

European Commission Proposes to Modernize Trade Defense Instruments in the EU

On April 10, 2013, the European Commission (the “Commission”) published an important information and consultation package on draft measures intended to reform the EU’s current trade defense instruments. This package includes:

- a proposal for a Regulation of the European Parliament and of the Council¹ amending the EU’s current Basic Anti-Dumping Regulation² and Anti-Subsidy Regulation³ (the “Proposed Regulation”) – this proposal will now be presented to the Council and the European Parliament for adoption in 2013-2014;
- a Commission Communication on the Modernization of Trade Defence Instruments,⁴ which includes non-legislative proposals to be implemented in the Commission’s decisional practice in the coming months; and
- four draft Commission guidelines (the “Draft Guidelines”), which provide guidance on certain aspects of the Commission’s decisional practice in trade defense investigations, and which are subject to public consultation until July 2013.⁵ The Draft Guidelines propose guidance respectively on the determination of the profit margin used in establishing the injury margin; the selection of an analogue country; the Union interest test; and expiry reviews and the duration of measures.

¹ Proposal for a Regulation of the European Parliament and of the Council, COM(2013) 192 final of April 10, 2013.

² Council Regulation (EC) No 1225/2009 of 30 November 2009.

³ Council Regulation (EC) No 597/2009 of 11 June 2009.

⁴ Communication from the Commission to the Council and the European Parliament on the Modernisation of Trade Defence Instruments, COM(2013) 191 final of April 10, 2013.

⁵ Draft Guidelines on Union Interest; Draft Guidelines on the Selection of an Analogue Country; Draft Guidelines on Expiry Reviews and the Duration of Measures; and Draft Guidelines on the Determination of the Profit Margin used in Establishing the Injury Margin.

I. Legislative and non-legislative proposals

The Proposed Regulation and the Communication's non-legislative proposals address several overlapping issues: increased transparency and predictability, dealing with threats of retaliation, effectiveness and enforcement, facilitating cooperation, optimising review practice, and codification.

(a) Increased transparency and predictability

- Interested parties will be informed at least two weeks before provisional anti-dumping and anti-subsidy measures are adopted. The disclosure will be limited to a summary of the measures and the relevant calculations, and parties will have a short three-day deadline to comment on the accuracy of the calculations. Interested parties will also be informed beforehand of the decision not to impose provisional measures.⁶

(b) Dealing with threats of retaliation

- Union producers exposed to retaliatory threats from exporting countries will be encouraged to contact the Commission in confidence, and the Commission will have the ability to open an *ex officio* investigation (*i.e.*, without a complaint) if there is evidence of injurious dumping or subsidization.⁷
- Union producers will be required to cooperate in those investigations that are not initiated by a complaint, including by answering the initial questionnaire and accepting on-the-spot inspections.⁸

While the possibility to open an *ex officio* investigation is already provided for in the current Basic Regulations, it has rarely been used and it is expected that these additional provisions (in particular the requirement for Union producers to cooperate) could limit the risk of retaliation.

(c) Effectiveness and enforcement

- The Commission will open *ex officio* investigations against suspected circumvention of duties.⁹

⁶ Recitals 4 and 5, and Articles 1.3(a), 1.8, 2.3(b) and 2.9 of the Proposed Regulation, explained in paragraphs 2.1.1 to 2.1.3 of the Communication.

⁷ Recital 6 of the Proposed Regulation, explained in paragraph 2.2.1 of the Communication.

⁸ Recital 7 and Articles 1.2 and 2.2 of the Proposed Regulation, explained in paragraph 2.2.2 of the Communication.

⁹ Paragraph 2.3.1 of the Communication.

- The Commission will not apply the current “lesser duty rule” (which allows for the imposition of lower measures if they are sufficient to remove the identified injury to Union industry) in anti-subsidy cases¹⁰ or if the exporting country interferes in trade of raw materials to keep them at home for the benefit of its downstream users.¹¹

These new provisions show a renewed emphasis by the EU on anti-circumvention and anti-subsidy investigations, in particular in cases where raw material prices are manipulated by export restrictions.

(d) Facilitating cooperation

- Stakeholders (including EU producers, users, traders, importers, suppliers of the EU industry and certain consumer organizations) will have longer deadlines to register as interested parties and to submit questionnaires in relation to the Union interest analysis.¹²
- Updated guidance and other documents will be published with the purpose of increasing transparency regarding refund procedures.¹³
- The Commission’s helpdesk and training efforts to assist small and medium enterprises (“SMEs”) will be upgraded.¹⁴

These proposals are expected to increase companies’ participation in trade defence procedures, in particular for SMEs.

(e) Optimising the review practice

- Duties paid by importers while the expiry review process is on-going will be refunded if the trade measures are not renewed following the review process.¹⁵
- Parties will be encouraged to submit a request for the interim review of the measures in parallel with the initiation of an expiry review, which will allow the Commission to adjust the measures in place when necessary.¹⁶

¹⁰ Recital 9 and Articles 2.3(a) and 2.5 of the Proposed Regulation, explained in paragraph 2.3.2 of the Communication.

¹¹ Recital 8 and Articles 1.3(b) and 1.4(b) of the Proposed Regulation, explained in paragraph 2.3.2 of the Communication.

¹² Paragraph 2.4.1 of the Communication.

¹³ Paragraph 2.4.2 of the Communication.

¹⁴ Paragraph 2.4.3 of the Communication.

¹⁵ Recital 10, Articles 1.5(a) and 1.6(a) of the Proposed Regulation, explained in paragraph 2.5.1 of the Communication.

¹⁶ Paragraph 2.5.2 of the Communication.

- An interim review will be systematically initiated if the Commission finds that Union producers have engaged in anti-competitive behaviour.¹⁷

These proposals might result in a higher number of interim review cases (where measures can be modified), as opposed to expiry cases where measures are prolonged without any modification. The requirement to open an interim review in case of anti-competitive practices shows a renewed interest into the impact of trade measures on competition. Nevertheless, it remains to be seen how this requirement will be applied in practice in situations where, in addition to the effects of anti-competitive conduct within the EU, dumping is a significant cause of injury to the EU industry.

(f) Codification

The Proposed Regulation and Communication also codify a number of features of the Commission’s current decisional practice in trade defense investigations, in particular on anti-circumvention and review investigation,¹⁸ the definition of the EU industry for injury determination,¹⁹ the practice of sampling²⁰ and the standing of non-complainants to provide elements on EU interest.²¹

II. Draft Guidelines

The Draft Guidelines originate from the Commission’s current practice and their objective is to improve transparency and knowledge about the complex and technical aspects of the investigations.²² The four sets of the Draft Guidelines are discussed separately below.

¹⁷ Paragraph 2.5.3 of the Communication.

¹⁸ Recitals 13-16 and Articles 1.4(a), 1.5(b), 1.6(a), 1.6(b), 2.4, 2.6(b), 2.7(a), 2.7(b) and 2.7(c) of the Proposed Regulation, explained in paragraphs 2.6.1-2.6.4 of the Communication.

¹⁹ Recital 12, Articles 1.1 and 2.1 of the Proposed Regulation, explained in paragraph 2.6.5 of the Communication.

²⁰ Recital 17, Articles 1.7 and 2.8 of the Proposed Regulation, explained in paragraph 2.6.6 of the Communication.

²¹ Recital 18, Articles 1.9 and 2.10 of the Proposed Regulation, explained in paragraph 2.6.7 of the Communication.

²² *See*, Commission MEMO/13/319, “Q&As: Modernisation of the EU’s Trade Defence Instruments”, April 10, 2013.

1. Draft Guidelines on Determination of the Profit Margin used in Establishing the Injury Margin

These draft guidelines clarify the calculation method for the profit margin to be used when calculating the target price that will remove the injury. In principle, such margin should be based on the profit the Union industry could reasonably count on under normal conditions of competition, in the absence of dumped imports. This can be calculated on the basis of the observed profit during the injury period when the dumped and/or subsidised imports did not have any negative effects on the situation of the Union industry. If this cannot be observed, alternative calculation methodologies accepted by the Commission may include (i) the target profit determined in a prior trade defence investigation; (ii) the profit achieved for a wider product category or neighbouring products; (iii) information available in the Bank for the Accounts of Companies Harmonized database.²³

2. Draft Guidelines on Selection of Analogue Countries

These draft guidelines provide a set of objective selection criteria in order to ensure the best possible choice of an analogue market country when normal value cannot be calculated on the basis of exporters' domestic sales.

These criteria include:

- the fact that products produced in the proposed analogue country are identical or similar in their physical characteristics and applications to those originating in the country concerned;
- the volume of (and degree of competition in) domestic sales to independent customers in the proposed analogue country. The Commission clarified that the lack of a representative amount of domestic sales does not *per se* entail the rejection of the proposed analogue country if normal value can be inferred from that country's export prices; and
- the extent to which producers in the proposed analogue country are willing to cooperate with the Commission services: at least one local producer must be willing to cooperate.

Regarding the procedural aspects of the selection of an analogue country, the draft guidelines clarify that the Commission may change the analogue country during the investigation if necessary, for example when cooperation in the first analogue country is "too incomplete" for the Commission to carry out the necessary verifications. During expiry reviews, the producers in the analogue country chosen in the original investigation will be contacted with a view to using that country for the review proceeding.

²³ This database contains harmonised annual accounts statistics (including data on profits on turnover) of non-financial enterprises for 11 Union Member States, Japan and the U.S..

3. Draft Guidelines on Expiry Reviews and the Duration of Measures

These guidelines clarify some features of the expiry investigations. In particular:

- To determine the likelihood of recurrence of dumping or subsidization, the Commission will use data covering a period of up to three years prior to the initiation of the review and forecasts for a period of one or two years after such initiation;
- Among other factors, import prices under inward processing schemes that are lower than the exporting country's usual export prices, or the existence of circumvention and absorption practices, can be good indications of the recurrence of dumping;
- In expiry reviews the Commission will conduct a fresh examination of the EU interest to prolong measures, in line with the European Courts jurisprudence;²⁴
- Expiry measures can be imposed for a shorter duration than five years, in line with the Basic Regulations requirement that an anti-dumping/countervailing measure shall remain in force "only" as long as and to the extent that it is "necessary" to counteract the dumping or subsidies.

4. Draft Guidelines on Union Interest

The draft guidelines clarify that all interests of European economic operators, such as the complainants, other EU producers, traders and importers (including those related to exporters), the downstream users, upstream input suppliers and the consumer organizations, are taken into account during the assessment of the Union interest. Representative consumer organisations will be considered as far as there is an objective link between the organisation's activities and the product under consideration, and individual consumers have no standing according to a court ruling.²⁵ According to the draft guidelines, there is a presumption that the trade measures are normally in the Union interest if injurious dumping or subsidisation has been found and "[t]he standard to rebut this presumption is high."

The draft guidelines clarify that Union interest considerations may justify the imposition of a price undertaking rather than a duty.

Finally, the Commission will verify whether the imposition of measures would significantly undermine other established EU policy/policies, suggesting that the Commission's investigation may cover a wider policy area in the future and a closer coordination between the Trade Directorate-General and other Commission services.

²⁴ Case T-132/01, Euroalliages et al. [2003], II-2359, paragraphs 40, and 56-60.

²⁵ Case T-256/97, BEUC, [2000] ECR-II 101, paragraph 77.

If you have any questions with respect to the issues addressed herein, please contact [Till Müller-Ibold](#) or [François-Charles Lapr v te](#) at the Brussels office of Cleary Gottlieb or any of your contact persons listed at <http://www.clearygottlieb.com>.

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