

Non-Application of the Lesser Duty Rule by the Commission since Modernisation (Article 7(2a))

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Background

The TDI Modernisation package (Regulation 2018/825) introduced changes to the lesser duty rule in the basic anti-dumping Regulation (Regulation 2016/1036). The modernisation package came into force in June 2018.

Article 7(2a) of the modernisation package now allows for the non-application of the lesser duty rule where there is a distortion on raw materials accounting for no less than 17% of the cost of production of the product concerned, and per Article 7(2b) it would be in the Union's interest to apply a duty reflecting the margin of dumping.

O'C&CO has examined the use made by the Union Industry and the Commission of this new provision. This examination is of all Article 5 Notices of Initiation since the introduction of the new rule in which the Commission provided that Article 7(2a) would be examined.

This brief paper has four sections:

- i) a statistical summary of the use of the new rule;
- ii) a summary of the 9 relevant investigations;
- iii) the finding of the examination (a better duty rule?);
- iv) the relevant law.

The paper has two annexes:

- [Annex 1](#): a detailed listing of the different investigations
- [Annex 2](#): a legal analysis of the relevant findings.

The Annex 1 listing provides links to the relevant notices of initiation and to the provisional and definitive measures in question.

Statistical summary

- 9 notices of initiation (since 2018) included Article 7(2a) within the scope of the investigation;
- 1 application of Article 7(2a) (UAN Russia).



- 17 Article 5 investigations in which Article 7(2a) was not cited.

Article 7(2a) was applied in one case

In UAN Russia (AD649), the Commission applied the injury margin on the basis that:

- Distortions for the purposes of 7(2a) were found;
- It was in the Union Interest under Article 7(2b) to apply 7(2a);
- COM considered the 30% export tax was decisive for Article 7(2b);
- It was therefor in the Union Interest not to apply the lesser duty.

Three different reasons emerge as to why Article 7(2a) was not applied in 8 investigations

1. The dumping margin was lower than the injury margin
 - *AD664 (Aluminium Extrusion - China)*
 - *AD665 (HRF Steel - Turkey)*
 - *AD680 (Graphite Electrodes – China)*
2. No distortion to the raw material within the meaning of Article 7(2a)
 - *AD668 (Aluminium Flat Rolled Products – China)*
 - *AD673 (Aluminium Convertor Foil - China)*
 - *AD679 (Calcium Silicon - China)*
 - *AD670 (Stainless Steel Cold Rolled – India, Indonesia)*
3. Commission's assessment concludes that it is not in the Union's interest within Article 7(2b)
 - *AD658 (Stainless Steel HRF – Indonesia, China, Taiwan)*

The BETTER Duty Rule: an analysis as to why Article 7(2a) was not applied

The Commission applies the new rule conservatively. In two cases, the Commission overemphasised the reasons not to apply the new rule when the facts and the clear interests of the Union industry called for its application.

The Commission has significant discretion, in trade defence investigations, to evaluate complex economic, market and commercial realities. For the purposes of the new Article



7(2a), this wide discretion extends to: i) the factors that the Commission can take into consideration in reaching its conclusions, ii) the weighting given to any one factor, and iii) the facts available in relation to each factor.

How the Commission exercises this discretion allows for considerable leeway in the setting of the level of the anti-dumping duty and in the application of Article 7(2a).

The Commission's conservatism can be first seen in AD670 concerning Stainless Steel Cold-Rolled Products originating in India and Indonesia. Here the Commission found that there was a distortion in the raw material but one company concerned did not purchase this raw material but an intermediate product that was not the distorted raw material. This is a highly formalistic approach as the Commission did not examine the extent to which the original distortion carried through to the intermediate product. In addition, the approach was out of line with findings of carry-throughs in other investigations.

Conservatism is also most clearly demonstrated by the findings in AD658 concerning Stainless Steel HRF originating China, Indonesia and Taiwan. In this investigation the Commission found that there were raw material distortions but did not consider that it was in the Union interest, within the terms of Article 7(2b) to apply the higher duty. It is clear from the Commission's reasoning that it gave greater weight to the needs of the Union user industry (to have a lower duty) despite the fact that the Commission also found that supplies were available from other origins and the Union industry had significant spare capacity.

The Commission applies what it considers the BETTER duty rather than a strict dis-application of the lesser duty rule as required by the new provisions of Article 7.

It's the BETTER duty approach and not what was intended in the MODERNISATION approach.

Relevant parts of Article 7 of Regulation 2016/1036

2. The amount of the provisional anti-dumping duty shall not exceed the margin of dumping as provisionally established, but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Union industry.

'2a. When examining whether a duty lower than the margin of dumping would be sufficient to remove injury, the Commission shall take into account whether there are distortions on raw materials with regard to the product concerned.

For the purposes of this paragraph, distortions on raw materials consist of the following measures: dual pricing schemes, export taxes, export surtax, export quota, export prohibition, fiscal tax on exports, licensing requirements, minimum export price, value added tax (VAT) refund reduction or withdrawal, restriction on customs clearance point for exporters, qualified exporters list, domestic



market obligation, captive mining if the price of a raw material is significantly lower as compared to prices in the representative international markets.

The Commission is empowered to adopt delegated acts in accordance with Article 23a to amend this Regulation by adding further distortions on raw materials on to the list referred to in the second subparagraph of this paragraph, if the OECD “Inventory on export restrictions on industrial raw materials”, or any OECD database which replaces this inventory, identifies other types of measures.

The investigation shall cover any distortion on raw materials identified in the second subparagraph of this paragraph, for the existence of which the Commission has sufficient evidence pursuant to Article 5.

For the purpose of this Regulation, a single raw material, whether unprocessed or processed, including energy, for which a distortion is found, must account for not less than 17 % of the cost of production of the product concerned. For the purpose of this calculation, an undistorted price of the raw material as established in representative international markets shall be used.

2b. Where the Commission, on the basis of all the information submitted, can clearly conclude that it is in the Union’s interest to determine the amount of the provisional duties in accordance with paragraph 2a of this Article, paragraph 2 of this Article shall not apply. The Commission shall actively seek information from interested parties enabling it to determine whether paragraph 2 or 2a of this Article shall apply. In this regard, the Commission shall examine all pertinent information such as spare capacities in the exporting country, competition for raw materials and the effect on supply chains for Union companies. In the absence of cooperation, the Commission may conclude that it is in accordance with the Union interest to apply paragraph 2a of this Article. When carrying out the Union-interest test in accordance with Article 21, special consideration shall be given to this matter.



Annex 1 - LIST OF THE CASES

Case	Product concerned	Notice of Initiation	7(2a) cited In NoI (y/n)	7(2a) Used (y/n)	Provisional Measures	Definitive Measures	Comments
AD649	Urea and ammonium nitrate (Russia, Trinidad, Tob, USA)	13/08/18	Yes C 284/08	Yes	2019/576	2019/1688	PM Recital (261) Having found distortions on raw materials with regard to the product concerned in the sense of Article 7(2a) of the basic Regulation, namely in the form of, among others, an export tax of 30 %, the Commission concluded that it would be in the Union interest, as provided for in Article 7(2b) of the basic Regulation, to set the amount of the duties at the level of the dumping margins as a duty lower than the margin of dumping would not be sufficient to address the injury suffered by the Union industry.
AD651	Hollow sections (North Macedonia, Russia; Turkey)	28/09/18	No C 347/6		terminated		
AD652	Steel road wheels (China)	15/02/19	No C 60/07		2019/2118	2020/353	



AD653	Glass fibre fabrics (Egypt, China)	21/02/19	No C 68/09			202/492	
AD655	Glass fibre reinforcements (Bahrain, Egypt)	03/05/19	No C 151/5		terminated		
AD654	Polyvinyl alcohol (China)	30/07/19	No C 256/3			2020/1336	
AD658	Stainless steel hot rolled flat products (Indonesia, China, Taiwan)	12/08/19	Yes C 269 I/01	No	2020/508	2020/1408	DM Recital (296) The fact that only one of the three elements explicitly listed in Article 7(2b) of the basic Regulation would speak against setting the duty pursuant to Article 7(2a) of the basic Regulation and the fact that the complainant, in addition, had identified other non-listed elements which would also call for applying Article 7(2a) cannot be held to invoke that a disproportionate weight was attributed to the third criterion, i.e. the effect on supply chains. If Article 7 (2a) would be applied, an analysis of the third criterion, the effect on supply chains, revealed disproportionate repercussions for the user industry, (...). Therefore, under these circumstances where one user, which provides significant employment in the Union, which accounts for most of the imports and a very significant share of consumption and which will clearly be seriously affected by duties if they would be established on the basis of Article 7(2a), the importance of the findings in the analysis of the effect on the supply chains for companies in the Union leads to the conclusion that it is not in the Union interest to apply Article 7(2a).



AD659	Thermal paper (Korea)	10/10/19	No C 342/8		2020/705	2020/1524	
AD663	Pins and staples (China)	18/12/19	No C 425/8		terminated		
AD664	Aluminium extrusions (China)	14/02/20	Yes C 51/12	No	2020/1428	2021/546	<p>PM Recital (347) Distortions appear to result in prices that are lower than those quoted on international markets of the same product. Therefore, in accordance with Article 7(2a) of the basic Regulation, this investigation examined the alleged distortions to assess whether, if relevant, a duty lower than the margin of dumping would be sufficient to remove injury.</p> <p>Recital (348) However, as the margins adequate to remove injury are higher than the dumping margins, the Commission considered that, at this stage, it was not necessary to address this aspect.</p>
AD665	Hot rolled flat products (Turkey)	14/05/20	Yes C 166/5	No	2021/9	2021/1100	<p>PM Recital (171) In accordance with Article 7(2a) of the basic Regulation, this investigation examined the alleged distortions to assess whether, if relevant, a duty lower than the margin of dumping would be sufficient to remove injury.</p> <p>Recital (172) However, as the margins adequate to remove injury are higher than the dumping margins, the Commission considered that, at this stage, it was not necessary to address this aspect.</p>



							DM Recital (244) In the absence of any comments with respect to this section, the Commission confirmed its conclusions set out in recitals (171) to (172) of the provisional Regulation.
AD668	Aluminium flat rolled products (China)	14/08/20	Yes C 268/5	No	2021/582	2021/1788	PM Recital (480) The Commission thus provisionally concluded that the price of aluminium ingots was not significantly lower as compared to prices in the representative international markets. Therefore, the Commission considered at this stage that the conditions of Article 7(2a) of the basic Regulation were not met.
AD669	Optical fibre cables (China)	24/09/20	No C 316/9		2021/201 <u>1</u>	2022/72	
AD670	Stainless Steel Cold-rolled products (India, Indonesia)	30/09/20	Yes C 322/6	No	2021/854	2021/2012	PM Recital (176) Since the underselling margin calculated for the Indian exporting producer Chromeni was lower than the dumping margin, the Commission considered whether there were distortions on raw materials with regard to the product concerned pursuant to Article 7(2a) of the basic Regulation. The investigation established that Chromeni did not use the raw material subject to the distortion. Therefore, a further analysis as to the application of Article 7(2a) and 7(2b) of the basic regulation was not required.
AD672	Birch Plywood (Russia)	14/10/20	No C 342/2		2021/940	2021/1930	
AD671	MEG (Saudi Arabia, USA)	14/10/20	No C 342/3		2021/939	2021/1976	



AD674	Steel wind towers (China)	21/10/20	No C 351/8			2021/2239	
AD673	Aluminium converter foil (China)	22/10/20	Yes C 352 I/1	No	2021/983	2021/2170	<p>PM Recital (383) The Commission thus provisionally concluded that the price of aluminium ingots was not significantly lower as compared to prices in the representative international markets. Therefore, the Commission considered at this stage that the conditions of Article 7(2a) of the basic Regulation were not met.</p> <p>DM Recital (271) Absent any comments concerning raw material distortions, the Commission confirmed its finding from recitals 381 to 383 of the provisional Regulation that the conditions of Article 7(2a) of the basic Regulation were not met</p>
AD676	Iron or steel fasteners (China)	21/12/20	No C 442/6			2022/191	
AD680	Graphite Electrode Systems (China)	17/02/21	Yes C 57/3	No	2021/181 2	No definitive measures yet	<p>PM Recital (308) the complainant provided the Commission sufficient evidence that there are raw material distortions in the country concerned regarding the product under investigation. Therefore in accordance with Article 7(2a) of the basic Regulation, this investigation examined the alleged distortions to assess whether, if relevant, a duty lower than the margin of dumping would be sufficient to remove injury.</p> <p>Recital (309) However, as the margins adequate to remove injury are higher than the dumping margins found, the Commission considered that, at this stage, it was not necessary to address this aspect.</p>



AD679	Calcium silicon (China)	18/02/21	Yes C 58/15	No	2021/181 1	No definitive measures yet	<p>PM Recital (280) The investigation did not find any evidence of a dual pricing scheme or any other of the measures mentioned in Article 7(2a) of the basic Regulation in the PRC. Moreover, none of the cooperating exporting producers is located in the Northern regions identified in the complaint. Two of the cooperating exporting producers stated that they purchased electricity at the market rate in their province; one of them provided evidence that the electricity rates are much higher in its region than in those identified in the complaint.</p> <p>Recital (281) The Commission therefore provisionally concluded that, based on the evidence on file at this stage of the investigation and the specific circumstances of this case, electricity was not subject to a distortion within the meaning of Article 7(2a) of the basic Regulation.</p>
AD681	Superabsorbent polymers (Korea)	18/02/21	No C 58/16				
AD682	Corrosion resistant steels (Russia, Turkey)	24/06/21	No C 245/17				
AD683	Electrolytic chromium steel (Brazil, China)	24/09/21	No C 387/2				
AD686	Aluminium road wheels (Morocco)	17/11/21	No C 464/6				



AD687	Fatty acid (Indonesia)	30/11/21	Yes C 482/5				
AD684	Ceramic tiles (India, turkey)	13/12/21	No C 501/8				

ANNEX 2: A LEGAL ANALYSIS OF THE CASES

Three different reasons emerge as to why Article 7(2a) was not applied

1. The dumping margin was lower than the injury margin
 - *AD664 (Aluminium Extrusions - China)*
 - *AD665 (HRF Steel - Turkey)*
 - *AD680 (Graphite Electrodes - China)*
2. No distortion to the raw material within the meaning of Article 7(2a)
 - *AD668 (Aluminium Flat Rolled Products - China)*
 - *AD673 (Aluminium Converter Foil -China)*
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THE FINDINGS OF NO RAW MATERIAL DISTORTION WITHIN 7(2A)

AD679 (Calcium Silicon - China)

Summary of the Commission's Conclusion

The Commission found in the Provisional Regulation that there is no evidence of the existence of a dual pricing scheme, or other measures, resulting in a distortion to the raw material market within the meaning of Article 7(2a).

Analysis

It is evident from Provisional Regulation Recitals (278) - (281) that the Commission's decision not to assess the Union's interest under Article 7(2b) is a result of insufficient evidence to determine the existence of a distortion on raw materials, a fact that must be determined before proceeding to an assessment under Article 7(2b).



AD668 (Aluminium Flat Rolled Products - China) and AD673 (Aluminium Converter Foil - China)

Summary of the Commission's Conclusion

In both investigations, the Commission found that aluminium ingots are subject to an export tax which is a measure capable of distorting the raw material market. However, following an examination of the price in representative international markets, the Commission concluded that the purchase price of aluminium ingots was not significantly lower. The conditions of Article 7(2a) were therefore not met.

Analysis

The Commission's conclusions in both investigations followed an examination into the existence of a distortion. The methodology and reasoning for the Commission's findings were set out in the Implementing Regulation and support the conclusion that the requirements for Article 7(2a) were not met.

AD670 (Stainless Steel Cold-Rolled Products – India, Indonesia)

Summary of the Commission's Conclusion

As evident from Provisional Regulation Recital (176), the Commission did not proceed with an analysis on the application of Article 7(2a) and 2(b) on the basis that the exporting producer Chromeni "did not use the raw material subject to the distortion". No explanation was provided for this initial conclusion in the Provisional Regulation.

Eurofer then submitted a claim that this conclusion was erroneous as the Commission had failed to take into account the fact that Chromeni evidently relies on intermediate inputs affected by the raw material distortions. Eurofer argued in addition that the Commission's interpretation of Article 7(2a) "strongly limits the possibility to tackle the impact of raw material distortions within a corporate group". In the Definitive Regulation the Commission nonetheless confirmed its previous conclusions.

Analysis

Stainless steel cold-rolled flat products (SSCR) was the product under investigation in this case and while Chromeni does not directly purchase this product, it transforms Stainless Steel Hot Rolled Coils (SSHR) into SSCR. Its business model therefore concerns the product under investigation.

The wording of Article 7(2a) does not support the Commission's approach to this case. The provision reads that the Commission "shall take into account whether there are distortions on raw materials with regard to the product concerned".

The Commission disregarded the existence of manifest distortions, consequently choosing not to exercise its discretion under Article 7(2b) to examine whether it was in the Union's interest to disapply the lesser duty rule. Additionally, the Commission has failed to substantiate its interpretation of Article 7(2a) irrespective of the fact it significantly limits the scope of changes introduced by the TDI

modernisation. No reasoning was given as to why the impact of raw material distortions on downstream sectors should not be taken into account.

Furthermore, the Commission's approach is inconsistent with the approach it took before Modernisation when assessing whether the imposition of anti-dumping measures is in the Union's interest.

In C/14/07 Frozen Strawberries, the Commission took into account the interests of the upstream industries to conclude that the Union industry would benefit from the imposition of anti-dumping measures:

- [Commission Regulation \(EC\) No 1551/2006](#), Recital (117) "if measures were not imposed it is highly likely that the various user industries will suffer a lack of supply in the medium and long term as farmers will no longer cultivate strawberries destined for the processing industry a result of depressed prices for strawberries."

Similarly, when the Commission proposed the imposition of anti-dumping duties on imports of bikes from China:

- [COUNCIL REGULATION \(EC\) No 1095/2005 Recital \(189\)](#) "One Italian supplier (and its association) made themselves known during the investigation. They argued that in Italy there exist more than 200 factories which are supplying components to the bicycle producers and that the further existence of the supplier industry was therefore inevitably depending on the continuation of the bicycle production in Europe. In this respect, it was found that without the existence of the measures, it is to be expected that further closures of bicycle production in Europe will occur, which would have negative consequences for the Community parts industry and would jeopardise employment in the supplier industry. It is therefore concluded that the imposition of anti-dumping measures would be in the interest of the suppliers."

The inconsistency of the Commission's finding is further reinforced by the fact that in the Provisional Regulation Recitals (346) and (350) of [ACD658](#) the Commission found that the distortion of raw materials such as nickel affected the same SSHR product that Chromeni imports.

The scope of the TDI Modernisation of Article 7(2b) is to reinforce the Union industry's interests. As there is a clear distortion in the market for the raw materials affecting a Union industry, the Commission should have continued with its assessment under Article 7(2b) or, at minimum, properly substantiated why the impact of raw material distortions on downstream sectors is not covered by the scope of Article 2(a).

DISTORTIONS FOUND BUT IT IS NOT IN THE UNION INTEREST

AD658 (Stainless Steel HRF)

Summary of the Commission's Conclusions

In this case the Commission found raw material distortions with regards to both the PRC and Indonesia. It then proceeded, within the terms of Article 7(2b) to examine if it was in the Union interest to dis-apply the lesser duty rule.

The Provisional Regulation examined the three factors set out in Article 7(2a) namely: (1) spare capacities in the exporting countries, (2) competition for raw materials and (3) the effect on supply chains for Union companies, to determine if it was in the Union interest to dis-apply the lesser duty rule. The Commission concluded that imposing a higher duty would not be in accordance with the Union interest as this would have a disproportionately negative effect on the supply chains for Union companies, specifically the user industry. The Commission's analysis of the effects on the user industry was not carried out under an Article 7(2b) union interest analysis. Rather, the conclusion in Provisional Regulation Recital (359) was reached by relying on the general Article 21 Union Interest analysis provided in Section 7 of the Regulation.

Eurofer claimed, in comments on the Provisional Regulation, that the Commission created an error of law by failing to properly assess the 'effects on supply chains for union companies' under the Article 7(2b) assessment. As the text of Article 7(2b) makes direct reference to the Article 21 'union interest' test, the Commission found this claim to be groundless and rejected Eurofer's comments.

On substance, Eurofer also claimed that the Commission had in essence overexaggerated the effects on the user industry and underestimated i) the availabilities of spare capacity in the Union industry and ii) availability of supply from third countries. Furthermore, as the Commission found that both significant spare capacities in the exporting countries and a comparative disadvantage for the European industry with regard to access for raw materials, Eurofer argued that disproportionate weight was placed on the third factor, effect on supply chains.

The Commission did not accept these claims and maintained its position in the Definitive Regulation as being adequate and proportionate.

Analysis

The Commission conducted the Union interest test of Article 7(2b) under the same general analysis it provided for the Article 21 Union interest test. While Eurofer claimed this was not coherent or consistent with Section 7(2b) of the Regulation, the Commission correctly pointed out that the provision does not strictly separate the two tests but rather explicitly links them. In addition, the Commission's general analysis does make reference to Article 7(2a), explaining why it finds a general union interest for the imposition of duties but not for the imposition of duties pursuant to Article

7(2a). However, providing a clear and distinct Article 7(2b) analysis would improve clarity and transparency – another aim of the Modernisation.

Article 7(2b) explicitly states that the *‘Commission shall examine all pertinent information such as spare capacities in the exporting country, competition for raw materials and the effect on supply chains for Union companies.’* While Article 7(2b) does allow for other factors to be taken into consideration, there is no indication in the Article that any of the three factors listed should be given more weight than another.

As two out of the three factors listed in Article 7(2b) demonstrate a need to apply a higher duty (and dis-applying the lesser duty rule), the Commission’s conclusions seem disproportionate. This is particularly so as the Commission found both at Provisional Regulation Recital (373) and again at Definitive Measure Recital (277) that the assessment it has made for the effect on supply chains for the Union companies, was the ‘worst case scenario’.

While the Commission acknowledges that only one criterion out of all the pertinent information speaks against setting the duty at the dumping margin level, the Commission disagrees that this is a disproportionate assessment. It is reasonable to conclude that the Commission has given excessive weight to user (supply chain) interests and less to the Union industry.