade within the meaning of Article 2(1) of the Regulation, as they are contrary to the following provisions:

— Article X.1 and XI.1 of the GATT,

— Article 1(3), 3(2), 3(5)(f) and 5 of the WTO Agreement on import licensing procedures.

(13) The Commission nonetheless considers that reference to the above legal bases does not rule out recourse to any other pertinent provision of the WTO Agreement and of the Agreements annexed to it, which could be of use in procedures before the WTO.

C. FINDINGS REGARDING ADVERSE TRADE EFFECTS

(14) The Commission investigation highlighted the enormous potentiality of the Brazilian market for the highly competitive products exported by Community producers. In this regard, the main findings on the adverse trade effects caused by the challenged practices indicate that Brazil's non-automatic import licensing system represents a significant restriction to access the Brazilian market for several Community textile products.

(15) The investigation covered products contained within Chapters 50 to 63 of the Combined Nomenclature and revealed that the effects of the Brazilian system vary from one sector of products to another. Generally speaking, notwithstanding the great potential of the Brazilian market, Community textile exports to Brazil registered no significant increase between 1996 and 1997, especially when compared to those reported on other similar South American markets.

(16) In particular, the introduction of the non-automatic import licence system and the way it is implemented through the compulsory payment terms and the imposed minimum price has already caused in 1997 (and, in some cases, in 1996) a decrease of exports of certain European Union textile products, such as mattress ticking (CN codes: 5516 23 10; 5210 49 00), webbing (CN code: 5806 32 10), bedspreads (and related products) (CN codes: 6302 32 90), knitted synthethic fabrics for curtains (CN code: 6002 43 11), technical fabrics for casual wear (e.g. lyocell, elastan) (CN code: 5516 13 00) to Brazil.

(17) The challenged Brazilian practices have caused an important loss of competitiveness in the Brazilian market for Community exporters of certain textile products. Such loss of competitiveness has been particularly drastic in those sectors, such as mattress ticking, curtain fabrics or webbing, that are subject to minimum import prices.

(18) The introduction of the contested measures has led in many cases to a significant loss in the number and importance of Brazilian clients as well as in the number and importance of the orders received or confirmed.

(19) The requirement of minimum prices has also led to a substantial reduction in the range of products that may be exported to Brazil. In other words, products whose export price is far too low, in comparison with the compulsory minimum price required, can no longer be exported because it would no longer be competitive at the higher price. Significantly enough, this consequence often takes place in relation to low price products, for which there is higher local competition. Accordingly, the Brazilian importer will turn to buy the Brazilian product, which, if it were not for the imposition of compulsory minimum prices, would be more expensive than the equivalent Community textile product.

(20) A further adverse trade effect caused on Community producers/exporters of textile products is the need to change the technical specification or composition of a product. This change is required by the need to comply with the required minimum prices. A change in the technical specification of the product will in some cases be the only way to obtain a product whose price meets the required minimum one and that it is still economically viable. In this regard, the Commission services have been provided with examples where, in the case of mattress ticking, the percentage of cotton, rayon, polyester, etc. in a product had to be altered, e.g. by using a new raw material (such as rayon) or by using a new raw material which results in a different weight per square metre (such as polypropylene).

(21) The use of Brazil's non-automatic import licensing system as a trade policy tool to control trade flows has resulted, in some textile sectors, in a complete alteration of the market conditions which in some cases has led to an almost closing of the Brazilian market to Community textile exporters. As an example, the minimum import price of USD 20/kg imposed by the Brazilian authorities on imports of jacquard mattress ticking under CN code 5516 23 10 is more than the double of the normal sale price of this product (i.e. to USD 8 to 11/kg). Such an increase of price has caused an important loss of competitiveness in the Brazilian market for Community exporters of this home textile product

(22) Therefore, the Commission concluded that the abovementioned effects do constitute adverse trade effects within the meaning of Article 2(4) of the Regulation.

D. COMMUNITY INTEREST

(23) In the last couple of years, European exporters and producers have lodged three cases against Brazilian practices having restrictive effects on Community exports of different products (steel plates, textiles, and sorbitol). These measures seem to be directed at specific sensitive sectors, in a non-transparent way, and through a very flexible decisional process. For this reason, it is of major importance for the Community to tackle in a comprehensive way the Brazilian system.

(24) Moreover, ensuring that WTO partners fully comply with their obligations is of the utmost importance for the Community, which has committed itself to the same obligations. It is fundamental for the good functioning of a multilateral trade system to consistently tackle all allegedly WTO incompatible practices.

(25) As regards the Febeltex case, given the importance of the textile industry for the Community as a whole and the need to ensure a fair access to third country markets for Community textile products, the Community should immediately challenge the Brazilian non-automatic licensing system, pursuant to the relevant provisions of the Agreement on import licensing procedures, GATT 1994 and the WTO Dispute Settlement Understanding.

E. CONCLUSIONS AND MEASURES TO BE TAKEN

(26) Meetings have been held and letters have been exchanged with the relevant Brazilian authorities to discuss this matter further aimed at finding an amicable solution, but the Brazilian authorities did not forward any proposal in view of such solution.

(27) In these circumstances, it appears that the interests of the Community call for initiation of WTO dispute settlement proceeding,

HAS DECIDED:

Article 1

1. The Brazilian non-automatic licensing system, compulsory minimum prices and compulsory payment terms appears to be inconsistent with the obligations of that country under the Marrakech Agreement establishing the World Trading Organisation and constitutes an 'obstacle to trade' within the meaning of Article 2(1) of Regulation (EC) No 3286/94.

2. The Community will commence action against Brazil under the Understanding on the rules and procedures for the settlement of disputes and other relevant WTO provisions with a view to securing removal of the obstacle to trade.

Article 2

This Decision shall apply from the date of its publication in the *Official Journal of the European Communities.*

Done at Brussels, 17 March 1999.

For the Commission

Leon BRITTAN

Vice-President