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DG TRADE Working Document

**DRAFT GUIDELINES ON EXPIRY REVIEWS AND THE DURATION OF
MEASURES**

I. TRIGGER FOR AN EXPIRY REVIEW

1. An expiry review can be initiated before the end of the five-year period of duration of measures (see section VIII. below). Pursuant to Articles 11(2) and 18(4) respectively, of Regulation (EC) No 1225/2009 (Basic Anti-Dumping Regulation) and Regulation (EC) No 597/2009 (Basic Anti-Subsidy Regulation), the notice of impending expiry is published by the Commission in the Official Journal around nine months prior to the end of the five-year period. It specifies the latest date at which the request for expiry review can be lodged. The expiry notice will also highlight the possibility for interested parties to request an interim review in parallel to the initiation of the expiry review.
2. The Union industry has the right to request the initiation of an expiry review, based on sufficient evidence concerning the likelihood of continuation or recurrence of injurious dumping/subsidisation. To do so, the Union industry must demonstrate that it has sufficient support (standing) pursuant to Articles 5(4) and 10(8) respectively of the Basic Regulations. A request for the initiation of an expiry review must reach the Commission at the latest three months before the end of the five-year period.
3. Pursuant to Articles 11(2) and 18(1) respectively, of the Basic Regulations, the Commission can also open expiry reviews on its own initiative. However, the Commission would only do so in exceptional circumstances.
4. If the Commission decides to initiate an expiry review, a notice of initiation is published in the Official Journal prior to the expiry of the measures.

II. THE PROSPECTIVE NATURE OF THE LIKELIHOOD TEST

5. The key issue in an expiry review is whether, in case of a repeal of the measures, dumping/subsidisation and injury are likely to continue or recur. Therefore, a prospective analysis is applied. The focus of this analysis is on the future development of imports in terms of dumping/subsidisation, prices and quantities, and the situation of the Union industry, should measures be repealed. This prospective examination or forward looking analysis inevitably entails assumptions about and projections into the future.
6. While the test is prospective, the determination must be based on available facts. The Commission considers it appropriate that data for the review investigation period covers up to three years prior to the date of initiation of such a review. Conclusions concerning continuation or recurrence, should measures be repealed, are drawn from these data on the record and relating to these periods. However, the fact that e.g. there are no or only few dumped imports, or that the situation of the Union industry has considerably improved during this period, is only the first step in the analysis of the future situation, should measures be repealed. Such relative improvements do not *per se* mean that measures are no longer needed as dumping and injury might still be likely to continue or recur despite them.
7. Contrary to the concept of threat of injury pursuant to Articles 3(9) and 8 (9) respectively of the Basic Regulations, where the injury must be clearly foreseeable and imminent, no timeframe is indicated as to when the injurious dumping/subsidisation is likely to recur

should measures be repealed. Given the uncertainties to predict future market developments in the medium-term, the Commission considers that a one-to-two year period after a possible repeal is an appropriate timeframe.

8. The mere possibility that dumping and injury might continue or recur is not sufficient to justify an extension of the measures. According to the case-law, likelihood is a higher threshold than the mere possibility¹. Measures can thus be retained only if the review has shown that their expiry would create conditions that would encourage the continuation or recurrence of dumping/countervailable subsidies and injury².

III. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF DUMPING

(a) Continuation of dumping

9. If it is established that there is a continuation of dumping for significant quantities during the review investigation period, the Commission will usually conclude that such dumping would continue if measures were repealed.
10. However, exceptionally, various specific market circumstances may prevent such a conclusion: if for example, in the absence of the AD/AS duty, the exporting producer might be able to raise its export prices above the normal value, or if the price level of the like product in the Union is higher than the normal value, continuation of dumping may be denied.

(b) Recurrence of dumping

11. The question of likelihood of recurrence of dumping normally arises in cases where exports of the product concerned have ceased after the imposition of measures, decreased to very low levels, or continued at prices above the dumping level. The focus of the likelihood of recurrence analysis is on likely prices and volumes of exports of the product concerned if measures were to be repealed. Both aspects are inter-related. This analysis aims at establishing whether dumped exports would resume in significant quantities as a result of the expiry. Consideration is given to the factors listed below, illustrated by examples in *italics*:
 - Relationship between prices of the product produced and sold in the Union and in the exporting country. *Lower prices in the Union could be an indication that the EU market is hard to contest and that exporters will dump if they resume exports to improve their chances of re-entering the market;*
 - Relationship between export prices to third countries and prices in the exporting country. *Lower export prices to 3rd countries prices could be an indication that exporters have the capacity to dump if they resume exports to the EU;*
 - Relationship between export prices to third countries and the price level in the Union. *Lower prices in third countries could be an incentive to redirect exports to the EU*

¹ Case T-188/99 *Euroalliage v. Commission* [2001] ECR II-1757, paragraph 42.

² Case T-188/99 *Euroalliage v. Commission* [2001] ECR II-1757, paragraph 43.

market at dumped prices as the Union market is more attractive; higher prices in third countries could discourage the resumption of dumping towards the EU market.

- *Prices of imports into the Union under inward processing schemes. Such prices can be a good indication as to price level in case of repeal of the measures. If they are lower than the prices in the exporting country this could be an indication of recurrence of dumping;*
- *Prices of imports subject to price undertakings or subject to variable duties. If prices reflect only the minimum price set in the undertaking or by the variable duty this could be an indication that such price levels are not the result of market forces but will automatically decrease should measures be removed;*
- *Unused capacities and stocks, planned capacity expansions in the exporting country. The existence of these elements is an indication of the likely recurrence of dumping as an exporter would be better off to sell even at dumped prices to the Union market than not using capacities and stocks at home.*
- *Ability to switch production from other products to the product concerned. This ability could be an indication of the possibility to increase import volumes at dumped prices. Much will depend on the particular market situation of this other product. For instance, a lower profitability for the other product as compared to the product subject to investigation might constitute an incentive for a switch;*
- *Circumvention and absorption practices (see Articles 12 and 13 of the Basic Anti-Dumping Regulation). The existence of such practises could be an indication of recurrence of dumping;*
- *Possible capacity of third country markets or the home market of the exporting country to absorb additional quantities. This could be a counter-indication of recurrence of dumping;*
- *Sustainability of dumping practises. Information showing that certain dumping practises are not sustainable could be a counter-indication of recurrence of dumping.*

However, none of the above mentioned factors can by itself give decisive guidance, as they are usually closely intertwined.

IV. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF SUBSIDISATION

12. In order to reach a positive determination of continuation or recurrence of subsidization, the benefit of a subsidy (or subsidies) must be likely to continue or recur, at a level above de-minimis, after the date of the expiry review decision.

13. The test for the likely continuation of subsidization applies in situations where subsidies still confer a benefit at the time of the expiry review. It requires that the benefit of a subsidy countervailed in the original investigation, or the benefit of a countervailable subsidy granted subsequent to the original investigation, must be likely to continue until after the date of the expiry review decision. In case of a recurring subsidy, the programme continues to confer benefits after the date of the expiry review decision. The determination also covers instances where existing subsidies are likely to be replaced by

new subsidies. In case of a non-recurring subsidy allocated over time, the allocation period must continue beyond the date of the expiry review decision.

14. Likelihood of a recurrence of subsidization is assessed in cases where subsidies are no longer being granted (or are granted at below *de-minimis* rates) at the time of the expiry review. It requires that the benefit of a subsidy countervailed in the original investigation, or the benefit of a countervailable subsidy granted subsequent to the original investigation, must be likely to recur within a reasonably foreseeable period of time after the date of the expiry review decision, and /or that new subsidies are likely to be granted after this date. Such recurrence would be "likely" in cases where e.g. a legislative proposal to introduce or reintroduce a subsidy programme has been made, where it is known that an exporter has applied for a subsidy, or where market conditions have changed, meaning that, for instance, currently non-subsidized interest rates from government banks are likely to confer again a benefit.

V. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF INJURY

15. As a result of the anti-dumping and/or anti-subsidy measures, the Union industry should be in a better situation than during the original investigation because measures should have limited or removed the injury. If there is still injury, the likelihood of continuation of injury is examined. In general however the focus of the injury analysis is whether there is a likelihood of recurrence of injury should the AD/AS measures be repealed.
16. The starting point of such analysis is the likely development of prices and volumes of dumped/subsidized imports as established under the continuation/recurrence of dumping analysis. This is followed by an examination of the situation of the Union industry during the review investigation period and the two or three years preceding such period. As a third step, the investigation examines whether or not the situation of the Union industry is likely to turn into a situation of injury, should measures be repealed. In order to assess whether continuation or recurrence of injury is likely, the injury indicators mentioned in Articles 3(5) and 8(5) respectively of the Basic Regulations should be examined³. On the basis of the development of the injury indicators during the review period, a projection is made as to how key factors would develop in case of a removal of measures. Key factors in this context are production, sales, prices and profits. If the projected development of such factors is negative, there is a likelihood of continuation or recurrence of injury.

VI. DE-MINIMIS THRESHOLDS

³ The injury factors listed in Articles 3(5) and 8(5) respectively of the Basic Regulations include: recovering from the effects of past dumping or subsidisation, the magnitude of the actual margin of dumping/countervailable subsidies, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

17. In cases where import volumes are negligible during the review investigation period, i.e. represent a market share of less than 1% (see Articles 5(7) and 10(9)⁴ respectively of the Basic Regulations), it is examined whether, if measures were to be repealed, it is likely that imports would increase to levels significantly above those reached in the review investigation period and certainly above the *de-minimis* threshold.
18. The *de-minimis* level of dumping is 2% and for subsidies 1% ad valorem, see Articles 9(3) and 14(5)⁵ respectively of the Basic Regulations. Measures will not be prolonged, if the likely margin of dumping/subsidisation would be below these thresholds, should measures be repealed.

VII. UNION INTEREST

19. Despite the absence of an explicit reference in the Basic Regulations, the Commission conducts a fresh examination of whether maintaining measures would be against the Union interest in the expiry reviews, as required by the Court⁶ (please see guidelines on Union interest).

VIII. DURATION OF ANTI-DUMPING AND ANTI-SUBSIDY MEASURES

20. Under Article 11 (1) of the Basic Anti-Dumping Regulation "an anti-dumping measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury". Similarly, Article 17 of the Basic Anti-Subsidy Regulation provides that a "countervailing measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the countervailable subsidies which are causing injury."
21. Articles 11 (2) and 18 of the Basic Regulations add that Anti-dumping (AD) and anti-subsidy (AS) measures shall expire five years from their imposition unless it has been determined following an expiry review that they should be maintained for another five year period. They can only be maintained if it is demonstrated in such review that there is a likelihood of continuation or recurrence of injurious dumping/subsidisation should measures be repealed.
22. As the words "only" and "necessary" in Article 11 (1) Basic AD Regulation and Article 17 Basic AS Regulation indicate, measures can be imposed for a shorter duration than five years in exceptional cases. This may be the case if the investigation shows that there are specific grounds or circumstances, such as a foreseeable and fundamental change in the market, clearly warranting such shorter duration.

IX. RELATIONSHIP BETWEEN INTERIM REVIEWS AND EXPIRY REVIEWS

⁴ In anti-subsidy investigations there is a second threshold for *de-minimis* imports for developing countries, i.e. less than 4%, see Article 14(4) of the Basic Anti-Subsidy Regulation.

⁵ The *de-minimis* threshold for subsidies for developing countries is 2% ad valorem.

⁶ CFI, Case T-132/01, Euroalliages et al. [2003], II-2359, paragraphs 40, and 56-60.

23. As set out in Article 11(7) of the Basic Anti-Dumping Regulation, when an interim review pursuant to Article 11(3) of the Basic Anti-Dumping Regulation is in progress at the end of the five year period, such review shall also cover the examination of the continuation or recurrence of dumping and/or injury. The Basic Anti-Subsidy Regulation contains a corresponding provision in its Article 22(3).
24. When the expiry of a measure is impending, any interested party may request an interim review in parallel (see paragraph 4). The combination of such an interim review with an expiry review can lead to changes in the level of the duty or the undertaking which can also be changed and adapted to the facts established in the review.

X. RESULT OF AN EXPIRY REVIEW

25. An expiry review investigation should normally be concluded within 12 months but cannot take longer than 15 months. The outcome of an expiry review is that measures are either maintained without any change, or measures are repealed. If the measure is maintained, it will normally apply for another five years, unless it is changed or repealed by a review during this period. There is no limitation in the number of expiry reviews that can be carried out with regard to an individual AS/AD measure.