

The European Commission proposes far-reaching changes to the EU's trade enforcement framework

On the eve of 2013 the European Commission proposed new draft legislation to streamline the EU's ability to enforce its rights within the international trading system and to respond to third countries' protectionist trading practices. While not mentioned directly, recent Russian and Ukrainian trade initiatives could be among the main reasons and targets of the EU's legislative proposal.

According to the Memo published on the European Commission's website¹, the proposed draft Regulation, if adopted by the European Parliament and Council, would empower the Commission to take swift and comprehensive unilateral retaliatory measures generally foreseen under international trade rules, namely:

1. EU trade sanctions when a country does not comply with an arbitration ruling under multilateral or bilateral dispute settlement rules.

This means that where a WTO member or a party to a bilateral agreement with the EU fails to implement a WTO dispute settlement ruling or an arbitration procedure outcome, and where no settlement or satisfactory compensation is agreed, the EU may respond with retaliatory temporary measures. The defensive measures may take the form of increased customs duties, restrictions on the volume of imports or exports, or restrictions concerning access to the EU's government procurement markets.

¹ Proposal for new enforcement framework for international trade rules, Reference: MEMO/12/1006, 18/12/2012 http://europa.eu/rapid/press-release_MEMO-12-1006_en.htm



2. Retaliatory actions in case of adoption by third countries of bilateral/regional safeguard measures without satisfactory compensation.

According to WTO rules, countries may under specific conditions implement safeguard measures in the form of increased duties or quantitative restrictions on all imports, in order to give an industry some time to adjust to an unexpected increase in import flows. However, in the case of safeguards the invoking country should provide compensation to its trading partners in order to balance the level of concessions agreed under its WTO membership terms. In the event no satisfactory deal on compensation is reached, the EU would be able to take reciprocal defensive measures unilaterally. Under the proposal, these measures can take the form of temporary increased duties, or volume restrictions on imports equivalent to the negative impact of the safeguards on the EU.

3. Suspension of trade benefits granted to a WTO Member that modifies its concessions towards the EU under Article XXVIII GATT 1994 and fails to provide due compensation.

Under Article XXVIII GATT 1994, WTO member countries may under certain conditions modify (i.e. increase) their bound maximum import tariff levels on goods fixed for example in their WTO accession terms. By doing so, the member in question impedes legitimate benefits of market access of other WTO members and thus has to provide an equivalent compensation.

In cases where an agreement on the adequate compensation is not reached, WTO members adversely affected may raise their tariffs on imports of goods from the country concerned or have recourse to the WTO dispute settlement mechanism.

According to the current Commission' proposal, within 6 months after a failure of the aforementioned compensation talks the Commission would be able to impose reciprocal defensive measures (e.g. to raise import tariffs) on the goods from the WTO member in question.

The most important common feature of the potential actions described above is that they are generally allowed under the WTO rules. Thus, in cases where the WTO member concerned would not agree with the level and scope of the EU's retaliatory measures the burden of proof to demonstrate the EU's inconsistency with WTO rules would shift on the WTO member implementing the initial measures (e.g. safeguards) affecting the EU exports.

An important peculiarity of the proposed EU legislation is that the goods coverage of the initial WTO member's measures (e.g. increased bound tariffs) may not coincide with the list of goods subject to the EU's retaliation measures.

If such proposals are adopted, the existence of such retaliatory mechanism at the EU's disposal may make any successful negotiations with it on satisfactory compensation a very difficult task.

While the proposed enforcement rules may potentially apply to any country, the Commission proposal emerged precisely at a time where the EU-Russia trade tensions are particularly high. Certain measures

applied recently by Russia after accession to the WTO in August 2012 (e.g. recycling taxes on imported cars) and expected safeguard measures (e.g. grain harvesters) may well trigger the application of the new rules.

The proposed legislation, if adopted, would allow the Commission to quickly and rigorously act with sanctions immediately upon WTO dispute settlement or international arbitration rulings. The choice of industry sectors for retaliation would remain within the EU's discretion and would most likely affect the most competitive industrial exports to the EU.

Moreover, potential safeguard measures that may result from numerous safeguard investigations recently initiated in the Customs Union of Russia, Kazakhstan and Belarus (CU), would substantially affect the EU's exports. In cases where the Russian/CU authorities would not be able to propose satisfactory compensation, the EU would probably begin with the unilateral retaliation within the most sensitive industry sectors rather than immediately challenge the measures in the WTO.

For example, in cases of questionable safeguard measures the EU's retaliation under the proposed rules may be introduced almost immediately and may target imports of a wide range of sensitive industrial and agricultural products for example.

Russia could in return have recourse to the WTO's formal dispute settlement proceedings to challenge the level and/or form of the EU's retaliation, but even in case of a positive outcome of the dispute the WTO rulings would not have retroactive effect. Hence, in practice the EU's measures may be in force as long as the CU's safeguards are affecting the EU's interests.

The proposed EU legislation would have a similar effect in regard to the recent initiative of the Ukrainian Government under the Article XXVIII GATT 1994 aiming to modify its binding tariffs on over 300 goods agreed upon WTO accession. Needless to say, this initiative resulted in a furious opposition of many WTO members including the EU. Given the number of tariff lines in question the successful outcome of the EU-Ukraine compensatory negotiations appears to be highly unlikely. Consequently, should Ukraine proceed unilaterally the proposed legislation would allow the Commission to swiftly impose substantive retaliatory measures on chosen Ukrainian exports.

It is suggested therefore that the new EU trade enforcement framework was created to target primarily the protectionist and discriminative practices of the most recent members of the WTO such as Russia (CU) and Ukraine. In practice, this newly designed EU trade enforcement legislation might also appear as an effective and legitimate tool for protecting the EU's most sensitive domestic industries.

In case any additional information is required or for further questions, please do not hesitate to contact our Global Trade Practice.

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