Regulation (EU) 2016/1035 of the European Parliament and of the Council of 8 June 2016 on protection against injurious pricing of vessels (codification)

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on protection against injurious pricing of vessels

(codification)

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) Council Regulation (EC) No 385/96[(2)] has been substantially amended[(3)]. In the interests of clarity and rationality, that Regulation should be codified.

(2) Multilateral negotiations conducted under the auspices of the Organisation for Economic Cooperation and Development led to the conclusion, on 21 December 1994, of an Agreement Respecting Normal Competitive Conditions in the Commercial Shipbuilding and Repair Industry ('the Shipbuilding Agreement').

(3) It has been recognised in the framework of the Shipbuilding Agreement that the special characteristics of ship-purchase transactions have made it impractical to apply countervailing and anti-dumping duties, as provided for under Article VI of the General Agreement on Tariffs and Trade, the Agreement on Subsidies and Countervailing Measures, and the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('the 1994 Anti-Dumping Agreement') annexed to the Agreement establishing the World Trade Organisation. The need to provide for an effective means of protection against sales of ships below their normal value which cause injury has led to the conclusion of a Shipbuilding Injurious Pricing Code which, together with its Basic Principles, constitutes Annex III to the Shipbuilding Agreement ('the IPI Code').

(4) The text of the IPI Code is mainly based on the 1994 Anti-Dumping Agreement, but deviates from that Agreement when warranted by the specific nature of ship-purchase transactions. Therefore, the language of the IPI Code should be reflected in Union legislation, to the extent possible on the basis of the text of Regulation (EU) 2016/1036 of the European Parliament and of the Council[(4)].

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2016/1035 of the European Parliament and of the Council. (See end of Document for details)*

(5) The Shipbuilding Agreement and the legislative provisions deriving therefrom are of significant importance for Union law.

(6) To maintain the balance of rights and obligations which the Shipbuilding Agreement establishes, action should be taken by the Union against any injuriously priced vessel whose sale at less than normal value causes injury to the Union industry.

(7) As regards shipbuilders from Contracting Parties to the Shipbuilding Agreement, the sale of a vessel may be subject to an investigation by the Union only when the buyer of the vessel is a Union buyer, and provided the ship is not a military vessel.

(8) It is desirable to set out clear and detailed rules on the calculation of the normal value. In particular, such value should, where possible, be based on a representative sale of a like vessel in the ordinary course of trade in the exporting country. It is expedient to define the circumstances in which a domestic sale may be considered to be made at a loss and may be disregarded, and in which recourse may be had to sale of a like vessel to a third country, or to constructed normal value. It is also desirable to provide for a proper allocation of costs, even in start-up situations. It is also necessary, when constructing the normal value, to indicate the methodology to be applied in determining the amounts for selling, general and administrative costs and the profit margin that should be included in such value.

(9) In order to be able to apply correctly the instrument for combating injurious pricing, the Commission should take all necessary steps to ascertain, in the large conglomerates and holdings of third countries, the validity of accounting charges when the cost price structure needs to be estimated.

(10) When determining the normal value for non-market economy countries, it appears prudent to set out rules for choosing the appropriate market-economy third country to be used for such purpose and, where it is not possible to find a suitable third country, to provide that the normal value may be established on any other reasonable basis.

(11) It is expedient to define the export price and to enumerate the adjustments which should be made in those cases where a reconstruction of that price from the first open-market price is deemed necessary.

(12) For the purpose of ensuring a fair comparison between the export price and the normal value, it is advisable to list the factors, including contractual penalties, which may affect prices and price comparability.

(13) It is desirable to provide clear and detailed guidance as to the factors which may be relevant for the determination of whether the injuriously priced sale has caused material injury or is threatening to cause injury. In demonstrating that the price level of the sale concerned is responsible for injury sustained by the Union industry, attention should be given to the effect of other factors and, in particular, prevailing market conditions in the Union.

(14) It is advisable to define the term ‘Union industry’ by reference to the capability to build a like vessel and to provide that parties related to exporters may be excluded from such an industry, and to define the term ‘related’.

(15) It is necessary to set out the procedural and substantive conditions for lodging a complaint against injurious pricing, including the extent to which it should be supported by the Union industry, and the information on the buyer of the vessel, injurious pricing, injury and causation which such a complaint should contain. It is also expedient to specify the procedures for the rejection of complaints or the initiation of proceedings.

(16) When the buyer of the injuriously priced vessel is established in the territory of another Contracting Party to the Shipbuilding Agreement, a complaint may also contain a request that an investigation be initiated by the authorities of that Contracting Party. Such request should be transmitted to the authorities of the Contracting Party, where warranted.

(17) Where appropriate, an investigation may also be initiated upon a written complaint by the authorities of a Contracting Party to the Shipbuilding Agreement, in accordance with this Regulation and under the conditions of the Shipbuilding Agreement.

(18) It is necessary to specify the manner in which interested parties should be given notice of the information which the authorities require. Interested parties should have ample opportunity to present all relevant evidence and to defend their interests. It is also desirable to set out clearly the rules and procedures to be followed during the investigation, in particular the rules whereby interested parties are to make themselves known, present their views and submit information within specified time limits, if such views and information are to be taken into account. It is also appropriate to set out the conditions under which an interested party may have access to, and comment on, information presented by other interested parties. There should also be cooperation between the Member States and the Commission in the collection of information.

(19) It is necessary to provide that the termination of cases should, irrespective of whether an injurious pricing charge is imposed or not, take place no later than 1 year from the date of initiation or the date of delivery of the vessel, as the case may be.

(20) Investigations or proceedings should be terminated where the margin of injurious pricing is *de minimis*.

(21) The investigation may be terminated without the imposition of an injurious pricing charge if the sale of the injuriously priced vessel is definitively and unconditionally voided or if an alternative equivalent remedy is accepted. However, the need to avoid jeopardising achievement of the aim pursued under this Regulation should be given special consideration.

(22) An injurious pricing charge equal to the amount of the injurious pricing margin should be imposed by decision on the shipbuilder whose injuriously priced sale of a vessel has caused injury to the Union industry, where all the conditions provided for in this Regulation are fulfilled. Precise and detailed rules should be laid down for the implementation of such decision, including all measures necessary for its actual enforcement, in particular the taking of countermeasures if the shipbuilder does not pay the injurious pricing charge within the applicable time limit.

Changes to legislation: *There are currently no known outstanding effects for the Regulation (EU) 2016/1035 of the European Parliament and of the Council. (See end of Document for details)*

(23) It is necessary to set out precise rules for the denial of the right to load and unload in Union ports to vessels built by shipbuilders subject to countermeasures.

(24) The obligation to pay the injurious pricing charge expires only when such charge is fully paid or at the end of the period during which the countermeasures are applicable.

(25) Any action taken under this Regulation should not be contrary to the Union interest.

(26) In acting pursuant to this Regulation, the Union should bear in mind the need for rapid and effective action.

(27) It is expedient to provide for verification visits to check information submitted on injurious pricing and injury, such visits being, however, conditional on proper replies to questionnaires being received.

(28) It is necessary to provide that, where parties do not cooperate satisfactorily, other information may be used to establish findings and that such information may be less favourable to the parties than if they had cooperated.

(29) Provision should be made for the treatment of confidential information so that business secrets are not divulged.

(30) It is essential that provision be made for the proper disclosure of the essential facts and considerations to parties which qualify for such treatment and that such disclosure be made, with due regard to the decision-making process in the Union, within a time period which permits parties to defend their interests.

(31) The implementation of the procedures provided for in this Regulation requires uniform conditions for the adoption of measures necessary for its implementation in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council[(5)],

HAVE ADOPTED THIS REGULATION:

Article 1

Principles and definitions

1 An injurious pricing charge may be imposed on the builder of any injuriously priced vessel whose sale to a buyer other than a buyer of the country in which the vessel originates causes injury.

2 A vessel is to be considered as being injuriously priced if the export price of the vessel sold is less than a comparable price for a like vessel, in the ordinary course of trade, when sold to a buyer of the exporting country.

3 For the purposes of this Regulation, the following definitions apply:

a ‘vessel’ means any self-propelled sea-going vessel of 100 gross tonnes and above, used for transportation of goods or persons or for performance of a specialised service (for example, ice breakers and dredgers) and any tug of 365 kW and above;

b ‘like vessel’ means any vessel of the same type, purpose and approximate size as the vessel under consideration and possessing characteristics closely resembling those of the vessel under consideration;

c ‘same general category of vessel’ means any vessel of the same type and purpose, but of a significantly different size;

d ‘sale’ covers the creation or transfer of an ownership interest in the vessel, except for an ownership interest created or acquired solely for the purpose of providing security for a normal commercial loan;

e ‘ownership interest’ includes any contractual or proprietary interest which allows the beneficiary or beneficiaries of such interest to take advantage of the operation of the vessel in a manner substantially comparable to the way in which an owner may benefit from the operation of the vessel. In determining whether such substantial comparability exists, the following factors shall be considered, inter alia:

(i) the terms and circumstances of the transaction;

(ii) commercial practice within the industry;

(iii) whether the vessel subject to the transaction is integrated into the operations of the beneficiary or beneficiaries; and

(iv) whether in practice there is a likelihood that the beneficiary or beneficiaries of such interests will take advantage of, and the risk for, the operation of the vessel for a significant part of the life-time of the vessel;

f ‘buyer’ means any person who, or any company which, acquires an ownership interest, including by way of lease or long-term bareboat charter, in conjunction with the original transfer from the shipbuilder, either directly or indirectly, including a person who, or company which, owns or controls a buyer, or gives instructions to the buyer. A person or company owns a buyer when it has more than a 50 % interest in the buyer. A person or company controls a buyer when the person or company is legally or operationally in a position to exercise restraint or direction over the buyer, which is presumed at a 25 % interest. If ownership of a buyer is shown, separate control of it is presumed not to exist unless established otherwise. There may be more than one buyer of any one vessel;

g ‘company’ means any company or firm constituted under civil or commercial law, including cooperative societies, and other legal persons governed by public or private law, including those which are non-profitmaking;

h ‘Contracting Party’ means any third country that is party to the Shipbuilding Agreement.

Article 2

Determination of injurious pricing

A.
Normal value

1 The normal value shall normally be based on the price paid or payable, in the ordinary course of trade, for a like vessel by an independent buyer in the exporting country.

2 Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish the normal value unless it is determined that they are unaffected by the relationship.

3 When there are no sales of like vessels in the ordinary course of trade, or where, because of the particular market situation, such sales do not permit a proper comparison, the normal value of the like vessel shall be calculated on the basis of the export price of a like