

Client Alert

International Trade

18 December 2013

New EU procedures for trade defence measures agreed

The Council and European Parliament recently¹ agreed on new procedural rules for the adoption of trade defence measures (i.e. anti-dumping, anti-subsidy, and safeguard measures) by the European Commission. The new rules increase the Commission's powers in the area of trade defence at the expense of Member States, which may make the process more technical/technocratic and less political in nature. In future, it would require a qualified majority of EU Member States – rather than a simple majority – to block trade defence measures. The new procedures are expected to be published soon, and will enter into force thirty days following their publication in the EU Official Journal. The new rules will not apply to ongoing investigations where a decision has already been made or EU Member States have been consulted on a Commission proposal.

Background

The purpose of the amendments is to bring existing EU legislation in the field of trade defence in step with the new “comitology” procedures (which were introduced post-Lisbon treaty) on adoption of implementing acts (Regulation 182/2011).² In other words, the amendments will establish how new trade defence procedures already outlined in Regulation 182/2011 are to be implemented. So far, the mechanisms for adoption of trade defence measures were excluded from the scope of the general comitology rules (outlining EU decision-making procedures involving specialized committees with national experts from the Member States), as they have been subject to unique procedural rules spelled out in each trade defence instrument to reflect the special nature of trade policy. As a result of Regulation 182/2011, procedures for trade defence measures were supposed to be brought in line with general comitology procedures; however, the “old” special trade defence procedures continued to apply until these, recently agreed, amendments to trade defence regulations enter into force.

The amendments will lead to a scenario where for the first time, anti-dumping and anti-subsidy measures (and, partially, safeguard measures) will be subjected to largely the same rules of comitology as the rest of the European policies, even though special rules are foreseen in certain circumstances (for example with respect to the use of the written procedure).



For more information, please contact:

James Killick
Partner, Brussels
+ 32 2 239 2552
jkillick@whitecase.com

Richard King
Counsel, Brussels
+ 32 2 239 2553
rking@whitecase.com

Vladimir Nyagolov
Associate, Brussels
+32 2 239 2573
vnyagolov@whitecase.com

Sara Nordin
Associate, Brussels & Hong Kong
+ 32 2 239 2576
snordin@whitecase.com

Fabienne Vermeeren
Regional Director Europe – International
Trade Services, Brussels
+ 32 2 239 2606
fvermeeren@whitecase.com

¹ On 10 December 2013, the position adopted by the Council at first reading concerning certain amendments to regulations in the area of the EU Common Commercial Policy was published in the EU's [Official Journal](#). On 12 December 2013, the European Parliament also approved these amendments, which reflect a compromise reached between the Council and the European Parliament during informal meetings.

² [Regulation \(EU\) No 182/2011](#) of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers.

International Trade

The changes to trade defence procedures

The compromise struck between the Council and the European Parliament (which is based on a 2011 proposal by the Commission) would introduce the following changes to the way EU trade defence measures are adopted and implemented:

- **The Commission, and not the Council, adopts all measures**

One of the most important changes to the legislative process for trade defence measures is that definitive anti-dumping and anti-subsidy measures will be adopted by the Commission. Under the current system, it is the Council which adopts definitive trade defence measures, based on a final proposal from the Commission following its consultation with the Member State representatives in the committee. The Commission will no longer submit proposals to the EU Member States for a final vote and adoption under the new system, even if it must also in the future submit proposals to the committee and (in certain circumstances) follow the opinion of this committee. In other words, while the Commission will have to continue to consult EU Member States and follow their decision (in certain circumstances), the Commission will have sole responsibility for actual adoption of trade defence measures.

- **Anti-dumping and anti-subsidy measures are adopted unless EU Member States oppose the measures through a qualified majority vote (“QMV”)**

Another important change under the new procedures compared to the current system is that definitive anti-dumping and anti-subsidy measures are subject to standard comitology rules where only a qualified majority of EU Member States (based on special weighting rules taking the size of the Member State population into account³) may ultimately block their adoption. In contrast, under the current system, a simple majority of EU Member States (taking no account of the size of the Member States) is sufficient to prevent the adoption of a Commission proposal for definitive measures.

The introduction of a QMV requirement to ultimately block anti-dumping and anti-subsidy measures is expected to impact the political landscape in Brussels, as the Commission will in most cases be able to adopt anti-dumping or anti-subsidy measures given the difficulty of persuading a qualified majority of Member States to agree to block it.

The new rules differentiate between the so called “advisory” and “examination” procedures applicable at different stages of trade defence investigations.

- **Advisory, examination, and special procedures**

The amendments will also introduce uniform procedural rules for the adoption of provisional and definitive duties, and for the termination of an investigation without measures, in line with the provisions of Regulation 182/2011. Regulation 182/2011 provides for three types of comitology procedures that will apply to trade defence measures: (i) the advisory procedure, (ii) the examination procedure, and (iii) a special procedure for immediately applicable implementing acts.

This Client Alert is provided for your convenience and does not constitute legal advice. It is prepared for the general information of our clients and other interested persons. This Client Alert should not be acted upon in any specific situation without appropriate legal advice.

This Client Alert is protected by copyright. Material appearing herein may be reproduced or translated with appropriate credit.

³ A “qualified majority” is a population-based standard in which the largest countries (such as France and Germany) have the greatest voting power. As a practical matter, more than half the Member States would have to oppose in order to reach the “qualified majority,” particularly if one or more of the large countries does not oppose the measures. Additionally, the opposition must be maintained – not only in an initial round of advisory committee voting but also potentially in a second voting round (in an “appeal committee”). For your information, the Council of Europe has a tool for calculating the Member State votes needed to reach a [qualified majority](#).

International Trade

- The advisory procedure (Article 4 of Regulation 182/2011) will be used in anti-dumping and anti-subsidy proceedings for decisions relating to the acceptance of undertakings, initiation and non-initiation of expiry reviews, and adoption and extension of suspended measures (as well as reinstatement of measures following suspension). Under the current system, the rules foresee Commission consultation with the committee for these proceedings, but do not specify any voting rules. The advisory procedure will also be used to terminate safeguard investigations and to introduce surveillance measures.

Under the advisory procedure, the Commission will submit a draft implementing act to the committee, which will deliver its opinion by a simple majority vote. The ultimate decision on the measures to be taken will continue to lie with the Commission, but it will be obliged to take “the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered” under Regulation 182/2011.

- The examination procedure (Article 5 of Regulation 182/2011) will apply for such decisions as the termination of anti-dumping and anti-subsidy investigations, the adoption of definitive trade defence measures, repeal or maintenance of anti-dumping or anti-subsidy measures following an expiry review, and anti-circumvention determinations. The main purpose of the examination procedure in the context of anti-dumping or anti-subsidy investigations will be to ensure that a draft measure proposed by the Commission can only be blocked if a qualified majority of Member States consistently votes against it. If the committee issues a positive opinion supported by QMV, the Commission must adopt the draft measures. In the event the committee is unable to agree on a decision through QMV and therefore delivers “no opinion”, the Commission may as a general rule adopt the proposal, but special consultation procedures – ultimately leading to a vote in the Appeals Committee – will apply if the Member States manage to muster a simple majority against the proposal. A negative opinion by the committee will keep the Commission from adopting the measure for the time being, but still allows for referral to the Appeal Committee (where amendments can be proposed to the draft measure) where the same proposal may ultimately be blocked if opposed by a qualified majority. Safeguard investigations are subject to special rules if a draft measure reaches the Appeals Committee: the Commission can only adopt the measure if it has QMV support in a positive opinion by the Committee (and must not adopt it if the Committee adopts either a negative or “no” opinion).
- For adoption of provisional anti-dumping and countervailing measures (and for the initiation of anti-circumvention cases and registration of imports), as well as in cases involving urgent safeguard measures, special rules for immediately applicable implementing acts (Article 8 of Regulation 182/2011) will apply. The rationale of this procedure is to allow the Commission to act quickly where a delay in the imposition of measures would cause damage which would be difficult to repair. Much like the current procedures, the Commission may first adopt an implementing act with measures and then submit it to the committee for an opinion (which could force the Commission to immediately repeal the measure through a negative opinion supported by QMV). (In anti-dumping and anti-subsidy investigations, the Commission will need to consult or at least inform the committee before it adopts the measures.) The main difference under the new rules is that the timelines will change, along with the period of imposition of provisional measures.

International Trade

- The right of scrutiny by the European Parliament and the Council and related document distribution

Under the new comitology rules, both the European Parliament and the Council will have a right of scrutiny of draft implementing acts presented under the new procedures. Accordingly, to enable such scrutiny all relevant committee agendas and draft acts presented to the committee will need to be provide to the Council and European Parliament. Public access to such documents will, however, remain limited.

Next steps

As both the Council and the European Parliament have endorsed the amendments, they are expected to be published in the Official Journal soon, together with a number of statements of the Council and the European Commission. The new trade defence procedures will start to apply 30 days after they have been published as adopted in the Official Journal (with certain exceptions for ongoing procedures). The proposed amendments provide that the new rules will not apply to ongoing trade defence proceedings where on the date of entry into force of the new rules, the Commission has already adopted a proposal, an act, or consultations have already taken place. The European Commission has also stated that it will prepare a proposal to codify the basic regulations by 1 June 2014 in order to improve the legibility of these regulations.