FIRST AEGIS EUROPE REPORT ON THE EU'S TRADE DEFENCE INSTRUMENTS

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EXECUTIVE SUMMARY

The AEGIS Europe Alliance represents more than 20 EU manufacturing sectors injured by unfair trade practices. The Alliance therefore has an interest in ensuring that the trade defence instruments effectively counter the distortions caused by the dumping, and/or the subsidisation, of imports.

This is the first AEGIS Europe Report reviewing the functioning of the European Union Trade Defence Instruments (TDI). Its starting point is the 2017 and 2018 reforms and looks at whether the objectives of the reforms were achieved. With this Report, AEGIS Europe seeks to contribute to the debate between the EU institutions and the EU manufacturing on the better functioning of the trade defence instruments.

The trade defence instruments must not be left out in the cold in the drive to improve the EU's toolbox on trade. The new instruments to address anti-coercion, foreign subsidies and the international instrument on public procurement are all welcome and AEGIS Europe looks forward to their early adoption and implementation. But they complement rather than replace existing tools.

The notable improvements since the 2017/2018 reforms are:

- The new methodology for determining normal value (the market price equivalent) in markets where prices are distorted has generally worked well and normally allows for the imposition of effective measures against distorted economies, particularly China;
- The Commission has adapted existing rules to successfully countervail subsidies from the government of one country to an enterprise in another country (cross-country subsidisation), even if duties to counter subsidies remain frustratingly low;
- The evolving practice of correcting errors in dumping, subsidy and injury calculations identified by the EU Courts in annulment proceedings and the application of the corrected duties from the date of the original measure ensures that measures remain effective.

In other areas, success in achieving the objectives of the 2018 reforms is less obvious:

- The Lesser Duty Rule was changed so as to allow higher duties where there are distortions in raw material costs. This new rule has only been applied once despite numerous requests from Union producers;
- Changes to encourage greater use of the trade defence instruments by small and medium sized enterprises need re-examination as problems remain;
- TDI can be made more effective by earlier imposition of provisional measures on the basis of submitted data and the registration of imports as a matter of course in all investigations;
- Circumvention of measures remains a significant problem.

AEGIS Europe makes 27 specific recommendations for improvement. The Alliance welcomes a debate on these recommendations.

The Report is available from AEGIS Europe on request.

INTRODUCTION

A first AEGIS Europe Report on the EU Trade Defence Instruments

Trade defence is about countering unfair trade practices that injure EU manufacturing. The main tools to counter unfair trade are the anti-dumping and the anti-subsidy instruments.[1] These instruments must be kept under constant review if they are to remain effective.

This first AEGIS Europe Report on the implementation of the EU trade defence rules looks at what needs to be improved in ensuring that unfair trade practices do not undermine fair competition and the health of EU manufacturing.

The Report takes as its starting point the implementation of the trade defence modernisation package in 2018.[2] Since then the members of AEGIS Europe have been involved in more than 20 investigations covering all aspects TDI law and practice.[3]

AEGIS Europe is thus in a position to evaluate the performance of the modernisation package and to comment on what other steps can be taken to ensure that the trade defence instruments work to counter unfair trade practices that undermine EU manufacturing and jobs.

The EU is a modest user of the trade defence instruments

Claims that EU manufacturers use trade defence as a protectionist tool do not stand up to scrutiny.

World Trade Organisation members must report each year on their use of trade defence instruments. Full data is available up to 2019. A simple examination of the numbers of the measures adopted by WTO Members shows that the EU is the second largest user of TDI after the United States.

However, if these simple numbers are rebased against the total imports, it can be seen that the EU is the most restrained user of TDI among the WTO members who exercise the right to counter unfair trade by means of anti-dumping and anti-subsidy measures.[4]

Two charts demonstrate this fact clearly. Chart 1 shows the absolute number of trade defence measures applied by Australia, Canada, the EU and the USA. Chart 2 shows these numbers rebased against the total imports into those countries. The EU is significantly below all three countries. Similar findings apply to the other countries examined in the AEGIS Europe study on TDI intensity.

[1] These are Regulation 2016/1036 of 8 June 2016 on protection against dumped imports and Regulation 2016/1037 of 8 June 2016 on protection against subsidised imports.
[2] The modernisation package was the name given to the amendments to the basic anti-subsidy and the anti-dumping Regulations.
[3] TDI is the common abbreviation of the term 'trade defence instruments'.
[4] See the AEGIS Europe TDI Intensity study for details of the AEGIS Europe examination and rebasing of the use of trade defence instrument in the top WTO users of these instruments.

Chart 1: total number of TDI measures in force in Australia, Canada, the EU and the US

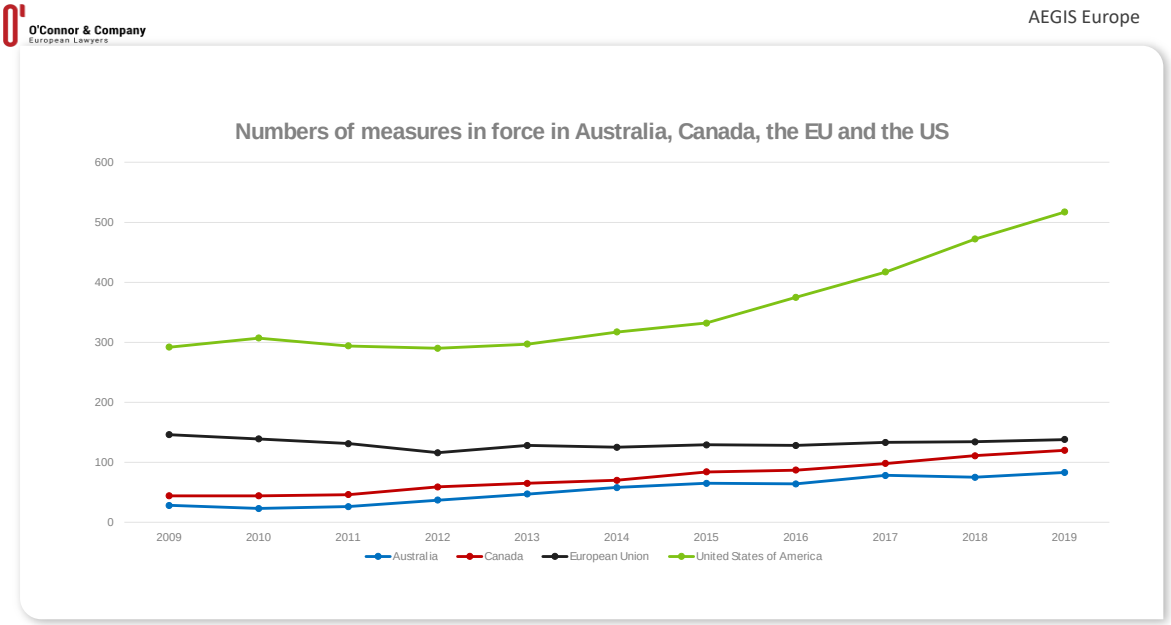
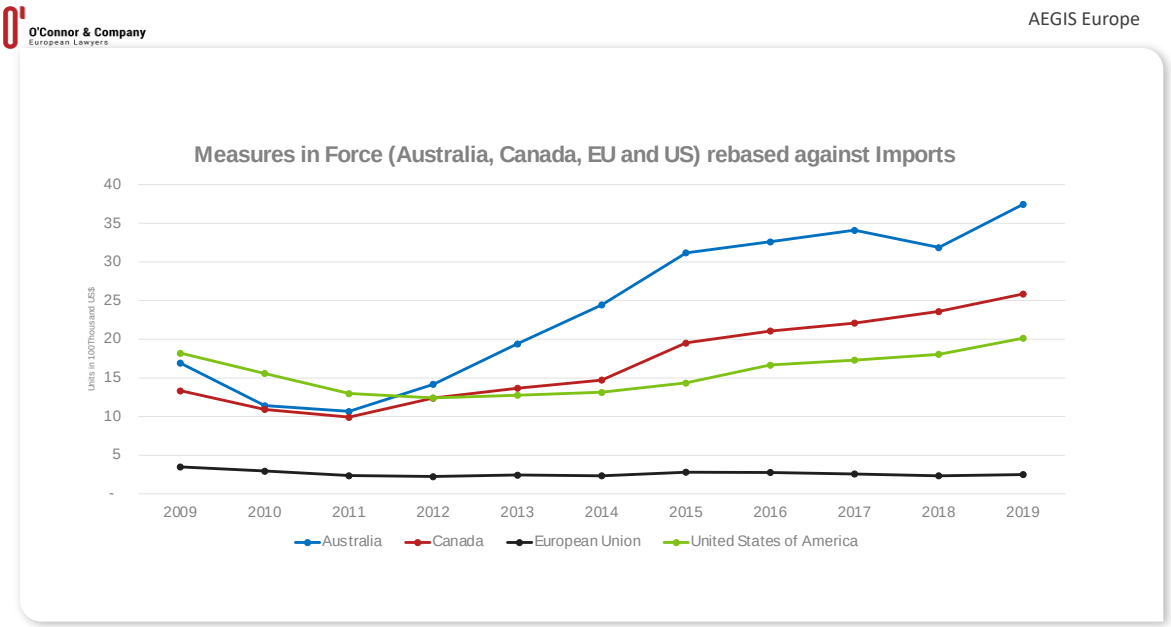


Chart 2: TDI measures rebased against total imports: EU is significantly below other countries



A greater understanding of EU law and practice is needed

Dumped and subsidised imports undermine the economic health of the EU. Unfair competition destroys jobs, inhibits innovation, and restrains enterprise. EU manufacturing is essential to the wellbeing not only of the economy but of the society as a whole.

In relation to the EU's public policy on TDI AEGIS Europe calls for:

i) the allocation of more policy time and resources to foster debate and discussion leading to a greater understanding of, and effective measures to, counter unfair trade;
ii) more resources should be allocated to trade defence within DG TRADE;
iii) greater publicity towards EU industries and trade unions of the availability of trade defence remedies;
iv) continued dialogue between the EU institutions and industry on the needs of EU manufacturing and the ability of the trade defence tools to counter unfair trade.

What is needed is stronger and more effective implementation of trade defence law and policy.

AEGIS EUROPE SEEKS RULES-BASED FAIR TRADE

Free trade only works if trade is fair

For the benefits of trade to manifest themselves, trade must be fair. This is seen in the 1947 General Agreement on Tariffs and Trade, which balanced the rights and obligations of contracting parties.[5] The core obligations prohibit discrimination and require transparency in the regulation of trade and the gradual freeing-up of the movement of goods.[6] The core right, along with rights to protect sovereignty, is the right of Members to stop unfair trade: dumping and subsidies can be sanctioned by contracting parties if they cause injury.[7]

In 1995, these general principles on fair trade were codified in the WTO Anti-Dumping Agreement[8] and the Agreement on Subsidies and Countervailing Duties.[9] That trade must be fair is a core and fundamental principle of the modern world economy and underpins rules-based trade.

The European Union has implemented these principles in two basic Regulations on dumping and subsidies.[10] The competence to apply the rules, and ensure that trade into the Union is fair, is given to the European Commission.

It has been seen in the Introduction to this Report that the EU is a modest user of the right to counter unfair trade. This Report argues that where Union industries are injured by unfair trade, the Union must be more vigilant in countering the unfairness and in enforcing measures that are adopted.[11]

Fair trade and AEGIS Europe

AEGIS Europe is an Alliance of trade associations representing EU manufacturing industries including, amongst others, the metals aluminium and steel, shipbuilders and train manufacturers, solar panels, ceramics, glass, bicycles and the fasteners that hold most products together. In other words, it represents the whole value chain, from commodities to consumer products and core sectors vital to the EU's manufacturing base.[12]

Many Union industries in the Alliance have been injured by unfair trade practices and regularly seek the imposition of anti-dumping and anti-subsidy measures to remove the injury.

[5] The GATT 1947: see https://www.wto.org/english/docs_e/legal_e/gatt47_01_e.htm.
[6] GATT Articles I, II and III.
[7] GATT Article VI.
[8] The Anti-Dumping Agreement (Implementation of Article VI of the GATT).
[9] The Agreement on Subsidies and Countervailing Measures (SCM Agreement).
[10] See footnote 1 for the references.
[11] Measures to stop circumvention must be easier and quicker to impose.
[12] Details of the members of AEGIS Europe can be found on https://www.aegiseurope.eu/about.

AEGIS Europe members have a combined turnover of more than €500 billion and account for about 3 million direct and indirect jobs in the Union.

In the last three years, members of AEGIS Europe have triggered procedures by the Commission in:

- 13 anti-dumping investigations
- 3 anti-subsidy investigations
- 7 expiry reviews
- 1 circumvention investigation
- 1 absorption investigation[13]

AEGIS Europe therefore has extensive experience in all aspects of the trade defence rules. This Report is based on the knowledge that has been accumulated at the coal face of trade defence work.

[13] Survey carried out among the members of the AEGIS Europe Working Group on TDI.

THE 2018 EU TDI MODERNISATION PACKAGE

The modernisation package was adopted by the Parliament and Council on 30 May 2018. It came into effect on 8 June for TDI procedures initiated after that date. The day before the adoption of the Modernisation package into law, Commission President Jean-Claude Juncker said that:

> *Our actions to defend European producers and workers against unfair trading practices must be bold and efficient and today's agreement will provide us with an additional tool to do just that.*

And,

> *The EU believes in open and fair trade but we are not naïve free traders. We have shown our teeth when we had to by adopting anti-dumping and anti-subsidy measures. And now we have new and improved trade defence rules in our arsenal to face down some of today's challenges in global trade. Make no mistake – we will do whatever it takes to defend European producers and workers when others distort the market or don't play by the rules.*

The then Trade Commissioner Malmström stated that:

> *I am very confident that* [the modernisation package] *provides us with the necessary tools to efficiently defend our industries from unfair trade practices. Now we are better equipped to stand up for our companies if other countries don't stick by the rules.*[14]

The European Parliament adopted its position on the Commission's modernisation proposal in April 2014. There was limited progress until 2017 when there were 8 trilogue meetings under two Council Presidencies to reach a compromise agreement on revisions of the anti-dumping and anti-subsidy Regulations as well as a letter from the Commissioner for Trade on guidelines.

The modernisation package included, amongst others, reforms aimed at achieving:

- Faster and more efficient investigations;
- Changes to the lesser duty rule to allow the imposition of higher duties;
- Improved injury margin calculations by setting a minimum target profit of 6%;
- Inclusion of future costs for compliance with social and environmental requirements in injury calculations;
- Support for SMEs by the creation of a help desk and a shorter injury questionnaire;
- Extension of the application of measures to the offshore sector;
- A greater role for trade unions and the protection of jobs in the Union.[15]

These issues will be examined in turn in the next section of the Report.

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[14] All three citations are from the Commission press release of 7 June 2018 on the coming into force of the modernisation package. See also: https://trade.ec.europa.eu/doclib/docs/2018/june/tradoc_156921.pdf. References to the objectives and advantages of the Modernisation package in the Commission Staff Working Document accompanying the 37th Annual Report on the EU's TDI activities.

[15] These objectives are taken from a Commission briefing memorandum entitled 'EU Modernises its trade defence instruments'.

THE SCORE CARD ON THE 2018 TDI MODERNISATION PACKAGE

In this section of the Report, AEGIS Europe will address the different aspects of TDI intended to be changed by the modernisation package and to evaluate whether the intended objectives have been achieved or meaningful progress made. Where necessary, AEGIS Europe makes recommendations for improvement.

In January 2018, after the conclusion of the trilogue negotiations between the Parliament, Council and Commission, the Commission published a Fact Sheet on the changes that had been agreed by the EU institutions. The Commission pointed out that the trade defence instruments had remained largely the same since the creation of the WTO in the mid-1990s and they needed updating. This updating was designed to achieve a number of objectives. These objectives were set out by the Commission in briefing memorandum and released on 23 January 2018.[16]

1: The need for more efficient investigations

For the Commission and the Parliament, modernisation was about faster and more efficient investigations. AEGIS Europe addresses these two issues separately: first more efficient, and then, faster investigations. The overall objective must be the quicker implementation of effective measures at the border.

More efficient and balanced investigations

Evidence from the investigations in which AEGIS Europe members have represented the Union industry is that, once an investigation has been opened, applications to be considered as an interested party by importers and users are often lodged out of time and that the information or data provided is incomplete or not in the form requested by the Commission.

It is clear that the more parties participate in an investigation the better it is, as it gives the Commission a better picture of the distortions that unfair trade causes. But if interested parties do not respect deadlines or do not provide full and complete data in the form requested by the Commission, the investigation itself becomes distorted. Union producers are required to provide detailed information if an investigation is to be opened and sampled Union producers must provide detailed data within fixed time limits. If the Union industry can meet the deadlines and provide the necessary data, all parties should be able to meet the deadlines with the necessary data. If some parties do not provide the details necessary within the time limits specified, all the data received should be disregarded. This would be a justified implementation of Art. 18 of the Basic ADR.

[16] See the 'EU Modernises its trade defence instruments' factsheet.

Often there is the absence of clarity of the status of interveners. Union producers seeking remedies are required to demonstrate that they represent a sufficient percentage of the Union industry as a whole. Interveners are not required to show their representativeness, meaning that the arguments, for example, of one small user can be given the same weight as arguments from market players representing a much larger part of the market.

Associations representing exporting producers and users have become more present in investigations. However, the requirement to show that these associations are 'representative' of the exporting producers or that Union users have demonstrated links to the production or even use of the products under investigation needs to be verified. Associations that are not representative trade associations, or are semi-state bodies established to coordinate the export strategies of their members, should be excluded.

AEGIS Europe Recommendations on More Efficient Investigations:

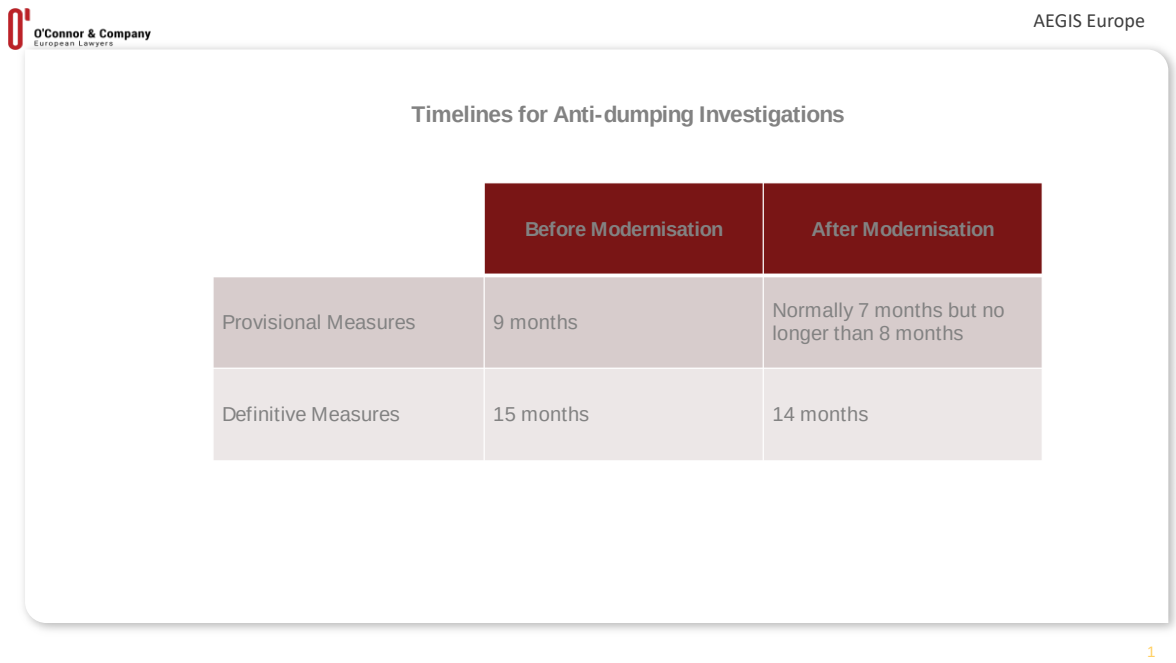
1. The Notice of Initiation of investigations should set out more clearly the need to respect deadlines and to provide data in the form needed by the Commission as well as the consequences of non-compliance;
2. Parties who apply to be part of the investigation out of time should be excluded, unless that party can show clear reasons for a late application, or why certain data is unavailable;[17]
3. A requirement that importers and users indicate the volume of the trade in the product concerned so as to evaluate representativeness and to allow an understanding of the weight to be given to any submissions from these parties is needed;
4. Where data is received out of time or is not complete it should be discarded, unless good administration requires it to be considered.

2: Earlier Remedies

This reform was aimed at ensuring the faster implementation of measures so as to counter unfair imports and help remove the injury being suffered by EU producers. The modernisation package shortened the time by which provisional measures should normally be imposed, and by which investigations to be concluded by some months.

As the Commission stated in the January 2018 briefing memorandum: '*Anti-dumping investigations will be faster and measures imposed earlier, giving EU industry much needed relief against the damaging effect of unfair imports.'*

[17] The evaluation of rights guaranteed by the EU legal order must be undertaken in the light of the need for efficient investigations and the needs of EU industry to be protected against unfairness.



AEGIS Europe appreciates that the Commission has respected the new timelines despite the marked increase in work due to shorter deadlines, the new dumping calculation methodologies and the increase in new requests to investigate unfair trade.

Even earlier relief is needed

Earlier relief is needed and is possible under existing law. Both AD and AS measures can be imposed as early as 60 days after the initiation of an investigation. AEGIS Europe is not aware that the Commission has imposed provisional measures this early in an investigation. To do so would require a change in the Commission work procedures so as to impose measures on the basis of the data submitted by the Union industry and exporting producers, but before verification. If the Commission were to impose measures prior to verification, a 90- or 100-day target for provisional measures could be met.[18] This is all the more justified by the very high standards imposed by the Commission at the complaint stage in relation to both evidence and quality of arguments.

WTO rules[19] provide that measures can be imposed no earlier than 90 days prior to the date of application of provisional measures. The EU has imposed a WTO plus rule to require proof of a '*further*' substantial rise in imports.[20] This is not required by WTO law.

[18] The statutory timeline for investigations in the US provides that provisional measures should be imposed no later than 120 days from initiation. See: https://www.trade.gov/statutory-time-frame-adcvd-investigations.
[19] Article 10.6 of the Anti-Dumping Agreement as implemented in Article 10 of the basic anti-dumping Regulation.
[20] See Article 10(4)(d) of the basic Regulation.

Registration of Imports

The registration of imports can also be imposed '*so that measures may subsequently be applied against those imports from the date of registration'*. Registration can be applied '[a]*s of the initiation of the investigation*' on the basis of a Commission Regulation. Registration may be imposed following a reasoned request from the Union industry or by the Commission acting on its '*own initiative*.'[21] AEGIS Europe considers that registration must become the norm rather than the exception. Registration allows the legitimate backdating of measures.[22]

Conclusions on faster relief

Registration and earlier provisional measures would deliver faster relief. Earlier implementation of provisional measures is currently available under the law, while immediate registration would require an interpretation of '*further'* different from the interpretation currently applied by the Commission. Both of these approaches must become standard practice if EU trade defence is really to become faster in delivering relief. Cutting one or two months off the normal investigation period does not go far enough. Faster remedies can only be achieved by early registration and earlier provisional measures.

AEGIS Europe Recommendations on Faster Relief:

5. Impose registration on all imports of the product concerned, in all investigations, either from the date of the initiation of the investigation or immediately thereafter;
6. Impose provisional measures on the basis of the data submitted by the interested parties but before that data is verified.

3: The exceptions to the lesser duty rule have not worked

WTO law provides that AD or AS duties must not be imposed at a level above the level of subsidisation or dumping. WTO law sets out in detail how dumping and subsidy margins must be calculated.

The lesser duty rule means that the EU calculates an injury margin as well as a dumping or subsidy margin and uses the lower of the two margins to calculate the measure to be imposed at the border. The calculation of an injury margin is a 'WTO plus' provision.[23] There are no calculation methods for an injury margin in WTO law. It is only implemented by a minority of WTO members. It is estimated

[21] All citations from Article 14(5) of the basic anti-dumping Regulation.
[22] The Parliament sought amendments in the modernisation Regulation to emphasise this need.
[23] Article 9 of the WTO Anti-Dumping Agreement makes imposition of a lesser duty optional. The United States does not apply such a rule. India, Australia and the UK, for example, do apply the provision.

that, in about half of investigations, the duty is imposed at the lower injury margin rather than at the higher dumping margin.[24]

AEGIS Europe considers that the injury margin does not fully reflect the injury caused by the dumping and subsidisation as the Union industry has had to adjust to the unfair trade before the steps can be taken to measure the unfairness.

The modernisation package changed the rules so as to open up the possibility of making it easier to apply the higher rather than the lower duty, particularly where there are distortions in the market of origin. The Parliament[25] sought to have an expansive idea of the distortions that would trigger the non-application of the lesser duty rule to include not only distortions in raw materials[26] but, for example, on dual pricing or where social and environmental standards were not complied with in the country of origin or where that country engaged in currency manipulation. The compromise between the institutions was to limit the distortions to raw materials only and only raw materials making up more than 17% of the cost of production. In addition, a 'positive' Union interest test was introduced to show that it was in the Union's interest not to apply the lesser duty rule.[27]

Since modernisation, an examination of the notices of initiation shows that there have been 9 requests not to apply the lesser duty rule. In only 1 of those 9 has the lesser duty rule not been applied.[28] AEGIS Europe concludes that the benefits which the Parliament sought have not materialised. The conditions for application of the new rules mitigate against their use.

For example, in one AD case, the Commission did not accept that energy prices were distorted despite its finding in other reports that energy prices in the country of origin were distorted.[29] In another case, the Commission did not think it was in the Union interest to impose the higher duty even when it found distortions in the supply of raw materials.[30] In a third case, the Commission dismissed evidence of distortion in the supply of raw materials because there was an intermediary between the raw material and the final input product.[31]

A detailed examination of the application of the amended lesser duty rule can be found on the AEGIS Europe website.[32] In addition, AEGIS Europe notes that the Commission is obliged to report to the Parliament and the Council by 9 June 2023 on the application of the new rules allowing for the non-application of the lesser duty rule.

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[24] See page 5 of the Annex to the 2019 Annual TDI Report for a comment on the use of the lesser duty rule.

[25] See the Position of the European Parliament from April 2014 on the Commission proposal to amend the anti-dumping and anti-subsidy Regulations.

[26] Distortion of raw material costs is the only distortion recognised in the modernisation package.

[27] See Article 7(2b) of the anti-dumping basic Regulation. The Parliament had sought a much broader idea of distortions to trigger the non-application of the lesser duty rule.

[28] AD649 (UAN – Russia).

[29] AD679 (Calcium Silicon – China). AEGIS Europe considers that international benchmark values must always be used where there is energy dual pricing.

[30] AD658 (Stainless Steel HRF – Indonesia, China, Taiwan).

[31] AD670 (Stainless Steel Cold Rolled – India, Indonesia).

[32] See the analysis on the Non-Application of the Lesser Duty Rule by the Commission since TDI Modernisation.

AEGIS Europe Recommendations on the Lesser Duty Rule:

7. There must be recognition that the injury margin can never fully reflect the injury caused by unfair trade as the Union industry has had to adjust to the unfair trade before the steps can be taken to measure the unfairness;
8. The rules on the application, or not, of the lesser duty must be revisited so that the norm is the imposition of the higher duty, unless it is in the Union interest not to do so, or the level of the duty is limited by WTO law;
9. The scope of the distortions triggering the non-application of the lesser duty should be expanded, in line with the Parliament's 2014 position;
10. The lesser duty rule should only be applied to those origins also implementing this WTO plus provision;
11. The lesser duty rule should not apply to unfair trade from origins not respecting international social and environmental standards;
12. The 'positive' Union interest test should be applied more strongly (i.e., to the benefit of the Union industry) in sectors where there is structural overcapacity, particularly in the market of origin;
13. An examination of distortions in the supply of raw materials should be carried out *ex officio* by the Commission on the basis of the data received from exporting producers or, in the absence of such data, on the basis of reliable public information and not be dependent on a claim in the request for the initiation of an investigation.

4: The 6% minimum target profit

The setting of the profit margin that Union producers can be expected to obtain in the absence of unfair trade has a direct impact on the determination of the level of the injury margin.

The modernisation package provided that the target profit should be a minimum of 6%.[33] For many industries this is not sufficient to ensure continued innovation, investments, and jobs.[34] During the trilogues, the Parliament had sought a higher minimum profit amount.

The Commission determines the profit that Union producers can be expected to obtain in the absence of market distortions on the basis of profits that the Union industry has achieved in the 3-year period prior to the period of investigation. The problem with this approach is that the period examined is exactly the period when injury is manifesting itself and Union producers have not been able to achieve the profits necessary for innovation and growth. This is because during this period the Union industry tries to maintain market share, capacity utilisation and jobs. Investment in new capacity, upgrading existing capacity, research and innovation are sacrificed and profits are hit.

[33] As Schumpeter has emphasised, profits are a necessary incentive for innovation.

[34] Article 7(2c) of the basic anti-dumping Regulation provides that the target price must be calculated taking into consideration, amongst other factors, '*the level of profitability needed to cover **full** costs and investments, research and development (R&D) and innovation*'.

Wider considerations to determine a reasonable profit are needed. Reference must be made to profit margins that can be achieved by the same industry in different markets or in markets for comparable products that are not subject to distorted trade. In essence, the core benchmark must be return on capital for the economy as a whole as Union manufactures are competing with all sectors of the economy for capital.[35]

AEGIS Europe Recommendations on Target Profit:

14. The base level target profit should be increased to reward innovation and create high value employment in the EU manufacturing sector;
15. The Commission must widen the sources to be examined so as to determine a reasonable profit for Union industries in the absence of unfair and distorted trade and to ensure that investments in decarbonisation and innovation are taken into consideration.

5: *Sustainable growth: Social and Environmental costs in trade defence*

The EU Treaties provide that EU trade law must reflect the EU values including the guaranteeing of social rights and the protection of the environment. The modernisation package implemented this obligation in two very limited ways: the calculation of the injury margin and the choice of the representative country.

In the injury calculation, adjustments to the cost of production can be made to reflect the cost of labour and environmental standards such as the ETS. When there are two countries which could represent a distorted economy such as China so as to find a non-distorted price, preference must be given to the country with higher social and environmental standards.

AEGIS Europe considers that the impact of social and environmental standards must be better integrated into the trade defence rules.

Social and Environmental costs in the target price for the Union industry

When determining the target price for the Union industry, the modernisation package introduced a provision stating that the future costs to Union producers of complying with multilateral environmental agreements or from International Labour Organisation Conventions must be reflected in that cost.

AEGIS Europe is not aware that the Commission has used this provision in relation to ILO Conventions. The cost of compliance with multilateral environmental agreements, and in particular

[35] EU state aid law takes an expansive view on the sources to determine reasonable profit and return on capital. See Paragraphs 61 to 64 of the Communication from the Commission on State Aid for environmental protection and energy 2014 – 2020.

the cost of compliance with the EU's Emissions Trading System, has been factored into the target price. This provision has worked well.

Social and Environmental Costs in choosing the Representative Country[36]

When two or more countries are considered suitable markets to represent a significantly distorted market for the purposes of obtaining values for the factors of production so as to construct the normal value, the Commission must give preference to countries with an adequate level of social and environmental protection.

The Commission has only had to make this choice in one investigation. In that investigation the Commission found that both Malaysia and Mexico were possible representative countries. The Commission therefore assessed their level of social and environmental protection in accordance with the last sentence of Article 2(6)(a) first indent of the basic anti-dumping Regulation. The Commission assessed their compliance with international labour and environmental standards including ratification of all core ILO and environmental conventions. The Commission gave preference to Mexico, the country with the higher level of protection.

In other investigations, the Union industry has challenged the Commission's choice of the representative country on the basis of social and environmental standards. The Commission found that where another appropriate representative country has not been identified, an analysis of the social and environmental standards is not warranted.

AEGIS Europe Recommendation on the Representative Country:

16. The level of social and environmental protection should be a factor in determining the suitability of a country to represent a distorted economy *ab initio* rather than only where there is a choice of more than one suitable country.

Social and Environmental costs: non-compliance in the exporting country

Unless certain exceptions apply, the normal value[37] of goods is determined on the basis of the price for those goods in the domestic market of the exporting country. If an exception applies, such as where there are no sales in the country of origin, or sales are not in the ordinary course of trade or if the market is distorted, then the normal value can be constructed on the basis of non-distorted input costs for the factors of production.

[36] This provision was introduced by the 2017 reforms to the basic anti-dumping Regulation: See Regulation 2017/2321 of 19 December 2017.

[37] Dumping is the difference between the normal value in the market of origin and the export price to the Union. WTO law refers to 'normal value' rather than the price in the country of origin as sometime there are no, or only limited sales in that market or the market is distorted and does not give a fair price.

The dumping margin is calculated by making a fair comparison between the normal value and the export price. The export price is the price of the goods for export to the EU market. Prices on the EU market are generally higher because of the high social and environmental costs. The fair comparison requirement means that the absence of social and environmental costs in market exporting the goods to the EU must be taken into consideration. Thus, when constructing the normal value from these countries, and to ensure a fair comparison with the export price which is influenced by the high social and environmental costs in the EU, the absence of social and environmental costs must be taken into consideration.

AEGIS Europe Recommendation on Normal Value:

17. When constructing normal value, the absence of social and environmental costs in the market of origin must be factored-in so as to ensure a fair comparison with the export price.

6: *The impact of unfair trade on jobs*

In recognition that unfair trade can destroy jobs and inhibit the expansion of employment, the modernisation package introduced the idea that trade unions can request investigations into unfair trade practices. This necessary improvement in the TDI rules has not worked out in practice. Trade unions are not aware of this right. If Unions are to be able to make a *prima facie* case for the initiation of an investigation, the rules on the data they must provide need to be changed or the existing rules must be applied in a manner that reflects the data that trade unions can have reasonable access to.

AEGIS Europe Recommendations on the role of Trade Unions in trade defence:

18. Trade Unions must be made aware of the rights given to them in the modernisation package by means of a targeted information campaign;
19. The presentation of a *prima facie* case for the initiation of a trade defence investigation by trade unions must be revised so as to facilitate the exercise of the right to call for investigations.

7: *Support for smaller companies*

As part of the reforms to trade defence practice, the Commission agreed to establish a help desk for small and medium sized enterprises (SMEs), to reduce the size of the injury questionnaire for SMEs, to give greater publicity to the availability of the trade defence tools, to produce a guide to making trade defence complaints[38] and to fix, as far as possible, the period of investigation to coincide with a financial year where the injured sector was made up mainly of SMEs. The need to increase

[38] The Commission has in fact established the help desk, has made a reduced questionnaire (which does not allow for easy consolidation with the normal injury questionnaire), published a guide to making complaints and uses as far as possible annual accounts for SMEs.

awareness of the availability of trade defence tools was also highlighted by the Court of Auditors in its 2020 review of the functioning of TDI.[39]

Some progress has been made but problems remain. The fixing of the period of investigation to coincide with the financial year is an essential element for SMEs, which most often do not have accounts allowing monthly or quarterly analysis. AEGIS Europe supports this development.

The new SME questionnaire does not allow consolidation of data with the normal questionnaire. If both SMEs and larger companies are part of the sample of Union producers, SMEs are *de facto* required to fill out the normal and larger questionnaire, which defeats the purpose of the smaller questionnaire. This is a burden that the vast majority of SMEs are not able to meet, particularly if they are suffering injury from distorted imports, and for this reason do not partake in TDI investigations. If SMEs are to be able to partake fully in investigations, changes are needed that, at least partially, remove this burden and in particular of providing data transaction by transaction or the classification of sales according to the product control numbers created specifically for each investigation.[40]

Footnote 13 of Article 5.4 of the WTO Anti-Dumping Agreement provides that: [i]*n the case of fragmented industries involving an exceptionally large number of producers, authorities may determine support and opposition by using statistically valid sampling techniques*. There must be greater use of this provision for sectors primarily made up of SMEs. At the complaint stage, the condition that 25% of the producers expressly support the complaint should be verified by only requiring the producers to sign a simple questionnaire indicating their production volume during the investigation period (no injury information) and their support for the complaint only. The requirement to commit to cooperate during the investigation puts many SMEs off, as small enterprises fear the possible burden of being sampled.

The Commission has made some excellent videos on the object and purpose of the trade defence tools but AEGIS Europe considers that they have not been distributed sufficiently among the SME community, the wider Union manufacturing base and trade unions.

Confidentiality remains an issue which can be better addressed. SMEs have significant concerns with being identified as complainants seeking trade defence measures. The concern is that EU distributors and importers will target them and refuse to purchase their production. Confidentiality is essential. A separate request is required at the complaint stage and then again for the investigation. This is overly burdensome.

The modernisation recognition that special treatment for SMEs is needed[41] has not fully worked out in practice.

[39] See ECA Special Report 17/2020.
[40] As the WTO rules to determine injury do not impose the approach taken in the EU, there is room for change in practice that gives greater recognition to the difficulties SMSs face.
[41] See generally the Parliament's 2014 position on the proposal to amend the anti-dumping and anti-subsidy Regulations.

AEGIS Europe Recommendations in relation to Smaller Companies:

20. A new approach to the gathering of the data necessary to show injury to SMEs that avoids the transaction-by-transaction data is needed;
21. Confidential treatment of the names of SMEs be granted as a matter of course;
22. Where confidential treatment is given to some complainants, it must be given to all complainants, as not to do so exposes those companies which have not been granted confidential treatment.

8: ***Expansion of the area to which trade defence measures apply***

The non-application of trade defence measures to offshore installations on the continental shelf was a serious loophole in the protection of highly specialised producers serving offshore installations against injurious dumping and subsidisation. The modernisation package closed this loophole. This is to be welcomed.

MAKING TRADE DEFENCE '*EFFECTIVE*'[42]: SOME FURTHER IMPROVEMENTS

The trade defence instruments must not be left out in the cold in the drive to improve the EU's toolbox on trade. The Commission proposals on anti-coercion, foreign subsidies, and the international instrument on public procurement are all welcome and AEGIS Europe looks forward to their early adoption and implementation.

The existing trade defence instruments remain central in ensuring that action can be taken when trade is unfair. The new tools that the Commission has proposed fit around the existing trade defence tools. The foreign subsidies instrument will not replace the anti-subsidy tool. Coercive steps are often against exports not imports. Blocking access to EU public procurement to companies from countries that do not reciprocate will be beneficial to EU manufacturers but does nothing about unfair trade practices. Thus, there is an ongoing need to improve the trade defence tools themselves.

The score card on the implementation of the modernisation package should not be read as a report that the trade defence instruments are not working. There have been significant and welcomed developments in the last years. As President Juncker said, '*we are not naïve free traders'*. The improvements, in addition to some of the successes of modernisation, include:

- The 2017 Regulation introducing new rules to calculate normal value for goods originating in markets that are affected by significant distortions such as prices not being the result of market forces, or where they are affected by substantial government intervention, works well;[43]
- The cross-border[44] subsidisation of goods for export to the Union has been identified as a problem and solutions found on a case-by-case basis during investigations;
- Procedures have been developed to adjust measures and apply new duties as from the date of the implementing regulation imposing measures when there has been a finding in the EU Courts that errors were made in the setting of the levels of the measures.

That being said, given the centrality of trade defence instruments to the rights of the Union industry to seek relief from unfair practices, the law, practice and policy of trade defence must be kept under constant review. This section of the AEGIS Europe Report will look at what more can be done.

[42] See Dombrovskis's quote in the press release: *The EU needs effective tools to defend ourselves when we face unfair trade practices. This is a key pillar of our new strategy for an open, sustainable and assertive trade policy.*

[43] However, these new rules do increase the burden on the Union industry in preparing complaints as they require access to international data bases, something that many industries dominated by SMEs do not have, or cannot afford, access to.

[44] Where one country provides subsidies to production in a second country so that those goods can be exported to the Union.

9: *Better enforcement of TDI measures (circumvention)*

The status of Exporting Producers

There is a need for a better examination of status of those exporting producers which make themselves known to the Commission and seek individual treatment but are not sampled for individual examination. The data requested of these exporting producers is designed to reveal the largest exporters to the Union. This data is not sufficient to show which companies are exporting producers or those that are exporting traders or distributors. Either the initial data requested of these companies is expanded or a second set of data should be requested requiring proof of production capacities and relations, if any, with other exporting producers, traders or distributors in the country of origin, and trading relations with importers in the EU.

Market Economy Treatment (MET) from the time of the analogue country methodology

In 2017, a change was introduced into the basic Regulation to the methodology for determining dumping from origins with economies that were significantly distorted. This removed the possibility of granting exporting producers from these origins market economy treatment. In reflection of these changes, Article 11(4) of the basic Regulation provides that the new methodology is to be used in reviews of the likelihood of the continuation of injurious dumping. However, the Commission continues to grant to these companies the same level of individual duty as if those companies were still recognized as operating according to market economy principles despite the finding that an economy is significantly distorted. In law, this means that the Commission continues to use the old methodology despite the requirement to use the new.

AEGIS Europe calls on the Commission to remove this anomaly by means of *ex officio* re-examinations of all TDI measures where market economy treatment is still granted.

Circumvention and monitoring

If it is determined that it is in the Union interest to impose measures, it is equally in the Union interest to enforce the measures. The Commission needs more resources to monitor patterns of trade to determine if circumvention is taking place and to open *ex officio* investigations to counter this practice.

The role of OLAF to combat fraud and loss of revenue to the Union

Traditional customs-checks on imports are becoming less and less practicable in the need to make the release of goods for free circulation in the Single Market more efficient. New approaches are needed.

OLAF is well placed to carry out this function helping the national customs authorities and identifying fraud and circumvention.

AEGIS Europe Recommendations on better enforcement:

23. Better examination of the nature and status of exporting producers seeking individual treatment;
24. *Ex officio* application of the new methodology to all exporting producers currently benefitting from market economy treatment under the old methodology;
25. More *ex officio* circumvention and anti-absorption investigations where the Commission monitoring determines that the criteria for these procedures are met;
26. Greater engagement of OLAF in the fight against circumvention (as well as fraud) so as to ensure the effectiveness of the measures and protect the Union budget.

10: *Greater cooperation with the Member States in gathering the data needed*

Existing provisions of the trade defence rules allow the Commission to request cooperation from the Member States to carry out all the necessary checks and inspections. The Member States must take whatever steps are necessary to give effect to these requests.

Currently the rules provide that the firms concerned must give their consent. Consideration must be given to making cooperation obligatory or making the absence of cooperation subject to sanction. This is particularly the case in relation to importers and users where the data submitted is partial or where relationships are not disclosed.

AEGIS Europe Recommendation in relation to the gathering of data:

27. Consideration must be given to increasing the powers of the Commission and the Member States to gather the data needed to ensure that when there is *prima facie* proof of dumping, subsidisation, injury and causation, complete data can be gathered in an efficient but comprehensive manner.

11: *Distortions of trade that still remain to be addressed*

As seen in the Commission's 2020 Annual Report to the Parliament and Council on TDI, the Commission has applied the existing rules to address the problem of one country subsidising another country to supply the Union, thus distorting the EU market by subsidisation. AEGIS Europe welcomes this development.

Other problems remain, and require solutions.

Currency manipulation

The Bretton Woods system is based on the idea that currencies will devalue if there is an imbalance in trade. But the GATT and the WTO rules do not address the problem of currency manipulation. Currency manipulation is the management of the value of the currency in the market producing exports to the Union so as to subsidise those exports. *De facto* currency manipulation is where inflation and devaluation are allowed to run free by reason of government action or inaction.

AEGIS Europe calls on the Commission to examine this problem to determine what criteria can be used to distinguish between manipulated currency values and those changes in value that result from fair trading.

Injury through dumped and subsidised forward contracts

Union producers can be injured today by the loss of contracts for the supply of goods in the future even though the goods have not begun to flow into the Union. This problem is common in the supply of parts to complex products built by original equipment manufacturers (OEMs).

Original equipment manufacturers design products today for production and sale in the future. The OEMs will plan and contract for the supply of parts long before those goods are actually produced and traded. Exporting producers offer dumped or subsidised prices for the future supply of parts. This destroys the order books of Union producers and the long-term viability of Union production.

The trade defence instruments need to be amended so as to address this very real problem.

Raw material distortions

Distortions in the markets for raw materials resulting in distortions in favour of producers exporting to the EU is at the core of trade defence law and practice. Dual pricing is a core problem. Raw material rich countries supply the domestic market at prices significantly lower than in export markets. This allows for the production of processed products at prices which are inevitably lower than the cost of production in the EU.

Greater use is needed of existing provisions that allow for adjustments to the costs of production in the exporting country to reflect global prices rather than the distorted raw material costs on the exporting market.

Fair trade in a globalised economy requires rules to eliminate this practice. The anti-dumping instrument allows for measures to counter this practice, but a better solution is not to allow the practice in the first place. Raw material distortions are not just a question of the application, or not, of the lesser duty rule. It is a core issue to ensure fair trade.

The creation of unreasonable production capacities

Many sectors are affected by government actions to increase production capacity. This is particularly the case in, but not limited to, the production of aluminium and steel. The new excess capacity is often achieved by a mixture of subsidisation and favourable and targeted regulation so as to create national champions.

In implementing the trade defence instruments, as well as the safeguard instrument, the EU must give greater weight to the impact of these realities. The presence of overcapacities should be a factor in favour of threat of injury cases and in expiry reviews.

CONCLUSIONS

The first AEGIS Europe Report on the EU's Trade Defence Instruments (TDIs) recognises the work done by the EU institutions to ensure that trade into the Union is conducted on fair and efficient terms. However, Union manufacturers consider that more can be done. The Report examines where the rules and their implementation can be strengthened and provides a series of recommendations for change.

AEGIS Europe Recommends:

1. The Notice of Initiation of investigations should set out more clearly the need to respect deadlines and to provide data in the form needed by the Commission as well as the consequences of non-compliance;
2. Parties who apply to be part of the investigation out of time should be excluded, unless that party can show clear reasons for a late application, or why certain data is unavailable;[45]
3. A requirement that importers and users indicate the volume of the trade in the product concerned, so as to evaluate representativeness and to allow an understanding of the weight to be given to any submissions from these parties, is needed;
4. Where data is received out of time or is not complete it should be discarded, in implementation of Article 18 of the basic Regulation, unless good administration requires it to be considered;
5. Impose registration on all imports of the product concerned, in all investigations, either from the date of the initiation of the investigation or immediately thereafter;
6. Impose provisional measures on the basis of the data submitted by the interested parties but before that data is verified;
7. There must be recognition that the injury margin can never fully reflect the injury caused by unfair trade as the Union industry has had to adjust to the unfair trade before the steps can be taken to measure the unfairness;
8. The rules on the application, or not, of the lesser duty must be revisited so that the norm is the imposition of the higher duty, unless it is in the Union interest not to do so, or the level of the duty is limited by WTO law;
9. The scope of the distortions triggering the non-application of the lesser duty should be expanded in line with the Parliament's 2014 position;
10. The lesser duty rule should only be applied to those origins also implementing the WTO plus provision;
11. The lesser duty rule should not apply to unfair trade from origins not respecting international social and environmental standards;
12. The 'positive' Union interest test should be applied more strongly (i.e., to the benefit of the Union industry) in sectors where there is structural overcapacity, particularly in the market of origin;

[45] The evaluation of rights guaranteed by the EU legal order must be undertaken in the light of the need for efficient investigations and the needs of EU industry to be protected against unfairness.

13. An examination of distortions in the supply of raw materials should be carried out *ex officio* by the Commission on the basis of the data received from exporting producers or, in the absence of such data, on the basis of reliable public information and not be dependent on a claim in the request for the initiation of an investigation;
14. The base level target profit should be increased to reward innovation and create high value employment in the EU manufacturing sector;
15. The Commission must widen the sources to be examined so as to determine a reasonable profit for Union industries in the absence of unfair and distorted trade and to ensure that investments in decarbonisation and innovation are taken into consideration;
16. The level of social and environmental protection should be a factor in determining the suitability of a country to represent a distorted economy *ab initio* rather than only where there is a choice of more than one suitable country;
17. When constructing normal value, the absence of social and environmental costs in the market of origin must be factored-in so as to ensure a fair comparison with the export price;
18. Trade Unions must be made aware of the rights given to them in the modernisation package by means of a targeted information campaign;
19. The presentation of a *prima facie* case for the initiation of trade defence investigations by trade unions must be revised so as to facilitate the exercise of the right to call for investigations;
20. A new approach to the gathering of the data necessary to show injury to SMEs that avoids the transaction by transaction data is needed;
21. Confidential treatment of the names of SMEs be granted as a matter of course;
22. Where confidential treatment is given to some complainants, it must be given to all complainants, as not to do so exposes those companies which have not been granted confidential treatment;
23. Better examination of the nature and status of exporting producers seeking individual treatment;
24. *Ex officio* application of the new methodology to all exporting producers currently benefitting from market economy treatment under the old methodology;
25. More *ex officio* circumvention and anti-absorption investigations where the Commission monitoring determines that the criteria for these procedures are met;
26. Greater engagement of OLAF in the fight against circumvention (as well as fraud) so as to ensure the effectiveness of the measures and protect the Union budget;
27. Consideration must be given to increasing the powers of the Commission and the Member States to gather the data needed to ensure that when there is *prima facie* proof of dumping, subsidisation, injury and causation, complete data can be gathered in an efficient but comprehensive manner.

AEGIS Europe welcomes a debate on these recommendations and the taking of the necessary steps to implement them.

Brussels, September 2022