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Proposal for a

COUNCIL REGULATION

re-imposing a definitive anti-dumping duty on imports of ironing boards originating in the People's Republic of China, manufactured by Foshan Shunde Yongjian Housewares and Hardware Co. Ltd., Foshan

EXPLANATORY MEMORANDUM

1) CONTEXT OF THE PROPOSAL

- Grounds for and objectives of the proposal

This proposal concerns the application of Council Regulation (EC) 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, ('the basic Regulation') in the partial reopening of the anti-dumping proceeding concerning imports of ironing boards originating in the People's Republic of China ('PRC').

- General context

This proposal is made in the context of the implementation of the basic Regulation and is the result of an investigation which was carried out in line with the substantive and procedural requirements laid out in the basic Regulation.

- Existing provisions in the area of the proposal

Council Regulation (EC) No 452/2007 of 23 April 2007¹.

- Consistency with other policies and objectives of the Union

Not applicable.

2) CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- Consultation of interested parties

Interested parties concerned by the proceeding have already had the possibility to defend their interests during the investigation, in line with the provisions of the basic Regulation.

- Collection and use of expertise

There was no need for external expertise.

- Impact assessment

This proposal is the result of the implementation of the basic Regulation.

The basic Regulation does not provide for a general impact assessment but contains an exhaustive list of conditions that have to be assessed.

3) LEGAL ELEMENTS OF THE PROPOSAL

- Summary of the proposed action

¹ OJ L 109, 26.4.2007, p. 12.

On 18 December 2009, the Commission announced by a notice ('notice of partial reopening'), published in the Official Journal Of the European Union², the partial reopening of the anti-dumping investigation concerning imports of ironing boards originating, inter alia, in the PRC.

This reopening was triggered by the annulment from the Court of Justice of the Council Regulation (EC) No 452/2007 in so far as it concerns one Chinese exporting producer ('Foshan Shunde'). In line with Article 266 of Treaty on the Functioning of the European Union, the institutions of the European Union are obliged to comply with the judgment of the Court of Justice. Consequently, the European Commission initiated the partial reopening of the anti-dumping investigation in so far it concerns Foshan Shunde.

The enclosed Commission proposal for a Council Regulation re-imposing the anti-dumping duty on Foshan Shunde is based on the analysis of comments received, upon the interested parties being given sufficient time to provide comments to the revised final disclosure document of 23 March 2007.

It is proposed that the Council adopt the attached proposal for a Regulation which should be published in the Official Journal of the European Union by xx XXXX 2010 at the latest.

- Legal basis

Council Regulation (EC) 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community.

- Subsidiarity principle

The proposal falls under the exclusive competence of the Union. The subsidiarity principle therefore does not apply.

- Proportionality principle

The proposal complies with the proportionality principle because the form of action is described in the above-mentioned basic Regulation and leaves no scope for national decision.

Indication of how financial and administrative burden falling upon the Union, national governments, regional and local authorities, economic operators and citizens is minimized and proportionate to the objective of the proposal is not applicable.

- Choice of instruments

Proposed instruments: Council Regulation.

Other means would not be adequate because the basic Regulation does not provide for

² OJ C 308, 18.12.2009, p. 44.

alternative options.

4) BUDGETARY IMPLICATION

The proposal has no implication for the Union budget.

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community³ (the 'basic Regulation') and in particular Article 9 thereof,

Having regard to the proposal submitted by the European Commission ('Commission') after having consulted the Advisory Committee,

Whereas:

A. PROCEDURE

- (1) By Regulation (EC) No 452/2007⁴, the Council imposed definitive anti-dumping duties ranging from 9,9 % to 38,1 % on imports of ironing boards, whether or not free-standing, with or without a steam soaking and/or heating top and/or blowing top, including sleeve boards, and essential parts thereof, i.e. the legs, the top and the iron rest originating in the People's Republic of China ('PRC') and Ukraine ('contested Regulation').
- (2) On 12 June 2007, one co-operating Chinese exporting producer, namely Foshan Shunde Yongjian Housewares and Hardware Co. Ltd. ('Foshan Shunde'), lodged an application at the Court of First Instance of the European Communities (now the General Court ('GC')) seeking the annulment of Regulation (EC) No 452/2007 in so far as it applies to the appellant (case T-206/07 Foshan Shunde Yongjian Housewares and Hardware v Council).
- (3) On 29 January 2008, the GC rejected the application of Foshan Shunde.
- (4) On 3 April 2008, Foshan Shunde lodged an appeal at the Court of Justice of the European Union ('CoJ') asking the Court to set aside the judgement of the GC and seeking the annulment of Regulation (EC) No 452/2007 as far as it concerns the appellant.

³ OJ L 343, 22.12.2009, p. 51.

⁴ OJ L 109, 26.4.2007, p. 12.

- (5) On 1 October 2009, the CoJ in its judgment in case C-141/08 P ('the CoJ judgment') set aside the previous judgment of the GC of 29 January 2008. By its judgment the CoJ found that Foshan Shunde's rights of defence were adversely affected by the infringement of Article 20(5) of the basic Regulation. Therefore, the CoJ annulled the contested Regulation in so far as it imposes an anti-dumping duty on imports of ironing boards manufactured by Foshan Shunde.
- (6) The GC in case T-2/95 *Industrie des poudres sphériques (IPS) v Council*⁵ (the 'IPS case') has recognized that, in cases where a proceeding consists of several administrative steps, the annulment of one of those steps does not annul the complete proceeding. The anti-dumping proceeding is an example of such a multi-step proceeding. Consequently, the annulment of the contested Regulation in relation to one party does not imply the annulment of the entire procedure prior to the adoption of the Regulation in question. Moreover, according to Article 266 of the Treaty on the Functioning of the European Union, the institutions of the European Union are obliged to comply with the CoJ judgment of 1 October 2009. This also implies the possibility to remedy the aspects of the contested Regulation which led to its annulment, while leaving unchanged the uncontested parts which are not affected by the CoJ judgment – as was held in case C-458/98 P *Industrie des poudres sphériques (IPS) v Council*⁶ (the 'IPS appeal case'). It must be noted that apart from the finding of an infringement of Article 20(5) of the basic Regulation, all other findings made in the contested Regulation remain automatically valid to the extent that the CoJ rejected all claims made in this respect.
- (7) Following the CoJ judgment of 1 October 2009, a notice⁷ was published concerning the partial reopening of the anti-dumping investigation concerning imports of ironing boards originating, inter alia, in the PRC. The reopening was limited in scope to the implementation of the CoJ judgment as far as Foshan Shunde is concerned.
- (8) The Commission officially advised the exporting producers, importers and users known to be concerned, the representatives of the exporting country and the Union industry of the partial reopening of the investigation. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the notice.
- (9) All parties who so requested within the above time limit and who demonstrated that there were particular reasons why they should be heard were granted the opportunity to be heard.
- (10) Representations were received from two exporting producers in the PRC (one being the party directly concerned, i.e. Foshan Shunde), the Union Industry and two unrelated importers.
- (11) All parties concerned were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive anti-dumping duties on Foshan Shunde. They were granted a period within which to make

⁵ Case T-2/95 *Industrie des poudres sphériques (IPS) v Council* [1998] ECR II-3939.

⁶ Case C-458/98 P *Industrie des poudres sphériques (IPS) v Council* [2000] ECR I-08147.

⁷ OJ C 308, 18.12.2009, p. 44.

representations subsequent to disclosure. The comments of the parties were considered and, where appropriate, the findings have been modified accordingly.

B. IMPLEMENTATION OF THE COURT RULING

1. Preliminary remark

(12) It is recalled that the reason for the annulment of the contested Regulation was that the Commission sent its proposal to impose a definitive anti-dumping duty to the Council of the European Union before the end of the mandatory deadline as set out by Article 20(5) of the basic Regulation, i.e. before the end of the 10-day mandatory deadline for receiving comments following the sending to interested parties of a definitive disclosure document.

2. Comments of interested parties

(13) Foshan Shunde argued that the CoJ judgment requires no implementing measures. According to the company the re-opening is illegal because there is no specific provision in the basic Regulation allowing for such an approach and because such re-opening would be in conflict with the statutory deadline for the completion of an investigation as set by Article 6(9) of basic Regulation (i.e. 15 months) and Article 5.10 of the WTO anti-dumping agreement (i.e. 18 months). Foshan Shunde submitted that the IPS case could not serve as a precedent because it was based on an old basic Regulation⁸, under which mandatory deadlines did not apply yet. Foshan Shunde also argued that if the Commission decided to proceed with the implementation of the CoJ judgment, this should be done on the basis of the Commission's definitive disclosure document dated 20 February 2007 (where the party was attributed Market Economy Treatment ('MET') and no dumping was found for this company) and not on the basis of the revised definitive disclosure document of 23 March 2007 (where the Commission confirmed its provisional findings for Foshan Shunde of no MET and a 18,1% dumping margin).

(14) The other Chinese exporting producer, i.e. Zhejiang Harmonic Hardware Products Co. Ltd. ('Zhejiang Harmonic') submitted a number of arguments that were essentially identical with those made by Foshan Shunde, i.e. that there is no legal basis for the re-opening of the proceeding, that no re-imposition of anti-dumping duties is by law possible beyond the time limits set by the basic Regulation and WTO anti-dumping agreement. It also argued that reissuing a revised disclosure and granting a period to reply in line with Article 20(5) of the basic Regulation cannot correct the violation of Zhejiang Harmonic's rights of defence and the unlawful imposition of duties. It finally pointed out that the Commission could not re-impose anti-dumping measures based on information relating to 2005 i.e. a period that is more than four years prior to the initiation of the partial re-opening of the investigation as this would not be in line with Article 6(1) of the basic Regulation. Furthermore, Zhejiang Harmonic argued that the Commission could not reopen the case because it has lost its objectivity and impartiality since the Regulation proposed by the Commission was partially annulled by the CoJ.

⁸ Council Regulation (EC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ L 209, 2. 8. 1988, p. 1.

- (15) The two EU unrelated importers/producers did not submit any information and data as to the legal merits of the re-investigation but rather emphasized their role as players in the EU's ironing boards market. One of them also pointed out the repercussions of the Court's annulment and the subsequent partial reopening of the investigation on their business.
- (16) The Union Industry argued that EU producers pay the price for the irregularity identified by the Court as they are left without protection against imports that were found to be dumped and causing injury. The Union Industry proposed that the procedure be resumed at the stage where the Commission's irregularity occurred i.e. at the time when the Chinese company had to submit its comments on the Commission's revised definitive disclosure document of 23 March 2007, the party's comments be decided upon and new proposal limited to the situation of Foshan Shunde be sent to the Council, with the aim of reinstating the anti-dumping duty on imports of ironing boards produced by Foshan Shunde. The Union Industry also submitted that a similar approach was followed in the past (i.e. in the judgments in the IPS case, the IPS appeal case, and in Regulation (EC) No 235/2004⁹ adopted following the judgment of the Court of Justice of the European Union in case C-76/00 P *Petrotub and Republica v. Council*). Moreover, according to this party the 15-month time limit of the basic Regulation does not apply to the amendment of a Regulation imposing anti-dumping duties in order to implement a judgement of an EU Court.

3. Analysis of comments

- (17) It is recalled that the CoJ has rejected all the substantive arguments of Foshan Shunde referring to the merits of the case. Thus, the Union institutions' obligation is focused on correcting the part of the administrative procedure where the irregularity occurred in the initial investigation.
- (18) The claim that the introduction of deadlines (i.e. 15 months and 18 months respectively) to conclude anti-dumping investigations prevents the Commission from following the approach underlying the IPS case was found unwarranted. It is considered that this deadline is not relevant for the implementation of a Court judgment. Indeed, such deadline only governs the completion of the original investigation from the date of initiation to the date of definitive action, and does not concern any subsequent action that might have to be taken for instance as a result of judicial review. Furthermore, it is noted that any other interpretation would mean that a successful legal action brought by the Union industry would be without any practical effect for that party if it is accepted that the expiry of the time limit to conclude the original investigation would not allow the implementation of a Court judgement. This would be at odds with the principle that all parties should have the possibility of effective judicial review.
- (19) It is also recalled that the GC in its judgment in the joint cases T-163/94 and T165/94¹⁰ has held that even the soft deadline applicable under the old basic Regulation could not be stretched beyond reasonable limits and found that an investigation lasting for more than 3 years was too long. This contrasts with the IPS case where the

⁹ OJ L 40, 12.2.2004, p. 11.

¹⁰ Joined cases T-163/94 and 165/94 *NTN Corporation and Koyo Seiko Co., Ltd v Council* [1995] ECR II-01381.

implementation of the Court ruling occurred seven years after the initiation of the original investigation and the Court's ruling contains no indication that deadlines were an issue.

- (20) Therefore, it is concluded that Article 6(9) of the basic Regulation applies to the initiation of proceedings and the conclusion of the investigation initiated pursuant to Article 5(9) of the basic Regulation only and not to a partial reopening of an investigation with a view to implementing an EU Court ruling.
- (21) This conclusion is in line with the approach taken for the implementation of WTO panels and Appellate Body reports rulings where it is accepted that institutions could amend deficiencies of a regulation imposing anti-dumping duties in order to comply with dispute settlement body reports, including in cases concerning the European Union¹¹. In such cases it was felt necessary to adopt special procedures to implement WTO panel and Appellate Body reports because of the lack of direct applicability of such rulings in the EU legal order, by contrast with the decisions taken by the Court of Justice which are directly applicable.
- (22) With respect to the arguments submitted on the application of Article 6(1) of the basic Regulation it is noted that no infringement of Article 6(1) of the basic Regulation could be established since the Commission has not opened a new proceeding but reopened the original investigation to implement a Court judgement.
- (23) With respect to the argument that Foshan Shunde should receive the disclosure document of 20 February 2007 and not the revised disclosure document of 23 March 2007 it is noted that in line with the CoJ's Judgment the Commission should correct the procedural irregularity. This administrative irregularity only happened when Foshan Shunde received less than 10 days to comment on the revised disclosure document. Hence, the validity of the preceding steps of the original investigation were not affected by the CoJ judgment and does therefore not require to be reviewed in the context of the current partial reopening.

4. Conclusion

- (24) Account taken of the comments made by the parties and the analysis thereof it was concluded that the implementation of the CoJ judgment should take the form of re-disclosure to Foshan Shunde and all other interested parties of the revised definitive disclosure document of 23 March 2007 on the basis of which it was proposed to impose Council Regulation (EC) No 452/2007.

¹¹ European Communities-Antidumping Duties on Imports of Cotton-Tyle Bed Linen from India: Recourse to Article 21.5 of the DSU by India WT/DS141/AB/RW (8 April 2003), paras.82-86.; Council Regulation (EC) No 1515/2001 of 23 July 2001 on the measures that may be taken by the Community following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters, OJ L 201, 26.7.2001, p.10.; Council Regulation (EC) No 436/2004 of 8 March 2004 amending Regulation (EC) No 1784/2000 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain malleable cast iron tube or pipe fittings originating in Brazil, the Czech Republic, Japan, the People's Republic of China, the Republic of Korea and Thailand following Reports adopted by the Dispute Settlement Body of the WTO, OJ L 72, 11.3.2004, p. 15.

- (25) On the basis of the above it was also concluded that the Commission should give Foshan Shunde and all other interested parties enough time to provide comments on the revised definitive disclosure document of 23 March 2007 and then evaluate such comments in order to determine whether to make a proposal to the Council to re-impose the anti-dumping duty on imports of ironing boards manufactured by Foshan Shunde on the basis of the facts relating to the original investigation period.

C. DISCLOSURE

- (26) Interested parties were informed of the essential facts and considerations on the basis of which it was intended to implement the CoJ judgment.
- (27) All interested parties were given an opportunity to comment (applying the 10 days period prescribed in Article 20(5) of the basic Regulation). Their comments were considered and taken into account where appropriate but they were not of a nature as to change the above conclusions.
- (28) Foshan Shunde and all other interested parties received the revised definitive disclosure document dated 23 March 2007 on the basis of which it was proposed to re-impose the anti-dumping duty on imports of ironing boards from Foshan Shunde on the basis of the facts relating to the original investigation period.
- (29) Foshan Shunde and all other interested parties were given an opportunity to comment on this revised disclosure document. The oral and written arguments submitted were considered and, where appropriate were taken into account. In the light of the comments made, the following can be observed. The course of action taken in this Regulation is based on the fact that in the CoJ judgment, the CoJ emphasised that Art. 2(7)(c) of the basic Regulation cannot be interpreted in such a manner as to oblige the Commission to propose to the Council definitive measures which would perpetuate an error of assessment made in the original assessment of the substantive criteria of that provision¹². Although the CoJ made this comment in relation to an error to the detriment of the applicant in that case, it is clear that this interpretation must be applied in an even-handed manner, meaning that also an error to the detriment of the Union industry can not be perpetuated. As stated in the revised final disclosure document of 23 March 2007 and in the revised specific disclosure document of the same date, and in earlier letters by the Commission to the Applicant on which those documents are based, Foshan Shunde must be refused Market Economy Status because its accounting practices had various serious deficiencies and were therefore not in line with International Accounting Standards. This violation of the 2nd criterion in Art. 2(7) can not be remedied by the statistics referred to in the last sentence of point 12 of the CoJ judgment. The approach which was originally considered in the final disclosure document of 20 February 2007 should therefore be qualified as an error, which must be corrected. In the interest of protecting the Union industry against dumping, the resulting anti-dumping duty on the applicant should be re-imposed as soon as possible.
- (30) Following the disclosure of the essential facts and considerations on the basis of which it was intended to recommend the re-imposition of definitive anti-dumping measures, one Chinese exporting producer proposed a price undertaking in accordance with

¹² Para. 111 of the CoJ judgment.

Article 8(1) of the basic Regulation. However, this undertaking offer failed to provide any remedies with respect to the problems already highlighted in recital 68 of Council Regulation (EC) No 452/2007, notably the need to establish meaningful minimum import prices for each of the numerous product types which could be properly monitored by the Commission without serious risk of circumvention. Moreover, the price undertaking offer either suggested one average minimum price covering only one product type exported to the EU, or several minimum import prices based again on weighted average prices for combinations of some products. Furthermore, all the proposed combinations for minimum import price were significantly lower than the highest established export prices. On the basis of the above, it was concluded that such undertaking was impractical and therefore it cannot be accepted. The party was informed accordingly and given an opportunity to comment. However, its comments have not altered the above conclusion.

D. DURATION OF MEASURES

(31) This procedure does not affect the date on which the measures imposed by Regulation (EC) No 452/2007 will expire pursuant to Article 11(2) of the basic Regulation,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby re-imposed on imports of ironing boards, whether or not free-standing, with or without a steam soaking and/or heating top and/or blowing top, including sleeve boards, and essential parts thereof, i.e. the legs, the top and the iron rest originating in the People's Republic of China, currently falling within CN codes ex 3924 90 00, ex 4421 90 98, ex 7323 93 90, ex 7323 99 91, ex 7323 99 99, ex 8516 79 70 and ex 8516 90 00 (TARIC codes 3924 90 00 10, 4421 90 98 10, 7323 93 90 10, 7323 99 91 10, 7323 99 99 10, 8516 79 70 10 and 8516 90 00 51) and manufactured by Foshan Shunde Yongjian Housewares and Hardware Co. Ltd., Foshan (TARIC additional code A785).

2. The rate of the definitive anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, shall be 18.1%.

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

This Regulation shall enter into force on the day following 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 Council
The President
[...]