

Proposal for a Council Regulation further amending Council Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Communities

(2002/C 331 E/31)

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(Submitted by the Commission on 19 August 2002)

EXPLANATORY MEMORANDUM

Council Regulation No 384/96 on the protection against dumped imports from countries not Members of the European Community (the 'Basic Regulation') requires amendment for two reasons.

First, in the interests of transparency and legal certainty, most of the amendments provide for clarifications to the Basic Regulation in the light of experience gained up to now in current anti-dumping practice.

The amendments provide for a clarification of the terms 'related parties' (for the purpose of determining dumping) and 'commissions' and provide guidance of the content of a 'particular market situation' that does not permit a proper comparison. They also give indications as to what has to be done when certain costs are distorted. Another amendment concerns the use of facts available; where it is clarified that also prices on the world market or other representative markets can be used.

They also specify the criteria for granting 'individual treatment' to certain exporters from non-market economy countries and countries in transition, i.e. an individual rate of duty (calculated by comparing the normal value for the non-market economy country as a whole with the exporter's individual export prices).

Second, in view of the significant progress made by the Russian Federation towards the establishment of market economy conditions, as recognised by conclusions of the Russia-European Summit on 29 May 2002, it is appropriate to grant the Russian Federation full market economy status. Consequently, this country will be taken out of the list of countries with an economy in transition, i.e. countries to which market economy status is granted on a company-by-company basis. This means that normal value for Russian exporters and producers will be established in accordance with the provisions of paragraphs 1 to 6 of Article 2 of the Basic Regulation.

THE COUNCIL OF THE EUROPEAN UNION,

dumped imports from countries which are not members of the European Communities.

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission,

Whereas:

(1) By Regulation (EC) No 384/96 of 22 December 1995 ⁽¹⁾, the Council adopted common rules for protection against

(2) It is expedient to give guidance as to when parties may be considered as being related for the purpose of determining dumping. Article 143 of Commission Regulation (EEC) 2454/93 of 2 July 1993 concerning the implementation of the Community Customs Code ⁽²⁾ contains such a definition which reflects the definition set out in Art. 15.4 of the Agreement on the Implementation of Article VII of the General Agreement on Tariffs and Trade 1994 ⁽³⁾.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 2238/2000 (OJ L 257, 11.10.2000, p. 2).

⁽²⁾ OJ L 253, 11.10.1993, p. 1 as last amended by Regulation (EC) No 444/2002 (OJ L 68, 11.3.2002, p. 11).

⁽³⁾ OJ L 336, 23.12.1994, p. 119.

- (3) Article 2(3) of Regulation (EC) No 384/96 stipulates, *inter alia*, that where because of a particular market situation sales of the like product do not permit a proper comparison, the normal value shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country. It is prudent to provide for a clarification as to what circumstances could be considered as constituting a particular market situation in which sales of the like product do not permit a proper comparison. Such circumstances can, for example, occur because of the existence of barter-trade and other non-commercial processing arrangements or other market impediments. As a result market signals may not properly reflect supply and demand which in turn may have an impact on the relevant costs and prices and may also result in domestic prices being out of line with world-market prices or prices in other representative markets. Obviously, any clarification given in this context cannot be of an exhaustive nature in view of the wide variety of possible particular market situations not permitting a proper comparison.
- (4) It is considered appropriate to give some guidance as to what has to be done if, pursuant to Article 2(5) of Regulation (EC) No 384/96, the records do not reasonably reflect the costs associated with the production and sale of the product under consideration, in particular in situations where because of a particular market situation sales of the like product do not permit a proper comparison. In such circumstances, the relevant data should be obtained from sources which are unaffected by such distortions. Such sources can be the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, any other reasonable basis, including information from other representative markets. The relevant data can be used either for adjusting certain items of the records of the party under consideration or, where this is not possible, for establishing the costs of the party under consideration.
- (5) Article 2(7) of Regulation (EC) No 384/96, as amended by Regulation (EC) No 905/98⁽¹⁾ and Regulation (EC) No 2238/2000⁽²⁾ provides, *inter alia*, that in case of imports from the Russian Federation, normal value may be determined in accordance with the rules applicable in market-economy countries for those producers which demonstrate that market conditions prevail in relation to the manufacture and sale of the product concerned. In view of the very significant progress made by the Russian Federation towards the establishment of market economy conditions, as recognised by the conclusions of the Russia-European Union Summit on 29 May 2002, it is appropriate to allow normal value for Russian exporters and producers to be established in accordance with the provisions of Article 2(1) to (6) of Regulation (EC) No 384/96.
- (6) Pursuant to Article 2(10)(i) of Regulation (EC) No 384/96, adjustments to normal value and export price are made when commissions are paid. It is prudent to clarify, in line with the consistent practice of the Commission and the Council, that such adjustments shall also be made, if the parties do not act on the basis of a principal — agent relationship, but achieve the same economic result by acting as buyer and seller.
- (7) Regulation (EC) No 384/96 does not indicate the criteria according to which an exporter for which a normal value is established pursuant to Article 2(7)(a) may be assigned an individual rate of duty calculated by comparing this normal value with the exporter's individual export prices. It is appropriate in the interests of transparency and legal certainty to lay down clear criteria for the granting of such individual treatment.
- Export prices of exporters falling under Article 2(7)(a) of Regulation (EC) No 384/96 may therefore be taken into account where the export activities of the company are freely determined, where ownership and control of the company are sufficiently independent and where State interference is not such as to permit circumvention of individual anti-dumping measures.
- Such individual treatment may be granted to exporters for which it can be demonstrated, on the basis of substantiated claims, that, in the case of wholly or partly foreign owned firms or joint ventures, they are free to repatriate capital and profits; that export prices and quantities and conditions and terms of sale are freely determined and that exchange rate conversions are carried out at the market rate. It shall also be demonstrated that the majority of shares belong to private persons and that State officials appearing on the Board of Directors or holding key management positions are either in a minority or that the company is sufficiently independent from State interference.
- (8) Article 18(5) of Regulation (EC) No 384/96 specifies that, in case of use of facts available, the information used shall be checked by reference to information from a number of sources. It is considered useful to specify that such sources can, where appropriate, also pertain to data concerning the world market or other representative markets.
- (9) In the interests of legal certainty, it is necessary to provide that these amendments shall apply as soon as possible to all new investigations.

⁽¹⁾ OJ L 128, 30.4.1998, p. 18.

⁽²⁾ OJ L 257, 11.10.2000, p. 2.

HAS ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 384/96 is amended as follows:

1. In Article 2(1), the following sentence is added:

'In order to determine whether two parties are associated account may be taken of the definition of related parties set out in Article 143 of Commission Regulation (EEC) 2454/93 of 2 July 1993 concerning the implementation of the Community Customs Code ⁽¹⁾.

⁽¹⁾ OJ L 253, 11.10.1993, p. 1.'

2. In Article 2(3), the following sentence is added:

'A particular market situation for the product concerned in the meaning of the preceding sentence may be deemed to exist, *inter alia*, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.'

3. In Article 2(5), the following sentence is inserted after the first sentence:

'If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.'

4. In Article 2(7)(b) first sentence, the word 'Russian Federation' is deleted.

5. In Article 2(10)(i), the following sentence is added:

'The term "commissions" shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis.'

6. Article 9(5) is replaced by the following:

'5. An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned.

Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:

- (a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;
- (b) export prices and quantities, and conditions and terms of sale are freely determined;
- (c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;
- (d) exchange rate conversions are carried out at the market rate; and
- (e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.'

7. In Article 18(5), the following sentence is added:

'Such information may include relevant data pertaining to the world market or other representative markets, where appropriate.'

Article 2

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Communities*.

It shall apply to all investigations initiated pursuant to Council Regulation (EC) No 384/96 after the date of entry into force of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.