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Proposal for a

COUNCIL REGULATION

**amending Regulation (EC) No 384/96 on protection against dumped imports from
countries not members of the European Community**

(presented by the Commission)

EXPLANATORY MEMORANDUM

REVIEW OF THE ANTI-DUMPING REGIME APPLICABLE TO RUSSIA AND CHINA AND A PROPOSAL FOR A COUNCIL REGULATION AMENDING COUNCIL REGULATION (EC) NO 384/96

1. PREAMBLE

In April 1998, the Commission and the Council agreed that the special anti-dumping regime applicable to Russia and China, along with the treatment of other countries classed as non-market economies for anti-dumping purposes would be reviewed in 2000.

This document sets out the outcome of that review and serves as an Explanatory Memorandum for a proposal for a Council Regulation amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community.

2. EXECUTIVE SUMMARY

1. In April 1998 the Council amended the Basic anti-dumping Regulation to allow, on a case-by-case basis, individual Russian and Chinese companies the opportunity to prove that they operate in market economy conditions in accordance with certain criteria contained in the legislation. Where they prove this is the case, dumping calculations for the company are based on their own domestic prices and costs. The amendment did not grant full market economy status to Russia and China and the analogue country approach is maintained for companies in those countries who do not meet the market economy treatment criteria. The amendment became effective on 1 July 1998.
2. This treatment differs from other countries classed as non-market economies (NMEs). In anti-dumping cases involving those countries one dumping calculation is made for the country as a whole by comparing their export prices with a normal value based on information from companies in a market economy third country, the analogue country. The reason for basing normal value on an analogue market is to overcome the distorting effect on prices/costs of State influence in a non-market economy.
3. The amendment to the legislation for Russia and China was in response to the ongoing reforms in those countries and the fact that some Russian and Chinese companies operate in market economy conditions and therefore their prices and costs may be appropriate for the calculation of normal value.
4. It was agreed by the Commission and the Council that the special regime would be reviewed after a period of two years in operation and that the situation in other countries currently classed as non-market economies would also be examined.

5. Since July 1998, only a small percentage of companies who applied for market economy treatment were successful in proving their claim i.e. just over 10%. However this has more to do with the economic situation in Russia and China rather than with the criteria for market economy treatment being too strict. Experience has shown the criteria to be a good framework to evaluate whether or not a company operates in a market economy environment.
6. Regarding the economic situation in Russia and China, while there have been some setbacks in the economic reform process in both these countries, they both continue making progress. It is also clear that both countries have some way to go before they can be considered market economy countries. The regime itself also gives a certain impetus to the reform processes in these countries. For these reasons it is considered appropriate to continue applying the regime to anti-dumping proceedings involving Russia and China.
7. In reviewing the situation in other countries currently classed as non-market economies with a view to adapting their treatment in anti-dumping cases, the countries can be classified into three groups. Ukraine, Vietnam and Kazakhstan in one group, those currently classed as non-market economies for anti-dumping purposes but who are members of the WTO in the second i.e. Georgia, Krygystan and Mongolia and the remaining NME countries in the third. Given the level of economic reforms in the first group and regarding the second group, the fact that membership of the WTO pre-supposes a certain level of economic reform it is now proposed to extend the special anti-dumping regime to these countries. Regarding the third group of countries it is proposed to automatically extend the ad hoc regime to any of the remaining NME countries that join the WTO in the future.
8. In applying the market economy regime one problem arose relating to an overlap between the market economy criteria, which essentially applies to the domestic situation of a company and the criteria for so-called individual treatment which concerns their export activities. Individual treatment means that, for companies in NMEs who can prove that their exporting activities are determined by market forces and not affected by State influence (based on criteria set by the Commission), an *individual* dumping margin is calculated for them based on a comparison of their *own* export prices with the normal value from the analogue country. However, the overlap in the criteria has created the anomaly that only those exporters that can fulfil the requirements for full market economy treatment can qualify for individual treatment. Given that the key issue for individual treatment is that export transactions are not subject to State interference, it is proposed to amend the criteria accordingly by focusing on those areas having a direct impact on the export activities of the exporting company.

9. The attached note sets out the following:
- A review of the application of the special anti-dumping regime for Russia and China;
 - Information on the economic reforms ongoing in Vietnam, Ukraine and Kazakhstan and a proposal to amend the Basic Anti-dumping Regulation to extend the special market economy regime to these three countries;
 - A proposal to extend the special market economy regime to those countries currently classed as NMEs for anti-dumping purposes but who are WTO members and to automatically extend the regime to any other NME country when they accede to the WTO in the future;
 - A proposal to change the criteria for individual treatment in anti-dumping investigations.

**REVIEW OF THE ANTI-DUMPING REGIME APPLICABLE TO RUSSIA
AND CHINA AND A PROPOSAL FOR A COUNCIL REGULATION
AMENDING COUNCIL REGULATION (EC) NO 384/96**

A. INTRODUCTION AND GROUNDS FOR REVIEW

- (1) In April 1998 the Council amended the Anti-dumping Regulation thereby changing the treatment of exporting producers in Russia and P.R. China in anti-dumping proceedings - Council Regulation (EC) No 905/98¹. The amendment provided for the use of domestic prices and costs for 'normal value' in anti-dumping proceedings if certain criteria were met. The amendment became effective on 1 July 1998.
- (2) At the time the amendment was adopted, a declaration in the Council minutes stated that the regime would be reviewed two years after its entry into force. A further declaration stated that the situation in other countries classed as 'non-market' economies, for anti-dumping purposes, would be reviewed with a view to extending the regime to them when it is considered appropriate to do so. Declarations to the Council minutes - Annex 1.
- (3) Up to April 1998 the EU Anti-dumping legislation categorised third countries as either a 'Market Economy' (ME) or a 'Non Market Economy' (NME), this latter category comprised of the countries of the CIS, Albania, China, North Korea and Vietnam. In practical terms the difference means that for the purposes of establishing normal value in dumping investigations concerning NMEs, information on domestic prices and costs is considered unreliable because of the significant distorting effect of State influence and control and the absence of meaningful market signals due to State interference. Therefore in these cases, normal value is based on information from companies in another market economy country i.e. the analogue country.
- (4) However this situation did not recognise the ongoing economic and political reforms in countries such as China and Russia and it was considered that the normal value calculation method automatically applied in anti-dumping investigations concerning these two countries was no longer appropriate in each and every anti-dumping proceeding. As a result, it was considered that there was clear economic justification to adapt EU antidumping practice so as to accommodate the impact of the ongoing reforms on individual companies. Consequently the anti-dumping Regulation was amended and a specific regime introduced for exporting companies in Russia and China.
- (5) The amendment did not confer 'market economy' status on these two countries nor did it abolish the analogue country regime for anti-dumping investigations concerning them. However, it introduced a regime whereby Russian and Chinese companies could claim, on a case-by-case basis, that they operate under market economy conditions according to 5 specific criteria. Where those companies successfully prove their case, the normal

¹ OJ L 128, 30.04.1998, p. 18.

value is based on their own domestic prices/costs rather than on information from companies in an analogue country.

B. EXPERIENCE TO DATE

- (6) The regime has been applied in 9 anti-dumping investigations concerning China and 1 concerning Russia - Annex 2. 29 companies in total claimed market economy treatment, 27 Chinese and 2 Russian. Only 3 Chinese companies were granted ME treatment, representing about 10% of the total companies which claimed ME status. The low level of claims/success by Russian companies for market economy treatment was not in line with original expectations as the situation in that country looked more promising at the time the regime was adopted than subsequently. Clearly the situation in that country has seriously impacted on the ability of companies there to meet the criteria.
- (7) The 5 criteria to determine whether or not a company operates in market economy conditions allow for an objective analysis of the situation in individual companies while taking into account those specific issues considered most important in anti-dumping investigations. In brief the criteria are:
- Decisions of firms are taken without significant State interference and are made in response to market signals;
 - Accounts must be independently audited in line with international accounting standards;
 - Production costs and the financial situation of the company is not affected by distortions carried over from the former State-led economic system, barter trade or compensation of debts;
 - Companies are subject to bankruptcy and property laws;
 - Exchange rate conversions carried out at market rates.
- (8) These criteria have provided an adequate framework for case-handlers to do an analysis against a background of the two different reform processes in Russia and China. As mentioned above, 3 companies successfully demonstrated that these criteria could be met. For those companies who were refused ME treatment the main reasons were:
- Restrictions on selling on the domestic market. This has proven to be one of the main tools employed by the Chinese Government to protect inefficient domestic industry from competition and is more extensive than originally thought. Even where such restrictions were no longer specified in legal documents they were still found to exist in practice in many instances;
 - Significant State interference in decision making, including investment obligations imposed by the State, compulsory use of certain raw material suppliers, Government regulations forcing foreign invested

enterprises to pay 120% of the salary paid to an equivalent worker in a State-owned company;

- Absence of properly audited accounts. Many companies submitted incomplete accounts, many accounts were either not audited at all or not audited in line with international accounting standards and many had inconsistent accounting policies particularly in relation to depreciation. While accounting laws are being brought into line with international standards, in practice the standards are only being implemented gradually;
 - Significant distortions in costs as a result of previous State involvement in the company e.g. improper valuations or arbitrary revaluation of assets carried over from previous State ownership of the company, often further compounded by depreciation policies which are subject to change and inconsistent with normal practice;
 - Barter trade was found to be common for a number of companies.
- (9) It should be noted that different companies failed to meet different criteria. In this context particular reference is made to the anti-dumping investigation concerning imports of quarto plates originating, inter alia, in China. In that investigation 6 companies claimed market economy treatment. However, while none of the companies fulfilled all the criteria on an individual basis, as a group the six companies together demonstrated that all the criteria could in fact be met.

Conclusion

- (10) Therefore the practical experience to date has proven that these criteria are not only realistic and attainable but are the minimum needed to prove market economy status. It is therefore proposed that these criteria should remain unchanged.

C. ECONOMIC SITUATION IN RUSSIA AND CHINA

- (11) The original Commission Communication (COM(1997) 677 final) proposing the change to the anti-dumping legislation said:

"...What is clear, however, is that both countries (Russia and China) have definitely moved away from a command economy..."

The following sets out a brief overview of the current economic situation in Russia and China with a view to determine if the special anti-dumping regime remains appropriate.

Russia

- (12) According to an assessment by the EBRD (1999), the economic and financial crisis suffered by Russia in the second half of 1998 has had a negative effect on the overall evolution of structural reforms. For example temporary price controls were imposed following the August 1998 crisis although in most

cases these were only maintained for a few months. In addition a range of currency restrictions was also imposed but some of these were removed during 1999 as a condition of the new IMF programme.

- (13) However, the improvement in some of the main macroeconomic variables in 1999 has allowed progress in restructuring the Russian economy to resume. While the privatisation process virtually stalled in late 1998/early 1999, the process may again be started through plans by the Russian Federal Property Fund to sell off large share packages in a range of oil and gas companies. There have been some advances in improving tax administration with a commitment to improve fiscal management in the context of the new IMF agreement and the introduction of a much improved bankruptcy law. There has also been a commitment to introduce international accounting standards (IAS) for large companies by the end of 2000 - for smaller companies the Russian accounting standards will gradually be adapted to IAS.
- (14) Further progress will depend on what reform policies, if any, will be introduced after the presidential elections which took place at the end of March.

China

- (15) The pace of reform in China has been somewhat constrained by concerns about its social impact particularly in terms of unemployment. The pursuit of reform has been rendered even more difficult by the recent slowdown in economic growth that is largely attributed to the poor health of the State-Owned Enterprises (SOEs). However the Government's approach is to apply a steady reform pressure throughout the SOE system through various steps; improved management in SOEs; a large scale restructuring of the SOE sector through privatisation, closures and mergers; shedding of excess labour; improvements in the financial situation of SOEs and the financial sector through debt write off, the setting up of Asset management companies and the banking sector being instructed to make lending decisions on the basis of market forces and not policy considerations.
- (16) In the private sector the Government announced in January 2000 the elimination of all restrictions and discriminatory regulations that impede the private sector development, including fiscal provisions, land use rights, import and export rights and access to stock markets. Although any change is expected to be gradual (only a handful of some 950 listed companies are privately held, and State banks remain weary of lending to non-State firms), this is seen as an important indicator of the Government's seriousness regarding the promotion of private sector development. The Government is also going out of its way to promote foreign direct investment which since 1998 showed a steep decline in this area of activity.
- (17) While all these developments are likely to lead to an increased pace of reform they are not without certain short-term risks: they will increase unemployment and put a strain on the fabric of Chinese society, exposing reformers to charges of destroying Chinese industry for the benefit of foreign and home-grown capitalism. So while the reform process is continuing in

China it will proceed with close reference to its social and political consequences.

Conclusion

- (18) Clearly while both Russia and China have had setbacks in their reform process, they both continue to move in the direction of market economy principles. In any event the regime itself lends certain support to the policy initiatives pursued by these countries to encourage fundamental restructuring at the company level, including the introduction of modern accounting and auditing systems and modern management techniques and effective bankruptcy legislation. In this context the regime has contributed to the Chinese Government lifting certain domestic selling restrictions.
- (19) In the case of China, the impetus added to the economic reforms from recent developments will help improve the economic climate ensuring that more Chinese companies should be able to meet the ME criteria in the future. Regarding Russia, the situation there has meant that, up to now it has proved not possible to apply the regime in practice. However any suspension of the regime would send the wrong political signal and would be counterproductive to the reform process in that country.
- (20) Therefore it is considered appropriate to maintain the regime as it stands for both these countries.
- (21) Our position is in line with some of our other WTO partners including Australia and US.
- (22) It is likely that this regime will remain appropriate for Russia and China for some time up to and after their accession to the WTO.

D. MONITORING OF OTHER NME COUNTRIES

- (23) In April 1998, when the original amendment to the anti-dumping legislation was adopted the Commission and the Council agreed to keep the situation in other NME countries under review with a view to granting the special anti-dumping regime when it was appropriate to do so.
- (24) These countries are Albania, Armenia, Azerbaijan, Belarus, Georgia, Kazakhstan, North Korea, Kyrgyzstan, Moldavia, Mongolia, Tajikistan, Turkmenistan, Ukraine, Uzbekistan and Vietnam. These countries can be categorised into three groups:
 - i. countries that were already singled out on the basis of their economic reforms as possible candidates for future consideration to have the special market economy regime applied to them and/or countries that have requested that the regime be applied to them i.e. Ukraine, Vietnam and Kazakhstan;
 - ii. countries currently classed as non-market economies for anti-dumping purposes but who are members of the WTO;

- iii. the remaining non-market economy countries.

Ukraine

- (25) For Ukraine, their treatment in anti-dumping proceedings is a political issue given they feel discriminated against, vis-à-vis our treatment of Russia. They have raised the issue at every available opportunity including at ministerial level.
- (26) Progress on reforms in Ukraine has been mixed and the Russian crisis has had some negative impact on the situation there. There has been progress in areas such as privatisation, deregulation, fiscal and public administrative reform and banking supervision. However, to some extent, private enterprises continue to face an unstable and unfriendly regulatory environment. Reforms in other areas especially the agriculture and energy sectors have been slow and disappointing.
- (27) Small-scale privatisation is virtually complete through a mass scheme launched in 1995. Of larger enterprises, just over a quarter originally identified for privatisation have been sold. Lack of transparency in the procedures has meant relatively low participation by foreign or strategic investors. However, the Government is expected to accelerate the process this year in order to raise budget revenues and obtain foreign exchange with which to meet its foreign debt obligations.
- (28) There has been progress in the areas of demonopolisation and deregulation but nevertheless the regulatory environment is not particularly conducive to the promotion of private enterprise activity. FDI is discouraged as a result of numerous permits required to conduct business and engage in foreign trade and companies exporting to Ukraine face a number of non tariff barriers and discriminatory practices e.g. certain testing and certification requirements and excise taxation.
- (29) Ukraine has introduced accountancy rules for banks and enterprises that are compatible with International Accountancy Standards (IAS) and the changeover in practice is taking place gradually.
- (30) In relation to fiscal and administrative reforms, Ukraine has undertaken a number of improvements including the elimination of certain exemptions under the VAT regime, abolition of the special payroll tax used to finance the Chernobyl fund as well as a reduction in public sector employment numbers. The frequent granting of exemptions to loss-making enterprises has led to an emergence of a black economy and an increase in barter transactions. However the Prime Minister has promised to cut down on tax exemptions and privileges although this has yet to be put into action. The Parliament has blocked the adoption of a personal income tax. In the energy sector prices are below cost-recovery levels and non-payment for energy supplies is common.
- (31) A new bankruptcy law was approved in August 1999 to take effect in 2000. Improvements in the enforcement of bankruptcy law are needed. Regarding property laws; private ownership of buildings, without restrictions, was authorised in 1993; private ownership of small parcels of land permitted

since 1996 for Ukrainian citizens and while full private ownership of larger plots of land is not yet possible, it has been promised for the future by the Prime Minister.

- (32) While the banking system remains weak, supervision in the sector has been strengthened. The country has a modern and effective payments system. On currency convertibility, in 1996 Ukraine accepted obligations imposed by the IMF implying full convertibility of its currency for current account transactions. While some restrictions on currency convertibility were imposed in 1998 in the wake of the Russian crisis, these were removed in 1999.

Vietnam

- (33) The reform process in Vietnam is continuing although the country seems to have been particularly badly affected by the economic crisis in that region and does not seem to be benefiting from the regional economic recovery that is underway.
- (34) Reform in the State-owned sector started back in 1989 but progress has been poor. However the onset of economic downturn has brought SOE reform back to the forefront of policy priorities. The National Enterprise Reform Committee developed a comprehensive SOE reform programme consisting of measures aimed at diversifying ownership, restructuring and downsizing large SOEs that are to remain in State hands and reducing the number of SOEs that are non-viable. A number of actions were taken in 1999 in this context; classification of SOEs using financial/economic criteria, issuing regulations to get rid of some small SOEs and the setting up of a Restructuring Fund to finance the cost of worker redundancy due to the reforms. The opening of Vietnam's first stock market in 1999 is also expected to help the process of privatisation.
- (35) There have been efforts to liberalise the highly restrictive foreign trade regime and regulatory framework since 1998 and these efforts have begun to show results. Liberalisation of trading rights and approval of an Enterprise Law have prompted rapid growth in the number of enterprises involved in import and export activities particularly in the private sector. However improvements in the actual implementation of the law are needed.
- (36) The normal support structures for a functioning market economy regime are not yet properly developed e.g. poor courts system, no accounting agencies, and little or no information agencies. This lack of market infrastructure is a problem for foreign investors. However a three-year agenda for banking reform includes the introduction of international accounting standards for banks and enterprises and this will be implemented gradually. There have been some improvements in property law including the granting of land-use rights to foreign companies investing in industrial and export processing zones. The reform agenda also includes further improvements on the issue of property laws.
- (37) The Vietnamese currency, the Dong, is not convertible. 80% of foreign exchange proceeds have to be sold to State banks and the exchange rate is

managed by the central bank, which announces the average exchange rate traded on the inter-bank market on the previous day. Enterprises are required to surrender and convert into local currency 50% of their foreign exchange currency balances. However this amount is decreasing - it had been 80% up to August 1999.

- (38) In a bid to accelerate the overall reform process, individual ministries and agencies have developed credible three year programmes for reform of State enterprises, banks and the trade regime. While these have not yet been put in place an implementation plan may be adopted in March or April of this year. International donors are pushing for speedy progress.

Kazakhstan

- (39) Privatisation in Kazakhstan is underway although the State remains the most important shareholder among large firms in transport, oil and gas sectors. A freeze on privatisations in the oil and gas sector took place in 1997 due to a dispute relating to the size of the stake which foreigners should be permitted to hold. Only 50% of SMEs and 35% of large companies have already been privatised. However the Government is set to re-launch the 'blue chips' privatisation in 2000. The privatisation strategy has been criticised for not being based on sound market principles and in many cases the value added by new owners of enterprises is questionable.
- (40) Among the Central Asian countries, Kazakhstan has the most developed commercial legal and regulatory environment. The legal framework is well established although there are still substantial obstacles hindering efficient commercial activities. In many cases detailed regulations are inadequate, and legislation is subject to frequent changes creating confusion over the law for both business and the tax authorities. The creation of a stable tax environment for business would be a significant enhancement of Kazakhstan's attractiveness as a place to invest and as a trading partner.
- (41) The Kazakhstan authorities are committed to maintaining a liberal trade regime. Changes to the import tariff schedule were introduced in July 1998, lowering the weighted-average tariff to 8.9%. The number of tariff lines with rates above 20% was also reduced. Limits on duty free imports were also reduced. While price liberalisation is well underway, cross subsidisation persist in the utilities sectors. Utility prices have gradually been adjusted upward to cost recovery levels, although higher rates for business and Government customers subsidise lower rates for households.
- (42) The currency is fully convertible for all purposes and exporters can freely convert on a forex market that is free of Government distortions.
- (43) The purchase of land is still restricted. A new bankruptcy law was adopted in 1999. Recently accounting laws have been adopted which take account of internationally agreed accounting principles. However it will take some time before this law is fully implemented in practice.

NMEs who are members of the WTO

- (44) Two of the countries currently classed as non-market economies for anti-dumping purposes are members of the WTO i.e. Kyrgystan and Mongolia while Georgia's accession is pending ratification.
- (45) In recognition of the fact that WTO membership pre-supposes a certain degree of economic reform and trade liberalisation, and as a further incentive towards their transition to market economies, it is proposed to extend the special ad hoc market economy regime to imports from countries classed as NMEs for anti-dumping purposes which are members of the WTO.

Remaining NME countries

- (46) The remaining NME countries are Albania, Armenia, Azerbaijan, Belarus, North Korea, Moldavia, Tajikistan, Turkmenistan and Uzbekistan. Some of these countries are in the process of negotiating their accession to the WTO. For reasons outlined under paragraph 45 above it is also proposed to automatically extend the regime to imports from any of these countries in respect of any anti-dumping investigations which are initiated following their accession to the WTO.

Conclusion

- (47) It is difficult to establish an exact point in the reform process at which countries could be considered for inclusion under the regime currently applied to China and Russia. In Ukraine, Vietnam and Kazakhstan reforms are underway and the countries are making efforts to move towards a market economy regime. Clearly events in Russia and Asia have had a knock-on effect on the economic situation in Ukraine and Vietnam respectively. However there appears to be a strong political will in the countries concerned to continue with the reform process.
- (48) When comparing Ukraine, Vietnam and Kazakhstan, it is obvious that in certain respects one or other of the countries is further progressed. However it would be difficult to attempt to make a judgement on which of these three countries has reached an acceptable level of reform. In any event this exercise is less concerned with the overall progress at a macroeconomic level than the ability of companies to meet the market economy criteria in the anti-dumping legislation. It should be recalled that the special market economy regime in anti-dumping is specifically designed to examine the situation of companies operating in countries in transition. The extent to which the actual reforms are implemented will only be clear once the regime is applied in anti-dumping investigations. This was certainly true in the case of Russia and China.
- (49) Ukraine, Vietnam and Kazakhstan continue to implement the legislation to create the necessary framework for a functioning market economy. As was the case with Russia and China, granting the ad hoc market economy regime will support the reform process and help fundamental restructuring at the company level, including the implementation of accountancy, bankruptcy and property laws. Furthermore any proposal to extend this regime to

Ukraine, Vietnam and Kazakhstan should interact positively with the search for solutions to ongoing market access issues in these countries currently causing difficulties for the EU. Moreover effective progress in resolving those issues would also further enhance the creation of a market economy climate in these countries and would therefore be taken into account when granting the special anti-dumping regime to them.

- (50) It is therefore proposed to grant the special market economy regime to anti-dumping proceedings involving Ukraine, Vietnam and Kazakhstan.
- (51) It is also considered appropriate to extend the special market economy regime to imports from countries classed as NMEs for anti-dumping purposes who are members of the WTO at the date of initiation of an anti-dumping investigation.

E. PROBLEMS OF SUBSTANCE IN THE PRACTICAL APPLICATION OF THE REGIME

- (52) In adopting the amendment in respect of Russia and China, the Council endorsed the criteria (Annex 3) which an exporting producer from an NME country had to meet in order to be granted individual treatment. Individual treatment is granted where an exporting producer in a non-market economy country can show that its export activities are not subject to State interference. Where it is granted an individual dumping margin is calculated for the exporting producer by comparing the normal value from the analogue country with the producer's own export prices. This is an option open to exporting producers who may not be able to meet all the criteria for full market economy treatment, which is granted where an exporting producer can show that neither its domestic nor its export activities are subject to State interference.
- (53) However a problem arises because of considerable overlap between the traditional individual treatment criteria and full market economy criteria and has been severely criticised by the Chinese. This has created the illogical situation that only those exporting producers that can fulfil the requirements for market economy status can qualify for individual treatment.
- (54) Therefore given that the important issue for individual treatment is that export transactions are not subject to State interference, it seems logical and fair to refocus the criteria for such treatment on those areas having a direct impact on the export activities of the exporting producer. This means that the exporter has to show that it is free to determine export prices and quantities, as well as their terms and conditions. The claim must be submitted together with the reply to the questionnaire. In this respect, the following criteria are considered to be relevant in determining whether an exporting producer in an NME should be granted individual treatment:
 - i) Exporters are free to repatriate capital and profits (applicable to wholly foreign owned firms or joint ventures).

- ii) Export prices and quantities, and conditions and terms of sale are freely determined, and the majority of the shares belong to genuinely private companies. State officials appearing on the board or in key management positions should be in a clear minority. The presumption is that a State-controlled company cannot guarantee its independence from State interference, and the burden rests with the exporter to prove otherwise.
 - iii) Exchange rate conversions are carried out at the market rate.
 - iv) State interference is not such as to permit circumvention of measures if exporters are given different rates of duty.
- (55) In granting individual treatment on the basis of the revised criteria the Commission will endeavour to ensure that circumvention of any anti-dumping measures imposed is not taking place. For example, the Commission would have to check the exporters' capacity, because if its exports are higher this could be an indication that circumvention is taking place. In this respect, particular attention will be paid to exports made via traders. Any change in the business licence may also indicate circumvention and must be reported by the companies concerned. If necessary, a withdrawal of individual treatment could ensue through an investigation.

F. FINAL CONCLUSION AND PROPOSAL

- (56) On the basis of the foregoing it is considered appropriate to continue applying the current regime to anti-dumping investigations concerning imports from Russia and China.
- (57) The economic reforms ongoing in Ukraine, Vietnam and Kazakhstan show that these countries have taken steps to move away from a centrally planned economy towards an economy based on market principles. It is considered that, in view of their ongoing progress and the fact that the special market economy regime should interact positively both with the reform process and the search for solutions to current EU market access problems, it is appropriate to extend the special anti-dumping regime to them. A legislative proposal to that effect is attached.
- (58) On the basis that membership of the WTO indicates a certain level of economic reform and trade liberalisation it is proposed to extend the market economy regime to those NME countries who are members of the WTO and to automatically extend it to others when they become WTO members in the future.
- (59) Finally it is proposed to base future claims for individual treatment on the revised criteria set out under paragraph 54 above in order to remove the anomaly which currently exists arising from the overlap with market economy treatment criteria.
- (60) This proposal does not require any additional budgetary resources.

ANNEX 1

STATEMENTS TO THE COUNCIL MINUTES

1. "The Council notes that in the case of individual treatment, i.e. determination of the individual dumping margin as opposed to the single national margin, within the framework of Regulation (EC) No 384/96, the Commission will comply with the criteria set out in the Annex to its communication to the Council (5070/98 COMER 4)."
2. "The Council calls on the Commission to implement this Regulation in such a way that firms of all sizes have equivalent opportunities to make use of its provisions if they fulfil all the necessary criteria."
3. "The Council and the Commission consider that it will be appropriate to keep developments in other countries at present listed as NMEs under review with a view to granting them, as and when appropriate, the same treatment as provided for in Article 1(b) of this Council Regulation."
4. "The Council and the Commission agree that the practice regarding derogations from the analogue country rule will be discussed within two years of the entry into force of this Regulation."
5. "The Council and the Commission agree to continue their exchange of views on the implementation of the anti-dumping Regulation. These discussions will cover transparency and the legal security of the procedure, amongst other matters."
6. "The Commission will carefully examine all requests for review arising out of this Regulation in order to ensure the provision of sufficient prima facie evidence that the conditions of Article 11(3) of Regulation (EC) No 384/96 for the initiation of interim reviews are met. Where the evidence provided is insufficient, such review requests will be refused."
7. "Austria takes note of and agrees with the opinion expressed by the European Commission during the discussions on the amendment of the Regulation, to the effect that the first criterion in Article 1(c) of the Regulation for recognition of the market economy status of an undertaking also comprises verification of the existence of freedom of establishment and freedom of employment in the undertaking's specific sphere of activity.

Austria moreover presumes that there has been compliance with the international accounting standards included in the second criterion if it has been proved that the accounting records adequately reflect the production and sales costs of the goods concerned."

ANNEX 2

ANTI-DUMPING INVESTIGATIONS CONCERNING CHINA			
PRODUCT CONCERNED	NO. OF ME CLAIMS	NO. OF CLAIMS ACCEPTED	REASONS FOR REFUSAL OF ME STATUS
Yellow Phosphorus	3	1	- No audited accounts provided - State holds directly or indirectly 2/3 majority of shares - One company not an exporter - Suppliers controlled by the State
Malleable cast iron fittings	3	0	- No audited accounts provided - Financial situation distorted as a result of improper valuation of assets transferred to the company from the State - State interference in setting salaries and through particular tax rebate
TV Tubes	1	0	- No audited accounts - Majority of suppliers controlled by the State - No export licence
Coke 80+	1	0	- Unreliable accounts not prepared in line with international accounting standards
CD Boxes	3	2	- Domestic sales prohibited - No legal status in China - No individual company accounts available

ANNEX 2 (cont.)

Quarto Plates	6	0	- All companies fully or partially owned by the State - Agreements to purchase raw materials from State owned suppliers - Only nominal fees paid for land-use rights - Barter trade practised
Hair Brushes	2	0	- No domestic sales allowed
Glycine	6	0	- Three of the claimants are not exporting producers of the product concerned - Related companies failed to claim ME treatment - Incomplete financial statements - Restrictions on domestic sales
Electronic Weighing scales	2	0	- Restrictions on domestic sales - Companies follow pricing law and consequently sell at loss making prices in China
ANTI-DUMPING INVESTIGATIONS CONCERNING RUSSIA			
PRODUCT CONCERNED	NO. OF ME CLAIMS	NO. OF CLAIMS ACCEPTED	REASONS FOR REFUSAL OF ME STATUS
Urea Ammonium Nitrate	2	0	- State interference affecting the price of energy which is a major input in the production of the product concerned - Absence of information on a related company - Accounts not audited in line with international accounting standards - Barter trade practised

ANNEX 3

CRITERIA ON INDIVIDUAL TREATMENT

- i) The majority of the shares should belong to genuinely private companies and no State officials should appear on the board or in a key management position; the fact that the company concerned is controlled by a foreign investor will be considered a relevant indication of independence.
- ii) The land on which the facilities of the company are built should be rented from the State at conditions comparable to those in a market economy country or purchased (e.g. proper contractual lease).
- iii) The company should have the right to hire and dismiss employees and the right to fix salaries.
- iv) The company should have full control over its supply of raw materials and inputs in general.
- v) The supply of utilities should be guaranteed on the basis of proper contractual terms.
- vi) Proof is given that profit can be exported and capital invested can be repatriated (only in case of foreign investment, e.g. joint ventures).
- vii) The export prices should be determined freely; the fact that export sales are made to a related party located outside the country in question will be a decisive factor.
- viii) Freedom to carry out business activities should be guaranteed, in particular in respect of the following:
 - there should be no restrictions on selling on the domestic market;
 - the right to do business cannot be withdrawn outside proper contractual terms;
 - quantities produced for export should be determined freely by the company in accordance with the traditional demand of its export markets.

Proposal for a

COUNCIL REGULATION

amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Article 133 thereof,

Having regard to the proposal from the Commission,²

Having regard to the opinion of the European Parliament,³

Whereas:

- (1) By Regulation (EC) No 384/96⁴ (hereafter referred to as 'the Basic Anti-dumping Regulation') the Council has adopted common rules for protection against dumped imports from countries which are not members of the European Community.
- (2) Article 2(7) of Regulation (EC) No 384/96 lays down that, in the case of imports from non-market economy countries and, in particular those listed in a footnote to that provision, normal value shall, inter alia, be determined on the basis of the price or constructed value in an analogue market economy third country.
- (3) Article 2(7) of Regulation (EC) No 384/96 further lays down that, in the case of imports from the Russian Federation and the People's Republic of China normal value may be determined in accordance with the rules applicable to market economy countries in cases where it can be shown that market conditions prevail for one or more producers subject to investigation in relation to the manufacture and sale of the product concerned.
- (4) The process of reform in Ukraine, Vietnam and Kazakhstan has fundamentally altered their economies and has led to the emergence of firms for which market economy conditions prevail; these three countries have as a result moved away from the economic circumstances which inspired the use of the analogue country method.
- (5) It is appropriate to revise the Community's anti-dumping practice in order to be able to take account of the changed economic conditions in Ukraine, Vietnam and Kazakhstan.

² OJ C

³ OJ C

⁴ OJ L 56, 6. 3. 1996, p. 1. Regulation as last amended by Regulation (EC) No 905/98 (OJ L 128, 30.04.1998, p. 18).

- (6) It is also appropriate to grant similar treatment to imports from such countries which are members of the World Trade Organisation (WTO) at the date of the initiation of the relevant anti-dumping investigation.

HAS ADOPTED THIS REGULATION:

Article 1

Sub-paragraphs (a) and (b) of Article 2(7) of Regulation (EC) No 384/96 shall be replaced by the following:

“7. (a) In the case of imports from non-market economy countries (*), normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.

(b) In anti-dumping investigations concerning imports from the Russian Federation, the People's Republic of China, Ukraine, Vietnam and Kazakhstan and any other non-market economy country which is a member of the WTO at the date of the initiation of the investigation, normal value will be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c) that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

(*) Including Albania, Armenia, Azerbaijan, Belarus, Georgia, North Korea, Kyrgyzstan, Moldavia, Mongolia, Tajikistan, Turkmenistan, Uzbekistan.”

Article 2

This Regulation shall enter into force on [insert date].

It shall apply to all anti-dumping investigations initiated after the date of its entry into force. In the case of imports from non-market economy countries which become members of the WTO after the entry into force of this Regulation, it shall apply to all anti-dumping investigations concerning products originating in those countries which are initiated after the date of their accession to the WTO.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at,

For the Council
The President