Regulation (EU) 2017/2321 of the European Parliament and of the Council of 12 December 2017 amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union

REGULATION (EU) 2017/2321 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 12 December 2017

amending Regulation (EU) 2016/1036 on protection against dumped imports from countries not members of the European Union and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Union

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(2) 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[(1)],

Whereas:

(1) By Regulation (EU) 2016/1036[(2)], the European Parliament and the Council adopted common rules for protection against dumped imports from countries that are not Member States of the Union.

(2) Article 2(7) of Regulation (EU) 2016/1036 constitutes the basis on which normal value should be determined in the case of imports from non-market economy countries. In view of developments with respect to certain countries, it is appropriate that normal value be determined on the basis of Regulation (EU) 2016/1036 as amended by this Regulation with effect from 20 December 2017. In the case of countries which are, at the date of initiation of an investigation, not Members of the World Trade Organization (WTO) and listed in Annex I to Regulation (EU) 2015/755 of the European Parliament and of the Council[(3)], normal value should be determined in accordance with a specific methodology designed for those countries. This Regulation is without prejudice to establishing whether or not any WTO Member is a market economy or to the terms and conditions set out in protocols and other instruments in accordance with which countries have acceded to the Marrakesh Agreement Establishing the World Trade Organization done on 15 April 1994[(4)].

(3) In light of experience gained in past proceedings, it is appropriate to clarify the circumstances in which significant distortions affecting to a considerable extent free market forces may be deemed to exist. In particular, it is appropriate to clarify that

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2017/2321 of the European Parliament and of the Council. (See end of Document for details)*

this is the case when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention. It is further appropriate to clarify that when assessing the existence of significant distortions regard should be had, inter alia, to the potential impact of one or more of the following elements: the market in question being to a significant extent served by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country; state presence in firms allowing the state to interfere with respect to prices or costs; public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces; the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws; wage costs being distorted; access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.

(4) The Commission should produce, make public and regularly update reports on significant distortions, which could potentially result in an anti-dumping investigation, describing the market circumstances concerning those instances in a certain country or a certain sector. Such reports and the evidence on which they are based should be placed on the file of any investigation relating to that country or sector. In such investigations, interested parties should have ample opportunity to comment on the reports and the evidence on which they are based. When assessing the existence of significant distortions, relevant international standards, including core conventions of the International Labour Organisation (ILO) and relevant multilateral environmental conventions, should be taken into account, where appropriate.

(5) Costs are normally calculated on the basis of records kept by the exporter and producer under investigation. However, where there are direct or indirect significant distortions in the exporting country with the consequence that costs reflected in the records of the party concerned are artificially low, such costs may be adjusted or established on any reasonable basis, including information from other representative markets or from international prices or benchmarks. Domestic costs may also be used, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence.

(6) When data are sourced in representative countries and the Commission has to establish whether the level of social and environmental protection in such countries is adequate, it is necessary for the Commission to examine whether those countries comply with core ILO and relevant multilateral environmental conventions.

(7) Where part of the costs for an exporter and producer is distorted, including where a given input is sourced from different sources, that part of the costs should be replaced by undistorted costs. In light of experience gained in past proceedings, it is appropriate to further clarify that, for the purposes of determining the existence of significant distortions in a third country, due account should be taken of all relevant evidence regarding the circumstances prevailing on the domestic market of the exporters and producers from that country, which has been placed on the file, and upon which interested parties have had an opportunity to comment, including an opportunity for

those exporters and producers to conclusively show that their domestic costs are undistorted. Where available, such evidence includes relevant reports. Indications as to the existence of significant distortions may also be presented by all relevant stakeholders, including Union industry and trade unions. Such indications and the need to avoid any additional burdens for Union industry in using the anti-dumping instrument, in particular in view of the economic and trade specificities of small and medium-sized enterprises, should be considered when deciding on preparing or updating the relevant reports.

(8) With respect to the methodology used in the original investigation and to be used in the review investigation, Article 11(9) of Regulation (EU) 2016/1036 applies. In that context, it is appropriate to clarify that, when examining whether there is an indication that circumstances have changed, due account should be taken of all relevant evidence, including relevant reports regarding the circumstances prevailing on the domestic market of the exporters and producers and the evidence on which they are based, which has been placed on the file, and upon which interested parties have had an opportunity to comment.

(9) In the absence of any other specific transitional rules regulating the matter, it is appropriate to provide for the application of this Regulation to all decisions on the initiation of proceedings, and to all proceedings, including original investigations and review investigations, initiated on or after 20 December 2017, subject to Article 11(9) of Regulation (EU) 2016/1036. Furthermore, by way of specific transitional rule for existing measures, and having regard to the absence of any other specific transitional rules regulating the matter, in the case of a transition from a normal value calculated pursuant to Article 2(7) of Regulation (EU) 2016/1036 to a normal value calculated in accordance with the methodology set out in Regulation (EU) 2016/1036 as amended by this Regulation, the original methodology should continue to apply until the initiation of the first expiry review following such transition. With a view to reducing the risk of circumvention of the provisions of this Regulation, the same approach should apply with respect to reviews conducted pursuant to Article 11(4) of Regulation (EU) 2016/1036. It is also appropriate to recall that a transition from a normal value calculated pursuant to Article 2(7) to a normal value calculated in accordance with the methodology set out in Regulation (EU) 2016/1036 as amended by this Regulation would not in itself constitute sufficient evidence within the meaning of Article 11(3) of Regulation (EU) 2016/1036. Such transitional rules should fill a lacuna that would otherwise risk generating legal uncertainty, provide a reasonable opportunity for interested parties to adapt themselves to the expiry of the old rules and the entry into force of the new rules, and facilitate the efficient, orderly and equitable administration of Regulation (EU) 2016/1036.

(10) By Regulation (EU) 2016/1037[(5)], the European Parliament and the Council adopted common rules for protection against subsidised imports from countries that are not Member States of the Union. Experience has shown that the actual magnitude of subsidisation is usually discovered during the relevant investigation. In particular, investigated exporters are frequently found to benefit from subsidies whose existence could not have been reasonably known before carrying out the investigation. It is

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appropriate to clarify that, when such subsidies are found in the course of any given investigation or review, the Commission should offer additional consultations to the country of origin and/or export concerned with regard to such subsidies identified in the course of the investigation. In the absence of specific transitional rules regulating the matter, it is appropriate to provide for the application of this Regulation to all decisions on the initiation of proceedings, and to all proceedings, including original investigations and review investigations, initiated on or after 20 December 2017.

(11) Regulation (EU) 2016/1036 and Regulation (EU) 2016/1037 should therefore be amended accordingly,

HAVE ADOPTED THIS REGULATION:

Article 1

Regulation (EU) 2016/1036 is amended as follows:

(1) in Article 2, the following paragraph is inserted:

6a.

a

In case it is determined, when applying this or any other relevant provision of this Regulation, that it is not appropriate to use domestic prices and costs in the exporting country due to the existence in that country of significant distortions within the meaning of point (b), the normal value shall be constructed exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks, subject to the following rules.

The sources the Commission may use include:

— corresponding costs of production and sale in an appropriate representative country with a similar level of economic development as the exporting country, provided the relevant data are readily available; where there is more than one such country, preference shall be given, where appropriate, to countries with an adequate level of social and environmental protection;

— if it considers appropriate, undistorted international prices, costs, or benchmarks; or

— domestic costs, but only to the extent that they are positively established not to be distorted, on the basis of accurate and appropriate evidence, including in the framework of the provisions on interested parties in point (c).

Without prejudice to Article 17, that assessment shall be done for each exporter and producer separately.

The constructed normal value shall include an undistorted and reasonable amount for administrative, selling and general costs and for profits.

b Significant distortions are those distortions which occur when reported prices or costs, including the costs of raw materials and energy, are not the result of free market forces because they are affected by substantial government intervention. In assessing the existence of significant distortions regard shall be had, inter alia, to the potential impact of one or more of the following elements:

— the market in question being served to a significant extent by enterprises which operate under the ownership, control or policy supervision or guidance of the authorities of the exporting country;
— state presence in firms allowing the state to interfere with respect to prices or costs;
— public policies or measures discriminating in favour of domestic suppliers or otherwise influencing free market forces;
— the lack, discriminatory application or inadequate enforcement of bankruptcy, corporate or property laws;
— wage costs being distorted;
— access to finance granted by institutions which implement public policy objectives or otherwise not acting independently of the state.

c Where the Commission has well-founded indications of the possible existence of significant distortions as referred to in point (b) in a certain country or a certain sector in that country, and where appropriate for the effective application of this Regulation, the Commission shall produce, make public and regularly update a report describing the market circumstances referred to in point (b) in that country or sector. Such reports and the evidence on which they are based shall be placed on the file of any investigation relating to that country or sector. Interested parties shall have ample opportunity to rebut, supplement, comment or rely on the report and the evidence on which it is based in each investigation in which such report or evidence is used. In assessing the existence of significant distortions, the Commission shall take into account all the relevant evidence that is on the investigation file.

d When filing a complaint in accordance with Article 5, or a request for a review in accordance with Article 11, Union industry may rely on the evidence in the report referred to in point (c) of this paragraph, where meeting the standard of evidence in view of Article 5(9), in order to justify the calculation of the normal value.

e Where the Commission finds that there is sufficient evidence, pursuant to Article 5(9), of significant distortions within the meaning of point (b) of this paragraph and decides to initiate an investigation on that basis, the notice of initiation shall specify that fact. The Commission shall collect the data necessary to allow the construction of the normal value in accordance with point (a) of this paragraph.

The parties to the investigation shall be informed promptly after initiation about the relevant sources that the Commission intends to use for the purpose of determining normal value pursuant to point (a) of this paragraph and shall be given 10 days to comment. For that purpose, interested parties shall be given access to the file, which shall include any evidence on which the investigating authority relies, without prejudice to Article 19. Any evidence regarding the existence of significant distortions may only be taken into account if it can be verified in a timely manner within the investigation, in accordance with Article 6(8).;

(2) in Article 2, paragraph 7 is replaced by the following:

7. In the case of imports from countries which are, at the date of initiation of the investigation, not members of the WTO and listed in Annex I to Regulation (EU) 2015/755 of the European Parliament and of the Council[6], normal value shall be determined on the basis of the price or constructed value in an appropriate