



2016/0351(COD)

11.4.2017

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DRAFT REPORT

on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union
(COM(2016)0721 – C8-0456/2016 – 2016/0351(COD))

Committee on International Trade

Rapporteur: Salvatore Cicu

Symbols for procedures

- * Consultation procedure
- *** Consent procedure
- ***I Ordinary legislative procedure (first reading)
- ***II Ordinary legislative procedure (second reading)
- ***III Ordinary legislative procedure (third reading)

(The type of procedure depends on the legal basis proposed by the draft act.)

Amendments to a draft act

Amendments by Parliament set out in two columns

Deletions are indicated in ***bold italics*** in the left-hand column. Replacements are indicated in ***bold italics*** in both columns. New text is indicated in ***bold italics*** in the right-hand column.

The first and second lines of the header of each amendment identify the relevant part of the draft act under consideration. If an amendment pertains to an existing act that the draft act is seeking to amend, the amendment heading includes a third line identifying the existing act and a fourth line identifying the provision in that act that Parliament wishes to amend.

Amendments by Parliament in the form of a consolidated text

New text is highlighted in ***bold italics***. Deletions are indicated using either the ▯ symbol or ~~strikeout~~. Replacements are indicated by highlighting the new text in ***bold italics*** and by deleting or striking out the text that has been replaced.

By way of exception, purely technical changes made by the drafting departments in preparing the final text are not highlighted.

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DRAFT EUROPEAN PARLIAMENT LEGISLATIVE RESOLUTION

on the proposal for a regulation of the European Parliament and of the Council amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union

(COM(2016)0721 – C8-0456/2016 – 2016/0351(COD))

(Ordinary legislative procedure: first reading)

The European Parliament,

- having regard to the Commission proposal to Parliament and the Council (COM(2016)0721),
 - having regard to Article 294(2) and Article 207(2) of the Treaty on the Functioning of the European Union, pursuant to which the Commission submitted the proposal to Parliament (C8-0456/2016),
 - having regard to Article 294(3) of the Treaty on the Functioning of the European Union,
 - having regard to the opinion of the European Economic and Social Committee of 29 March 2017¹,
 - having regard to Rule 59 of its Rules of Procedure,
 - having regard to the report of the Committee on International Trade and the opinion of the Committee on Industry, Research and Energy (A8-0000/2017),
1. Adopts its position at first reading hereinafter set out;
 2. Calls on the Commission to refer the matter to Parliament again if it replaces, substantially amends or intends to substantially amend its proposal;
 3. Instructs its President to forward its position to the Council, the Commission and the national parliaments.

Amendment 1

Proposal for a regulation

Recital 3

Text proposed by the Commission

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Amendment

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¹ Not yet published in the Official Journal

distortions affecting to a considerable extent free market forces may be deemed to exist. In particular, it is appropriate to clarify that this situation may be deemed to exist, inter alia, when reported prices or costs, including the costs of raw materials, are not the result of free market forces because they are affected by government intervention. It is further appropriate to clarify that in considering whether or not such a situation exists regard *may* be had, inter alia, to the potential impact of the following: the market in question is to a significant extent served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country; state presence in firms allowing the state to interfere with respect to prices or costs; public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; and access to finance granted by institutions implementing public policy objectives. It is further appropriate to provide that the Commission services *may* issue a report describing the specific situation concerning these criteria in a certain country or a certain sector; *that* such report and the evidence on which it is based may be placed on the file of any investigation relating to that country or sector; and that interested parties should have ample opportunity to comment on the report and the evidence on which it is based in each investigation in which such report or evidence is used.

distortions affecting to a considerable extent free market forces may be deemed to exist. In particular, it is appropriate to clarify that this situation may be deemed to exist, inter alia, when reported prices or costs, including the costs of raw materials *and other factors of production*, are not the result of free market forces because they are affected by government intervention. It is further appropriate to clarify that in considering whether or not such a situation exists regard *should* be had, inter alia, to the potential impact of the following: the market in question is to a significant extent served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country *sacrificing of fact and law an adequate corporate governance*; state presence in firms allowing the state to interfere with respect to prices or costs; public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; *the lack of a transparent and effective functioning company law and a bankruptcy regime that prevents the exercise of property laws; wage rates are not the result of free bargaining between labour and management; the absence of a transparent set of laws produces discriminatory effects with regard to joint-ventures and other foreign investment* and access to finance granted by institutions implementing public policy objectives *and any other circumstance the Commission considers appropriate in order to evaluate the existence of significant distortions.*

The existence of significant distortions in the economy as a whole or in sector of the economy of the exporting country should lead automatically to the use of undistorted international, third country or EU prices, costs or benchmarks for each factor of production in the construction of the normal value.

However, if an exporting producer from a

country that does not meet those conditions clearly demonstrates that its costs of one or more individual factors of production are not distorted, those costs should be used in the construction of its normal value.

It is further appropriate to provide that the Commission services issue a report describing the specific situation concerning these criteria in a certain country or a certain sector; *for those countries for which a substantial number of anti-dumping cases have been recorded, the report should be completed and adopted before the entry into force of this Regulation. The Union industry should be consulted during the report drafting process.* Such report and the evidence on which it is based may be placed on the file of any investigation relating to that country or sector; and that interested parties should have ample opportunity to comment on the report and the evidence on which it is based in each investigation in which such report or evidence is used. *In accordance with its role, the European Parliament is to monitor the report drafting process. On the request of the European Parliament or in the case of a change of circumstances in a specific country or sector, the Commission shall update the report. In any event the European Commission should carry out a review of the report every two years.*

Or. en

Amendment 2

Proposal for a regulation Recital 4

Text proposed by the Commission

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Amendment

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basis of records kept by the exporter or producer under investigation. However, where there are significant distortions in the exporting country with the consequence that costs reflected in the records of the party concerned are artificially low, such costs *may* be *adjusted or* established on any reasonable basis, including information from other representative markets *or* from international prices or benchmarks. In the light of experience gained in past proceedings, it is appropriate to further clarify that, for the purposes of applying the provisions introduced by this regulation, due account should be taken of all relevant evidence, including relevant assessment reports regarding the circumstances prevailing on the domestic market of the exporting producers and the evidence on which they are based, which has been placed on the file, and upon which interested parties have had an opportunity to comment.

basis of records kept by the exporter or producer under investigation. However, where there are significant distortions in the exporting country with the consequence that costs reflected in the records of the party concerned are artificially low, such costs *should* be established on any reasonable basis, including information from other representative markets, from international prices or benchmarks *or from markets in the Union*. In the light of experience gained in past proceedings, it is appropriate to further clarify that, for the purposes of applying the provisions introduced by this regulation, due account should be taken of all relevant evidence, including relevant assessment reports regarding the circumstances prevailing on the domestic market of the exporting producers and the evidence on which they are based, which has been placed on the file, and upon which interested parties have had an opportunity to comment.

Or. en

Amendment 3

Proposal for a regulation

Article 1 – paragraph 1

Regulation (EU) 2016/1036

Article 2 – paragraph 6 a (new)

Text proposed by the Commission

Amendment

(1) In Article 2 the following paragraph 6a is inserted

'6a. (a) In case it is determined, *when applying this provision or any other relevant provision of this Regulation*, that it is not appropriate to use domestic prices and costs in the exporting country due to the existence of significant distortions, the normal value shall be constructed on the basis of costs of production and sale reflecting undistorted prices or benchmarks. For this purpose, the sources

'6a. (a) In case it is determined that it is not appropriate to use domestic prices and costs in the exporting country due to the existence of significant distortions *in the economy as a whole or in sectors therein*, the normal value shall be constructed on the basis of costs of production and sale reflecting undistorted prices or benchmarks. For this purpose, the sources that may be used include undistorted

that may be used include undistorted international prices, costs, or benchmarks, or corresponding costs of production and sale in an appropriate representative country *with a similar level of economic development as the exporting country*, provided the relevant cost data are readily available. The constructed normal value shall include a reasonable amount for administrative, selling and general costs and for profits.

'6a. (b) Significant distortions *for the product concerned* within the meaning of point (a) may be deemed to exist, *inter alia*, when reported prices or costs, including the costs of raw materials, are not the result of free market forces as they are affected by government intervention. In considering whether or not significant distortions exist regard *may* be had, *inter alia*, to the potential impact of the following: the market in question is to a significant extent served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country; state presence in firms allowing the state to interfere with respect to prices or costs; public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; *and* access to finance granted by institutions implementing public policy objectives.

international prices, costs, or benchmarks, or corresponding costs of production and sale in an appropriate representative country, *including those in a Member State*, provided the relevant cost data are readily available. The constructed normal value shall include a reasonable amount for administrative, selling and general costs and for profits.

'6a. (b) Significant distortions within the meaning of point (a) may be deemed to exist, *inter alia*, when reported prices or costs, including the costs of raw materials *and other factors of production*, are not the result of free market forces as they are affected by government intervention. In considering whether or not significant distortions exist regard *shall* be had, *inter alia*, to the potential impact of the following: the market in question is to a significant extent served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country *sacrificing of fact and law an adequate corporate governance*; state presence in firms allowing the state to interfere with respect to prices or costs; public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; *the lack of a transparent and effective functioning company law and a bankruptcy regime that prevents the exercise of property laws; wage rates are not the result of free bargaining between labour and management; the absence of a transparent set of laws produces discriminatory effects with regard to joint-ventures and others foreign investments*; access to finance granted by institutions implementing public policy objectives *and any other circumstance the Commission considers appropriate in order to evaluate the existence of significant distortions.*

The existence of significant distortions in

the economy as a whole or in a sector of the economy of the exporting country shall lead automatically to the use of undistorted international, third country or EU prices, costs or benchmarks for each factor of production in the construction of the normal value.

If an exporting producer from a country that does not meet those conditions clearly demonstrates that its costs of one or more individual factors of production are not distorted, those costs shall be used in the construction of its normal value.

'6a. (c) *When appropriate*, the Commission services *may* issue a report describing the specific situation concerning the criteria listed in point (b) in a certain country or a certain sector. Such report and the evidence on which it is based may be placed on the file of any investigation relating to that country or sector. Interested parties shall have ample opportunity to supplement, comment or rely on the report and the evidence on which it is based in each investigation in which such report or evidence is used. The determinations made shall take into account all of the relevant evidence on the file.

'6a. (c) The Commission services *shall* issue a *detailed* report describing the specific situation concerning the criteria listed in point (b) in a certain country or a certain sector. *For those countries for which a substantial number of anti-dumping cases have been opened, the report shall be completed and adopted before the entry into force of this Regulation. The Union industry shall be consulted during the report drafting process.* Such report and the evidence on which it is based may be placed on the file of any investigation relating to that country or sector. Interested parties shall have ample opportunity to supplement, comment or rely on the report and the evidence on which it is based in each investigation in which such report or evidence is used. The determinations made shall take into account all of the relevant evidence on the file. *In accordance with its role, the European Parliament shall monitor the report drafting process. On the request of the European Parliament or on the Commission's own initiative when the circumstances in a specific country or sector have changed, the Commission shall update the report. In any event, the European Commission shall carry out a review of the report every two years.*

'6a. (d) The Union industry may rely on the report referred to in point (c) for the calculation of normal value when filing a complaint in accordance with Article 5 or a

'6a. (d) The Union industry may rely on the report referred to in point (c) for the calculation of normal value when filing a complaint in accordance with Article 5 or a

request for a review in accordance with Article 11.

request for a review in accordance with Article 11. ***When the conclusions of the report show the existence of significant distortions, the report pursuant to the paragraph 6 (b) shall constitute sufficient evidence in order to justify the calculation of the normal value pursuant to the methodology referred to in subparagraph (a). In any event, no additional burdens shall be requested from the Union Industry.***

The absence of a report shall not prevent the Commission from using any available information or data to establish the existence of significant distortions and use the methodology referred to in subparagraph (a) if the relevant requirements are met.

Or. en

Amendment 4

Proposal for a regulation

Article 1 – paragraph 2

Regulation (EU) 2016/1036

Article 2 – paragraph 7

Text proposed by the Commission

Amendment

2. In Article 2, paragraph 7 is replaced by the following:

'7. In the case of imports from countries which are, at the date of initiation, not members of the WTO and listed in Annex I of Regulation (EU) 2015/755, normal value shall be determined on the basis of the price or constructed value in ***a market economy third*** country, or the price from such a third country to other countries, including the Union, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit

'7. In the case of imports from countries which are, at the date of initiation, not members of the WTO and listed in Annex I of Regulation (EU) 2015/755, normal value shall be determined on the basis of the price or constructed value in ***an appropriate representative*** country, or the price from such a third country to other countries, including the Union, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a

margin.

An appropriate *market economy third* country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, *a market economy third* country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the country envisaged and shall be given 10 days to comment.'

reasonable profit margin.

An appropriate *representative* country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, *an appropriate representative* country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed forthwith after its initiation of the *appropriate representative* country envisaged and shall be given 10 days to comment.'

Or. en

EXPLANATORY STATEMENT

The legal context:

1. The proposal has been triggered by the recent expiry of part of section 15 of China's protocol. This accession protocol has allowed WTO Members to treat China as a Non Market Economy Country and, as a consequence, to calculate dumping duties by applying an alternative methodology instead of the standard methodology.

As a consequence of the expiry of Paragraph 15(a) (ii) of the Protocol of Accession to the WTO, on 12th December 2016 China requested consultations with the European Union concerning certain provisions of the EU regulation pertaining to the determination of normal value for "non-market economy" countries in anti-dumping proceedings involving imports from China.

China claimed that the measures appear to be inconsistent with:

- Articles 2.1 and 2.2 of the Anti-Dumping Agreement;
- Articles I:1 and VI:1 of the GATT 1994.

On 23rd of January 2017 Consultations were held with a view of reaching a mutually satisfactory solution. While these consultations assisted in clarifying some of the issues before the parties, they failed to resolve the dispute.

Therefore, on 9th March China requested the establishment of a panel to examine the matter referred to the above mentioned Articles.

The Commission considers that the challenge by China to the WTO will be likely to succeed and therefore has proposed an alternative methodology of dumping calculation which will avoid the *vacatio legis* in case of defeat of the EU current system in Geneva.

If adopted the new Regulation will offer an alternative system possibly before the ruling of the WTO panel which should be delivered in December 2017.

This situation could also generate requests by the importers for the reimbursement of the AD duties imposed since December 2016, in front of the European Court of Justice.

The defeat in WTO, without an alternative system in force, will inevitably force the European Union to put the system in conformity with the ruling within a more limited period of time.

In the end if we accept and share the legal arguments on which the European Commission has founded the new proposal we have to consider where the text of the new proposal includes all the elements in a way which clearly permits to reach the two major objectives:

- a) having a methodology which makes the dumping calculation less difficult to be determined and the whole instrument more effective
- b) not to create additional burdens for the EU industry

In this respect we should concentrate our attention and very likely our amendments on the two major issues of the Commission's proposal : the meaning of significant distortions

and its criteria as well as the nature and the content of the Commission's report.

1. The meaning of SIGNIFICANT DISTORTIONS and its CRITERIA:

The Commission proposal introduces the expression of "Significant Distortions" for referring to those circumstances in which the domestic prices and costs would not provide a reasonable basis to determinate the normal value.

According to the new Article 2 (6a) where Commission states that

"due to the existence of significant distortions, the normal value shall be constructed on the basis of costs of production and sale reflecting undistorted prices or benchmark"

and according to the new Art. 2 6(b) where is specified that

"Significant distortions for the product concerned within the meaning of point (a) be deemed to exist, *inter alia*, when reported prices or costs, including the costs of raw materials, are not the result of free market forces...."

it is crucial to understand whether the concept and the definition of "significant distortions" is clear enough and legally strong to justify the use of the alternative methodology or it should be better determined.

If we have to consider the existence of "Significant Distortions" as the condition through which applying the new methodology, this existence has to be properly specified in order to have a univocal method for consequently applying the New Methodology.

During the technical briefing hold on the 28th March 2017 the Commission clarified distortions may concern factors of production as raw materials, labour cost, cost of the energy and others.

The existence of anomalies in the determination of these costs of production will bring the Commission to conclude that there are significant distortions and determine a dumping calculation on the basis of the normal value which has to be constructed using undistorted costs in an appropriate representative country or international benchmarks.

Although the value of these costs is determined in the appropriate third country the Commission will check the structure of the whole cost of production in the country where significant distortions exist in order to properly assess the mix of the different elements of such costs.

It should be clear in the end that we are not reconstructing the system on the basis of a cost adjustment operation but on the effective determination of such costs where they are not distorted. All the component of the costs of production are reconstructed in such a way unless the interested parties- and in particular the exporters- can show that such a component in a specific sector is not distorted.

What it is important to underline is that in fact the European Parliament should amend the proposal in a way to empowered the meaning of significant distortions in order to make

clearer the meaning of significant distortions.

Proceeding with this approach could represent a reasonable solution alternative to the current system.

In this way it could be useful make a comparative analysis with the United States Anti-dumping Regulation which is based on “The Tarif Act of 1930” containing an explicit reference to six criteria used by the administering authority for determining whether a Foreign Country may be considered operating as a Market Economy.

The comparison between the two systems is also necessary in order to get clear why the Regulation 1036/2016 brought the EU to a legal incertitude after the expiry of part 15 a (ii) of the Accession Protocol of China to the WTO.

2. *The Report:*

The proposal provides that “when appropriate the Commissions Service may issue a report describing the criteria listed in point (b) in a certain country or sector”.

The concerned provision has to be considered too general to properly understand how the new mechanism might work.

Moreover, the use of the word MAY creates several concerns if we have to consider the report as the core of the proposal namely the evidence that might be placed by the EU Industry on the file of any investigation relating to that country or sector.

Besides that, the proposal does not provide with any information on timeline of its adoption and how regularly the report will be updated in order to reflect potential developments (either positive or negative) in specific sectors or countries.

The role of the European Parliament in the whole procedure should be made clear as well as the consultation of the EU stakeholders in the preparation of the report.

Conclusion: consider whether the European Parliament should reinforce this point in order to have more clarity on the report, in particular the time of its adoption, of its update as well as its structure and its details.

Other issues

We consider that the other elements of the Commission’s proposals, up from Article 1(2)- countries not Members of the WTO- until Article 1 (5) as well as Article 2,3 and 4, are clear enough.

They match the concerns and the interests of the EU industry in cases of review and additional investigation for subsidies and therefore there is no need for substantial changes on these parts of the text.