

European Commission Launches Public Online Consultation on Possible Methodology Changes in Trade Defense Investigations Regarding China

On February 10, 2016, the European Commission (the “Commission”) launched a public online consultation to gather input from stakeholders on possible changes to the methodology for assessing dumping duties on goods originating from China.¹ This consultation takes place in the context of the impending expiry on December 11, 2016, of certain provisions of China’s Accession Protocol to the WTO, which essentially allowed the EU and other WTO members to treat China as a non-market economy (“NME”) in anti-dumping investigations. The consultation follows a College orientation debate on the treatment of China in anti-dumping investigations, on January 13, 2016.²

I. The Context : China’s Treatment as a Non-Market Economy in the EU

Under standard WTO and EU rules, in trade defense investigations concerning exporters from a market economy dumping margins are typically calculated by comparing the export price of a product to the EU with the domestic prices or costs of the product in the exporting country.³ By contrast, domestic prices and costs are not used in calculations for a NME. Instead, the Commission uses data from another market economy country (an “analogue” country) as a basis for determining dumping margins. This is a result of WTO rules which allow for special treatment for countries where market conditions did not fully exist at the time of their accession.⁴ The use of analogue country data typically results in higher duty margins for producers from NMEs.

Currently, in anti-dumping proceedings before the Commission, producers from China are *prima facie* treated as exporting from an NME. This treatment is based, in

¹ “Public online consultation concerning a possible change in the methodology to establish dumping in trade defence investigations concerning the People’s Republic of China”. Available at: http://trade.ec.europa.eu/consultations/index.cfm?consul_id=191

² See “College orientation debate on the treatment of China in anti-dumping investigations” at: http://europa.eu/rapid/press-release_MEMO-16-61_en.htm.

³ Article 2.2.2, Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994; Article 2.6 of Regulation (EC) No. 1225/2009.

⁴ General Agreement on Tariffs and Trade (GATT) 1994, annex I, Ad. Article VI.

particular, on Article 15(a)(ii) of China's Protocol of Accession,⁵ which allows an importing WTO member to use a NME methodology regarding Chinese producers if such producers cannot clearly show that they are operating under market economy conditions. These provisions are reflected in the EU's anti-dumping legislation, namely, Article 2.7 of Regulation (EC) No. 1225/2009 (the "Basic Regulation").⁶ Thus, under current EU trade defense investigations, market economy treatment will be granted to a Chinese producer under investigation only if it is able to fulfill stringent criteria under Article 2.7(c) of the Basic Anti-Dumping Regulation.⁷ Although several other WTO Members⁸ are also considered as NMEs under Article 2.7 the case of China is particularly significant. China accounts for close to 80% of the trade defense measures currently applied by the EU in sectors as diverse as steel, bicycles, solar panels or ceramics.⁹

Article 15(a)(ii) of China's Protocol of Accession to the WTO will expire on December 11, 2016.¹⁰ As a result, the Commission is contemplating possible amendments to the Basic Regulation,¹¹ which may modify or entirely abolish China's status as an NME. Such amendments would require the approval of the Council and the European Parliament under the EU legislative procedure. While the Commission was initially expected to formulate its proposal by the end of 2015/ early 2016, it decided to launch an Inception Impact Assessment before determining its position.¹² The public consultation is a key part of this Impact Assessment.

⁵ Article 15, "Price Comparability in Determining Subsidies and Dumping", China's Protocol of Accession to the WTO. Available at: https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm

⁶ See Article 2.7 (a) and (b).

⁷ For example, the producer should show that business decisions and costs are made in response to normal market conditions and without significant state interference; there is a clear set of accounting records; and the production and financial situations of firms are not subject to significant distortions carried over from the former non-market economy system.

⁸ *I.e.* Vietnam, Armenia and Kazakhstan

⁹ See "Anti-Dumping/Anti-Subsidy Safeguard Statistics Covering the First Eleven Months of 2015, at: http://trade.ec.europa.eu/doclib/docs/2015/june/tradoc_153518.pdf

¹⁰ See Article 15(d) of China's Protocol of Accession to the WTO which states that "the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession".

¹¹ Regulation (EC) No. 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community. OJ L188/93? 18.07.2009. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:188:0093:0126:EN:PDF>

¹² See "Inception Impact Assessment" at http://ec.europa.eu/smart-regulation/roadmaps/docs/2016_trade_002_dumping_investigations_china_en.pdf

II. The public consultation

In the public consultation, the Commission is requesting input through an online questionnaire aimed at all stakeholders, including producers inside and outside the EU, trade associations, importers, EU entities with production facilities in China, consumer organizations, trade unions, NGOs, government institutions, private individuals, and academic institutes. The questionnaire calls for views on key issues such as the impact of potential changes on businesses, jobs, investment decisions, and trade distortive measures experienced in China, including state interference on prices and costs, preferential access to finance, differential tax treatment, local content requirements, state policies, export restrictions, and dual pricing.

Importantly, the consultation already provides a first indication of the Commission's mindset and the policy options that are being considered. Thus, the Commission acknowledges that removing China from the list of NMEs under Article 2.7 of the Basic Anti-Dumping Regulation *"is expected to result, on average, in lower dumping margins, because the standard methodology normally does not take into account the remaining distortions in the Chinese economy and/or other non-market economies"*.¹³ This, in the Commission's view, may *"render the EU's TDI less effective, i.e. dumped imports will continue to enter the EU market, which will negatively affect the EU industry in terms of output and may ultimately put jobs at risk"*. In order to ascertain the extent of the impact of applying the standard methodology in anti-dumping investigations concerning China, the Commission has commissioned an external study on this issue. The results of the study are expected to be available in May 2016.

Against this background, the consultation outlines three policy options:

- Leaving the EU legislation unchanged;
- Changing the current anti-dumping methodology (i.e. presumably changing China's NME status) with no additional measures;
- Changing the current anti-dumping methodology as part of a package with additional measures.¹⁴

¹³ While the consultation is triggered by the expiry of the specific WTO provision concerning China, it makes clear that the Commission may also envisage removing other countries from the list of NMEs.

¹⁴ See *"Open public consultation regarding the possible change in the methodology to establish dumping/subsidization in trade defence investigations concerning the Peoples' Republic of China"*. Available at: http://trade.ec.europa.eu/doclib/docs/2016/february/tradoc_154258.pdf at p. 2.

More specifically, four types of “additional measures” appear to be contemplated:

- Grandfathering for a limited number of years the trade defense measures already in place at the time the methodology is changed; this would presumably allow measures adopted before December 2016 to run their course (typically for a period of 5 years);
- Addressing significant distortions affecting costs/prices of exporters in the country of export (e.g. State-controlled companies, discriminatory policies, distortions on the costs of raw materials, State-sponsored access to funding) by rejecting the prices/costs of an exporter benefitting from such distortions;
- Disapplying the “lesser duty rule” (LDR), which serves to limit anti-dumping or anti-subsidy duties to the amount strictly necessary to prevent injury to EU industry by limiting the duty applied to the lower of the dumping margin and the injury margin; and
- Expanding the reach of anti-subsidy investigations to cover all other subsidy schemes found in the course of an on-going investigation, instead of limiting them to those specifically identified in a complaint.

III. Next Steps

The consultation period will run until April 20, 2016. A stakeholder conference will take place with the Commission in mid-March to further discuss the economic and social impacts of the potential changes. Subsequently, the Commission will collect and analyze all relevant evidence in order to draft an Impact Assessment (IA) Report. The draft will then be reviewed by the Commission’s Regulatory Scrutiny Board, which will issue an opinion on it. If the Board provides a positive opinion, the IA Report and the accompanying policy initiative, which may comprise one of the options listed above, can then proceed to the adoption process.

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If you would like assistance in making a submission to the Commission, or have any questions with respect to the issues addressed herein, please contact [François-Charles Lapr votte](#) or [Till M ller-Ibold](#) at the Brussels office of Cleary Gottlieb or any of your contact persons listed at <http://www.clearygottlieb.com>.

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