

The new EU anti-dumping methodology and other upcoming changes to the EU anti-dumping rules

20 December 2017

The new EU anti-dumping methodology was published in the Official Journal on 19 December 2017. [Regulation \(EU\) 2017/2321](#)¹ sets out new rules for establishing normal value in case of “significant distortions” in the market of the exporting country.

In a related development, on 5 December 2017, the Commission, the Council and the European Parliament reached a political agreement on the modernisation of the EU's trade defence instruments, addressing, amongst other matters, the partial waiver of the lesser-duty rule (*LDR*), the relevance of social and environmental standards in anti-dumping investigations and the issue of “pre-disclosure”.

While these two sets of amendments were agreed upon independently and result from different necessities and political motives, together they constitute a major overhaul of the EU's existing anti-dumping rules.

1. NEW EU ANTI-DUMPING METHODOLOGY

Through the addition of a new paragraph 6a to Article 2 of the Basic Anti-Dumping Regulation, the EU introduces a new methodology for establishing normal value in case of “significant distortions” in the market of the exporting country, which render the use of domestic prices and costs in that country inappropriate.

Formally, the new EU methodology provides for a country-neutral approach, abolishing the current distinction between market and non-market economies. Instead, the new methodology now applies to all countries where “significant distortions” are deemed to exist.

¹ Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 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.

In practice, however, China is the main target of the new legal regime. This follows from the *raison d'être* of the new methodology, which was implemented in order to bring the EU's Basic Anti-Dumping Regulation in line with the changes resulting from China's WTO Accession Protocol and, more precisely, the expiry of the alternative methodologies contained in Section 15(a)(ii) of China's WTO Accession Protocol on 11 December 2016.

1.1 Significant distortions

The new regulation defines "significant distortions" as "*distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention*".

In assessing the existence of significant distortions, Article 2(6a)(b) of the new Basic Anti-Dumping Regulation provides a non-exhaustive list of elements to take into account: (i) the market being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country; (ii) state presence in firms allowing the state to interfere with respect to prices or costs; (iii) public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; (iv) the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws; (v) wage costs being distorted; and (vi) access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.

1.2 Undistorted prices and benchmarks

In a scenario where the Commission finds 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 will be "*constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks*".

In determining such "undistorted prices or benchmarks", the Commission may use: (i) corresponding costs of production and sales in an appropriate representative country with a similar level of economic development as the exporting country; (ii) if it considers it appropriate, undistorted international prices, costs, or benchmarks; or (iii) domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence.

1.3 International social and environmental standards

The reference to international social and environmental standards is one of the main innovations introduced by the new set of rules. However, the role of such standards in the determination of the normal value remains unclear.

While Recital 4 states that when assessing the existence of significant distortions, “*relevant international standards, including core conventions of the International Labour Organisation (ILO) and relevant multilateral environmental conventions, should be taken into account, where appropriate*”, Article 2(6a)(b) of the new Basic Anti-Dumping Regulation does not explicitly include social and environmental standards in the list of elements to be taken into account when assessing whether significant distortions exist.

Therefore, it appears that the Commission is not obliged to take into account the social and environmental standards in a certain country when deciding on the existence of significant distortions and, as a consequence, when deciding whether or not to disregard the domestic prices and costs in the exporting country.

Once the Commission has determined that significant distortions exist and decides to construct the normal value on the basis of undistorted prices or benchmarks, Article 2(6a)(a) of the new Basic Anti-Dumping Regulation states that the Commission may base itself on “*corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country*”. Article 2(6a)(a) goes on by stating that where there is more than one such country, “*preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection*”.

It follows that social and environmental standards may play a role in the Commission’s choice of the third country to use for the constructed normal value, provided that several countries with a similar level of economic development as the exporting country exist. In such a scenario, EU investigators would be encouraged to choose a third country with higher social and environmental standards rather than other possible choices. This will generally lead to higher anti-dumping duties, as more stringent social and environmental policies are often linked to countries with higher domestic prices and costs.

In any event, these changes might not differ substantially from the current regime in terms of the choice of an analogue country in application of a non-standard methodology, as investigating authorities enjoy wide discretion in this regard.²

1.4 Burden of proof

The EU has repeatedly stated that the new rules will not impose an additional burden of proof on EU companies in anti-dumping cases.

² See Panel Report, *EU – Footwear (China)*, para. 7.295. In this respect, practice reveals that the European Union has frequently used data from countries with higher levels of development and GDP per capita in normal value determinations concerning imports from so-called non-market economies.

The new methodology predominantly places the burden of proof on the exporting producers, who must establish that their domestic prices and costs are undistorted. Article 2(6a)(a) of the new Basic Anti-Dumping Regulation indeed provides that the sources for constructing normal value which the Commission may use include domestic costs, *“but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence”*.

On the basis of Article 2(6a)(c) of the new Basic Anti-Dumping Regulation, the Commission will provide assistance in determining the existence of “significant distortions” by publishing reports describing the market circumstances in a certain country or sector for which the Commission has well-founded indications of the possible existence of significant distortions.

Consistent with the new legislation’s aim to provide for a substitute for the analogue country methodology previously applied for determining normal value in anti-dumping investigations against exports from China, the Commission published, on 20 December 2017, its [report](#) on the market circumstances in China.³

It remains unclear whether, for the purpose of filing a complaint to initiate an anti-dumping proceeding and asking for the application of the new EU methodology, it will be sufficient for the EU industry to simply refer to the reports of the Commission, or whether the EU industry will need to further substantiate its claims regarding the existence of significant distortions.

1.5 Grandfathering provisions

For interim reviews and new exporter reviews of existing anti-dumping measures, Articles 11(3) and 11(4) of the new Basic Anti-Dumping Regulation provide that the new EU methodology *“shall replace the original methodology used for the determination of the normal value only [from/after] the date on which the first expiry review of those measures, after [19/20] December 2017, is initiated”*.

It follows that the new rules will not be applied for the calculation of normal value in the context of an interim review. The old methodology will continue to apply for existing measures until an expiry review is initiated, irrespective of any request for an interim review. The same applies to new exporter reviews. Moreover, any future expiry review can only result in the continuation or repeal of the existing measures. It is therefore to be expected that most expiry reviews will result in the continuation of measures determined on the basis of the old analogue country methodology.

³ Commission Staff Working Document on Significant Distortions in the Economy of the People’s Republic of China for the Purposes of Trade Defence Investigations” (SWD(2017)483 final/2). As reported by the European Commission, the report on China “simply reflects the fact that this is the country on which the majority of the EU’s trade defence activity occurs”. The next country report published by the Commission will concern Russia.

1.6 Conclusion

While formally abolishing, for the calculation of normal value, the distinction between market and non-market economies, it appears that the new EU anti-dumping methodology based on “significant distortions” is designed to target China and other countries which the EU previously qualified as non-market economies. Despite the EU’s efforts, the relabelling of “non-market economy” countries as “distorted economies” is unlikely to avoid new legal challenges in the WTO or other fora.

It is doubtful that the application of the new rules will be consistent with, amongst other provisions, Articles 2.2 and 2.2.1.1 of the WTO Anti-Dumping Agreement to the extent that they lead the Commission to determine normal value for exporting producers on the basis of data other than their domestic costs. The Appellate Body in *EU – Biodiesel* clearly condemned the use of costs other than those resulting from the accounts of the exporting producer. Problems also emerge with regard to a possible violation of Article 11.2 of the WTO Anti-Dumping Agreement, since the new rules deny exporters the possibility of requesting an interim or new exporter review on the basis of the changed circumstances resulting from the entry into force of the new EU methodology. Moreover, where an interim or new exporter review is initiated, the old analogue country methodology will continue to apply.

In addition, the newly introduced concepts of “significant distortions” and “undistorted prices and benchmarks”, the role of international social and environmental standards in the calculation of the normal value and the burden of proof of the new rules remain unclear. This lack of clarity could result in an unpredictable and discretionary application of the new methodology by the European Commission.

It is therefore highly unlikely that the new rules could survive WTO dispute settlement proceedings, either on an “as such” or “as applied” basis. At the most, it will offer the European Commission an excuse to continue applying a refurbished non-market economy methodology against Chinese exports for several years longer than was permitted on the basis of China’s WTO Accession Protocol.

2. MODERNISATION OF THE EU’S ANTI-DUMPING LEGISLATION

Following the Commission’s 2013 proposal on the modernisation of the EU’s trade defence instruments, and subsequent struggles amongst the EU Member States to arrive at a joint position, the Commission, the Council and the European Parliament managed to reach a political agreement on the modernisation of the EU’s anti-dumping rules on 5 December 2017.

The amendments predominantly relate to the partial waiver of the LDR, the relevance of social and environmental standards in anti-dumping investigations, the issue of “pre-disclosure” and the closing of the so-called “maritime loophole”. In addition, the new rules on the modernisation of the EU's trade defence instruments purport to shorten the time before duties can be imposed, enhance the transparency of the system and facilitate the participation of smaller companies by providing them with assistance from a specific help desk.

2.1 Partial waiver of the lesser-duty rule

The LDR currently prevents the Commission from imposing anti-dumping duties above the calculated level of injury caused to domestic companies, even if the calculated margin of dumping may be higher. It appears that the EU negotiators agreed on a limited waiver of the LDR, which would only apply in case of distortions in raw material prices in the exporting country under investigation.⁴ With regard to the applicable threshold that would trigger the waiver of the LDR, it has been reported that the value of the raw materials of which the price is considered distorted would have to account for more than 17% of the cost of production in the exporting country.

2.2 Social and environmental standards

It has been reported that, pursuant to the negotiated agreement, social and environmental standards will be taken into account when calculating the injury margin in anti-dumping investigations. It appears that for goods originating in countries with lower social and environmental standards, the cost to EU companies of complying with such standards will be included in the calculation of the injury margin.

2.3 Three-week notice period

The negotiators agreed on the issue of “pre-disclosure”, putting in place an early warning mechanism to ensure that interested parties are informed of anti-dumping duties before their imposition, allowing them to adapt to the new situation in case duties are imposed. By way of a compromise, the European Parliament accepted a three-week notice period afforded to interested parties for impending measures, two weeks longer than what had been initially proposed. In exchange, the rules require the national customs authorities to register imports “whenever possible”, allowing duties to be collected retroactively in case duties are imposed. Under the current rules, such registration is optional.

⁴ Article 9.1 of the WTO Anti-Dumping Agreement contains a hortatory provision according to which it is “desirable” to impose duties at a level that is lower compared to the established dumping margins if that nevertheless allows injury to be offset. As the WTO Anti-Dumping Agreement does not mandate the use of the LDR, any deviation from the imposition of the LDR would not violate the EU's WTO obligations.

The three-week notice period will be reviewed after two years. If the review confirms that the three-week notice period has led to significant stockpiling, the Commission will be obliged to propose reducing the notice period down to one week. However, if there is no stockpiling, the Commission may propose to extend the notice period to four weeks.

2.4 Maritime loophole

The negotiators agreed on how to close the so-called “maritime loophole”. Anti-dumping measures will now also apply to goods intended to be used in the maritime exclusive economic zones or the continental shelves of the EU Member States. The Commission will draft an implementing act that would provide for the collection of the duties on goods, such as pipes and tubes or certain steel, used in significant quantities by the companies operating in these areas. This effectively amounts to an extension of the customs territory of the EU for the purposes of imposing anti-dumping duties.

2.5 Conclusion

The likely result of the “modernisation” package is that it will become easier for the European Commission to impose higher anti-dumping duties more quickly. The limited provisions on transparency are unlikely to be of any real benefit to importers.

The political agreement will enter into force once the Council and the European Parliament have formally approved the amendments to the EU anti-dumping rules. The Council endorsed the agreement on 20 December 2017, and the vote at the European Parliament’s trade committee is likely to take place on 23 January 2018. While both institutions theoretically have the right to propose amendments to the current agreement, the negotiators agreed to refrain from doing so.

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