

AEGIS Europe reaction to European Commission announcement after 20 July College orientation debate on MES China

The EU College of Commissioners held an orientation debate on Market Economy Status and China on 20 July. AEGIS Europe - the industry alliance representing about 30 key industries aiming to promote manufacturing investment, innovation, jobs and growth in Europe – would like to highlight certain elements with regard to the Commission's statements following the debate concerning China's Market Economy Status (MES) and new rules for trade defence measures on imports from China.

AEGIS Europe welcomes the Commissioners' public statement that the EU will not grant MES to China, and that the EU would apply a new non-standard methodology for anti-dumping calculations concerning imports from China which the Commission promises will result in measures as effective as duties to date.

However, AEGIS Europe has several concerns and for this reason believes it is important to clarify certain points in order to allow a proper assessment of the new non-standard methodology the Commission intends to propose.

Points to consider in relation to Commission statements about the EU's orientation in relation to China MES and new rules for trade defence measures on imports from China

1) MES: removal of list of WTO Non-Market Economy Countries from the EU anti-dumping Regulation and greater decision-making powers / discretion for the European Commission

i) MES: global assessment of country's status

- We welcome the Commission's statement that the EU "will not grant MES to China"¹. At the same time, the Commission indicated that it will propose to eliminate the existing list of WTO Non-Market Economy (NME) Countries, which includes China, from the EU legislation. Our concern is that if the ME/NME distinction is not maintained in the EU legislation – which would be the opposite of the US approach – there could easily be a *de facto* grant of MES to China.

Q1) The consequence of a decision to grant MES to China would have been the systematic use of Chinese prices and costs as the starting point for calculating dumping margins (i.e. what is normally referred to as the "standard methodology"). How would

¹ Press conference following the 20 July College orientation debate on the treatment of China in anti-dumping investigations, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=1124953>, 20 July 2016.

the removal of the existing list of WTO Non-Market Economy (NME) countries and of the ME/NME distinction from the EU anti-dumping Regulation not give the same result to those countries (including China) as a simple grant of MES?

To ensure that it is clear that the aim is not to get to the same result as a grant of MES, AEGIS Europe asks that the ME/NME distinction remain in the EU anti-dumping Regulation, with "non-market economies" continuing to be understood as those countries which do not meet the EU's five long-established market economy criteria. In this manner, the trigger for application of the new non-standard methodology would be clearly linked with those market economy criteria.

Q2) If no specific country is identified as an NME in the legislation, who will be competent to decide if and when the Commission should start systematically using Chinese prices and costs in AD investigations (i.e. to implement a full grant of MES)?

If no specific country is identified as an NME in the legislation, AEGIS Europe would like to see some mechanism in the new provisions by which the approval of the co-legislators is required before there would be a systematic use of Chinese prices and costs.

ii) **Case-by-case determinations**

- From the Commission's statement, we understand that the elimination of the existing list of Non-Market Economy Countries from the EU legislation would mean in practice that the Commission would decide on a case-by-case basis whether or not to apply a (new) non-standard methodology². Our concern is that without the ME/NME distinction, there would be no clear trigger for application of a non-standard methodology, and thus no control over the Commission's exercise of discretion in individual cases to start from Chinese prices and costs, or not.

Q3) In the absence of a listing of China as a NME in EU legislation, how would the Commission's discretion be limited to ensure that individual case decisions reflect a set of objective criteria that would permit judicial review, and are based on an overall framework decided upon by the co-legislators?

In this regard, AEGIS Europe asks that the trigger for application of the new non-standard methodology be sufficiently defined and include a clear link with the EU's five long-established market economy criteria. In particular, there should be a set of objective criteria and illustrative examples in the legislation.

Q4) Specifically with regard to WTO Members already recognised by the EU as market economies (e.g. USA, Russia, Brazil, Argentina, India), how would the Commission apply the new non-standard methodology to imports from those countries should market distortions be established with regard to them?

² A non-standard methodology is a methodology to calculate normal value in anti-dumping investigations which is not based on the generally applicable provisions of Art. 2.2 of the [WTO Anti-Dumping Agreement](#).

AEGIS Europe asks that a continuing (clear) distinction be made between the treatment of WTO Members which have met the EU's five cumulative market economy criteria and those which have not.

Q5) For a country found to have significant market distortions, would the Commission allow individual producers from that country the possibility of demonstrating that they are not affected by the distortions in question, and thereby to obtain the use of their own prices and costs in the calculation of normal values (i.e. as with the possibility under the current regime for individual NME producers to obtain "market economy treatment" (MET))?

AEGIS Europe asks that the Commission publish adequate guidance concerning the application of the new methodology prior to its entry into force.

2) **China's WTO Accession Protocol and EU's five market economy criteria**

i) **Continued existence of most of Section 15 of China's WTO Accession Protocol**

- We welcome the Commission's statement that it will propose the continued use of a non-standard methodology. However, there was no reference to the remainder of the major portion of Section 15 of China's WTO Accession Protocol after 11 December 2016, as the basis for continuing to apply a non-standard methodology. Our concern is that such an approach fails to consider that the EU should continue to apply a non-standard methodology *in application* of what remains of Section 15 of China's WTO Accession Protocol after 11 December 2016 (as clearly requested, *inter alia*, by the European Parliament in its resolution adopted on 12 May 2016).

Q6) In the absence of a reference to the remainder of Section 15 of China's WTO Accession Protocol, what does the Commission understand the legal justification to be for the new non-standard methodology it intends to propose?

AEGIS Europe asks that the Commission make clear that the basis for the new non-standard methodology is inter alia the possibility offered by international rules outside the WTO Anti-Dumping Agreement.

ii) **Link to the EU's five existing market economy criteria**

- Besides the fact that the Commission's statement makes no reference to the remainder of the major portion of Section 15 of China's WTO Accession Protocol after 11 December 2016 as the basis for continuing to apply a non-standard methodology, it also does not make any reference to the EU's existing five market economy criteria. Our concern is that with no mention of the Protocol and no link to the EU's existing five market economy criteria, the new non-standard methodology would have no clear legal justification, in particular under China's WTO Accession Protocol.

Q7) In the absence of an express link to the EU's market economy criteria, what legal justification does the Commission see for the application of a new non-standard methodology in relation to China's WTO Accession Protocol (or otherwise)?

AEGIS Europe asks that the trigger for application of the new non-standard methodology be clearly linked with the EU's five long-established market economy criteria (see below).

3) **New non-standard methodology**

i) **Burden of proof**

- We welcome the Commission's statement that it will propose the continued use of a non-standard methodology. However, the Commission also mentions that the burden of proof will be on the Commission during an investigation where use is made of this methodology. This leaves open the question of the burden of proof at the complaint stage. Our concern is that the proposed rules might place an additional burden of proof on complainants to convince the Commission to open an investigation. This would create a significant risk that EU industries, and particularly SMEs, would be handicapped in bringing forward complaints about dumped imports from China. In addition, the burden of proof to demonstrate that China is a market economy should remain on China, as clearly provided for in Section 15 of China's WTO Accession Protocol, and not be imposed on EU decision-makers or stakeholders.

Q8) Will the new rules place an additional burden of proof on complainants in comparison with the current rules?

In order to avoid an additional burden for complainants, which is in any event not required by the special anti-dumping rules of China's WTO Accession Protocol, AEGIS Europe asks that the proposed arrangement make clear that complainants can rely on Commission reports issued in previous years in the context of MES assessments, to justify the use in the complaint of the new non-standard methodology in calculations of dumping.

Q9) Can the Commission confirm that China will continue to have the burden of proving that it is a market economy under Paragraph 15(d) of China's WTO Accession Protocol?

AEGIS Europe asks that the Commission clarify China's continuing burden of proof in relation to obtaining the systematic use of Chinese prices and costs.

ii) **Trigger of the new non-standard methodology**

- A further question arises from the continued use of a non-standard methodology in the absence of the ME/NME distinction which serves as a clear and objective trigger. Our concern is that a legislative proposal removing the ME/NME distinction from EU legislation

and not maintaining at least a reference to the EU's existing five market economy criteria would not have a sufficiently clear and objective trigger for application of the new non-standard methodology. The Trade Commissioner spoke about a "non-standard methodology that takes into account the distortions provoked by state intervention"³, but provided no further details.

Q10) Should the Commission propose to remove the ME/NME distinction from the EU anti-dumping Regulation, will the proposed new methodology include at least a reference to the five criteria used by the EU for defining a market economy and mentioned in China's WTO Accession Protocol?

AEGIS Europe asks that the ME/NME distinction remain in the EU anti-dumping Regulation. If a new methodology is proposed which does not refer to that distinction, AEGIS Europe requests that at least that methodology make reference to the five long-established market economy criteria.

Q11) How will the Commission objectively and transparently define the distortions which would trigger application of the new non-standard methodology? In particular, will the Commission refer to the market economy criteria (at least as illustrative of conditions whose unfulfillment indicates the existence of distortions)?

AEGIS Europe asks that the ME/NME distinction remain in the EU anti-dumping Regulation as the trigger for application of the new non-standard methodology. If a new trigger is proposed which does not make use of that distinction, AEGIS Europe requests that at least that trigger incorporate a reference to the five market economy criteria (for example, as illustrative of the conditions that create significant market distortions).

iii) **Similarity to US system**

- The Commission statement⁴ spoke about using a similar methodology to that used in the US. The question that arises in this regard is the extent to which the Commission will actually propose a system similar to that applied in the US.

Q12) As the US expressly uses the ME/NME distinction as the trigger for application of a non-standard methodology, why would the Commission proposal not maintain that clear and objective trigger to apply its new non-standard methodology?

AEGIS Europe asks that the ME/NME distinction remain in the EU anti-dumping Regulation as the trigger for application of the new non-standard methodology. If a new trigger is proposed which does not make use of that distinction, AEGIS Europe requests that at least that trigger incorporate a reference to the five market economy criteria (for example, as illustrative of the conditions that create significant market distortions).

³ Press conference following the 20 July College orientation debate on the treatment of China in anti-dumping investigations, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I124954>, 20 July 2016.

⁴ Press conference following the 20 July College orientation debate on the treatment of China in anti-dumping investigations, <http://ec.europa.eu/avservices/video/player.cfm?sitelang=en&ref=I124960>, 20 July 2016.

Q13) Would the Commission propose a factors of production methodology along the lines used by the US for imports from non-market economies? If so, would the proposal be to apply it in the same manner as in the US, based on market price information available per factor of production, and only from public sources, in a country at a level of development similar to that of China?

AEGIS Europe asks, if the Commission's proposal for a new non-standard methodology makes use of a factors of production approach, that it would clearly and in detail follow the US approach also in its application. In particular, it is critical that the value of all factors reflect market economy prices.

Q14) Would the Commission propose to maintain the use of the current analogue country methodology for imports from non-WTO Members which are not market economies?

AEGIS Europe asks that the Commission's proposal leave in place the application of the current analogue country methodology for imports from non-WTO Members which are not market economies.

iv) **Effective level of measures**

- We welcome the Commission commitment to ensure that the application of the new non-standard methodology results in anti-dumping measures which are at least as effective as those imposed under the current rules. Our concern is that anti-dumping measures resulting from the application of the new non-standard methodology will be less effective than measures adopted today, unless the Commission properly sanctions non-cooperation and makes use of facts available.

Q15) Can the Commission provide examples of how the results of using the new methodology compare with calculations done under the current rules?

AEGIS Europe asks that the Commission carry out simulations of the calculations of AD duties using the new non-standard methodology and make the results available in a manner which compares them to the results using the analogue country methodology.

4) **Transparency: Public Consultations results and Impact Assessment**

- We welcome the fact that the Commission carried out extensive public consultations before reaching any conclusion as to the orientation of its proposal on the China MES issue. Our concern is that without the publication of the results of the public consultations and the impact assessment that those consultations facilitated, it is not possible to assess the degree to which the Commission's proposal may reflect the results of those exercises.

Q16) Will the Commission release the results of the public consultations and the related impact assessment prior to the adoption and publication of its proposal? If not, why not?

AEGIS Europe requests that, regardless of the timing of the adoption of a proposal, the Commission publish now the results of the public consultation and the related impact assessment.

5) **Transition**

- The Commission statement indicates that while moving towards a new non-standard methodology, there will be a transition period. "Grandfathering" is mentioned in the Commission's announcement. Our concern is that only measures already in place and ongoing investigations are mentioned.

Q17) What will the Commission propose with regard to investigations started after 11 December 2016 and before the entry into force of legislative changes which put in place the new non-standard methodology?

AEGIS Europe requests that for investigations started after 11 December 2016 and before the entry into force of legislative changes which put in place the new non-standard methodology, the Commission make clear that it will continue to use the analogue country methodology.

AEGIS EUROPE

AEGIS Europe is a grouping of nearly 30 industrial associations dedicated to ensuring that EU policymakers work towards free and fair international trade. AEGIS members are leaders in sustainable manufacturing and account for more than €500 billion in annual turnover and millions of jobs across the EU. To find out more about AEGIS Europe please visit www.aegiseurope.eu.

