



22 May 2017

## BusinessEurope's position on the Commission's legislative proposal for a EU Regulation on anti-dumping and anti-subsidy

### KEY MESSAGES

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The EU legislation should respect the following key principles: compliance with WTO and EU rules; objectivity of methodology, with market distortions determination based on technical criteria; effectiveness of TDIs in restoring a level playing field; workability for the industry, which means that no additional workload must be imposed on EU economic operators as compared to the current legislation. The level of protection for EU economic operators should not fall below the level of protection of the current methodology.

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While the Commission proposal abandons the presumption that certain countries are non-market economies, EU companies must be able to rely on the country or sector reports to provide *prima facie* evidence while filing a complaint for alleged dumping practices. SMEs that have few resources to provide the necessary evidence are particularly vulnerable.

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#### 1. Introduction

On 9 November 2016, the European Commission presented a legislative proposal for a regulation of the European Parliament and the Council amending the basic anti-dumping and anti-subsidy regulations. The proposal was presented following the publication of the Communication "For a robust Trade Policy".

The Commission's document proposes to change the methodology used to calculate the dumping margin (more specifically, the normal value) to capture market distortions linked to state intervention in third countries that conceal the true extent of dumping practices. Such methodology could potentially be used in investigations of producers from all WTO countries (it is "country-neutral").

As the current EU anti-dumping regulation contains the legal presumption that specific countries are "non-market economies", China has already challenged the relevant provisions at the WTO. In specific, on 12 December 2016, China requested consultations at the WTO with the EU and the US based on existing legislation. Consultations have been concluded and a panel has been established to review the EU dumping methodology, following China's request. Since the request for consultations and pending the outcome of the proceeding, EU businesses are facing legal uncertainty. This must



be taken into account by the Council and the European Parliament when assessing the proposal presented by the European Commission.

## 2. Key principles

The European Union should aim at adopting legislation that respects the following key principles:

- compliance with WTO and EU rules.
- objectivity of the EU method: market distortions should be determined on the basis of objective and technical criteria, not on political considerations.
- effectiveness of EU TDIs; if, based on objective criteria, market distortions are determined, the TDIs should be effective and predictable to restore the level playing field.
- workability for the industry: no additional burden should be imposed on EU economic operators compared to the current methodology.

## 3. Main features of the Commission proposal:

### 3.1 **Determination of significant distortions triggers use of alternative methodology**

The new methodology will be **country neutral** as it could potentially be applied to all WTO members. For WTO members, the **normal value** will be determined on the basis of domestic prices.

In circumstances in which domestic prices and costs would be significantly distorted by e.g. state intervention and thus would not provide a reasonable basis to determine the normal value, a new provision, Article 2(6)a, stipulates that the normal value would instead be constructed on the basis of costs of production and sale reflecting undistorted prices or benchmarks. Therefore, the **trigger** for using the alternative methodology would be the **determination of significant distortions**, made by the Commission, which may issue reports for countries or sectors.

“**Significant distortions**” may be deemed to exist, when reported prices or costs “are not the result of free market forces as they are affected by government intervention”. In determining “significant distortions”, several criteria will be considered, such as *inter alia*, undistorted international prices, costs, or benchmarks, or corresponding costs of production and sale in an appropriate representative country [...].

### 3.2 **Establishing the link between market distortions and a given product**

At the start of the AD investigation, i.e. at complaint stage, complainants may rely on the horizontal and/or sectoral principles outlined in the reports and other documents/reports. Once the investigation is launched, the Commission must establish whether a **link** between the horizontal and/or sectoral principle (“significant distortions”) and the product under investigation can be found. This needs to be determined by the EU Commission in a specific period of time during the investigation.

This means upon the ordinary course of trade tests, costs and prices will be verified, and if the horizontal and/or sectoral distortions affect the cost of production (inputs), Selling,



General & Administrative expenses (SG&A) and the profit levels, they will be adjusted accordingly. It is important to ensure that only if the third-country producers during the investigation period can prove that the horizontal and/or sectoral distortions do not affect one or more cost items or prices, those undistorted input items can be taken into account. If new distortions are identified during a review for a measure that was calculated on domestic prices, the calculation methodology could be re-constructed on the basis of undistorted prices or benchmarks.

### 3.3 Reports and burden of proof

According to the Commission, these provisions would invoke no greater burden on industry than in current AD investigations and the legal standard for prima facie evidence on both dumping and injury required at complaint stage will remain the same. Still, the burden of proving “significant distortions” falls on the EU.

As it is the case today, it will be for the EU industry to file complaints. Domestic producers may be able to rely on the reports by the Commission to substantiate their case both when filing a complaint and when requesting a review of a measure in force. It is important to ensure that reports lead to a conclusion on the existence of significant distortions in a certain country or sector. While the Commission proposal abandons the presumption that certain countries are Non-Market Economies, EU companies must be able to rely on the country or sector reports to provide prima facie evidence while filing a complaint for alleged dumping practices. SMEs that have few resources to provide the necessary evidence are particularly vulnerable. Interested parties will have the opportunity to supplement, comment or rely on the reports and evidence on which they are based.

Besides the use of reports, the new provisions for the basic regulation allow complainants to provide out of country data (such as reports by the World Bank, World Trade Organisation, International Monetary Fund, Organisation for Economic Co-operation and Development, International Labour Organisation, etc.) that may prove the existence of significant distortions. Independent studies would also be permissible.

## 4. Recommendations:

1. BusinessEurope would like to stress the importance that the determination of the existence of distortions be made by the Commission and that such determination, as proposed by the Commission, be made on the basis of a **non-exhaustive list of technical and objective criteria** and on the five criteria currently used by the EU to reference a country as a market economy. This would ensure that political considerations would not have a bearing on the determination of “significant distortions” and that TDIs will be effective in addressing distortions stemming from unfair practices unforeseen at the time of adoption of legislation.
2. As far as the **reports** are concerned, a number of aspects should be clarified further:
  - a) The European Commission should adopt reports on the basis of **technical considerations** to ensure **objectivity**. Reports must be available at the time the legislation enters into force.

Clear timelines for “supplementing, commenting or relying on the report” in each investigation should be provided to interested parties.



- b) **Clarification on how regularly** the reports will be updated to reflect the situation on the ground and on which bases this decision will be made

Unclear language may lead to uncertainty in the procedure e.g. Article 1 (1) (e) "The parties of the investigation shall be informed *shortly* after the initiation about the relevant sources...". This leads to legal uncertainty and may give rise to divergent interpretations and unwanted litigation. Reports should meet the demands of the EU industries, be made available timely and be kept up to date to best reflect the current market situation.

- c) Under what **circumstances** reports will be adopted.

BusinessEurope calls for the alternative methodology/ sources used to determine costs and prices be used in all cases when the reports demonstrate the existence of market distortions, not only when they are "readily available". The wording in Article 1 (1) should not leave room for different interpretations.

3. It has to be ensured that **the burden of proof for significant distortions will not shift towards the EU industry**. BusinessEurope welcomes that the EU industry may rely on the country or sector reports to provide *prima facie* evidence while filing a complaint for alleged dumping practices. However, no additional workload must be imposed as compared to the current legislation.
4. It has to be ensured that the anti-dumping measures resulting from the application of the new methodology would be no less effective than measures adopted today under the current methodology.
5. The EU-Commission should coordinate its course of action with major international trade partners.

## **5. Conclusions:**

With this legislative proposal, the Commission tries to strike the balance between a) aligning the EU basic Anti-Dumping Regulation with WTO rules and b) equipping the EU with effective Trade Defence Instruments.

BusinessEurope considers this approach a first step for a legislative framework and calls on the Council and the European Parliament to ensure legal certainty and clear procedures to avoid any additional burden is imposed on EU industries compared to current legislation.

Economic operators need legal certainty, and with the basic legislation currently under challenge at the WTO, BusinessEurope considers it important to have a legal framework in place soon.