

**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 (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

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) 2016/1036<sup>1</sup> 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) 2015/755<sup>2</sup>, 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 or *to the terms and conditions set out in protocols and other instruments in accordance with which countries have acceded to the Marrakesh Agreement establishing the WTO*.

(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 occurs 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. It is further appropriate to clarify that when assessing the existence of significant distortions regard should be had, inter alia, to the potential impact of one or more 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; the lack of or the discriminatory application or inadequate enforcement of in relation to bankruptcy, corporate or property laws; wage costs are distorted; access to finance granted by institutions which implement public policy objectives or otherwise not acting autonomously from the state. It is further appropriate to provide that reports on distortions, which could potentially result in an anti-

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<sup>1</sup> 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).

<sup>2</sup> 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).

dumping investigation, describing the market circumstances concerning these instances in a certain country or a certain sector, should be issued or updated; that such reports and the evidence on which they are based should 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.

When assessing the existence of significant distortions, relevant international standards, including core ILO conventions and relevant multilateral environmental conventions, should be taken into account, where appropriate.

(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 direct or indirect 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. Domestic costs may also be used, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence

When data are sourced in representative countries and the Commission has to establish whether the level of social and environmental protection in such countries is adequate, the Commission will examine whether those countries comply with core ILO and relevant multilateral environmental conventions.

It is appropriate to clarify that, where the costs for a given exporter and producer are only partially distorted, including where a given input is sourced from different sources, the part of costs that is distorted should in any event be replaced by undistorted costs.

In the light of experience gained in past proceedings, it is appropriate to further clarify that, for the purposes of determining the existence of significant distortions, due account should be taken of all relevant evidence regarding the circumstances prevailing on the domestic market of the exporting producers, which has been placed on the file, and upon which interested parties have had an opportunity to comment including an opportunity for exporting producers to conclusively show that their domestic costs are undistorted. Where available, such evidence includes relevant assessment reports.

Indications as to the existence of significant distortions may also be proffered by all relevant stakeholders, including Union industry and trade unions. Such indications and the need to avoid any additional burdens for the Union industry, in using the anti-dumping instrument, in particular in view of the economic and trade specificities of SMEs, should be considered when deciding on producing or updating the relevant reports.

(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 for existing measures, 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 methodology of paragraphs (1) to (6a) of Article 2 shall not replace the original methodology until 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) 2016/1037<sup>3</sup>, 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:

(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 exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks, subject to the following rules.

The sources the Commission may use include:

- 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 data are readily available; [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];

- if considered appropriate by the Commission, undistorted international prices, costs, or benchmarks,

[or

- domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence, including in the framework of the provisions on interested parties in point (c)]

Without prejudice to Article 17, this assessment shall be done for each exporter and producer separately.

The constructed normal value shall include an undistorted and reasonable amount for administrative, selling and general costs and for profits.

(b) Significant distortions within the meaning of point (a) are those distortions which occur when

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<sup>3</sup> 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).

reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces as they are affected by substantial government intervention. In assessing the existence of significant distortions regard shall be had, inter alia, to the potential impact of one or more 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; the lack of or the discriminatory application or inadequate enforcement of in relation to bankruptcy, corporate or property laws; wage costs are distorted; access to finance granted by institutions which implement public policy objectives or otherwise not acting autonomously from the state.

(c) When the Commission has well-founded indications of the possible existence of significant distortions as referred to in point (b), and when appropriate for the effective application of this Regulation, a report describing the market circumstances as per point (b) in a certain country or a certain sector shall be produced and regularly updated. Such reports and the evidence on which they are based shall be placed on the file of any investigation relating to that country or sector. Interested parties shall have ample opportunity to rebut, 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. In assessing the existence of significant distortions the Commission shall take into account all the relevant evidence that is on the file of investigation.

(d) The Union industry may rely on the evidence in the report referred to in point (c), where meeting the standard of evidence in view of Article 5(9) in order to justify the calculation of the normal value when filing a complaint in accordance with Article 5, or a request for a review in accordance with Article 11.

e) Where the Commission finds that there is sufficient evidence pursuant to Article 5(9) showing significant distortions within the meaning of subparagraph (a) and decides to initiate an investigation on that basis, the notice of initiation shall specify this fact. The Commission shall collect the data necessary to allow the construction of the normal value in accordance with subparagraph (a).

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 determining normal value pursuant to subparagraph (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. Any evidence regarding the existence of significant distortions can only be taken into account if it can be verified in a timely manner within the investigation, subject to Article 6(8).

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

(7) 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 an appropriate representative 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.

The appropriate representative country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection, and in particular cooperation by at least one exporting producer in that country. 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. Account shall also be taken of time-limits; where appropriate, an appropriate representative 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 country envisaged and shall be given 10 days to comment.

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

Where existing anti-dumping measures are based on a normal value calculated pursuant to the former Articles 2(7)(a) or 2(7)(b), the methodology of paragraphs (1) to (6a) of Article 2 shall not replace the original methodology used for the determination of the normal value until the date on which the first expiry review of these measures, following the entry into force of Regulation ..., is initiated. In accordance with Article 11(2), those measures shall remain in force until the review is completed.

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

Where existing anti-dumping measures are based on a normal value calculated pursuant to the former Articles 2(7)(a) or 2(7)(b), the methodology of paragraphs (1) to (6a) of Article 2 shall not replace the original methodology used for the determination of the normal value until the date on which the first expiry review of these measures, following the entry into force of Regulation ..., is initiated. In accordance with Article 11(2), those measures shall remain in force until the review is completed.

- (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.

- (6) Article 23(1) is replaced by the following text:

The Commission shall, with due regard to the protection of confidential information within the meaning of Article 19, present an annual report on the application and implementation of this Regulation to the European Parliament and to the Council. The report shall include information about the application of provisional and definitive measures, the termination of investigations without measures, reinvestigations, reviews, significant distortions and verification visits, and the activities of the various bodies responsible for monitoring the implementation of this Regulation and fulfilment of the obligations arising therefrom.

- (6) Article 23(2) is replaced by the following text:

The European Parliament may invite the Commission to an ad hoc meeting of its responsible committee to present and explain any issues related to the implementation of this Regulation. It may also, inter alia on the basis of the report pursuant to paragraph 1 and the presentation and explanations of the present paragraph, communicate any relevant considerations and facts to the Commission.

#### *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. All interested parties shall be given additional and sufficient time 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,