



Brussels, 9.11.2016
COM(2016) 721 final

2016/0351 (COD)

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

{SWD(2016) 370 final}

{SWD(2016) 371 final}

{SWD(2016) 372 final}

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

The proposal covers targeted amendments to Regulation (EU) 2016/1036 on protection against dumped imports from countries that are not members of the European Union (the Basic Anti-Dumping Regulation) and to Regulation (EU) 2016/1037 on protection against subsidised imports from countries that are not members of the European Union (the Basic Anti-Subsidy Regulation)

1.1. Amendments to the Basic Anti-Dumping Regulation

1.1.1. Determination of normal value in the presence of market distortions

Articles 2(1) to 2(7) of the Basic Anti-Dumping Regulation stipulate the basis on which normal value shall be determined. The circumstances prevailing in certain countries that are Members of the WTO and the experience gathered from the case-law make it appropriate to amend the methodology used to determine the normal value and the dumping margin for the countries concerned, in particular those currently subject to the provisions of Article 2(7)(b) and (c).

As a result, the Commission proposes to amend Article 2(7) and to introduce a new provision, namely Article 2(6)a for WTO member countries.

(a) Normal value for WTO Members

For WTO members, the normal value is normally determined on the basis of the domestic prices of the like product or on the basis of a constructed normal value.

There are circumstances however in which the domestic prices and costs would not provide a reasonable basis to determine the normal value. This could be the case, for instance, when prices or costs are not the result of free market forces because they are affected by government intervention. Relevant considerations in this respect include, for instance, the fact that 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; the state presence in firms allowing the state to interfere with respect to prices or costs; the existence of public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; and the access to finance granted by institutions implementing public policy objectives.

In such circumstances, it would be inappropriate to use domestic prices and costs to determine the value at which the like product should be normally sold ("the normal value") and a new provision (Article 2(6)a) stipulates that the normal value would instead 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 would 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.

This methodology would allow the Commission to establish and measure the actual magnitude of dumping being practised in normal market conditions absent distortions.

For the sake of transparency and efficiency, the Commission services intend to issue public reports describing the specific situation concerning the market circumstances in any given country or sector. Of importance, the EU industry would be in a position to rely on and refer to the information contained in these reports when alleging in a complaint or a request for review that the domestic prices and costs in the exporting country are unsuitable to determine

the normal value. Such reports and the evidence on which it is based would also be placed on the file of any investigation relating to that country or sector so that all interested parties would be in a position to express their views and comments.

(b) Normal value for non-WTO members

For those countries which are, at the date of initiation, not Members of the WTO and listed in Annex I of Regulation (EU) 2015/755 of 29 April 2015 on common rules for imports from certain third countries, the normal value will be determined on the basis of the analogue country methodology as provided by Article 2(7) as amended.

1.1.2. Transition from the current system to the new one

The proposal introduces specific disciplines ensuring that the entry into force of the new system would be made in an orderly and transparent manner and would not create legal uncertainty for ongoing cases or unduly affect existing measures.

Thus, the proposal makes clear that the new system would only apply to cases initiated upon entry into force of the amended provisions. Any given ongoing anti-dumping investigation at the time of entry into force would remain governed by the current disciplines.

As far as existing measures are concerned, the Commission considers that the sheer introduction of the new disciplines does not constitute sufficient reasons to review such measures within the meaning of Article 11(3) of the Basic Anti-Dumping Regulation. Indeed, reviews of existing measures should only be conducted if and when the factual circumstances of the exporters concerned, as opposed to the legal disciplines to which they are subject, have changed to an extent that the current level of measures is shown to no longer be appropriate. Furthermore, if a review is initiated as a result of an objective change in the circumstances of an exporter, the review could still be conducted on the basis of the current methodology if the specific circumstances that led to the application of the current methodology, including the methodology based on Articles 2(7)(a) and 2(7)(b), have not changed. If the factual circumstances justifying the application of a given methodology have not changed, the normal value and dumping margin will be established on the basis of the same methodology as the one that led to the imposition of the measure subject to review. This is clarified in Article 11(9) of the Basic anti-dumping regulation and is necessary to avoid a situation where essentially the same circumstances would lead overtime to the application of two different methodologies.

Furthermore, the proposal provides that, in the case of a transition from a normal value calculated pursuant to Articles 2(7)(a) or 2(7)(b) to a normal value calculated pursuant to paragraphs 1 to 6a of Article 2, the reasonable period of time provided for in the first subparagraph of Article 11(3) of the Basic Anti-Dumping Regulation shall be deemed to elapse on the date on which the first expiry review following such transition is initiated.

The same approach should apply with respect to newcomer reviews conducted pursuant to Article 11(4) of the Basic Anti-Dumping Regulation.

1.2. Amendment to the Basic Anti-Subsidy Regulation

The Commission considers also it is essential that the Basic anti-subsidy regulation can deploy its full effectiveness. In that respect, experience shows that the actual magnitude of subsidisation is not always evident at the time of initiation. Oftentimes, investigated exporters are found to benefit from subsidies whose existence could not have been reasonably known before carrying out the investigation. Yet, those subsidies clearly provide an unfair benefit the exporters concerned, which allows them to sell at injurious prices to the EU market.

It is therefore essential that such subsidies be adequately captured in the final analysis and level of duty imposed.

For that purpose and for reasons of due process and transparency, the proposal clarifies that, when such subsidies are found in the course of any given investigation or review, the Commission will offer additional consultations to the country of origin and/or export concerned with regard to such subsidies identified in the course of the investigation. In these situations, the Commission will send to the country of origin and/or export a summary of the main elements concerning these other subsidies to ensure meaningful consultations.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

2.1. Consultation of interested parties

Interested parties concerned by this proposal have had the opportunity to participate in the Public consultation carried out from February to April 2016. A summary of the results of the public consultation was published as part of the Impact Assessment together with this legislative proposal. The Impact Assessment can be found on DG Trade's website.

2.2. Collection and use of expertise

An independent study into the impact of a number of options to address the way normal value is calculated in the case of imports from non-market economy countries was finalised in May 2016 and was published on DG Trade's website in parallel to the release of the legislative proposal.

2.3. Impact Assessment

Taking into account the results of the public consultation, the independent study and the Commission's extensive practice in the use of the instruments an impact assessment was carried out in Spring 2016. The impact assessment analysed various options. The Impact Assessment Board considered the report in June 2016 and gave a favourable opinion subject to some revisions to the report. The report has since been revised and finalised. The preferred solutions form the basis for this proposal.

3. LEGAL ELEMENTS OF THE PROPOSAL

3.1. Legal basis

The legal basis for this proposal is Article 207(2) of the Treaty on the Functioning of the European Union, in accordance to which the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

This proposal amends Regulation (EU) 2016/1036 and Regulation (EU) 2016/1037.

3.2. Subsidiarity Principle

Pursuant to Article 3(1)(e) of the Treaty on the Functioning of the European Union, the proposal falls under exclusive competence of the Union. The subsidiarity principle therefore does not apply.

3.3. Proportionality Principle

The proposal complies with the proportionality principle.

3.4. Choice of instruments

Proposed instrument: Regulation of the European Parliament and of the Council.

Other means would not be adequate for the following reason: a Regulation must be amended by a Regulation.

4. BUDGETARY IMPLICATION

Not applicable.

5. OPTIONAL ELEMENTS

Not applicable.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) By Regulation (EU) 2016/1036¹ the Council and the European Parliament adopted common rules for protection against dumped imports from countries that are not members of the Union.
- (2) Articles 2(7)(a) and 2(7)(b) of Regulation (EU) 2016/1036 stipulate the basis on which normal value should be determined in the case of imports from non-market economy countries. In view of developments with respect to certain countries that are Members of the WTO, it is appropriate that, for those countries, normal value should be determined on the basis of paragraphs 1 to 6a of Article 2 of Regulation (EU) 2016/1036, with effect from the date on which this Regulation enters into force, and subject to the provisions of this Regulation. In the case of countries which are, at the date of initiation, not Members of the WTO and listed in Annex I of Regulation (EU) 2015/755², normal value should be determined on the basis of paragraph 7 of Article 2 of Regulation (EU) 2016/1036, as amended by this Regulation. This Regulation should be without prejudice to establishing whether or not any WTO Member is a market economy.
- (3) In the light of experience gained in past proceedings, it is appropriate to clarify the circumstances in which significant 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

¹ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 21).

² Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries (OJ L 123, 19.5.2015, p. 33).

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.

- (4) It is further appropriate to recall that costs should normally be calculated on the 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.
- (5) It is further appropriate to recall that, with respect to the methodology used in the original investigation and to be used in the review investigation, Article 11(9) of Regulation (EU) 2016/1036 applies. In this context, it is appropriate to clarify that, when examining whether there is an indication that circumstances have changed, 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.
- (6) Absent any other specific transitional rules regulating the matter, it is appropriate to provide for the application of this Regulation to all decisions on the initiation of proceedings, and to all proceedings, including original investigations and review investigations, initiated, on or after the date on which this Regulation enters into force, subject to Article 11(9) of Regulation (EU) 2016/1036. Furthermore, by way of specific transitional rule, and having regard to the absence of any other specific transitional rule regulating the matter, it is appropriate to provide that, in the case of a transition from a normal value calculated pursuant to Articles 2(7)(a) or 2(7)(b) to a normal value calculated pursuant to paragraphs 1 to 6a of Article 2, the reasonable period of time provided for in the first sub-paragraph of Article 11(3) of Regulation (EU) 2016/1036 should be deemed to elapse on the date on which the first expiry review following such transition is initiated. With a view to reducing the risk of circumvention of the provisions of this Regulation, the same approach should apply with respect to reviews conducted pursuant to Article 11(4) of Regulation (EU)

2016/1036. It is also appropriate to recall that a transition from a normal value calculated pursuant to Articles 2(7)(a) or 2(7)(b) to a normal value calculated pursuant to paragraphs 1 to 6a of Article 2 would not in itself constitute sufficient evidence within the meaning of Article 11(3) of Regulation (EU) 2016/1036. Such transitional rules should complete a lacuna that would otherwise risk to generate legal uncertainty, should provide a reasonable opportunity for interested parties to adapt themselves to the expiry of the old rules and the entry into force of the new rules, and should facilitate the efficient, orderly and equitable administration of Regulation (EU) 2016/1036.

- (7) By Regulation (EU) 2016/1037³, the Council and the European Parliament adopted common rules for protection against subsidised imports from countries that are not members of the European Union. Experience has shown that the actual magnitude of subsidisation is usually discovered during the relevant investigation. In particular, it happens frequently that investigated exporters are found to benefit from subsidies whose existence could not have been reasonably known before carrying out the investigation. It is appropriate to clarify that, when such subsidies are found in the course of any given investigation or review, the Commission should offer additional consultations to the country of origin and/or export concerned with regard to such subsidies identified in the course of the investigation. In the absence of specific transitional rules regulating the matter, it is appropriate to provide for the application of this Regulation to all decisions on the initiation of proceedings, and to all proceedings, including original investigations and review investigations, initiated, on or after the date on which this Regulation enters into force.
- (8) Regulation (EU) 2016/1036 and Regulation (EU) 2016/1037 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) 2016/1036 is amended as follows:

- (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 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.
- (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

³ Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ L 176, 30.6.2016, p. 55).

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.

(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.

(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.

(e) The parties to the investigation shall be informed shortly after initiation about the relevant sources that the Commission intends to use for the purpose of point (a) and shall be given 10 days to comment. For this purpose, interested parties shall be given access to the file, including any evidence on which the investigating authority relies, without prejudice to Article 19.'

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

'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 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 market economy third country envisaged and shall be given 10 days to comment.'

(3) In Article 11(3), first subparagraph, the following is added :

'In the case of a transition from a normal value calculated pursuant to the former Articles 2(7)(a) or 2(7)(b) to a normal value calculated pursuant to paragraphs 1 to 6a of Article 2, the reasonable period of time shall be deemed to elapse on the date on which the first expiry review following such transition is initiated.'

(4) In Article 11(4), the following subparagraph is added:

'In the case of a transition from a normal value calculated pursuant to the former Articles 2(7)(a) or 2(7)(b) to a normal value calculated pursuant to paragraphs 1 to 6a

of Article 2, any review pursuant to this paragraph shall be deferred to the date on which the first expiry review following such transition is initiated.'

(5) In Article 11(9), the following is added:

'In relation to the circumstances relevant for the determination of the normal value pursuant to Article 2, due account shall 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.'

Article 2

In Article 10(7) of Regulation (EU) 2016/1037, the following subparagraph is added:

'The Commission shall also offer consultations to the country of origin and/or export concerned with regard to other subsidies identified in the course of the investigation. In these situations, the Commission shall send to the country of origin and/or export a summary of the main elements concerning other subsidies, in particular those referred to in point (c) of paragraph 2 of this article. If the additional subsidies are not covered by the notice of initiation, the notice of initiation shall be amended and the amended version be published in the Official Journal of the European Union, inviting all interested parties to comment.'

Article 3

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Article 4

This Regulation shall apply to all decisions on the initiation of proceedings, and to all proceedings, including original investigations and review investigations, initiated, on or after the date on which this Regulation enters into force.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President