



EUROPEAN COMMISSION

Brussels, 7.2.2012
COM(2012) 41 final

2012/0019 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**amending Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection
against dumped imports from countries not members of the European Community**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

On 28 July 2011, the Dispute Settlement Body of the World Trade Organisation ('DSB') adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report in the case 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China'¹ ('Reports').

In the Reports, it was found, inter alia, that Article 9(5) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ('the Basic Anti-Dumping Regulation')² was inconsistent with Articles 6.10, 9.2 and 18.4 of the WTO Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement. Article 9(5) of the Basic Anti-Dumping Regulation provides that individual exporting producers in non-market economy countries which do not receive market economy treatment pursuant to Article 2(7)(c) of the Basic Anti-Dumping Regulation will be subject to a countrywide duty rate unless such exporters can demonstrate that they meet the conditions for individual treatment laid out in Article 9(5) of the Basic Anti-Dumping Regulation ('the DSB finding on Article 9(5) of the Basic Anti-Dumping Regulation').

On 18 August 2011 the European Union notified the DSB that it intends to implement the recommendations and rulings of the DSB in this dispute in a manner that respects its WTO obligations.

On 19 January 2012 the European Union and China agreed that the reasonable period of time for implementing the DSB recommendations and rulings would be 14 months and two weeks from the date the DSB adopted the Reports. The reasonable period of time will therefore expire on 12 October 2012.

The purpose of this legislative proposal is to implement the DSB recommendations and rulings on Article 9(5) of the Basic Anti-Dumping Regulation.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Not applicable.

3. LEGAL ELEMENTS OF THE PROPOSAL

- Legal basis

¹ WTO, Report of the Appellate Body, AB-2011-2, WT/DS397/AB/R, 15 July 2011. WTO, Report of the Panel, WT/DS397/R, 29 September 2010. The reports can be downloaded from the WTO's website (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds397_e.htm)

² OJ L 343, 22.12.2009, p. 51.

The legal basis for this proposal is Article 207(2) of the Treaty on the Functioning of the European Union, in accordance to which the European Parliament and the Council, acting by means of regulations in accordance with the ordinary legislative procedure, shall adopt the measures defining the framework for implementing the common commercial policy.

This proposal amends Council Regulation (EC) No 1225/2009 the Basic Anti-Dumping Regulation, which was based on the equivalent provision of the Treaty establishing the European Community, i.e. Article 133.

- Subsidiarity Principle

Pursuant to Article 3(1)(e) of the Treaty on the Functioning of the European Union, the proposal falls under exclusive competence of the Union. The subsidiarity principle therefore does not apply.

- Proportionality Principle

The proposal complies with the proportionality principle.

- Choice of instruments

Proposed instrument: Regulation of the European Parliament and of the Council.

Other means would not be adequate for the following reason: a Regulation must be amended by a Regulation.

4. BUDGETARY IMPLICATION

Not applicable.

5. OPTIONAL ELEMENTS

Not applicable.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207 thereof,

Having regard to Council Regulation (EC) No 1515/2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) On 28 July 2011, the Dispute Settlement Body of the World Trade Organisation ('DSB') adopted the Appellate Body Report and the Panel Report as modified by the Appellate Body Report in the case 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China'³ ('Reports').
- (2) In the Reports, it was found, inter alia, that Article 9(5) of Council Regulation (EC) No 1225/2009⁴ of 30 November 2009 on protection against dumped imports from countries not members of the European Community ('the Basic Anti-Dumping Regulation') was inconsistent with Articles 6.10, 9.2 and 18.4 of the WTO Anti-Dumping Agreement and Article XVI:4 of the WTO Agreement ('the DSB finding on Article 9(5) of the Basic Regulation'). Article 9(5) of the Basic Anti-Dumping Regulation provides that individual exporting producers in non-market economy countries which do not receive market economy treatment pursuant to Article 2(7)(c) of the Basic Anti-Dumping Regulation will be subject to a countrywide duty rate unless such exporters can demonstrate that they meet the conditions for individual treatment ('IT') laid out in Article 9(5) of the Basic Anti-Dumping Regulation.

³ WTO, Report of the Appellate Body, AB-2011-2, WT/DS397/AB/R, 15 July 2011. WTO, Report of the Panel, WT/DS397/R, 29 September 2010. The reports can be downloaded from the WTO's website (http://www.wto.org/english/tratop_e/dispu_e/cases_e/ds397_e.htm)

⁴ OJ L 343, 22.12.2009, p. 51.

- (3) The Appellate Body found that Article 9(5) of the Basic Anti-Dumping Regulation established a presumption that exporting producers operating in non-market economy countries are not entitled to individual treatment but, in order to qualify for such treatment, they bear the burden to demonstrate that they satisfy the criteria of the IT test. According to the Appellate Body, no legal basis for such a presumption is provided for in the WTO covered agreements.
- (4) However, the Appellate Body clarified that whether determining a single dumping margin and a single anti-dumping duty for a number of exporters is inconsistent with Articles 6.10 and 9.2 of the WTO Anti-Dumping Agreement will depend on the existence of a number of situations, which would signal that, albeit legally distinct, two or more exporters are in such a relationship that they should be treated as a single entity. These situations may include: (i) the existence of corporate and structural links between the exporters, such as common control, shareholding and management; (ii) the existence of corporate and structural links between the State and the exporters, such as common control, shareholding and management; and (iii) control or material influence by the State in respect of pricing and output. In this regard, the terms in the proposed amendments reflecting these situations should be applied in the light of the Appellate Body's clarifications without prejudice to terms using the same or similar wording in other provisions of the Basic Anti-dumping Regulation.
- (5) On 18 August 2011 the European Union notified the DSB that it intends to implement the recommendations and rulings of the DSB in this dispute in a manner that respects its WTO obligations.
- (6) For that purpose, it is necessary to amend the provisions of Article 9(5) of the Basic Anti-Dumping Regulation,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EC) No 1225/2009 is hereby amended as follows:

1. Article 9 paragraph 5 shall be replaced by the following:

"5. An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except for imports from those sources from which undertakings under the terms of this Regulation have been accepted.

The Regulation imposing anti-dumping measures shall specify the duty for each supplier or, if that is impracticable, the supplying country concerned. Suppliers which are legally distinct from other suppliers or which are legally distinct from the State may nevertheless be considered as a single entity for the purpose of specifying the duty. For the application of this paragraph, account may be taken of factors such as the existence of structural or corporate links between the suppliers and the State or between suppliers, the control or material influence by the State in respect of pricing and output, or the economic structure of the supplying country."

Article 2

This Regulation shall enter into force on the [...] day following that of its publication in the *Official Journal of the European Union*.

It shall apply to all investigations initiated pursuant to Regulation (EC) No 1225/2009 following the entry into force of this Regulation.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President