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WORKING DOCUMENT

on the proposal for a regulation of the European Parliament and of the Council amending Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community

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United in diversity

Introduction

On April 10th 2013, the European Commission published its proposal for a modernisation of the EU's Trade Defence Instruments, amending both the anti-dumping and the anti-subsidy regulations. The proposal does not constitute a major revamp of the regulations, but does entail four central changes: the removal of the lesser duty rule in anti-dumping cases where structural raw material distortions are present and in all anti-subsidy cases, the obligation for Union producers to cooperate in ex-officio investigations, the reimbursement of duties collected during expiry reviews, and the two weeks notice before provisional duties are introduced, which is commonly, and hereafter, referred to as "the shipping clause". Along with these changes, the Commission has also presented four guidelines on the calculation of the dumping margin and injury margin, the choice of analogue country, the union interest test, and the expiry reviews.

The Commission's rationale behind its proposal is based on three objectives: to increase the effectiveness of the instruments, to reduce the threat of retaliation by affected parties in third countries, and, on the other hand, increase transparency and predictability. The Rapporteur welcomes these objectives and believes that these three objectives have to be combined in order to keep the public trust in the instruments.

However, beyond the changes of the Regulations outlined in the Commission's proposal, the Commission has chosen to place crucial elements of the modernisation in the guidelines, to which the European Parliament has shown a concern. For the Parliament to fulfil its role given through the codecision procedure, there are areas of the modernisation that the Parliament ought to address in regards to both the presentation of the guidelines and the objectives of the Commission proposal at hand. An option that the Rapporteur is contemplating is whether it would be constructive to move certain parts of the guidelines into the Regulation. The merits of such a maneuver is primarily the creation of a legal basis for the Commission's actions, and better legal certainty due to the removal of the legal vacuum which otherwise could be created.

In light of the nature of this package, there are several questions that necessitate further elaboration. The Rapporteur wishes to examine the Commission's objectives, i.e. effectiveness, transparency and predictability, and reducing the threat of retaliation, and how the proposed changes serve these objectives. In other words, this Working Document will take an objective-based approach, where the objectives legitimise changes, rather than the changes legitimise objectives. The proposals outlined in this document are neither final, nor exhaustive, but ought to be seen as possible ways to address the below concerns, as well as material to be used for discussion.

To what extent does the Commission's proposal ensure the effective use of the instruments?

Improving effectiveness of the instruments is one of the main objectives by implementing the changes made in the Commission proposal. The Rapporteur agrees with the Commission that effectiveness is fundamental to ensure that the instrument serves its purpose: to prevent the injury from illegal dumping and subsidisation. In relation to effectiveness, at least three areas of the proposal have to be examined: the obligation to cooperate in ex-officio proceedings, the reimbursement of duties collected under expiry reviews, and the partial removal of the lesser

duty rule.

Obligation to cooperate in ex-officio proceedings
To improve effectiveness, the Commission reiterates its ability to initiate ex-officio investigations, i.e. investigations started at the Commission's initiative and where no formal complaint has been issued by a Union producer. In such proceedings, the Commission proposes that all Union producers of the like product ought to be obliged to cooperate by providing the Commission with all necessary information. There are significant benefits of this proposal, not least the creation of an anonymous environment and the extended access to data. This could improve the quality of the sampling in the investigation, where better and firmer conclusions can be drawn.

However, although there are benefits of such an approach, there are issues still unresolved and not addressed by this proposal. Firstly, one should not underestimate the administrative burden of taking part in an investigation, especially for SMEs. Secondly, SMEs as well as larger corporations might not be comfortable with providing the Commission with sensitive business information. Thirdly, it is questionable whether the parties who are not in favour of such proceedings should be obliged to cooperate. Fourthly, the consequences of potential noncompliance with such information requests are unclear. Inspiration might be taken from competition law, where fines are issued in case of non-cooperation. In the Rapporteur's view, such inspiration might not be desirable, due to its complexity and the extra costs and burden it would induce on SMEs. Nevertheless, despite these doubts and concerns, it could be argued that the benefits of the anonymous environment and better sampling outweigh the disadvantages, and might thus be considered legitimate.

* How can the Commission ensure that the advantages of the obligation to cooperate, i.e. better sampling, outweigh the disadvantages i.e. administrative burden for SMEs?

Reimbursement of duties collected under expiry reviews
The Commission also proposes to reimburse duties collected under expiry reviews, if proven that dumping/subsidiation has been terminated, claiming that it would ensure effectiveness. It must be asked how this change addresses the aim of better effectiveness. Moreover, the Commission has to clarify how the reimbursement can be carried out in an effective way, without causing administrative challenges for the involved parties. Currently within TDI, it can take up to 21 months in order for reimbursements to be administered. Furthermore, there is a concern about undermining consistency throughout the two Regulations. Several voices have been raised in regards to why the reimbursement is only proposed under this article, and not under other relevant articles. Moreover, others have pointed out that such a proposal undermines the principle of non-retroactivity.

* How can a reimbursement be administered easily and efficiently to ensure the objective of increased effectiveness?
* Is there a relevant conflict between the reimbursement of duties and the principle of non-retroactivity?

Partial removal of lesser duty rule
As mentioned above, the Commission proposes to remove the lesser duty rule in anti-dumping cases where structural raw material distortions are found and in all anti-subsidy

cases, arguing that this removal will improve the effectiveness of the instruments. However, it is difficult to ascertain from where such conclusion arrives. In accordance with WTO, dumping per se is not illegal, but injurious dumping is illegal. Hence, the lesser duty rule ensures the removal of the injury caused on the Union producers, and it is questionable whether higher tariffs would bolster effectiveness, and if they are needed. Deterrence and the creation of extra leverage might be motivations behind the proposed change, however, if this is the case, the potential effects of this proposal have to be kept in mind. The Rapporteur wishes to more closely examine the potential risk of causing counterproductive effects, such as the negative effect on the Union's access to intermediate goods and the potential increased threat of retaliation. Considering the much more globalised value chain of 2013 compared to 1995, when the last reform of the instruments was made, the increased duty level will not only keep finished dumped and subsidised third country goods out of the European market, but might have an impact beyond the scope of foreign goods. There is an argument to be made that distortions from third countries cannot be tackled by tariffs beyond the correction of the injury. Further elaborations on the relationship between the removal of the lesser duty rule, effectiveness and threat of retaliation will be discussed under the next heading.

Furthermore, the lack of a precise definition of structural raw material distortions may prove problematic. As of yet, the Commission has not presented a uniform definition, which has resulted in numerous of speculations to arise. It has been suggested that there will be an ad hoc case-by-case determination, but also that energy and labour costs are included in such a definition. By using an undefined and unpredictable concept as the basis for input, the output will be equally as unpredictable, which puts the effectiveness of the removal of the lesser duty rule into question. The concept also blurs the lines between the anti-dumping and anti-subsidy regulations, which might be considered to be in breach of Article 32.1 of the WTO Agreement on Subsidies and Countervailing Measures. Here, the Parliament has to determine whether the elected institution can accept a definition drafted by the Commission, or whether the legislators in the Parliament itself ought to provide the legal framework of the concept. Regardless of which, it is clear that the legal uncertainty has to be removed. Consequently, prior of knowing the intended use of the concept of structural raw material distortions, it is difficult to determine to what extent it would increase the effectiveness of the instrument, or whether the legal uncertainty could in fact reduce effectiveness.

* What is the nature of the relationship between the partial removal of the lesser duty rule and effectiveness?
* In what way should the Parliament resolve the legal uncertainty resulting from the lack of definition of structural raw material distortions?

To what extent does the proposal ensure sufficient transparency and predictability?
The Commission proposal entails several elements that are aimed at increasing transparency and predictability, most notably the shipping clause and the four guidelines. Transparency and predictability are vital for all involved parties, and are aimed at ensuring public trust, accountability and legitimacy of the instruments. The Rapporteur wishes to discuss three areas in regards to transparency and predictability: the shipping clause, the timing of the imposition of provisional duties and the access to information.

Shipping clause
The shipping clause, or the two weeks notice before provisional duties are introduced as it is

referred to in the proposal, would provide importers with a legal certainty that business can carry on as normal until the Commission has shown initial proof that dumping and subsidisation is occurring. According to the Commission, this proposal aims at increasing the predictability of the investigations. Many stakeholders argue that shipments already on the way to Europe should not be affected by duties, and many importers regard this as a measure of fairness, since trade distortions should not be created without substantial evidence. However, others have questioned the rationale the period of two weeks, taking into account the fact that the Impact Assessment was based on a period of three weeks. Hence, the choice of two weeks does not necessarily have a logical foundation. Yet others have raised the issue that regardless of the length, the fixed period will either be too long or too short. Imports from Russia do not necessitate a shipping clause of two or three weeks, but perhaps only four or five days. Imports from East Asia, on the other hand, might require a shipping clause of six weeks. This incongruity has to be addressed.

Others have warned about the potential danger of stockpiling if a shipping clause were to be adopted. Nevertheless, the Impact Assessment claims that even three weeks is not long enough to risk increased stockpiling, but that six weeks might increase the risk. This is a risk that ought to be taken into account and further investigated, since it might undermine effectiveness of the instruments. It is vital to ensure that both effectiveness and transparency can find a way to be combined in order to keep the public trust in the instruments. The Rapporteur wishes to explore options that can serve both purposes. Thus, if the concept of a shipping clause is accepted, certain alterations must follow.

In addition, there is a discriminatory factor imbedded in the proposal. As it stands, only registered interested parties can make use of the shipping clause. It is safe to assume that the registered interested parties are those producers that are larger corporations and that are well-represented in Brussels. In other words, the shipping clause presented in the proposal bring large corporations into a favourable position, whilst it disadvantages SMEs on tight budgets, and that are not fully informed of the Commission's latest TDI investigations. The Rapporteur wishes to see a levelling of the playing field in regards to this issue, and would like to consider options of creating a more flexible, transparent and user-friendly shipping clause, perhaps where the dates are published together with the level of provisional duties on TARIC.

* Can a flexible shipping clause, based on either geographical distance or date of contract, be possible?
* Can it include all importers and not only registered interested parties?

Timing of provisional duties
There are other areas of the AD and AS investigations where transparency and predictability can be enhanced for all involved parties. It is well-known that the initiation of an AD/AS investigation per se affects trade patterns and the behaviour of all affected parties. Therefore, it is vital to ensure that those who might be subject to the introduction of provisional duties are well aware of the timeline of an investigation. According to the statistics available on the timing of the introduction of provisional duties in AD and AS cases between 1999 and 2012, it can be seen that in an overwhelming majority of the cases, the duties are introduced on the nine month deadline or in the last week before the deadline. Only in exceptional cases have the provisional duties been introduced earlier. With this information at hand, it can be asked whether it might be of use to state more clearly when provisional duties will be imposed. Such

measures of predictability could also solve the above-discussed problematique of the proposed shipping clause.

* Would a more narrow timeframe of the imposition of provisional duties, for instance the last week of the investigation, be of use for interested parties and enhance transparency and predictability?

Access to information
Under the current Regulations, interested parties have a very limited access to relevant files of anti-dumping and the anti-subsidy investigations. This concern has been raised by stakeholders, arguing that the accessible non-confidential files are of a too poor quality in order to be of use for interested parties. Therefore, to ensure the trust and legitimacy of the instruments, and to avoid miscalculations and the improper use of data, more ought to be done to facilitate greater access to the both non-confidential, but also confidential, files.

When examining other states' trade defence instruments, it can be argued that there are certain best practices that the EU would be able to emulate. In the United States, an Administrative Protective Order (APO) system is used, where registered trade lawyers have access to the documents under a strict confidentiality clause, preventing the lawyer from divulging any information obtained through the order. Such a system would allow legal representatives to study the data in more depth. This idea was considered in the Commission's Impact Assessment, but was rejected on the basis that it would be an expensive system, and the different bars in the EU could be an obstacle to such an approach. The Rapporteur believes that there is a need for further scrutinising the Commission's claims. Alternatively, it may be suggested, that certain written information can be disclosed to legal representatives through the Hearing Officer to a greater extent than today. Such a change could serve as an alternative to a much more sophisticated, but certainly more advanced, APO system.

Other methods of increasing transparency would be the introduction of a notification system where legal representatives or interested parties are notified when new non-confidential and confidential files are added to the investigation. Moreover, the Rapporteur considers it relevant to question why not all non-confidential files are accessible online. These proposals facilitate transparency without changing the nature of the documents.

* Would an APO system for TDI investigations be plausible in the EU?
* Are there administrative changes that could be introduced and increase transparency, such as a notification system for the addition of new non-confidential and confidential files, or an online access of all non-confidential files?

Does the proposal appropriately address the threat of retaliation by third countries?
In the Commission proposal, as well as in the Impact Assessment, the Commission emphasises the importance of acknowledging the Union producers' growing concern in regards to the threats of retaliation by third country producers after lodging an anti-dumping and/or anti-subsidy complaint. The Commission has therefore presented the obligation to cooperate in ex-officio proceedings. However, as previously mentioned, the Rapporteur has concerns in regards to other parts of the Commission proposal that might undermine the objective of securing the Union against a trend of increasing retaliation. The partial removal of the lesser duty rule could be considered to have an impact on the threat of retaliation.

Obligation to cooperate in ex-officio proceedings
According to the Commission, the threat of retaliation can be managed and reduced by initiating ex-officio investigations, i.e. warranting the Commission to initiate investigation on its own behalf without a formal complaint issued by a Union producer. This, in combination with the Commission's proposal to oblige Union producers to cooperate in such ex-officio proceedings, supplying the Commission with all necessary information, is intended to create an anonymous environment where no Union producer can be singled out as a complainant and thus be subject to threats of retaliation.

However, although there are benefits of such an approach, there are issues still unresolved and not addressed by this proposal. Firstly, it must be stated that the Commission's ability to initiate ex-officio proceedings is already in the Regulations, which raises the question why the Commission sees ex-officio as the answer to the threat of retaliation at this point in time. Secondly, despite the argument that this reduces the risk of retaliation, it does not entirely remove it. It is safe to assume that a well-informed third country producer can without difficulties conclude on which Union producers' behalf the Commission is acting. However, a more recent and worrying trend which has been discovered is the tendency of third countries to penalise and retaliate against certain EU member states, or vital sectors within the Union not necessarily connected to the sector affected by third country dumping or subsidisation. Hence, it could be argued that instead of suffering from an intra-sector retaliation, there is an increased risk for creating a much more harmful and unjust inter-sector retaliation. In this sense, Union producers from other sectors, that have no interest in the outcome of the investigation, are affected by initiatives taken by the Commission. The Rapporteur sees this as a trend that is less than desirable.

* Can the obligation to cooperate transfer the intra-sector retaliation to a more harmful and unjust inter-sector retaliation? If so, how can it be mitigated?

Partial removal of the lesser duty rule
Furthermore, the Commission's proposal to partially remove the lesser duty can be seen to have an impact on the threat of retaliation. It is worth recalling that the lesser duty rule is a WTO+ commitment, however, there are several elements which bring the partial removal into question. Firstly, removing the lesser duty rule could be perceived as changing the nature of the instruments from being a corrective measure into a penalising measure. This, in combination with the fact that there is no uniform definition of structural raw material distortions, which may result in unpredictable outcomes, could be seen to create more room for a tit-for-tat mentality. It is to be remembered that the partial removal may have a significant effect on the level of duties imposed, which might exacerbate the problem. The primary objective of the lesser duty rule is to remove the injury caused, not to penalise the Union's trading partners, which is the logic behind the Union's drive to including the lesser duty rules in WTO negotiations.

Combined with the view that the threat of retaliation cannot be eliminated entirely, it must be asked whether the limiting of the lesser duty rule will reduce the risk of retaliation or exacerbate it. Again, the concerns raised in the previous section about intra-sector retaliation becoming inter-sector retaliation have to be reiterated. Therefore, it is the Rapporteur's conclusion that whilst attempting to address the threat of retaliation, other concerns have been

brought into being that in turn need attention. Hence, if the concept of removing the lesser duty rule in cases of structural raw materials is accepted, it can only be done so in combination with a distinct definition of what structural raw material distortions entail, and with the Commission's assurance that it will only be applied within a specific legal framework and in exceptional circumstances.

* To what extent, if any, does the removal of the lesser duty rule increase effectiveness of the instrument compared to the potential increased risk of retaliation by third countries?
* Could a more narrow definition of structural raw material distortions reduce the risk of retaliation?

To what extent does the proposal take into account the challenges of the future?
The Commission's proposal is commonly referred to as a modernisation of the instruments, adapting certain aspects of the regulation in order to better suit the conditions of modern trade patterns. The instruments have not been reviewed since 1995, although attempts were made in 2006/07. With this background, the Rapporteur considers it necessary to take into account both Omnibus and the wider policy concerns of the Union.

Omnibus
With the upcoming adoption of the Trade Omnibus I and II, it is sensible for the Parliament to scrutinise the increased powers that the Commission will gain after their implementation. The increased powers will, amongst other areas, affect the decision-making and implementation processes of future TDI proceedings. The balance of the modernisation has to be seen in the light of these upcoming changes, which renders the question to what extent the present proposal takes the changes into account. The Rapporteur acknowledges that this modernisation cannot and should not per se alter or reverse the decision-making and implementation processes, but instead gives impetus for strengthening the scrutiny, and creating legal clarity and certainty of the Regulations, not least by raising the above questions. Furthermore, the role of the Parliament, the elected guardians of the Union's interests, cannot be ignored. An Annual Monitoring Report of Trade Defence Instruments could be introduced, where the activities of the Commission, along with the quality of the internal proceedings, are examined and which is subject to a Parliament resolution. Additionally, the Parliament could be notified when a new investigation has been initiated, when provisional and definite duties are imposed, if an undertaking has been accepted, and when measures expire.

* Would the introduction of an Annual Monitoring Report of Trade Defence Instruments be possible?
* To what extent could the Parliament be informed of the processes and decisions made in regards to the investigations?
* Are there any further plausible measures that could contribute to increasing the Parliament's powers of scrutiny?

Other policy concerns
In regards to future proofing the instrument and making it apt for the modern environment, other policy concerns might have to be taken into account to a greater extent than previously. The Union Interest Test is a vital part of ensuring this policy coherence. It has become salient that trade faces challenges that are not in essence trade-related, but nevertheless influence both the input and output of trade policies. Trade defence instruments are no exception.

Intellectual property rights, security considerations, environmental concerns, and the access of raw materials are only some of the policy areas that could have an impact on the choice of anti-dumping and anti-subsidy investigations. In fact, the proposal of the removal of the lesser duty rule in case of structural raw material distortions could rather be seen as a part of the comprehensive raw material policy pursued by the Commission, than a legal and logical development of TDI objectives.

However, there is a danger of, and in, politicising the instrument if the framework of the Union Interest is not properly defined. The Union Interest test in TDI investigations should guarantee that the Commission speaks with one voice towards its citizens and consumers, as well as towards third countries. Therefore, the Rapporteur wishes to see changes that keep the instrument policy coherent without making it into a Swiss army knife: a multi-policy tool that can be used for several purposes depending on how it is applied.

* Are there any other ways to ensure the legal and technical nature and to reduce the risk of the instruments becoming more of a tool to be used for political objectives?

Guidelines

The Rapporteur welcomes the Commission's intention of increasing transparency by publishing the four guidelines. However, it needs to be explained why some of the vital topics are not in the Regulations, but only in the guidelines. Due to the uncertainty of the legal standing of the guidelines, and due to their political nature, it is less than ideal that they can be used at the Commission's own prerogative. Therefore, it is the role of the Parliament and the Council to scrutinise the powers held by the Commission, and thus hold the Commission accountable for their internal procedures. The Rapporteur therefore proposes to introduce a clause which obliges the Commission to put any future revision of the current guidelines, or an addition of a guideline, in a delegated act.

* How can the Parliament and the Council scrutinise the powers held by the Commission and hold it accountable for their internal procedures?
* Are there any relevant parts of the guidelines that should be moved to the regulations?

Conclusion

In conclusion, the Rapporteur welcomes the objectives pursued by the Commission. Effectiveness, transparency and predictability, and reducing the threat of retaliation are admirable objectives that in combination ensure the public trust in the instrument. In essence, the Rapporteur does not wish to go beyond these objectives, but sees areas where these objectives can be strengthened by finding answers to the questions raised above.