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**DG TRADE working document**

**DRAFT GUIDELINES ON THE SELECTION OF AN ANALOGUE COUNTRY**

## I. LEGAL BASIS

1. Article 2 (7) (a) of Council Regulation (EC) No 1225/2009 on protection against dumped imports from countries not members of the European Community lays down how normal value shall be determined in the case of imports from **non-market economy countries (NME)**. In such countries market conditions, and in particular costs and prices, are not driven by market forces such as supply and demand, but they are distorted by state intervention in the economy. Consequently such costs and prices are not reliable for the purpose of determining normal value.
2. The footnote thereto explicitly refers to Azerbaijan, Belarus, North Korea, Tajikistan, and Turkmenistan. Drawing from the word 'including' in the footnote, this list is not exhaustive. Rather, it also contains at present Albania, Armenia, China, Georgia, Kazakhstan, Kyrgyzstan, Moldova, Vietnam and Uzbekistan, some of which are WTO members.
3. Under the cited provision "normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin".
4. The second subparagraph of Article 2 (7) (a) further specifies that "an appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market economy third country which is subject to the same investigation shall be used".
5. Given the complex economic assessment which must be dealt with within the strict time limits for investigations, the Court has confirmed that the institutions enjoy discretion in the choice of an analogue country. Judicial control is limited to the examination as to whether information contained in the file was considered with due care and that normal value was determined in an appropriate and not unreasonable manner<sup>1</sup>. The main method is to find an analogue country. Failing that, the stated alternative method for determining the normal value is to be determined 'on any other reasonable basis'. Where the Union institutions can make a choice of an analogue country, the Court expects from the institutions also to conduct such a choice<sup>2</sup>.

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<sup>1</sup> ECJ, Cases C-16/90, Detlef Nölle v. Hauptzollamt Bremen-Freihafen, [1991] ECR I-5163, paragraphs 12 and 13; C-26/96 Rotexchemie Internationale Handels GmbH & Co v. Hauptzollamt Hamburg-Waltershof, [1997] ECR I-2817, paragraphs 10 – 12.

<sup>2</sup> ECJ, Case C-338/10, Grünwald Logistik Service GmbH v Hauptzollamt Hamburg-Stadt, Judgment of 22 March 2012, nyr, paragraph 26.

## II. SELECTION CRITERIA

6. The correct choice of an analogue country is an important step in investigations as it has direct bearing on their outcome and specifically on the level of the duty. It is for the institutions, whilst taking into account the possible alternatives, to use its best efforts to find a third country in which the prices for a like product are determined in circumstances which are **as similar as possible** to those in the country of export, provided it is a market economy country<sup>3</sup>.
7. The Commission will consider a set of objective selection criteria in order to ensure the best possible choice. These criteria include:
  - (a) *The fact that products produced in the proposed analogue country are identical or similar in their physical characteristics and applications to those originating in the country concerned*

In this evaluation the same standards are applied as in a like product analysis. It is preferable that the products produced by the analogue country producers and the country concerned be as similar as possible. If there are minor differences in the product produced in the proposed analogue country and the NME, motivation must be given whether these differences may, if necessary, be dealt with in the investigation by way of appropriate adjustments to the domestic sales prices.

- (b) *The volume of domestic sales to independent customers in the proposed analogue country, in comparison with the exports of the product concerned from the non-market economy country*

The volume of domestic sales is generally considered to be representative if they amount to at least 5 % of the exports in question (Article 2 (2) 1<sup>st</sup> sentence of the Basic Regulation). Exceptionally, drawing from Article 2 (2) 2<sup>nd</sup> sentence of the Basic Regulation, a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned. This is the same test of representativeness carried out for exporting producers in market economy countries, involving a comparison of their domestic and export sales. However, the lack of a representative amount of domestic sales does not *per se* entail the rejection of the market economy country in question, as normal value can be constructed or based on export prices, as set out in the first paragraph of Article 2(7)(a).

- (c) *The size of the market and competition existing in the analogue country domestic market for the like product*

The fact that prices in the analogue country are the result of competition, either among local producers or between them and imports from other third countries are a factor

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<sup>3</sup> ECJ, Case C-338/10, Grünwald, see footnote 2, paragraph 21.

considered. The fact that a country has imposed trade defence measures on imports of the product from the origin in question, does not necessarily exclude its selection as analogue country, in particular if these measures comply with WTO rules.

*(d) The extent to which producers in the proposed analogue country are willing to cooperate with the Commission services*

The proposed analogue country can only be chosen if at least one local producer is willing to cooperate in the investigation.

### **III. OTHER CONSIDERATIONS**

8. In an anti-dumping proceeding concerning more than one country (including an NME and a market economy country), Article 2(7) of the Basic Regulation states that the latter shall be used as the analogue country, where appropriate. However, this is not automatic. In determining whether or not the market economy country also subject to the proceeding is appropriate in this instance, the criteria outlined above under heading II are taken into consideration.
9. The fact that one or more producers in the EU, including complainants, are related to a producer in a market economy third country does not prevent the latter from being chosen as the analogue country but care will be taken that such a relationship does not influence the result.

### **IV. PROCEDURE**

10. When lodging an anti-dumping complaint concerning imports from a non-market economy country, the complainant is expected to propose at least one analogue country to be able to demonstrate prima facie dumping, a list of companies producing the like product in the country proposed and other relevant information. This information is verified to the extent possible, including with the help of the Union Delegation in the country concerned. The proposed analogue country is then mentioned in the notice of initiation. Interested parties are given ten days to comment. At the same time, producers or their associations in the envisaged analogue country are contacted in order to ascertain their willingness to cooperate.
11. Comments from interested parties may be received and one or more alternative analogue countries may be proposed. In such instances these interested parties have to provide elements justifying their proposal as well as a list of companies in the country proposed. Substantiated information/proposals will be examined in the search for an appropriate analogue country.
12. The Commission has also an obligation to consider on its own initiative information available, since in an anti-dumping investigation, its role is not confined to making

findings on the basis of evidence provided by the parties to the investigation<sup>4</sup>. It may request Member States to supply information and carry out all necessary checks and inspections under Article 6(3) and (4) of the basic regulation.

13. The Commission may also change the analogue country during the course of an investigation for example, where cooperation in the first analogue country is too incomplete for the Commission to carry out the necessary verifications. Such change may occur before or after imposing provisional measures. When the analogue country is changed in the phase leading to definitive measures, interested parties will be notified of this change at the latest through general disclosure.
14. Cooperating producers in an analogue country will be subject to the same procedure as exporting producers in the non-market economy country concerned, involving questionnaires, confidential and non-confidential versions of the replies, deficiency letters and on-spot visits. All the information provided by producers in an analogue country is subject to the verification standards applied in all anti-dumping proceedings.
15. A non-confidential version of all the relevant exchanges on the selection of the analogue country, including letters and questionnaires sent to producers in potential analogue countries is placed in the file for inspection by interested parties.
16. The official decision on which country will be the analogue country is part of the decision on the imposition of provisional / definitive measures. The reasons for the choice of the analogue country are included in the regulation imposing measures.
17. In conducting reviews where dumping is examined (expiry and certain interim reviews), the producers in the analogue country which were used in the original investigation will be contacted with a view to using that country again, in so far as it remains appropriate.

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<sup>4</sup> ECJ, Case C-338/10, see footnote 2, paragraph 32.