



Brussels, XXX
[...] (2013) XXX draft

DG TRADE Working Document

DRAFT GUIDELINES ON UNION INTEREST

I. INTRODUCTION

1. The EU only imposes ant-dumping ('AD') or anti-subsidy ('AS') measures if they are not against the interest of the European Union.
2. Article 21 (1) 3rd sentence of Council Regulation (EU) No 1225/2009 ('Basic AD Regulation') and Article 31 (1) 3rd sentence of Council Regulation (EU) No 597/2009 ('Basic AS Regulations') respectively contain a presumption for the need to apply AD/AS measures unless Union authorities "can clearly conclude that it is not in the Community interest to apply such measures".
3. Based on the Institution's experience, these guidelines explain the operation of the Union interest test.

II. ALL INTERESTS OF EUROPEAN ECONOMIC OPERATORS ARE TAKEN INTO ACCOUNT

4. Under the first sentences of Article 21 (1) and Article 31 (1) of the basic Regulations, "a determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers".
5. The second paragraphs of these provisions add that "the complainants, importers and their representative associations, representative users and representative consumer organisations" may make themselves known and provide information to the Commission. In practice the economic operators located in the EU that would be affected by the outcome of the AD or AS investigation have standing under the Union interest test:
 - The complaining Union industry (individual companies as well as associations representing the complainants of an AD/AS case).
 - Other producers of the like product operating a production plant in the EU, and their associations who constitute part of the Union industry according to Article 4 of the Basic Regulation.
 - Individual traders and importers, including those related to exporters, and associations representing importers and traders.
 - Representative individual users, *i.e.* the downstream industry which uses the product under investigation for further processing, and representative associations of users.
 - Suppliers of inputs for the like product/product concerned, including their associations.
 - Representative consumer organisations¹ provided there is an objective link between the organisation's activities and the product under consideration.

¹ According to the Court, individual consumers have no standing (CFI, Case T-256/97, BEUC, [2000] ECR-II 101, paragraph 77).

6. The above list comprises different types of parties that are typically affected, but it is not exhaustive. Exporting producers of the product concerned have no standing under the Union Interest test as they are not located in the EU.

III. METHODOLOGY

7. The Union interest analysis is not a cost/benefit examination. It aims at identifying the potential effects of imposing or not the AD/AS measures for different interested parties. The analysis is prospective and is normally based on specific data relating to the investigation period (normally one year prior to the initiation of the investigation). It tries to project how the imposition or non-imposition of measures would impact on the economic operators in question.
8. Therefore, the Commission seeks information on the following questions in order to conduct the Union interest analysis:
 - How would the Union industry benefit from measures? Is it likely to maintain its price level and increase its market share as a consequence of the AD/AS measures? Or can it rather be expected to raise prices and maintain current market shares? Or will there be a combination of these two scenarios? What is the future perspective of the Union industry without injurious dumping/subsidisation? Are there high entry costs into the market so that re-entry of producers who previously left the market or entry of new producers would be unlikely?
 - Are there sources of supply of the product concerned from countries other than the one subject to investigation? Are there substitute products?
 - Would measures reduce effective competition on the Union market? Would they create or strengthen an oligopolistic/monopolistic market structure or a dominant position on the market?
 - How would measures impact on the business of importers and traders? How would measures impact on their value chains? What is the importance of the product concerned for the business activity of the importers/traders (*i.e.* only a minor part or a major share of their total turnover)? What are their profit margins? Could importers and traders pass on cost increases to their purchasers? Do importers and traders also trade the product from other sources including from Union producers?
 - How would taking measures / not taking measures affect the interests of the user industry of the like product/product concerned? Would measures result in a shortage of certain product types? How much would users' cost of production increase as a result of measures? Would measures affect the viability of users? Would measures negatively impact on their competitive position in export markets?
 - How would the upstream industry be affected by taking measures or not taking measures? Are they economically dependent on the Union industry? Do they also supply the exporters of the dumped/subsidised products?

- How would final consumers be affected by taking measures / not taking measures? Would their choice of products be significantly limited? Would they be exposed to significant price increases?
 - Is there a direct economic link between the product subject to investigation and other EU policies? Would the imposition or not of measures significantly undermine other established EU policy/policies in a verifiable way?
9. The analysis aims at making representative findings for different types of economic operators in question for which data is available. Individual companies providing data for the Union interest analysis should collectively represent a significant portion of the group in question. Otherwise, they should demonstrate that findings relating to individual companies are representative for the majority of the group in question.
10. Where data is available, the investigation also seeks to establish a cost ratio between the total production costs of each major downstream product and the cost of the product concerned. It then discusses the cost increase if measures are adopted. This calculation examines questions such as:
- Are the exporters and importers likely to fully pass on the duty to their customers or only a part thereof?
 - How is the Union industry likely to react as a result of AD/AS measures, *e.g.* will it rather increase prices or benefit from increased economies of scale?
 - Do users have alternative sources of supply, *e.g.* do they source the input product potentially subject to measures only from the country/ies concerned and/or also from sources within the Union or from countries not subject to investigation? Are there exporters of the product concerned that are not engaged in injurious dumping/subsidisation or that have only low margins? To what extent can users switch suppliers?
 - What are the profit margins of users? Will they be able to pass on any cost increases to their customers?

Experience has shown that the impact of measures is in most cases limited to the input product obtained from the country concerned. Price increases of the input product from other sources as a result of measures are much less likely.

IV. MEASURES ARE NOT TO BE IMPOSED IF THEY ARE CLEARLY NOT IN THE UNION INTEREST

11. Article 21 (1) 2nd sentence as well as Article 31 (1) 2nd sentence of the Basic Regulations enshrine "the need to eliminate the trade distorting effects of injurious dumping / subsidisation and to restore effective competition shall be given special consideration". Measures may not be applied where the authorities "on the basis of all information submitted, can clearly conclude that it is not in the Community interest to apply such measures" (3rd sentence of the two respective provisions).

12. These two parameters outlined above constitute a rebuttable presumption that AD or CVD measures are normally in the Union interest if injurious dumping or subsidisation has been found.
13. The standard to rebut this presumption is high. Measures would normally be against the Union interest if it can be established that the Union industry would not be able to benefit from such measures, *i.e.* that the industry does not have the potential to recover from injurious dumping/subsidisation and play a role in the Union market in terms of market share, production capacity, technology etc. Measures would also be against the Union interest if their adoption entails disproportionate negative consequences for the user industry of the product concerned. Proportionality is also applied in relation to possible negative consequences on importers, traders or consumers.
14. By way of example, measures may be found clearly against the Union interest in light of some or all of the following circumstances: the Union industry's market share is very small, the future perspective of the Union industry is unclear, duties amount to a multiple of the turnover of the Union industry, measures would limit consumer choice and the level of employment provided by the Union industry is low.
15. On the other hand, since the Union interest analysis is not a simple cost/benefit analysis, the imposition of measures is not automatically against the Union interest if such measures have negative consequences for importers, traders, users and / or consumers. Moreover, AD/AS measures are not intended to exclude the dumped or subsidised imports from the EU market, but to ensure that they compete on a non-dumped/subsidised or non-injurious price level (whichever is lower) with other suppliers on the EU market. Therefore, the mere fact that Union producers cannot replace the dumped or subsidised imports does not run *per se* against the Union interest.

V. UNION INTEREST CONSIDERATIONS MAY INFLUENCE THE SELECTION OF THE TYPE OF MEASURES

16. The appreciation of all the various interests taken as a whole under the first sentences of Article 21 (1) and Article 31 (1) of the Basic Regulations may also have an impact on the choice of measure. Considerations relating to the impact of measures may for example play a role in the decision whether an AD/AS duty should be imposed or an undertaking should be accepted. By contrast, Union interest considerations do not influence the level of duties. In other words, the duty rate or the minimum prices set in an undertaking cannot be changed because of Union interest considerations.

VI. RELEVANCE OF THE UNION INTEREST FOR DIFFERENT TYPE OF INVESTIGATIONS

17. Union interest is examined in all investigations initiated pursuant to Article 5 and 10 respectively. Moreover, it is examined in all expiry reviews initiated pursuant to Article 11(2) and 18 respectively². In interim reviews (see Article 11(3) and 19 respectively), Union interest is only examined if the scope of an investigation covers dumping/subsidies

² CFI, Case T-132/01, Euroalligies et al., [2003] ECR II-2359, paras. 40, 56-58.

and injury or if such review explicitly covers Union interest. In reviews, the past impact of existing measures is an important source of information.

VII. PROCEDURE FOR ESTABLISHING UNION INTEREST

18. The respective third sentences of Article 21 (1) AD Regulation and Article 31 (1) AS Regulation stipulate that the decision about the non-application of measures has to be taken 'on the basis of all information submitted'. Paragraph 7 adds that "information shall only be taken into account where it is supported by actual evidence which substantiates its validity".
19. Union interest findings thus need a solid factual basis and due process is important to establish the relevant facts. Parties invoking Union interest reasons must submit relevant evidence and other interested parties must have the possibility to review such evidence and to comment on it. In order to ensure due process, the respect of deadlines is necessary. The due process comprises the right to make submissions on Union interest, the right to inspect the submissions made by other parties and to respond to them, the right to request a hearing (provided the party sets out the reasons in terms of Union interest why they should be heard), the right to provide comments on the application of provisional duties, and the right to request disclosure of the facts and considerations on which final decisions are likely to be taken. If parties provide confidential information or data, they are also required to provide a non-confidential summary.
20. The Commission also seeks information and data relevant to the assessment of the Union interest, and facilitates the cooperation of parties. In addition to the interested parties that request a questionnaire within the deadlines, the Commission sends out questionnaires to parties it knows or can reasonably get to know via representative associations or other means, and who have standing under the Union interest test. The deadlines to complete questionnaires and provide comments are set out in the notice of initiation of the investigation. Questionnaire responses submitted by parties are typically verified on the spot by the Commission. If the number of interested parties is high, sampling is applied and only interested parties selected in the sample are requested to submit a questionnaire reply and accept an on-the-spot verification by the Commission.