



EUROPEAN COMMISSION

Brussels, 8.6.2012
COM(2012) 270 final

2012/0145 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

On 2 February 2012, the European Court of Justice in case *C-249/10¹ P - Brosmann and others v. Council ('Brosmann')* annulled Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam in so far as it relates to the applicants. In its judgement, the Court of Justice ruled that the sampling technique laid down in Article 17 of Council Regulation (EC) No 1225/2009 may not be applied for the purposes of the determination of claims of individual market economy treatment made under Article 2(7)(c). In its judgment, the Court found that under Article 2(7)(c) the cooperating producers, which are not part of the sample, are entitled to have their claim of market economy treatment examined, regardless of whether an individual dumping margin was to be calculated for those companies outside the sample. The European Court of Justice also pointed out that the determination under Article 2(7)(c) is to be made within three months after the initiation of the investigation.

The ruling by the European Court of Justice on the application of Council Regulation (EC) No 1225/2009 would require that the Commission examine all applications for market economy treatment filed by cooperating producers who are not part of the sample, irrespective of the number of producers. However, such a practice would impose a disproportionate administrative burden on the investigating authorities of the Union. Therefore, it is appropriate to amend Regulation (EC) No 1225/2009, in particular with regard to the time limit of three months for the Commission to decide on the applications for market economy treatment.

It should also be noted that the use of the sampling technique provided for in Article 17 of Council Regulation (EC) No 1225/2009 for the purposes of the determination of claims of market economy treatment to be made under Article 2(7)(c) of that Regulation is not in breach of the obligations of the Union under the World Trade Organisation rules. For example, the panel of the Dispute Settlement Body of the World Trade Organisation in dispute DS405 (*European Union — Anti-Dumping measures on Certain Footwear from China*, report adopted on 22 February 2012) found that China did not establish that the European Union acted inconsistently with Articles 2.4 and 6.10.2 of the Anti-dumping Agreement, Paragraph 15(a)(ii) of China's Accession Protocol, and Paragraphs 151(e) and (f) of China's Accession Working Party Report, by failing to examine the market economy treatment applications of the cooperating Chinese producers that are not part of the sample for the limited original investigation.

Therefore, taking into account this background and for reasons of legal certainty, it is considered appropriate to introduce a provision clarifying that the decision to limit the investigation to a reasonable number of producers by using samples on the basis of Article 17 of Council Regulation (EC) No 1225/2009 also applies to the parties subject to a market economy treatment examination, in accordance with Article 2(7)(b) and (c). Consequently, it is also appropriate to clarify that a determination under Article 2(7)(c) should not be made for

¹ Case C-249/10 P – Brosmann Footwear (HK) and Others v Council, Judgement of 2 February 2012 (not yet published in the ECR).

producers that are not part of the sample unless such producers request and obtain individual examination in accordance with Article 17(3).

Furthermore, it is considered appropriate to clarify that the anti-dumping duty to be applied to imports from producers, which have made themselves known in accordance with Article 17 but were not included in the examination, shall not exceed the weighted average margin of dumping established for the parties in the sample, irrespective of whether the normal value established for such parties was determined on the basis of Articles 2(1) to 2(6) or Article 2(7)(a).

Lastly, the three month time limit by which a determination pursuant to Article 2(7)(c) should be made, has proved impracticable in many anti-dumping proceedings, in particular where sampling is applied in accordance with Article 17. In its proposal to amend certain regulations in order to ensure consistency with the provisions introduced by the Treaty of Lisbon ('Trade Omnibus I')², the Commission included an amendment to extend the time limit in Article 2(7)(c) of Council Regulation (EC) No 1225/2009 to six months (point 1 of Heading 24 in Annex to 'Trade Omnibus I'). However, in view of the *Brosmann* ruling on such time limit (which intervened one year after the Omnibus I proposal was made), it is considered that an extension of the time limit to six months is no longer adequate for reasons of legal certainty. Instead, it is considered more appropriate to remove this time limit from Council Regulation (EC) No 1225/2009. Therefore the Commission should discontinue its efforts to amend the time limit in Article 2(7)(c) in the context of the Trade Omnibus I proposal, and should inform the Council and the Parliament of its intentions.

In the interest of legal certainty and the principle of sound administration, it is necessary to provide that these amendments should apply as soon as possible to all new and pending investigations.

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

Not applicable.

3. LEGAL ELEMENTS OF THE PROPOSAL

- Legal basis

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 which was based on the equivalent provision of the Treaty establishing the European Community, i.e. Article 133.

² Proposal for a regulation of the European Parliament and of the Council amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (COM(2011) 82 final).

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

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 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) In Case C-249/10 P³, the European Court of Justice ruled that the sampling technique provided for in Article 17 of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community⁴ may not be applied for the purposes of the determination of claims of market economy treatment to be made under Article 2(7)(c) of that Regulation.
- (2) The ruling by the European Court of Justice would require that the Commission examine all applications for market economy treatment filed by cooperating exporting producers who are not part of the sample, irrespective of whether the number of cooperating producers is large. However, such a practice would impose a disproportionate administrative burden on the investigating authorities of the Union. Therefore, is it appropriate to amend Council Regulation (EC) No 1225/2009.
- (3) Moreover, the use of the sampling technique provided for in Article 17 of Council Regulation (EC) No 1225/2009 for the purposes of the determination of claims of market economy treatment to be made under Article 2(7)(c) of that Regulation is allowed under the rules of World Trade Organisation. For example, the panel of the Dispute Settlement Body of the World Trade Organisation in dispute DS405 (*European Union — Anti-Dumping measures on Certain Footwear from China*, report adopted on 22 February 2012) found that China did not establish that the European Union acted inconsistently with Articles 2.4 and 6.10.2 of the Anti-

³ Case C-249/10 P - Brosmann Footwear (HK) and Others v Council, Judgment of 2 February 2012.

⁴ OJ L 343, 22.12.2009, p. 51.

dumping Agreement, Paragraph 15(a)(ii) of China's Accession Protocol, and Paragraphs 151(e) and (f) of China's Accession Working Party Report, by failing to examine the market economy treatment applications of the cooperating Chinese exporting producers that are not part of the sample for the original investigation.

- (4) Therefore, taking into account this background and for reasons of legal certainty, it is considered appropriate to introduce a provision clarifying that the decision to limit the investigation to a reasonable number of parties by using samples on the basis of Article 17 of Council Regulation (EC) No 1225/2009 also applies to the parties subject to an examination in accordance with Article 2(7)(b) and (c). Consequently, it is also appropriate to clarify that a determination under Article 2(7)(c) should not be made for exporting producers that are not part of the sample, unless such producers request and obtain individual examination in accordance with Article 17(3).
- (5) Furthermore, it is considered appropriate to clarify that the anti-dumping duty to be applied to imports from exporters or producers which have made themselves known in accordance with Article 17, but were not included in the examination shall not exceed the weighted average margin of dumping established for the parties in the sample, irrespective of whether the normal value established for such parties was determined on the basis of Articles 2(1) to 2(6) or Article 2(7)(a).
- (6) Lastly, the three month time-limit by which a determination pursuant to Article 2(7)(c) should be made has proved impracticable, in particular in proceedings where sampling in accordance with Article 17 is applied. It is therefore considered appropriate to remove this time-limit.
- (7) In the interests of legal certainty and the principle of sound administration, it is necessary to provide that these amendments should apply as soon as possible to all new and pending investigations.
- (8) Council Regulation (EC) No 1225/2009 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

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

(1) Article 2(7) is amended as follows:

(a) The penultimate sentence of subparagraph (c) is modified as follows:

The terms "*within three months of the initiation of the investigation*" are deleted.

(b) The following subparagraph (d) is added:

"(d) When the Commission has limited its examination in accordance with Article 17, a determination pursuant to subparagraphs (b) and (c) shall be limited to the parties included in the examination and any producer that receives individual treatment pursuant to Article 17(3)".

(2) In Article 9(6), the first sentence is replaced by the following:

"When the Commission has limited its examination in accordance with Article 17, any anti-dumping duty applied to imports from exporters or producers which have made themselves known in accordance with Article 17 but were not included in the examination shall not exceed the weighted average margin of dumping established with respect to the parties in the sample, irrespective of whether the normal value for such parties is determined on the basis of Articles 2(1) to 2(6) or Article 2(7)(a)."

Article 2

This Regulation shall apply to all new and pending investigations at the time of entry into force of this Regulation.

Article 3

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

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