



13 April 2010

PROPOSED AMENDMENTS TO BILATERAL SAFEGUARD CLAUSE OF THE EU-KOREA FREE TRADE AGREEMENT

Further to its position paper of 5 March 2010 on the implementation of the EU-Korea Free Trade Agreement, BUSINESSEUROPE submits the following proposals for amendments to the draft regulation implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement¹

Commission Proposal

Recital 14

The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission

Proposed Amendment

Recital 14

The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission. **In the forthcoming reform of the Council Decision, all institutions should not weaken the present regulation.**

Justification

The Comitology procedure based on article 202 of the TEU was replaced in the Lisbon Treaty by two new articles (article 290 and 291 TFEU). The Council, the Commission and the Parliament are currently discussing the implications of this change and the setting up of a new procedure. While the safeguard regulation cannot bind future action by the EU, a political marker could be laid down to assert that any changes arising from this reform should not weaken the provisions of the safeguard clause

¹ COM (2010) 49; COD 2010/0032



Commission Proposal

Article 1

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Proposed Amendment

Article 1

...

(f) "interested parties" means parties commercially affected by the imports of the product in question and includes the Union industry.

Justification

The first actors to feel the impact of an import surge will be EU producers. Producers will also, no doubt, be called on to provide much of the evidence for the investigation. Yet, in the proposal there is no formal entrance point for industry besides the reference to "interested parties" who are to be consulted during the investigation. It is first important to make clear that interested parties include Union industry and their representatives.

Commission Proposal

Art 3.1

An investigation shall be initiated upon request by a Member State or on the Commission's own initiative if it is apparent to the Commission that there is sufficient evidence to justify such initiation.

Proposed Amendment

Art 3.1

An investigation shall be initiated upon request by a Member State; **by any natural or legal person, or any association not having legal personality, acting on behalf of the Union industry;** or on the Commission's own initiative if it is apparent to the Commission that there is sufficient ***prima facie*** evidence **as determined on the basis of factors laid down in Article 4.5** to justify such initiation.

Justification

In addition to being an interested party, the Union industry should be permitted to request the initiation of an investigation.

The second amendment addresses the fact that the type of evidence to be considered when deciding to initiate a proceeding is not defined. Examples of evidence are provided for the investigation stage, (import figures, market share and company figures such as sales, production, productivity, capacity utilisation, profits and losses and employment) but it is not clear that this applies also to the initiation. This is insufficient to provide certainty for affected industries. Naturally, at the initiation stage industry or Member States cannot be expected to provide all the information that would be uncovered during an investigation so "prima facie" is included. The same amendment is made in articles 3.2, 3.3 and 5.1.



Commission Proposal

Art 3.2

The Member States shall inform the Commission should trends in imports from the Republic of Korea appear to call for safeguard measures. That information shall include the evidence available as determined on the basis of factors laid down in Article 4. The Commission shall pass that information on to all Member States within three working days.

Proposed Amendment

Art 3.2

The Member States **or the Union industry** shall inform the Commission should trends in imports from the Republic of Korea appear to call for safeguard measures. That information shall include the evidence available as determined on the basis of factors laid down in Article 4.5. The Commission shall pass that information on to all Member States within three working days.

Justification

As above, the Union industry should be permitted to request the initiation of an investigation.

Commission Proposal

Art 3.3

Consultation with the Member States shall take place within eight working days of the Commission's sending the information to Member States as provided for in paragraph 2 within the Committee referred to in Article 10 on the basis of the procedure referred to in Article 11.1. Where, after consultation, it is apparent that there is sufficient evidence to justify the initiation of a proceeding the Commission shall publish a notice in the *Official Journal of the European Union*. Initiation shall take place within **one month** of the receipt of information from a Member State.

Proposed Amendment

Art 3.3

Consultation with the Member States shall take place within eight working days of the Commission's sending the information to Member States as provided for in paragraph 2 within the Committee referred to in Article 10 on the basis of the procedure referred to in Article 11.1. Where, after consultation, it is apparent that there is sufficient **prima facie** evidence **as determined on the basis of factors laid down in Article 4.5** to justify the initiation of a proceeding the Commission shall publish a notice in the *Official Journal of the European Union* **and notify the Union industry**. Initiation shall take place **within one month** of the **request by** a Member State **or the Union industry**.

Justification

Same as for the changes in Article 3.2 and the second change to Article 3.1.

Commission Proposal

Art 4.1

Following the initiation **of the proceeding**, the Commission shall commence an investigation.

Proposed Amendment

Art 4.1

Following the initiation, the Commission shall commence an investigation.



Justification

In the draft regulation there is a lack of clarity about the dates from where deadlines are measured. Different terms are used at different points: "initiation of a proceeding"; "initiation" (Article 3.3), (Article 4.1) and "initiation of the investigation" (Article 4.3). To ensure certainty as to the deadlines, it is preferable to refer to the "initiation of a proceeding" the first time it is mentioned and to "initiation" thereafter throughout the text.

Commission Proposal

Art 4.3

The investigation shall, whenever possible, be concluded within **six months** of the initiation of the investigation. In exceptional circumstances duly justified by the Commission, that time limit may be extended by a further period of three months.

Proposed Amendment

Art 4.3

The investigation shall, whenever possible, be concluded within **180 days of the initiation**. In exceptional circumstances duly justified by the Commission, that time limit may be extended by a further period of three months.

Justification

A six month time period may be excessive for companies seriously affected by import surges. BUSINESSEUROPE recommends this shorter deadline.

Commission Proposal

Art 4.6

Interested parties which have come forward pursuant to Article 3 (4) (b) and representatives of the Republic of Korea may, upon written request, inspect all information made available to the Commission in connection with the investigation other than internal documents prepared by the authorities of the Union or its Member States, provided that that information is relevant to the presentation of their case and not confidential within the meaning of Article 9 and that it is used by the Commission in the investigation. Interested parties which have come forward may communicate their views on the information in question to the Commission. Those views **may** be taken into consideration where they are backed by sufficient evidence.

Proposed Amendment

Art 4.6

The Commission shall make available electronically to interested parties which have come forward and representatives of the Republic of Korea, all information it receives in connection with the investigation, provided that the information is not confidential within the meaning of Article 9. The Commission shall continually update the interested parties and representatives of the Republic of Korea with the latest information regarding safeguard investigation proceedings. Interested parties which have come forward may communicate their views on the information in question to the Commission. Those views **shall** be taken into consideration where they are backed by sufficient evidence.

*Justification*

Easy and timely access to all relevant information in connection with ongoing or pending investigations will be vital for companies. Bureaucratic procedures should be minimized. The Commission should always take into account the views of interested parties when backed by evidence

Commission Proposal

Art 4.7

The Commission **may** hear **the** interested parties. **Such parties shall be heard where they have made** a written application within the period laid down in the notice published in the *Official Journal of the European Union*, showing that they are actually likely to be affected by the outcome of the investigation **and that there are special reasons for them to be heard orally.**

Proposed Amendment

Art 4.7

The Commission **shall at least once** hear interested parties **who so request if they have** made a written application within the period laid down in the notice published in the *Official Journal of the European Union*, showing that they are actually likely to be affected by the outcome of the investigation. **The Commission shall hear such parties on further occasions if there are special reasons for them to be heard again.**

Justification

It should be ensured that affected industries are effectively heard when needed.

Commission Proposal

Art 5.1

Provisional safeguard measures shall be applied in critical circumstances where a delay would cause damage which it would be difficult to repair, pursuant to a preliminary determination that there is **clear** evidence that imports of an originating good from the Republic of Korea have increased as the result of the reduction or elimination of a customs duty under the Agreement, and such imports cause serious injury, or threat thereof, to the domestic industry. Provisional measures shall be taken on the basis of the procedure referred to in Article 11.1.

Proposed Amendment

Art 5.1

Provisional safeguard measures shall be applied in critical circumstances where a delay would cause damage which it would be difficult to repair, pursuant to a preliminary determination **on the basis of factors laid down in Article 4.5** that there is **sufficient prima facie** evidence that imports of an originating good from the Republic of Korea have increased following the reduction or elimination of a customs duty under the Agreement, and such imports cause serious injury, or threat thereof, to the domestic industry. Provisional measures shall be taken on the basis of the procedure referred to in Article 11.1.

Justification

Clarity as regards the type of evidence required should also extend to provisional safeguard measures. While clearly the evidence must be more compelling to justify provisional measures imposed without an investigation, BUSINESSEUROPE believes the first clause of the sentence is sufficient to set a higher standard. The same evidence test for an initiation ("sufficient prima facie evidence") should therefore apply.



Commission Proposal

Art 5.2

Where a Member State requests immediate intervention by the Commission and where the conditions in paragraph 1 are met, the Commission shall take a decision within five working days of receiving the request.

Proposed Amendment

Art 5.2

Where a Member State **or any natural or legal person, or any association not having legal personality, acting on behalf of the Union industry** requests immediate intervention by the Commission and where the conditions in paragraph 1 are met, the Commission shall take a decision within five working days of receiving the request.

Justification

If the Union industry can request the initiation of investigations, it should also be able to request intervention in the case of provisional safeguard measures.

Commission Proposal

Art 6

Where bilateral safeguard measures are deemed unnecessary the investigation and proceeding shall be terminated on the basis of the procedure referred to in Article 11.2.

Proposed Amendment

Art 6

Where bilateral safeguard measures are deemed unnecessary the investigation and proceeding shall be terminated on the basis of the procedure referred to in Article 11.2.

At this time, the Commission shall make public, with due regard to the protection of confidential information within the meaning of Article 9, a report including a summary of the material facts and considerations relevant to the determinations.

Justification

Imposition of measures or termination without measures must be properly justified by the Commission.



Commission Proposal

Art 7

Where the facts as finally established show that the circumstances set out in Article 2.1 are met, a decision to impose definitive bilateral safeguard measures shall be taken in accordance with the procedure referred to in Article 11.2.

Proposed Amendment

Art 7

Where the facts as finally established show that the circumstances set out in Article 2.1 are met, a decision to impose definitive bilateral safeguard measures shall be taken in accordance with the procedure referred to in Article 11.2.

At this time, the Commission shall make public, with due regard to the protection of confidential information within the meaning of Article 9, a report including a summary of the material facts and considerations relevant to the determinations.

Justification

Imposition of measures or termination without measures must be properly justified by the Commission.