



EUROPEAN COMMISSION

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2011/0262 (COD)

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

**Implementing the bilateral safeguard clause and the stabilisation mechanism for
bananas of the Trade Agreement between the European Union and Colombia and Peru**

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

This proposal concerns the incorporation in the European Union law of the safeguard clause and the Stabilisation Mechanism foreseen in the Trade Agreement with Colombia and Peru.

General context

On 19 January 2009 the Council authorised the Commission to open negotiations with the Member Countries of the Andean Community, which resulted in a Trade Agreement with Colombia and Peru. The Agreement was initialled on 23 March 2011.

The agreement includes a bilateral safeguard clause that provides for the possibility to re-instate the MFN customs duty rate when, as a result of a trade liberalisation, imports take place in such increased quantities and under such conditions as to cause (or threaten to cause) serious injury to the Union Industry producing the like or directly competitive product.

Furthermore, the agreement also incorporates a Stabilisation Mechanism for Bananas according to which, until 1 January 2020, preferential customs duties can be suspended when a certain annual import volume is reached.

In order for these measures to be operational, the safeguard clause and the Stabilisation Mechanism should be incorporated in European Union law, and the procedural aspects of their application as well as the rights of interested parties need to be specified.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

This proposal for an implementing Regulation is directly derived from the text of the Agreement negotiated with Colombia and Peru. Consequently, no separate , consultation with interested parties nor any impact assessment is necessary. It is largely based on existing implementing regulations.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

The attached proposal for a Regulation of the European Parliament and of the Council constitutes the legal instrument for the implementation of the safeguard clause and the Stabilisation Mechanism of the EU- Colombia and Peru FTA.

Legal basis

Article 207(2) of the Treaty on the Functioning of the European Union.

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 207(2) thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Acting in accordance with the ordinary legislative procedure¹,

Whereas:

- (1) On 19 January 2009 the Council authorised the Commission to negotiate a multiparty trade agreement on behalf of the European Union with the Member Countries of the Andean Community which shared the aim to reach an ambitious, comprehensive, and balanced trade agreement.
- (2) Those negotiations have been concluded and the Trade Agreement between the European Union and Colombia and Peru (hereinafter referred to as "the Agreement") was initialled on 23 March 2011 and, in accordance with Council Decision No .../2011/EU of ...² the Agreement was signed on behalf of the European Union on ..., subject to its conclusion at a later date. On (...), the Agreement obtained the consent of the European Parliament. Thereafter, the Council adopted Council Decision No.../2011 of ...³ on the conclusion of the Agreement.
- (3) It is necessary to lay down the procedures for applying certain provisions of the Agreement which concern the bilateral safeguard clause and for applying the Stabilisation Mechanism for Bananas that has been agreed with Colombia and Peru.
- (4) The terms "serious injury", "threat of serious injury" and "transitional period" as referred to in Article 48 of the Agreement should be defined.

¹ Position of the European Parliament of 17 February 2011 (not yet published in the Official Journal) and decision of the Council of ...

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- (5) Safeguard measures should be considered only if the product in question is imported into the Union in such increased quantities, in absolute terms or relative to Union production, and under such conditions as to cause, or threaten to cause, serious injury to Union producers of like or directly competitive products as laid down in Article 48 of the Agreement.
- (6) Safeguard measures should take one of the forms referred to in Article 50 of the Agreement.
- (7) The tasks of carrying out investigations and, if necessary, imposing safeguard measures should be carried out in the most transparent manner possible.
- (8) There should be detailed provisions on the initiation of proceedings. The Commission should receive information including available evidence from the Member States of any trends in imports which might call for the application of safeguard measures.
- (9) If there is sufficient prima facie evidence to justify the initiation of a proceeding, the Commission should publish a notice as provided for in Article 51 of the Agreement in the Official Journal of the European Union.
- (10) There should be detailed provisions on the initiation of investigations, access to and inspections by interested parties of the information gathered, hearings for the parties involved and the opportunities for those parties to submit their views as provided for in Article 51 of the Agreement.
- (11) The Commission should notify Colombia and Peru in writing of the initiation of an investigation and consult with Colombia and Peru as provided for in Article 49 of the Agreement.
- (12) It is also necessary, pursuant to Article 51(4) of the Agreement, to set time limits for the initiation of investigations and for determinations as to whether or not measures are appropriate, with a view to ensuring that such determinations are made quickly, in order to increase legal certainty for the economic operators concerned.
- (13) An investigation should precede the application of any safeguard measure, subject to the Commission being allowed to apply provisional measures in critical circumstances as referred to in Article 53 of the Agreement.
- (14) Safeguard measures should be applied only to the extent, and for such time, as may be necessary to prevent serious injury and to facilitate adjustment. The maximum duration of safeguard measures should be determined and specific provisions regarding extension and review of such measures should be laid down, as referred to in Article 52 of the Agreement.
- (15) The implementation of the bilateral safeguard clause of the Agreement requires uniform conditions for the adoption of provisional and definitive safeguard measures, for the imposition of prior surveillance measures, for the termination of an investigation without measures and for suspending temporarily the preferential customs duty established under the Stabilisation Mechanism for Bananas that has been agreed with Columbia and Peru. Those measures should be adopted by the Commission in accordance with Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down

the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers¹.

- (16) It is appropriate that the advisory procedure be used for the adoption of surveillance and provisional measures given the effects of those measures and their sequential logic in relation to the adoption of definitive safeguard measures. Where a delay in the imposition of measures would cause damage which would be difficult to repair, it is necessary to allow the Commission to adopt immediately applicable provisional measures.
- (17) This Regulation should apply only to products originating in the Union and in Colombia and Peru,

HAVE ADOPTED THIS REGULATION:

CHAPTER I - SAFEGUARD PROVISION

Article 1

Definitions

For the purposes of this Regulation:

- (a) "products" means goods originating in the Union or in Colombia or Peru. A product subject to an investigation may cover one or several tariff lines or a sub-segment thereof depending on the specific market circumstances, or any product segmentation commonly applied in the Union industry;
- (b) "interested parties" means parties affected by the imports of the product in question;
- (c) "Union industry" means the Union producers as a whole of the like or directly competitive products, operating within the territory of the Union, or those Union producers whose collective output of the like or directly competitive products constitutes a major proportion of the total Union production of those products. In cases where the like or directly competitive product is only one of several products that are made by the producers constituting the Union industry, the industry shall be defined as the specific operations that are involved in the production of the like or directly competitive product;
- (d) "serious injury" means a significant overall impairment in the position of Union producers;
- (e) "threat of serious injury" means serious injury that is clearly imminent. A determination of the existence of a threat of serious injury shall be based on verifiable facts and not merely on allegation, conjecture or remote possibility. Forecasts, estimations and analyses made on the basis of factors referred to in Article 4(5), should, inter alia, be taken into account in order to determine the existence of a threat of serious injury;
- (f) "transition period" means 10 years from the date of application of the Agreement for any product for which the Tariff Elimination Schedule provides for a tariff elimination period of less than 10 years. For the products for which the Tariff Elimination Schedule provides

¹ OJ L 55, 28.2.2011, p. 13.

for a tariff elimination period of 10 or more years, "transition period" means the tariff elimination period for the product set out in that Schedule, plus 3 years.

Article 2

Principles

1. A safeguard measure may be imposed in accordance with this Regulation where a product originating in Columbia or Peru is, as a result of tariff concessions on that product under the Agreement, being imported into the Union in such increased quantities, in absolute terms or relative to Union production, and under such conditions as to cause or threaten to cause serious injury to the Union industry producing a like or directly competitive product.
2. Safeguard measures may take one of the following forms:
 - (a) a suspension of further reduction of the rate of customs duty on the product concerned provided for in the Tariff Elimination Schedule of the European Union set out in Annex I to the Agreement;
 - (b) an increase in the rate of customs duty on the product concerned to a level which does not exceed the lesser of:
 - the most-favoured-nation ("MFN") applied rate of customs duty on the product in effect at the time the measure is taken; or
 - the base rate as specified in the Tariff Elimination Schedule of the European Union set out in Annex I to the Agreement.

Article 3

Initiation of proceedings

1. An investigation shall be initiated upon request by a Member State, by any 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 referred to in Article 4(5), to justify such initiation.
2. The request to initiate an investigation shall contain evidence that the conditions for imposing the safeguard measure set out in Article 2(1) are met. The request shall generally contain the following information: the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports, and changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment.
3. An investigation may also be initiated in the event that there is a surge of imports concentrated in one or several Member States, provided that there is sufficient prima facie evidence that the conditions for initiation are met, as determined on the basis of factors referred to in Article 4(5).
4. A Member State shall inform the Commission if trends in imports from Columbia or Peru appear to call for safeguard measures. That information shall include the evidence

available as determined on the basis of factors referred to in Article 4(5). The Commission shall pass that information on to all Member States.

5. Where it is apparent that there is sufficient *prima facie* evidence as determined on the basis of factors referred to 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*. Initiation shall take place within one month of the request or information received pursuant to paragraph 1.
6. The notice referred to in paragraph 5 shall:
 - (a) give a summary of the information received, and require that all relevant information be communicated to the Commission;
 - (b) state the period within which interested parties may make known their views in writing and submit information, if such views and information are to be taken into account during the investigation;
 - (c) state the period within which interested parties may apply to be heard orally by the Commission in accordance with Article 4(9).

Article 4

The investigation

1. Following the initiation of the proceeding, the Commission shall commence an investigation. The period as set out in paragraph 3 shall start on the day the decision to initiate the investigation is published in the *Official Journal of the European Union*.
2. The Commission may request Member States to supply information and Member States shall take whatever steps are necessary in order to give effect to any such request. If that information is of general interest and is not confidential within the meaning of Article 11, it shall be added to the non-confidential files as provided for in paragraph 8.
3. The investigation shall, whenever possible, be concluded within six months of its initiation. That time limit may be extended by a further period of three months in exceptional circumstances such as the involvement of an unusually high number of parties or complex market situations. The Commission shall notify all interested parties of any such extension and explain the reasons which have led to this extension.
4. The Commission shall seek all information it considers necessary to make a determination with regard to the conditions set out in Article 2(1), and, where it considers it appropriate, endeavour to verify that information.
5. In the investigation, the Commission shall evaluate all relevant factors of an objective and quantifiable nature having a bearing on the situation of the Union industry, in particular, the rate and amount of the increase in imports of the product concerned in absolute and relative terms, the share of the domestic market taken by increased imports and changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment. This list is not exhaustive and other relevant factors may also be taken into consideration by the Commission for its determination of the existence of serious injury or threat of serious injury, such as stocks, prices, return on capital employed, cash flow, and

other factors which are causing or may have caused serious injury, or threaten to cause serious injury to the Union industry.

6. Interested parties who have come forward pursuant to Article 3(6)(b) and representatives of Columbia or Peru may, upon written request, inspect all information made available to the Commission in connection with the investigation other than internal documents prepared by the Union authorities or those of the Member States, provided that that information is relevant to the presentation of their case and not confidential within the meaning of Article 11 and that it is used by the Commission in the investigation. Interested parties who have come forward may communicate their views on the information to the Commission. Those views shall be taken into consideration where they are backed by sufficient prima facie evidence.
7. The Commission shall ensure that all data and statistics which are used for the investigation are available, comprehensible, transparent and verifiable.
8. The Commission shall, as soon as the necessary technical framework is in place, ensure password-protected online access to the non-confidential file ("online platform"), which it shall manage and through which all information which is relevant and is not confidential within the meaning of Article 11 shall be disseminated. Interested parties to the investigation as well as Member States and the European Parliament shall be granted access to this online platform.
9. The Commission shall hear the interested parties, in particular 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.

The Commission shall hear such parties on further occasions if there are special reasons for them to be heard again.
10. When information is not supplied within the time limits set by the Commission, or the investigation is significantly impeded, findings may be made on the basis of the facts available. Where the Commission finds that any interested party or third party has supplied it with false or misleading information, it shall disregard that information and may make use of the facts available.
11. The Commission shall notify Columbia or Peru in writing of the initiation of an investigation and of the imposition of provisional or definitive measures.

Article 5

Prior surveillance measures

1. Where the trend in imports of a product originating in Columbia or Peru is such that it could lead to one of the situations referred to in Articles 2 and 3, imports of that product may be subject to prior surveillance measures.
2. Prior surveillance measures shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 12(2).

3. Prior surveillance measures shall have a limited period of validity. Unless otherwise provided, they shall cease to be valid at the end of the second six-month period following the first six months after the measures were introduced.

Article 6

Imposition of provisional safeguard measures

1. Provisional safeguard measures shall be applied in critical circumstances where a delay would cause damage which would be difficult to repair, pursuant to a preliminary determination on the basis of the factors referred to in Article 4(5) that there is sufficient prima facie evidence that imports of a product originating in Columbia or Peru have increased as a result of the reduction or elimination of a customs duty in accordance with the Tariff Elimination Schedule of the European Union set out in Annex I to the Agreement, and such imports cause serious injury, or threat thereof, to the Union industry.

Provisional measures shall be adopted by the Commission in accordance with the advisory procedure referred to in Article 12(2). In cases of imperative grounds of urgency, including the case referred to in paragraph 2, the Commission shall adopt immediately applicable provisional safeguard measures in accordance with the procedure referred to in Article 12(4).

2. Where a Member State requests immediate intervention by the Commission and where the conditions set out in paragraph 1 are met, the Commission shall take a decision within five working days of receiving the request.
3. Provisional measures shall not apply for more than 200 days.
4. Should the provisional safeguard measures be repealed because the investigation shows that the conditions set out in Article 2(1) are not met, any customs duty collected as a result of those provisional measures shall be refunded automatically.
5. The measures referred to in this Article shall apply to every product which is put into free circulation after their entry into force. However, such measures shall not prevent the release for free circulation of products already on their way to the Union provided that the destination of such products cannot be changed.

Article 7

Termination of investigation and proceeding without measures

1. Where the facts as finally established show that the conditions set out in Article 2(1) are not met, the Commission shall adopt a decision terminating the investigation and proceeding in accordance with the examination procedure referred to in Article 12(3).
2. The Commission shall make public, with due regard to the protection of confidential information within the meaning of Article 11, a report setting forth its findings and reasoned conclusions reached on all pertinent issues of fact and law.

Article 8

Imposition of definitive measures

1. Where the facts as finally established show that the conditions set out in Article 2(1) are met, the Commission shall invite the authorities of Colombia or Peru to hold consultations in accordance with Article 49 of the Agreement. Where no satisfactory solution has been reached within 45 days, the Commission may adopt a decision imposing definitive safeguard measures in accordance with the examination procedure referred to in Article 12(3).
2. The Commission shall make public, with due regard to the protection of confidential information within the meaning of Article 11, a report containing a summary of the material facts and considerations relevant to the determination.

Article 9

Duration and review of safeguard measures

1. A safeguard measure shall remain in force only for such period of time as may be necessary to prevent or remedy the serious injury and to facilitate adjustment. That period shall not exceed two years, unless it is extended under paragraph 3.
2. A safeguard measure shall remain in force, pending the outcome of the review under paragraph 3, during any extension period.
3. The initial period of duration of a safeguard measure may exceptionally be extended by up to two years provided it is determined that the safeguard measure continues to be necessary to prevent or remedy serious injury and to facilitate adjustment, and that there is evidence that the Union industry is adjusting.
4. Any extension pursuant to paragraph 3 shall be preceded by an investigation upon a request by a Member State, by any legal person or any association not having legal personality, acting on behalf of the Union industry, or on the Commission's own initiative if there is sufficient prima facie evidence that the conditions laid down in paragraph 3 are met, on the basis of factors referred to in Article 4(5).
5. The initiation of an investigation shall be published in accordance with Article 3(5) and 3(6). The investigation and any decision regarding an extension pursuant to paragraph 3 shall be done in accordance with the provisions of Article 4, 7 and 8.
6. The total duration of a safeguard measure may not exceed four years, including any provisional measure.
7. A safeguard measure shall not be applied beyond the expiry of the transitional period.
8. No safeguard measure shall be applied to the import of a product that has previously been subject to such a measure, except for one time for a period of time equal to half of that during which such measure had been previously applied, provided that the period of non-application is at least one year.

Article 10

Outermost regions of the European Union

Where any product originating in Columbia or Peru is being imported in such increased quantities and under such conditions as to cause or threaten to cause serious deterioration in the economic situation of one or several of the Union's outermost region(s) referred to in Article 349 of the Treaty on the Functioning of the European Union a safeguard measure may be imposed, in accordance with the provisions set out in this chapter.

Article 11

Confidentiality

1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.
2. Neither information of a confidential nature nor any information provided on a confidential basis received pursuant to this Regulation shall be disclosed without specific permission from the supplier of such information.
3. Each request for confidentiality shall state the reasons why the information is confidential. However, if the supplier of the information wishes neither to make it public nor to authorise its disclosure in general terms or in the form of a summary, and if it appears that the request for confidentiality is unjustified, the information concerned may be disregarded.
4. Information shall in any case be considered to be confidential if its disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information.
5. Paragraphs 1 to 4 shall not preclude reference by the Union authorities to general information and in particular to reasons on which decisions taken pursuant to this Regulation are based. Those authorities shall, however, take into account the legitimate interest of natural and legal persons concerned that their business secrets should not be divulged.

Article 12

Committee procedure

1. The Commission shall be assisted by the Committee established by Article 4(1) of Council Regulation (EC) No 260/2009 of 26 February 2009 on the common rules for imports¹. That Committee shall be a Committee within the meaning of Regulation (EU) No 182/2011.
2. Where reference is made to this paragraph, Article 4 of Regulation (EU) No 182/2011 shall apply.

¹ OJ L 84, 31.3.2009, p. 1.

3. Where reference is made to this paragraph, Article 5 of Regulation (EU) No 182/2011 shall apply.
4. Where reference is made to this paragraph, Article 8 of Regulation (EU) No 182/2011, in conjunction with Article 4 thereof, shall apply.

CHAPTER II - STABILISATION MECHANISM FOR BANANAS

Article 13

Stabilisation Mechanism for Bananas

1. For bananas originating in Colombia or Peru under heading 0803.00.19 of the Combined Nomenclature (fresh Bananas, excluding plantains) and listed under the staging category "BA" in the Tariff Elimination Schedule of the European Union set out in Annex I to the Agreement, a stabilisation mechanism I shall apply until 1 January 2020.
2. A separate annual trigger import volume is set for imports of products mentioned in paragraph 1, as indicated in the third and fourth columns of the table in the Annex to this Regulation. Once the trigger volume for either Colombia or Peru is met during the corresponding calendar year, the Commission may, in accordance with the examination procedure referred to in Article 12(3), temporarily suspend the preferential customs duty applied to products of the corresponding origin during that same year for a period of time not exceeding three months, and not going beyond the end of the calendar year.
3. In case the Commission decides to suspend the preferential customs duty applicable, the Commission shall apply the lesser of the base rate of customs duty or the MFN rate of duty in application at the time such action is taken.
4. In case the Commission applies the actions mentioned in paragraphs 2 and 3, it shall immediately enter into consultations with the affected country (either Colombia or Peru or both) to analyse and evaluate the situation on the basis of factual available data.
5. The measures mentioned in paragraphs 2 and 3 may be applicable only during the period ending on 31 December 2019.

CHAPTER III - FINAL PROVISIONS

Article 14

Entry into force

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

It shall apply from the date of application of the Agreement as provided for in Article 330 thereof. A notice shall be published in the *Official Journal of the European Union* specifying the date of application of the Agreement.

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

Done at,

For the European Parliament

For the Council

The President

The President

Annex

Table regarding trigger import volumes for the application of the Stabilisation mechanism for bananas provided for in Annex I, Appendix I, Section B: for Colombia Subsection 1A, point 1(n) and for Peru Subsection 2A, point 1(i).

Year	Trigger import volume for Colombia	Trigger import volume for Peru
From 1 January until 31 December 2010	1 350 000 t.	67 500 t.
From 1 January until 31 December 2011	1 417 500 t.	71 250 t.
From 1 January until 31 December 2012	1 485 000 t.	75 000 t.
From 1 January until 31 December 2013	1 552 500 t.	78 750 t.
From 1 January until 31 December 2014	1 620 000 t.	82 500 t.
From 1 January until 31 December 2015	1 687 500 t.	86 250 t.
From 1 January until 31 December 2016	1 755 000 t.	90 000 t.
From 1 January until 31 December 2017	1 822 500 t.	93 750 t.
From 1 January until 31 December 2018	1 890 000 t.	97 500 t.
From 1 January until 31 December 2019	1 957 500 t.	101 250 t.
As from 1 January 2020	Not applicable	Not applicable