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European Commission

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Case R722 - Expiry review of the anti-dumping measures applicable to imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan (2020/C 280/06) [1]- EURANIMI - Comments with regard to the Final Disclosure Document (FDD) issued by DG Trade - Directorate G - Trade Defence - Investigations IV. Relations with third countries on Trade Defence matters

Dear Case Team,

1. **Product definition**

The Investigating Services have committed a legal error by altering the product definition via the addition of further Combined Nomenclature Codes.

More in detail, legally speaking, the product definition under COMMISSION IMPLEMENTING REGULATION (EU) 2015/1429 of 26 August 2015 imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan was drafted as follows.

Article 1 such Regulation reads as follows:

A definitive anti-dumping duty is imposed on imports of flat-rolled products of stainless steel, not further worked than cold-rolled (cold-reduced), **currently falling within CN codes** 7219 31 00, 7219 32 10, 7219 32 90, 7219 33 10, 7219 33 90, 7219 34 10, 7219 34 90, 7219 35 10, 7219

[1] *OJ C 280, 25.8.2020, p. 6–17*

35 90, 7220 20 21, 7220 20 29, 7220 20 41, 7220 20 49, 7220 20 81 and 7220 20 89 and originating in the People's Republic of China and Taiwan. (emphasis added).

Strictly legally speaking the above means that for a product in order to be covered by the relevant anti-dumping duties the latter will have: a) first to match with the descriptive part of such article “flat-rolled products of stainless steel, not further worked than cold-rolled (cold-reduced)” and b) to also fall within one of the mentioned CN Codes. It is the combination of the product definition with the relevant CN Codes relevant when such Regulation was published that determined what product that was originally subject to the anti-dumping duties at issue with such 2015 Regulation.

In the current expiry review investigation the Commission would like to add CN Codes 7219 90 20, CN 7219 90 80, CN 7220 90 80 and CN 7220 90 20 to the product definition of the future possible Review Regulation. However, this would be a legal error in that the product definition would be enlarged covering products categories which were not covered in the original regulation of year 2015.

The fact that products under CN Codes 7219 90 20, CN 7219 90 80, CN 7220 90 80 and CN 7220 90 20 were not covered by the original regulation, be it by mistake or not, rendered the product definition of the 2015 Regulation narrower than the one which the Commission would like to adopt in the possible future Expiry Review Regulation. We invite the Commission’s services to review such matter so to avoid that the possible Review Regulation would be illegal as a matter of EU law because it impermissibly enlarges the scope of the product definition, a matter which is forbidden in a pure expiry review Regulation.

2. Injury and causation

Despite the fact that the injury and causation analysis are based on “facts available”, the data presented by the Commission if interpreted in an objective manner show now sign of injury for the European Industry.

As far as the Chinese imports are at issue, the latter represented a de minimis EU market share of 0.4% , which renders their impact on the EU market a nullity as far as injury is concerned. Also from the point of view of the causation analysis such imports cannot be correlated with any form of injury. Recital 167 of the General Disclosure document is clear in confirming that imports from the People's Republic of China were very low. Even if they allegedly doubled during the RIP, still they remained very low.

In recital (223) of the General Disclosure document the Commission stated that the investigation revealed that the volume of PRC's imports remained below de minimis level during the entire period considered. More importantly, prices of Chinese imports were during the entire period considered higher than prices of the Union Industry and did not undercut the prices of the Union industry.

The Commission then concluded that the material injury suffered by the Union industry could not have been caused by the imports from China.

We agree with such Commission's analysis. However we have to disagree with the subsequent step of such analysis concerning the Likelihood and continuation and/or recurrence of injury analysis concerning the above PRC's products.

Recitals (229) to (239) of the General Disclosure document de facto argue that despite the fact that the Commission found Chinese imports having higher prices than EU industry ones, despite the fact their volume in the EU market and their EU market share is de minimis, in the future they would likely to continue being dumped and causing injury to the EU industry.

First of all EURANIMI is of the view that such analysis is highly defective as there is no evidence at all which could sustain that the PRC's imports would become at lower prices and injurious in the future. The Commission's services here goes even against the "facts available" doctrine in that facts available on the file show exactly the likelihood that the opposite takes place, namely that PRC's imports will continue to be de minimis, at high prices and not causing any

injury to EU industry. There is nothing on file which would explain how high price imports from a country with such de minimis quota of the EU market would in the future become injurious.

Such analysis breaches Article 3 para 2 of the Basic Regulation which provides that that the injury and causation analysis must be based on positive evidence.

At the same time there is a legal error here in that the likelihood of continuation and/or recurrence of injury for the future presuppose that there has been at one point injury which is not the case concerning imports from PRC.

In light of the above, we request the Commission to conclude that the imports from PRC are likely not to cause any form of injury in the future.

With regard to imports from Taiwan, while Taiwan in general historically had a higher EU market share than the PRC, the following considerations apply.

The imports from Taiwan during the RIP amounted to 159.110 tonnes which corresponded to a EU market share of 5,0%. Such EU market share has been stable over the years ranging from 5.3% in year 2017, to 5,7% in 2018 and decreased to 5,2% in 2019. As far as imports volumes are at issue it is to be noted that the lower amount of such imports was to be found in year 2019 with 178.758 tonnes.

The above background concerning imports from Taiwan shows a stable and even decreasing EU market share and a stable and even decreasing volume of imports from Taiwan. It is therefore difficult to understand how such data can sustain a finding of injury to the EU industry. In reality the Commission has omitted to duly consider that imports from other third countries and the respective market share, like it happened with Korea, have increased in an important manner during the RIP. If there is any injury at all, the latter is caused by such imports in primis and not by imports from Taiwan. Therefore, also here the injury analysis by the General Disclosure documents seems defective.

The above is to be read in the context of the overall data present in the injury assessment which also show absence of serious prejudice to EU industry. EU industry maintains a very high market share of 72,9% and the total number of its employees even increased during the RIP.

In light of the above, we ask the Commission to reconsider its position and find that imports from Taiwan caused no injury.

3. **Breach of Article 2(6a) of the EU Basic Anti-dumping Regulation concerning the legal status of the Report by which the European Commission establishes the existence of significant market distortions in a certain country or a certain sector in that country.**

The European Commission in paragraphs 63 of the final disclosure document (FDD) argues:

"(63) In sum, the evidence available showed that prices or costs of the product under review, including the costs of raw materials, energy and labour, are not the result of free market forces because they are affected by substantial government intervention within the meaning of Article 2(6a)(b) of the basic Regulation as shown by the actual or potential impact of one or more of the relevant elements listed therein. On that basis, and in the absence of any cooperation from the GOC, the Commission concluded that it is not appropriate to use domestic prices and costs to establish normal value in this case. Consequently, the Commission proceeded to construct the normal value exclusively on the basis of costs of production and sale reflecting undistorted prices or benchmarks, that is, in this case, on the basis of corresponding costs of production and sale in an appropriate representative country, in accordance with Article 2(6a)(a) of the basic Regulation, as discussed in the following section."

The Commission, as stated in paragraphs 33 to 62 of the FDD, to reach the aforementioned conclusions as well as on the content of the "Commission services working document on significant distortions in the economy of the People's Republic of China for the purpose of trade defense investigations "(see para. 34 FDD) based its analysis on the fact that in some

recent investigations concerning the steel sector in the PRC, the Commission found significant distortions within the meaning of Article 2 (6a) (b) of the basic Regulation (see par. 42 FDD).

In these investigations, the Commission allegedly found substantial government intervention in the PRC which led to a distortion of the effective allocation of resources in line with market principles. In particular, the Commission concluded that in the steel sector, which is the main raw material to produce the product concerned, not only does a substantial degree of GOC ownership persist under Article 2 (6a), point (b), first indent of the basic Regulation13, but the GOC is also able to interfere with prices and costs through the presence of the State in the enterprises within the meaning of Article 2 (6a) (b), second indent of the basic regulation 14. The Commission also found that the presence and intervention of the state in the financial markets, as well as in the supply of raw materials and inputs, have an additional distorting effect on the market. Indeed, overall, the planning system in the PRC would result in a concentration of resources in sectors designated as strategic or otherwise politically important by the GOC, rather than being allocated in line with market forces. Furthermore, the Commission concluded that Chinese bankruptcy and property law is not functioning properly under Article 2 (6a) (b) fourth indent of the basic Regulation, thus creating distortions, in particular when keeping companies afloat. insolvent and are assigned land rights of use in the PRC. Similarly, the Commission found distortions of wage costs in the steel sector within the meaning of Article 2 (6a) (b), fifth indent of the basic Regulation17, as well as distortions in financial markets within the meaning of Article 2 (6 a) (b) sixth indent of the basic Regulation, in particular as regards access to capital for corporate actors in the PRC (see par. 45 FDD).

The Commission refers, in particular to Commission Implementing Regulation (EU) 2021/635 of 16 April 2021 imposing a definitive anti-dumping duty on imports of certain welded pipes and tubes of iron or non-alloyed steel originating in Belarus, the People's Republic of China and Russia following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036

of the European Parliament and of the Council[2] and to Commission Implementing Regulation (EU) 2020/508 of 7 April 2020 imposing a provisional anti-dumping duty on imports of certain hot rolled stainless steel sheets and coils originating in Indonesia, the People's Republic of China and Taiwan[3].

As can be seen from the reading of recitals 89 to 150 and 101 to 159 of such Regulations, the verification of the existence of the significant distorsions referred to in Article 2 (6) (b) is based entirely or almost entirely on a Commission staff document and in particular on "Commission Staff Working Document on Significant Distortions in the Economy of the People's Republic of China for the purposes of Trade Defense Investigations, 20 December 2017"(hereinafter also referred to as "Report").

The Report mentioned above is a simple Commission's Staff Working document **which lacks the formal and substantive characteristics for being considered a formal European Commission's Report** and **cannot be used as a means of proof for the purpose of determining the existence of significant distortions pursuant to Article 2 (6) (a) (b).**

The Report at issue is a "Staff Working" document that has never been approved formally by the Commission /College of Commissioners. Otherwise, it would have a different title and different references. As such, therefore, the Report cannot qualify as a formal document *produced* by the Commission and cannot be used to prove alleged trade distortions of the Chinese Market.

The Report in the form of Working Document has only been made available on the DG TRADE's Internet Site and in any event only in English language. Therefore, the Working Document at issue has not been rendered public within the meaning of European Union law in that it has not been *published* on the Official Journal of the European Union.

[2] *OJ L 132, 19.4.2021, p. 145–193*
[3] *OJ L 110, 8.4.2020, p. 3–57*

According the Article 2, 6 a (c) of 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 as lastly amended by Commission Delegated Regulation (EU) 2020/1173 of 4 June 2020 (the "Basic Regulation") reads as follows:

(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 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.* (emphasis added)

The Basic Regulation makes it clear that the document at issue **must be a report** and **must be a document adopted formally by the European Commission** which **shall be made public** and **updated.**

The PRC's alleged market distortion analysis in the present General Disclosure Document is therefore unlawful in that it relies on the market distortion analysis of other EU Regulation which in turn had relied on a Commission's Working Staff document which is defective as per the above mentioned arguments.

Yours truly,

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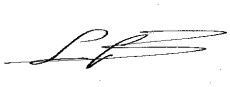

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