

Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (codification)

Article 2

Determination of dumping

A.
NORMAL VALUE

1 The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.

However, where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers.

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.

In order to determine whether two parties are associated, account may be taken of the definition of related parties set out in Article 127 of Commission Implementing Regulation (EU) 2015/2447⁽¹⁾.

2 Sales of the like product intended for domestic consumption shall normally be used to determine the normal value if such sales volume constitutes 5 % or more of the sales volume of the product under consideration to the Union. However, a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned.

3 When there are no or insufficient sales of the like product 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 product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.

A particular market situation for the product concerned within the meaning of the first subparagraph may be deemed to exist, inter alia, when prices are artificially low, when there is significant barter trade, or when there are non-commercial processing arrangements.

4 Sales of the like product in the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs (fixed and variable) plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price, and may be disregarded in determining the normal value, only if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

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If prices which are below costs at the time of sale are above weighted average costs for the period of investigation, such prices shall be considered to provide for recovery of costs within a reasonable period of time.

The extended period of time shall normally be one year but shall in no case be less than six months, and sales below unit cost shall be considered to be made in substantial quantities within such a period when it is established that the weighted average selling price is below the weighted average unit cost, or that the volume of sales below unit cost is not less than 20 % of sales being used to determine normal value.

5 Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.

If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.

Consideration shall be given to evidence submitted on the proper allocation of costs, provided that it is shown that such allocations have been historically utilised. In the absence of a more appropriate method, preference shall be given to the allocation of costs on the basis of turnover. Unless already reflected in the cost allocations under this subparagraph, costs shall be adjusted appropriately for those non-recurring items of cost which benefit future and/or current production.

Where the costs for part of the period for cost recovery are affected by the use of new production facilities requiring substantial additional investment and by low-capacity utilisation rates, which are the result of start-up operations which take place within or during part of the investigation period, the average costs for the start-up phase shall be those applicable, under the abovementioned allocation rules, at the end of such a phase, and shall be included at that level, for the period concerned, in the weighted average costs referred to in the second subparagraph of paragraph 4. The length of a start-up phase shall be determined in relation to the circumstances of the producer or exporter concerned, but shall not exceed an appropriate initial portion of the period for cost recovery. For this adjustment to costs applicable during the investigation period, information relating to a start-up phase which extends beyond that period shall be taken into account where it is submitted prior to verification visits and within three months of the initiation of the investigation.

6 The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product by the exporter or producer under investigation. When such amounts cannot be determined on that basis, the amounts may be determined on the basis of:

- a the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- b the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;

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- c any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.

[^{F1}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

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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).]

[^{F27} 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⁽²⁾, normal value shall be determined on the basis of the price or constructed value in an appropriate representative country, or the price from such a third country to other countries, including the Union, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Union for the like product, duly adjusted if necessary to include a reasonable profit margin.

The appropriate representative country shall be selected in a reasonable manner, due account being taken of any reliable information made available at the time of selection, and in particular of cooperation by at least one exporter and producer in that country. 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. Account shall also be taken of time limits. Where appropriate, an appropriate representative country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed promptly after its initiation of the country envisaged and shall be given 10 days to comment.]

B.

EXPORT PRICE

8 The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Union.

9 In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer or are not resold in the condition in which they were imported, on any reasonable basis.

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In those cases, adjustment for all costs, including duties and taxes, incurred between the importation and resale, and for profits accruing, shall be made so as to establish a reliable export price, at the Union frontier level.

The items for which adjustment shall be made shall include those normally borne by an importer but paid by any party, either inside or outside the Union, which appears to be associated or to have a compensatory arrangement with the importer or exporter, including usual transport, insurance, handling, loading and ancillary costs, customs duties, any anti-dumping duties, and other taxes payable in the importing country by reason of the importation or sale of the goods, and a reasonable margin for selling, general and administrative costs and profit.

C.

COMPARISON

10 A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at, as closely as possible, the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis, due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be made are listed as follows:

a Physical characteristics

An adjustment shall be made for differences in the physical characteristics of the product concerned. The amount of the adjustment shall correspond to a reasonable estimate of the market value of the difference.

b Import charges and indirect taxes

An adjustment shall be made to the normal value for an amount corresponding to any import charges or indirect taxes borne by the like product and by materials physically incorporated therein, when intended for consumption in the exporting country and not collected or refunded in respect of the product exported to the Union.

c Discounts, rebates and quantities

An adjustment shall be made for differences in discounts and rebates, including those given for differences in quantities, if those are properly quantified and are directly linked to the sales under consideration. An adjustment may also be made for deferred discounts and rebates if the claim is based on consistent practice in prior periods, including compliance with the conditions required to qualify for the discount or rebates.

d Level of trade

(i) An adjustment for differences in levels of trade, including any differences which may arise in OEM (original equipment manufacturer) sales, shall be made where, in relation to the distribution chain in both markets, it is shown that the export price, including a constructed export price, is at a different level of trade from the normal value and the difference has affected price comparability, which is demonstrated by consistent and distinct differences in functions and prices of the seller for the different levels of trade in the domestic market of the exporting country. The amount of the adjustment shall be based on the market value of the difference.

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(ii) However, in circumstances not envisaged under point (i), when an existing difference in level of trade cannot be quantified because of the absence of the relevant levels on the domestic market of the exporting countries, or where certain functions are shown clearly to relate to levels of trade other than the one which is to be used in the comparison, a special adjustment may be granted.

e Transport, insurance, handling, loading and ancillary costs

An adjustment shall be made for differences in the directly related costs incurred for conveying the product concerned from the premises of the exporter to an independent buyer, where such costs are included in the prices charged. Those costs shall include transport, insurance, handling, loading and ancillary costs.

f Packing

An adjustment shall be made for differences in the directly related packing costs for the product concerned.

g Credit

An adjustment shall be made for differences in the cost of any credit granted for the sales under consideration, provided that it is a factor taken into account in the determination of the prices charged.

h After-sales costs

An adjustment shall be made for differences in the direct costs of providing warranties, guarantees, technical assistance and services, as provided for by law and/or in the sales contract.

i Commissions

An adjustment shall be made for differences in commissions paid in respect of the sales under consideration.

The term ‘commissions’ shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis.

j Currency conversions

When the price comparison requires a conversion of currencies, such conversion shall be made using the rate of exchange on the date of sale, except that, when a sale of foreign currency on forward markets is directly linked to the export sale involved, the rate of exchange in the forward sale shall be used. Normally, the date of sale shall be the date of invoice but the date of contract, purchase order or order confirmation may be used if those more appropriately establish the material terms of sale. Fluctuations in exchange rates shall be ignored and exporters shall be granted 60 days to reflect a sustained movement in exchange rates during the investigation period.

k Other factors

An adjustment may also be made for differences in other factors not provided for under points (a) to (j), if it is demonstrated that they affect price comparability as required under this paragraph, in particular if customers consistently pay different prices on the domestic market because of the difference in such factors.

D.
DUMPING MARGIN

Changes to legislation: There are currently no known outstanding effects for the Regulation (EU) 2016/1036 of the European Parliament and of the Council, Article 2. (See end of Document for details)

11 Subject to the relevant provisions governing fair comparison, the existence of margins of dumping during the investigation period shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all export transactions to the Union, or by a comparison of individual normal values and individual export prices to the Union on a transaction-to-transaction basis. However, a normal value established on a weighted average basis may be compared to prices of all individual export transactions to the Union, if there is a significant difference in the pattern of export prices among different purchasers, regions or time periods, and if the methods specified in the first sentence of this paragraph would not reflect the full degree of dumping being practised. This paragraph shall not preclude the use of sampling in accordance with Article 17.

12 The dumping margin shall be the amount by which the normal value exceeds the export price. Where dumping margins vary, a weighted average dumping margin may be established.

Textual Amendments

- F1** Inserted by 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.
- F2** Substituted by 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.

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- (1) Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343, 29.12.2015, p. 558).
- (2) [^{F2}Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries (OJ L 123, 19.5.2015, p. 33).]

Textual Amendments

- F2** Substituted by 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.

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