BUSINESSEUROPE
POSITION PAPER

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MODERNISATION OF TRADE DEFENCE INSTRUMENTS

1. Increased transparency and predictability

Increased transparency and predictability can benefit all parties involved. BUSINESSEUROPE supports issues that benefit all stakeholders and makes for a balanced set of instruments to defend companies against unfair trade practices by third countries. The European Union already has one of the most technical and far-reaching TDI systems and must not be weakened. Furthermore, additional transparency measures should not affect the timelines.

1.1 Pre-disclosure / Advance notice

Early disclosure could increase transparency and predictability. Interested parties could determine that procedures and calculations are correct – a check on the validity of the calculations to avoid mathematical errors. However, there is a risk of circumvention through stockpiling which would ultimately undermine the purpose of anti-dumping measures and lead to distortions in the market. BUSINESSEUROPE believes that three weeks should be the maximum amount of time for early disclosure.

1.2 Advance notice of the non-imposition of provisional measures

The proposal that the Commission informs interested parties in good time prior to the expiry of the nine-month deadline, in cases where the imposition of provisional measures is not envisaged, could indeed increase transparency. However, the sentence "in good time" is too vague; we believe three weeks should be the limit.

1.3 Activities of the Anti-dumping/Anti-subsidy Advisory Committee

The proposal that DG TRADE sends a summary document about the proposed measures to interested parties at the same time as the documents for consultation on provisional and definitive anti-dumping/countervailing duty measures are sent to the ADC/ASC could increase transparency and therefore would be in the interest of stakeholders. However, it also risks intensifying lobbying and threats of retaliations to the Commission, Member States and companies at the critical stage of provisional measures.

1.4 Shipping clause

Concerning the proposal not to impose provisional measures within a period of around three weeks after the sending of the pre-disclosure, while we understand the concerns of the importers regarding shipments in transit, BUSINESSEUROPE believes that the creation of such a shipping clause could lead to increased dumping. It is important to

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bear in mind that in this period of around three weeks, though the provisional measures have not yet been applied, it has been verified that dumping is taking place and hence there is a serious risk of aggravating the injury to EU industry.

Certain importers and user industries represented by BUSINESSEUROPE and its members are in favour of the shipping clause.

1.5 Injury margin

BUSINESSEUROPE welcomes the fact that the Commission envisages drafting and publishing guidelines regarding the calculation of the injury margin. Guidelines on current practices would increase transparency. However it is important to stress that the purpose of the guidelines should be to explain existing practices and not to introduce possible changes to the methodologies applied when calculating the injury margin. The most recognizable methodology is to set the profit rating according to the profits actually achieved in the non injurious periods. BUSINESSEUROPE should be closely involved in the process of drafting the guidelines.

1.6 Analogue country

BUSINESSEUROPE welcomes that the Commission envisages drafting and publishing guidelines regarding the choice of analogue country. The concept of analogue country is crucial as it can have a significant impact on the calculation of dumping margins. BUSINESSEUROPE supports the idea of guidelines as they can improve transparency, provided that it builds on examples from past cases and is balanced. BUSINESSEUROPE should be consulted on the drafting of the guidelines.

1.7 Union interest test

BUSINESSEUROPE welcomes that the Commission envisages drafting and publishing guidelines regarding the Union interest test. BUSINESSEUROPE should be consulted on the drafting of the guidelines. As a general point on guidelines, we feel they should codify existing practices, and not introduce substantial changes or changes inconsistent with current practices.

1.8 Expiry reviews

BUSINESSEUROPE should be consulted on the drafting of the guidelines.

2. Fight against retaliation

Companies are faced with retaliation and this is a very serious concern for BUSINESSEUROPE. All care must be taken to protect EU producers using legitimate trade defence tools against retaliation. In addition, the Commission should protect EU companies/industries not linked to a case that may be subject to retaliation or threats by third-country governments.

2.1. *Ex-officio* AD and CVD investigations

Concerning the proposal that the Commission initiates *ex-officio* investigations in situations where there is threat of retaliation, we would like to underline that the Commission already has the power to initiate *ex-officio* investigations yet hardly ever does so. BUSINESSEUROPE believes that in cases of threat of retaliation it is important that the Commission takes the initiative to launch *ex-officio* – we therefore support this idea, especially for anti-subsidy investigations where the threat of retaliation is especially high.

2.2 Obligation to cooperate in *ex-officio* investigations

BUSINESSEUROPE believes the Commission should strongly encourage companies to cooperate, however, we do not believe that sanctions are the right tool in case of non-cooperation. Therefore, we consider any type of sanctions inappropriate in cases of non-cooperation.

Ex-officio investigations with mandatory cooperation will ensure that third countries cannot divide the EU and threaten retaliation to certain companies over others. This will strengthen the EU's trade defence instruments.

3. Effectiveness and enforcement

The current instrument is already highly technical, professional and balanced. With some issues going beyond the WTO requirements, the EU has a unique and strong TDI system. This instrument must not be weakened. There are elements that could be further improved, mainly regarding raw materials distortions. It is necessary that in case of unfair raw materials practices, there should be provisions introduced within the TDI that deal with these distortions. This may be by abolishing the lesser duty rules or, in certain cases, or not granting MET status.

3.1 *Ex-officio* anti-circumvention investigations (Article 13)

Our members have experienced various types of circumvention practices

Circumvention is illegal and in cases where the Commission has sufficient evidence at its disposal, it should initiate *ex-officio* anti-circumvention investigations. The Commission should do everything to ensure circumvention practices do not happen or are stopped as soon as possible when they do.

3.2 Verification visits

BUSINESSEUROPE believes that the Commission should extend the length of the investigation only in those cases where it is necessary and where the issue of distortion is difficult to access. This prerogative should rest with the Commission.

3.3 Lesser duty rule

BUSINESSEUROPE is of the opinion that the Commission should not apply the lesser duty rule in cases of fraud, circumvention or subsidisation Given the fact that the EU

has a very strict state aid regime, unmatched anywhere else in the world, the lesser duty rule should not be applicable to anti-subsidy cases, where the injury is caused by the subsidy itself and the resulting market distortion. Therefore it seems appropriate not to apply the lesser duty rule in this case. Equally we believe the lesser duty rule should not apply in cases of fraud and circumvention. In general, fraud should preferably be dealt with through the legal system for criminal cases.

4. Facilitate cooperation

Our members have not experienced specific difficulties in cooperating in trade defence investigations. However, we are concerned that in some cases there is an apparent increase in opening expiry reviews, far beyond what is legally required. There are structurally distorted markets which warrant continued protection of the EU industry, especially when the latter has taken all necessary measures to adapt.

For companies that are importers or users it is sometimes difficult to react in the timeframe given. It takes time for the companies to get the information that a trade defence investigation is ongoing and that they have an interest at stake.

4.1 Time-limits: longer time-limits for users to register as interested party and to reply to the questionnaire

The Commission should not extend the deadlines for users only to make themselves known to the Commission and to submit questionnaire replies, because then all interested parties would not be treated equally. Giving more time for companies to react when an investigation is started will particularly help SMEs, which find the current timeframe challenging.

4.2 Simplification of refund procedures

Concerning the handling of refund applications and the proposal that they are reviewed with a view to facilitate such requests and to make such decisions more easily accessible to the public, we believe that a simplified refund procedure would help certain stakeholders to claim all or part of the duties paid under certain conditions. This simplification would be beneficial to users and importers and would obviate the need for an automatic reimbursement mechanism. Industry should be consulted on the process of facilitating this tool.

4.3 Small and medium-sized enterprises (SMEs)

TDI is complex and especially difficult for SMEs. BUSINESSEUROPE has supported and supports Commission initiatives to improve help to SMEs, such as an upgrade of the SME helpdesk. This should be the case for complaints and other interested parties as well as for SME exporters subject to abusive trade defence cases in third countries. However, this should not be a detriment to effectiveness of the rest of the TDI services.

5. Optimising review practice

5.1 Expiry reviews – reimbursement of duties paid if the investigation is terminated without renewal of measures

BUSINESSEUROPE is opposed to the proposed reimbursement of duties collected since the opening of the review investigation in cases where, after investigation, the measures are not prolonged. If the measures are not prolonged, then there might no longer be dumping, as a result the duties could be reimbursed. However, the same argument could be used to impose retro-active duties in the period preceding the provisional duties (as the investigation will establish effective dumping in this period). Union producers should be made aware of this fact and be facilitated to ask for registration of imports provided the conditions of the Basic Anti Dumping Regulation are met.

5.2 Expiry reviews combined with interim reviews

We do not see the added value in a second or any further expiry review of measures being combined with an interim review, in order to allow for the level of the duty to be changed if appropriate linking the two reviews automatically. It is up to the complainant(s) and the European Commission to decide if there is need to adapt the levels of duty. Duties should reflect the current dumping margins.

5.3 *Ex-officio* interim reviews

The Commission should systematically initiate interim reviews of measures when relevant anti-competitive behaviour has been sanctioned. Anti-competitive or cartel behaviour is illegal in any event, and the Commission should have the right to initiate interim reviews. However, there should be more clarity on this issue as there has been confusion between "concentration" and "collusion" or "abuse of dominant position" in the past.

6. Codification

6.1 Registration of imports *ex officio*

We believe that registration should also be possible on the initiative of the Commission ('*ex officio*'). The Commission should be able to initiate registration of imports, in all cases when the conditions for registration pursuant to the Anti-Dumping Basic Regulation are met.

6.2 Delete article 11(9) of the basic AD regulation and article 22(4) of the basic AS regulation

Deleting article 11(9) of AD may lead to the use of different methodologies in review investigations (i.e. product scope) which could negatively impact transparency and would give way to uncertainties with the relevant interested parties.

6.3 Ensure that exporting producers with a zero or *de minimis* dumping margin in an original investigation (as opposed to a review investigation) will not be subject to any review)

BUSINESSEUROPE considers that exclusion of exporting producers with zero or *de minimis* dumping margin is appropriate. However, it is obvious, that after initial investigation circumstances related to these particular companies might change. Therefore, the Commission is invited to organise a thorough control of these companies, in order to ensure that the anti-dumping duties are not avoided.

6.4 Provide the possibility for exemption also to related parties if they are not involved in circumvention practices

Companies that are not involved in circumvention practices should be exempted.

6.5 Clarify the definition of "a major proportion" of the Union industry

Article 4(1) refers to what constitutes the Community industry while article 5 (4) refers to both the minimum threshold of expressly supporting the complaint (25%) as to what constitutes the Community industry which is eligible to support the complaint (50%). Both aspects are important elements with regards to the injury assessment as well as standing. In view of transparency, it would be good to make clear what "major proportion" of the Union industry is. However, this will not be achieved by deleting the reference to article 5 (4), but rather by explicit mentioning what is meant by "major proportion" within article 4(1).

6.6 Sampling provisions should refer to Union producers and not to complainants, except for the standing test

As it is already Commission's practice to select samples not only from complainants but also from cooperating Union producers, it would be acceptable to replace the reference to complainants' within article 17. However, the reference should be made to supporting and/or neutral Union producers and not to Union producers which are against the investigation.

6.7 Clarify that the investigation of Union interest covers all Union producers and not only complainants

The Union interest should constitute not only the complainants, but also Union producers.

7. Any other areas where the EU's rules or practice should be updated

Where relevant and legally possible, the changes should be introduced as non-legislative changes to facilitate implementation.

Further issues that could be addressed

POSITION PAPER

1. Raw material distortions: It is absolutely necessary to take the opportunity of the TDI modernisation exercise to introduce provisions to deal with the distortions caused by unfair practices with regards to the raw materials. The issue relates not only to prices, but also to the availability and relative prices which, in the end, determines the EU industries' competitiveness.
2. Price undertakings: Improved transparency on price undertakings could be introduced to provide information to the interested parties within the Union and to the companies subject to measures.
3. Profit margins: The choice of profit margins could be adjusted to take into account segment specific profit margin and most suitable indicator rather than relying on an overall margin for dumping and injury calculation.
4. Application of article 7 of the basic regulation - relates to immediate action in case of extreme urgency after informing Member States.
5. Application of Article 7.5 of the basic regulation - Member states can request immediate intervention by the Commission regarding provisional duties.
6. Application of Article 10.4a and 10.4b – regarding retroactivity in case of a history of dumping over an extended period / or where the importer should have been aware of the extent of the dumping.
7. Standing**:** To have a standing, the industry needs to represent 25% of the industry. However, it is difficult for SMEs to share confidential data. It would be more appropriate if the association representing the industry could provide statistics on behalf of the sector instead of having data being collected by individual companies.
8. Evidence**:** To provide evidence, a period of six months is required during which the sector has to collect information. For less fragmented sectors this is an easy exercise, however, for a sector with lot of SMEs the data are difficult to be collected and might become obsolete if not collected within a specified timeframe.
9. Confidentiality: We welcome the possibility for companies to request confidentiality in the proceedings if they fear a direct retaliation. However, the confidentiality treatment in practice remains weak in some cases.
10. Sampling**:** Sampling is a difficult exercise for companies which need to complete the questionnaire and the data required. Ideally, a representative sample should comprise small, medium and large companies, however this is not always the case. Geographical representation has to be balanced and the real weight has to be considered (companies with a majority of extra-EU exports should not be sampled). Furthermore, the sample should only have the complainants or at least supporters.