

# Position Paper



**FTA**  
Foreign Trade Association

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## **The WTO draft text on anti-dumping Good news for EU importers and retailers?**

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## THE WTO DRAFT TEXT ON ANTI-DUMPING GOOD NEWS FOR EU IMPORTERS AND RETAILERS?

### INTRODUCTION

The EU Anti-Dumping Regulation (the “Basic Regulation”)<sup>1</sup> is based upon the WTO Anti-Dumping Agreement (ADA) – indeed many articles use the same text. However, this has not prevented it from considerable criticism. In 2006 the Trade Commissioner, Peter Mandelson, initiated a Green Paper reform on the EU’s Trade Defence Instruments (TDI) legislation. Unfortunately, following significant political pressure by the more protectionist Member States and EU industry the reform was pulled in early 2008.

One of the main arguments raised by critics against the EU reform was that a reform of the EU’s TDI should only be applied following a revision of the WTO Anti-Dumping Agreement and indeed, in November 2007 such an exercise was initiated. On 19 December 2008, Ambassador Guillermo Valles Galmés who chairs the WTO Negotiating Group on Rules issued a new negotiating text for the ADA<sup>2</sup>. This was the latest attempt to collate the myriad of comments received from WTO members since the exercise began. The new text came with the announcement that it consisted of a “bottom-up approach” with draft legal language appearing only when there seemed to be some consensus of opinion. Furthermore, this text is by no means final and is intended to provide a basis for further discussions throughout 2009.

In this Paper we examine the text from the viewpoint of European importers and retailers, taking particular note of areas relating to transparency and predictability. It is not intended to be a critique of the ADA *per se* (and so it does not comment of those areas of the existing text that are considered to be a fault) – instead it focuses on the amendments proposed.

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<sup>1</sup> Council Regulation 384/96 (as last amended by Council Regulation 2117/2005)

<sup>2</sup> WTO document TN/RL/W/236 of 19 December 2008

## ARTICLE 2 - ZEROING

Although this is a term that is often used in anti-dumping, not everyone will be aware of its significance. For those that do not know, “zeroing” is a method of calculating the dumping margin (which has a direct effect on the level of anti-dumping measures) of a product exported from the country under investigation. For example, under current WTO rules, if a product with a domestic market price of €100 is exported in equal amounts at €100, €90 and €110, the export price margins would be €0, +€10 and -€10, and (overall) there would be no dumping margin. Under the “zeroing” method, any negative margin (i.e. the products exported at €110) is “zeroed” - so the export price margins would be €0, +€10 and €0, giving an overall dumping amount of +€10.

It is easy to see that zeroing unfairly distorts the dumping margin and inevitably leads to the conclusion that dumping has occurred. This allows the imposition of unfairly high anti-dumping duties.

The US is a strong supporter of this practice and often assigns very high duties as a consequence. However, since the WTO rules prohibit zeroing the Appellate Body has ruled repeatedly that it is in breach of its obligations to follow WTO rules. Nevertheless, discussions on allowing zeroing in a revised version of the ADA did take place under the current round of negotiations with the US leading the way.

Fortunately, there is strong opposition to zeroing by many WTO members and so opinions on its inclusion differed too widely to allow the proposal to progress. Considering the impact that anti-dumping measures have on European importers and retailers already *without the zeroing method*, we are pleased at this result and will continue to oppose its inclusion and support the Commission in its opposition also.

## ARTICLE 4 – EXCLUSION OF PRODUCERS

When we responded to the Commission's Green Paper exercise on the reform of its TDI legislation, we examined the possibility of including producers who import the product under investigation within the definition of “Community Industry”. Article 4(1)(a) of the Basic Regulation allows their exclusion but as the European Court of Justice has confirmed, the Commission has a certain level of flexibility in this respect<sup>3</sup>. The exclusion of such individuals allows complainants to reach the 25% standing threshold, which the Commission accepts as justification to opening an investigation, more easily. Unfortunately, there seems to be no consistency to the Commission's practice in this area<sup>4</sup>.

We were disappointed therefore to see that opinions on this proposal differed too widely between WTO members to allow any amendment to the ADA; some would prefer precise rules governing exclusion, others prefer exclusion on a case-by-case basis. Whilst we would, of course, prefer a rule which allows importers to import significant quantities, any consensus on this point would create greater certainty to a process which is too unpredictable for importers and exporters. We will continue to support any moves in this direction and hope that an agreement can be reached in future discussions.

That said, the added footnoted clarification is seen as a positive step toward greater transparency: *“The reasons underlying any decision by the authorities to exclude from the domestic industry producers that are related to the exporters or importers or are themselves importers of the allegedly dumped product shall be explained in the relevant public notices or separate reports required by Article 12.”*

## ARTICLE 5.5

Two amendments to the provision regarding notification of a request for an anti-dumping investigation (the “complaint”) to the government of the country in question introduce a greater level of transparency and predictability; *“...after receipt of a properly documented application and no later than 15 days before initiating an investigation, the authorities shall notify the government of the exporting Member concerned and shall provide it with the full text of the written application [with due regard to confidentiality]”*.

<sup>3</sup> Case C-156/87, *Gestetner Holding plc v Council*, 1990 ECR I-781

<sup>4</sup> This is discussed in more detail in our Paper *“The EU Commission's reform of TDI: Two years on: a re-assessment”*

Neither provision is currently provided for in the Basic Regulation – merely that the government should be notified and we trust that once they are included in the final version of the ADA text, the Basis Regulation will be suitably amended.

#### **ARTICLE 5.10BIS**

We have argued before<sup>5</sup> that it was intention of the WTO – following the conclusions of the Fourth Session of the Doha Ministerial Conference on 14 November 2001 – to prevent “chain complaints” by imposing a one year moratorium (on a further investigation) following a negative conclusion to an investigation. This initiative was strongly supported by the FTA.

Therefore, this addition to the ADA which reads: *“Except where circumstances have changed, the authorities shall not initiate an investigation where a previous investigation of the same product from the same Member initiated pursuant to this Article resulted in a negative final determination within one year prior to the filing of the application. If an investigation is initiated in such a case, the authorities shall explain the change in circumstances which warrants initiation in the notice of initiation or separate report provided for in Article 12.1.”* is welcomed.

If agreed, this would improve greatly the predictability of the anti-dumping process and one would trust that it would subsequently be incorporated within the Basic Regulation.

#### **ARTICLE 6.1.1BIS**

The Basic Regulation allows interested parties (e.g. retailers and importers, or their representatives such as the FTA) to questionnaires in order to take part in an anti-dumping investigation. However, it does not demand that the Commission should respond to those questionnaires – except when it is determined that the information received therein is insufficient.

The earliest opportunity for an interested party to see how the information it has provided has been considered by the Commission is when, approximately eight months later, provisional measures are imposed. There is no possibility to counter-argue any of the conclusions that are made by the Commission on which it bases its decision to impose provisional measures before those measures are applied.

The new article appears to address this shortcoming: *“Within a reasonable period of time after the receipt of the response to a questionnaire, the authorities shall make a preliminary analysis of that response. Any requests for clarification or additional information shall be directed to the interested party concerned in writing and in sufficient time for the authorities to consider timely responses thereto.”* and is welcomed as a positive improvement to the transparency of anti-dumping investigations.

However, it is regretful that a similar provision is not extended to responses by interested parties to provisional measures; currently, the Commission is obliged to do so only at the disclosure stage of definitive measures. At this point the interested party is normally given the minimum ten days in which to respond – effectively giving no possibility for its counter-arguments to be taken into consideration.

#### **ARTICLE 6 – INFORMATION REQUESTS TO AFFILIATED PARTIES**

The amount of information that is requested by the Commission from interested parties is often too extensive to provide within the time permitted. SMEs in particular often find that such requests are simply not possible to fulfil.

In addition, the Commission will usually conclude that a lack of response is an indication that those parties consider that they will be unaffected by any measures – which is rarely the case.

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<sup>5</sup> See our Paper “*Observations on the EU Anti-Dumping Regulation*”.

The additional burden of being determined non-cooperative if one does not provide information from affiliates one does not control simply adds to the restrictive nature of the anti-dumping procedure.

Therefore, it is regrettable to learn that no consensus could be reached on the text that was proposed in an earlier version of the negotiating round<sup>6</sup> that incorporated a provision which ensured that parties faced by such circumstances, would not be seen as “non-cooperating”. Whilst there was some WTO members supported its inclusion, others argued that it would encourage non-cooperation. The FTA disagrees with this sentiment and believes that the proposed amendment would make the system more accessible and encourage greater cooperation, rather than less. We hope it can be re-introduced in future negotiations.

#### ARTICLE 6.9

In this respect the Basic Regulation already deviates from the existing ADA insofar that it obliges interested parties *to request, in writing*, final disclosure of the facts and considerations on the basis of which it intends to recommend the imposition of definitive measures. This obligation places an additional burden on the interested parties. Since those parties are known to the Commission from the very outset of the investigation, it should be a simple matter to provide those parties with a report spontaneously.

The additional amendments that include a requirement that authorities should provide this disclosure in writing is a positive step that increases transparency; *“The authorities shall, before a final determination is made, provide all interested parties with a written report of the essential facts under consideration which they intend will form the basis for the decision whether to apply definitive measures.”*

Finally, when an interested party wishes to respond to the aforementioned disclosure, Article 20(5) of the Basic Regulation sets a deadline of “at least 10 days” - which the Commission often takes as being the only deadline permitted. The new ADA text adds that *“Interested parties shall have 20 days to respond to this report and the authorities shall address such responses in their final determination.”* This amendment is welcomed and we look forward to it being introduced to the Basic Regulation.

#### ARTICLE 6.9BIS

Determining *how* the Commission has calculated the dumping margins in any particular case is complicated by two factors: (i) the non-transparent nature of anti-dumping investigations *per se* and (ii) the significant amount of discretion that is provided by the Basic Regulation to calculate such<sup>7</sup>.

The proposed new text places an obligation on authorities to disclose specific information regarding the calculation of such: *“The authorities shall, normally within seven days after giving public notice of a final determination...disclose to each exporter or producer for whom an individual rate of duty has been determined the calculations used to determine the margin of dumping...[and shall provide]...a detailed explanation of the information used, the sources of that information and any adjustments made to the information prior to its use in the calculations. The disclosure and explanation shall be in sufficient detail to permit the interested party to reproduce the calculations without undue difficulty.”*

The FTA welcomes this as a significant improvement on the current text which, if agreed and incorporated within the Basic Regulation, will provide a much needed greater level of transparency. However, it would be preferred if such information could be provided before the final determination and that the same provision be applied to decisions taken at the provisional measures stage.

#### ARTICLE 6.10.3

In a similar vein, when an investigation is limited to sampling, the reasons behind why such sampled was carried out and the manner in which it conducted, is also unclear.

<sup>6</sup> WTO document TN/RL/W/232 of 28 May 2008

<sup>7</sup> For more details see our Paper “EU Anti-Dumping Measures: How they are calculated and applied”

The proposed text requires authorities to: “...*explain, in their public notices...the basis for their conclusion that it was impracticable to determine an individual margin of dumping for each known exporter or producer, the reasons for the specific selection made and the reasons why an individual margin was not determined for any exporter or producer not initially selected who submitted the necessary information in time for that information to be considered during the course of the investigation.*”

The FTA supports this additional requirement. It should engender greater attention to detail and ensure that the decisions taken are not based on extraneous criteria.

### ARTICLE 6.13

Although the Basic Regulation does not expressly demand such, the Commission will commonly provide assistance to interested parties having difficulties completing the requests for information (“questionnaires”). However, as there is no legislative requirement to demand such a service, such assistance can not be guaranteed. The complicated nature of such questionnaires and the extent of the information that is often required, invariably means that many interesting parties, in particular SMEs, do encounter difficulties in their completion.

Therefore, the FTA welcomes the amendment to Article 6.13 of the ADA (underlined): “*The authorities shall take due account of any difficulties experienced by interested parties, in particular small companies, in supplying information requested, and shall provide any assistance practicable, including by responding in a timely manner to requests for clarification of questionnaires.*” We hope that it can be agreed upon and incorporated into the Basic Regulation.

### ARTICLE 9 – LESSER DUTY

One area of its anti-dumping practice for which the Commission should not be criticised is in its use of the “lesser duty” rule whereby “*The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Community industry.*”<sup>8</sup>

It would be preferable to have the practice enshrined within the text of the ADA and so it is regrettable that delegations opinions were too divided for a consensus of opinion to be reached.

### ARTICLE 11 – SUNSET REVIEWS

Users of the anti-dumping system – notably EU industry – would like to see sunset reviews (otherwise known as “expiry reviews”) conducted as often as possible and there is good reason for this.

The Commission will generally allow itself the full 15 month period permitted to conclude such a review<sup>9</sup>. During this time the measures that were in place up to the date of normal expiry continue – thereby granting the applicant for the review a *de facto* extension of the measures in force. In addition, should an expiry review conclude that the continuation of duties is not necessary reimbursement of duties paid during the period of the review is not possible.

The FTA has previously argued that not only is the 15 month period too long and that nine months should be sufficient but that there is no justification for preventing any reimbursement of duties.

The *de facto* extension described above could be removed if reviews were conducted within the term of the measures and timed to conclude before normal expiry. Neither the Basic Regulation, nor the ADA seem to expressly deny this possibility, indeed the ADA says; “*The authorities shall review the need for the continued imposition of the duty...provided that a reasonable period of time has elapsed since the*

<sup>8</sup> Article 7(2) and Article 9(4) Basic Regulation

<sup>9</sup> The Basic Regulation deviates from the ADA in this regard since Article 11.4 of the ADA says that such reviews “...shall normally be concluded within **12 months** of the date of initiation of the review.” (emphasis added).

*imposition of the definitive anti-dumping duty...*” (either on their own initiative or upon request by any interested party).

There is also the issue of whether it should be permitted to continually extend measures by conducting one expiry review after another; arguably this does more harm to EU industry than good.

Therefore is disappointing to note that authorities’ opinions during the negotiations were too divergent to obtain a consensus on some of the ideas for reform. It is particularly disappointing to see that the text proposed by the Chairman in a previous version of Article 11.3.3<sup>10</sup>, regarding the requirement to conduct and conclude an expiry review within the term of the current measures, has been removed. In addition, the lack of support for an automatic termination of measures after a maximum 10 year period<sup>11</sup> (i.e. after one sunset review) is also regrettable.

#### **ARTICLE 12.1.1(ii)**

The Commission is in the practice of permitting the complainant requesting an anti-dumping investigation to remove a significant amount of information from the version of the complaint that interested parties have access to on the grounds of confidentiality. This can even extend to withholding the name of the complainant<sup>12</sup>. This practice makes it difficult for importers and retailers to defend their own interests

The additional text seen in this article appears to be a significant improvement to the requirements regarding disclosure by authorities: “A public notice of the initiation of an investigation shall contain...adequate information on the following: [...] (ii) the domestic like product and the domestic industry, including whether any domestic producers were excluded from the domestic industry, and the names of the applicant and of the domestic producers of the like product (or, if relevant, associations of producers) supporting the application and of other domestic producers of the like product insofar as they are known to the investigating authorities;”.

Though it is not clear whether requests for “confidentiality” may be applied to reduce the effectiveness of these requirements, it would seem to counteract yet another aspect of the lack of transparency that is all too typical in anti-dumping investigations. We hope that the final text, and subsequently the Basic Regulation, sees its inclusion.

#### **ANNEX I (9)**

Although, for the oft-used excuse of “confidentiality”, a full and transparent account of the Commission’s third country investigations is not easy to discover, there are worrying accounts that the manner in which such investigations are conducted inconsistently and differ from case to case.

Therefore, in another example of the increased level of transparency that this latest text seems to strive for, the requirements under this section are a welcome addition: “The investigating authorities shall disclose in the form of a written report their factual findings resulting from the on-the-spot investigation. In addition to the factual findings, the report shall describe the methods and procedures followed in carrying out the on-the-spot investigation. The report shall be made available to all interested parties in sufficient time for the parties to defend their interests, subject to the requirement to protect confidential information.”

The FTA has continually protested the lack of transparency that exists within the anti-dumping system and has argued that by its very nature it only serves to lend weight to allegations of poor practice. This new text should at least give the Commission the opportunity to counter any such claims.

<sup>10</sup> WTO document TN/RL/W/213

<sup>11</sup> c.f. WTO document TN/RL/W/232

<sup>12</sup> c.f. *Leather Shoes* (Council Regulation 1472/2006 – OJ [2006] L275/1) and the subsequent expiry review - OJ [2008] C251/21

### ANNEX III

The first article to this new Annex reads: *"The anti-dumping policy and practices of Members shall be subject to periodic review by the Committee."* From this it would appear that a system will be set up to ensure that the manner in which the Commission conducts anti-dumping investigations would be scrutinised and that any failings would be dealt with by the WTO.

Article 8 lists a number of issues that will be reviewed including: pre-initiation proceedings and practices, determination of export price and normal value, calculation of dumping margins, application of public interest (Community interest) and review investigations.

These reviews are due to start three years after the entry into force of the Doha Development Agenda and shall last for a five year period.

Unfortunately, Article 2 reads: *"The purpose of the review is to contribute to the transparency and understanding of Members' policies and practices in respect of anti-dumping. **The review is not intended to serve as the basis for enforcement of specific obligations** under this Agreement or for dispute settlement procedures, **or to impose new policy commitments** on Members."* (emphasis added). So it is, disappointingly, a mechanism without any real teeth.

However, the FTA is pleased to note that some work is being done to address the non-transparent nature of the anti-dumping system and any WTO governed review system that seeks to improve this is welcomed.

### CONCLUSION

The new text shows definite attention by the WTO towards the improvement of transparency. It also shows that efforts have been made to improve more controversial aspects, such as expiry reviews, that unfortunately failed to obtain a consensus of opinion amongst Member States.

The new text is a distinct improvement and we can only hope that subsequent negotiations do not dilute those improvements until they are rendered worthless.

For further information about the position paper, please contact:

Stuart Newman

[stuart.newman@fta-eu.org](mailto:stuart.newman@fta-eu.org)

Direct tel: + 32 2 741 64 04