The European Commission’s proposal to reform the EU’s Trade Defence Instruments

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Various proposals aimed at modernising of the EU’s Trade Defence Instruments (TDIs) have been discussed over the years, but failed to gather the necessary consent in the European Parliament and the Council. Reforming the TDIs, however, has become more urgent in light of the forthcoming expiry, on 11 December 2016, of the special provision in China’s WTO Accession Protocol allowing other Members to disregard Chinese domestic prices and costs when determining normal value in the framework of anti-dumping investigations against Chinese products.

Today, the European Commission tabled its long-awaited proposal for the reform of the Basic Anti-Dumping Regulation and the Basic Anti-Subsidy Regulation. The proposal largely reflects the ideas which the European Commission had informally circulated in the course of 2016, the only absence being the envisaged abolition of the “lesser duty rule”. Below, we provide an overview of the main features of the Proposal.

1. ENHANCED COST-ADJUSTMENT POWERS FOR THE COMMISSION

The European Commission proposes to add a new Article 2(6)(a) to the existing Basic Anti-Dumping Regulation. Pursuant to this new provision, in the presence of so-called “market distortions” in the country of origin, domestic prices and costs for products under investigation should be disregarded and the normal value should be constructed on the basis of “undistorted prices and benchmarks”, including international prices and costs or costs of production and sale in an appropriate representative country with a similar level of economic development compared to the exporting country. It is worth mentioning that this new rule will apply to products originating in any WTO Member and would thus not be limited to investigations concerning a subset of countries. When resorting to these benchmarks, the European Commission must allow any interested party to access the file, including any evidence on which the authority relies.

The new provision contains a non-exhaustive list of situations where reported prices or costs cannot be considered as resulting from the free interaction of market forces: (i) the market concerned is served to a significant extent by enterprises operating under the control of state authorities; (ii) the presence of the state has an impact on prices and costs; (iii) domestic measures in the country of production discriminate in favour of domestic suppliers; (iv) access to finance in the country of production is granted by institutions implementing public policy objectives.

The Commission services may prepare reports with a view of describing the abovementioned distortions in a particular sector or country. The Union industry can

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rely on such reports for the calculation of the normal value in its application for the initiation of an antidumping investigation. The new Article 2(6)(a) is presented as the tool to address any instance of market distortions, irrespective of the classification of countries as market-economies or not. The proposed new approach, however, appears to be at odds with several provisions of the Anti-Dumping Agreement especially in light of the recent findings of the Appellate Body in EU – Biodiesel.

2. THE ANALOGUE COUNTRY METHODOLOGY REMAINS IN PLACE FOR INVESTIGATIONS CONCERNING NON-WTO COUNTRIES

Pursuant to the new formulation of Article 2(7) of the Basic Anti-Dumping Regulation, the normal value in investigations concerning non-WTO Members that are listed in Annex I of Regulation (EU) 2015/755 (Azerbaijan, Belarus, North Korea, Turkmenistan, Uzbekistan) will be determined on the basis of the price or constructed normal value in a market-economy third country, or the price from such third country to other countries or on any other reasonable basis, including EU domestic prices for the like product.

3. “GRANDFATHERING” FOR INTERIM AND NEW EXPORTER REVIEWS

The Commission’s proposal introduces transitional rules for anti-dumping regulations imposed following a determination of the normal value based on the current formulations of Articles 2(7)(a) and 2(7)(b) of the Basic Anti-Dumping Regulation. In particular, concerned producers or exporter will not be able to request an interim review on the basis of a “significant change in circumstances” until an expiry review is initiated. Moreover, any “new exporter” review is deferred to the first expiry review. It must be noted that the blanket denial of interim and new exporters’ reviews is inconsistent with Article 11.2 of the Anti-Dumping Agreement, which contains an obligation for the authorities to review the need for the continued imposition of anti-dumping duties, where warranted, ex officio or after the submission of positive information by the interested parties.

4. NEW SUBSIDIES

The proposal formulated by the Commission aims to amend the Basic Anti-Subsidy Regulation as well. Under the proposed rules, the Commission will be entitled to expand the scope of pending anti-subsidy investigations, so as to cover new subsidy schemes not initially listed in the notice of initiation. This proposal codifies an established practice followed by the European Commission over the last few years. However the proposed text is at odds with Article 22.2.(iii) of the Agreement on Subsidies and Countervailing Measures of the WTO, which mandates the description of all “the subsidy practices to be investigated” in the notice of initiation.
5. CONCLUSION

The newly proposed provisions granting the Commission the authority to adjust costs on the basis of third country prices and costs where market distortions exist effectively extend to all WTO Members the use of analogue country data to determine normal value currently restricted to countries classified as non-market economies in the EU Basic Anti-Dumping Regulation. Compared to the previous non-market economy methodology of Article 2(7) of the Basic Anti-Dumping Regulation, the burden of proving that distortions exist will now shift to the complainants. The Commission, however, will mitigate the evidentiary burden by having its services prepare country and sectoral reports setting out existing distortions for use by potential complainants.

The new methodology’s main features are thus strikingly similar to the methodology currently applied in investigations against China pursuant to Section 15 of China’s WTO Protocol of Accession, which is due to expire on 11 December 2016. By proposing to remove China from the list of non-market economies in Article 2(7) of the Basic Anti-Dumping Regulation, the Commission is seeking to avoid an as such WTO challenge of its anti-dumping methodology applicable to China. However, the proposed new methodology appears to be equally inconsistent with the WTO Anti-Dumping Agreement, especially in light of the recent findings of the Appellate Body in the EU-Biodiesel case, which has made it clear that normal value determinations with respect to WTO Members must be made in relation to costs actually incurred by exporters in the country of origin.