

How to Suspend Trade Defence Remedies Applied in the Eurasian Economic Union: Recent Trends

Anzhela Makhinova*

In the recent investigations the Eurasian Economic Union (EAEU) has faced strong opposition of certain Member-States against application of trade defence remedies on the whole territory of the Union. To avoid application of remedies, the Member-States have successfully employed two options, namely: reconsideration of decisions on the application of remedies by different authorities of the EAEU and changed circumstances review upon request of end customers. In view of problems interested parties face, while employing the above options, it goes without saying that the EAEU regulations shall be added by special provisions to address concerns of the Member-States in the course of investigation without creating uncertainties for the interested parties.

Keywords: Eurasian Economic Union, anti-dumping, safeguards, suspension of trade defence remedies, changed circumstances review.

As of today, the Eurasian Economic Union ('EAEU') covers Russia, Belarus, Kazakhstan, Armenia and Kyrgyzstan. The EAEU was created as a customs union,¹ within which freedom of movement of goods, services, capitals and labour forces shall be ensured.

Under the Agreement on the EAEU² and the Protocol on Application of Special Safeguard, Anti-dumping and Countervailing Measures to the Third Countries (the 'Protocol'), powers to apply trade defence remedies are entrusted to the relevant authorities of the EAEU. Specifically, the Department for Internal Market Protection of the Eurasian Economic Commission³ is responsible for conducting trade defence proceedings, to name but a few: for initiation of investigation, registration of interested parties, holding hearings, collecting evidence (e.g. answers to questionnaires), drafting reports with recommendations on application/non-application of trade defence remedies following the results of investigations. At the same time, the Board of the Eurasian Economic Commission is responsible for the adoption of decisions on application of trade defence remedies. If applied, trade defence remedies cover the whole territory of the EAEU. Notably, the Protocol does not stipulate the right of Member-States to apply trade defence

instruments at the national level only or to object to application thereof in the course of investigation in order to be later excluded from the application of measures.

The recent practice of trade defence proceedings in the EAEU has revealed that in cases where domestic producers, initiating investigation, are located only in one Member-State (usually in Russia), large end customers of products subject to remedies located in other Member-States usually object strongly to the application of any measures. Therefore, in more and more cases, Member-States try to find possible options to avoid application of trade defence remedies on their territories. As of the date of this article, the following options have been successfully employed.

I RECONSIDERATION OF DECISIONS ON THE APPLICATION OF TRADE DEFENCE REMEDIES BY DIFFERENT AUTHORITIES OF THE EAEU

The Regulation of the Eurasian Economic Commission (Annex 1 to the Agreement on the EAEU)⁴ sets out the following general procedure for abolishing or amending decisions of the Board of the Eurasian Economic Commission:

Notes

* Attorney-at-law, partner at Sayenko Kharenko (Kyiv) responsible for the International Trade Practice. Email: amakhinova@sk.ua. Author thanks Tetyana Tanchyn, a junior associate at Sayenko Kharenko, for assistance in drafting this article.

¹ Article 1 of the Agreement on Eurasian Economic Union, <http://www.consultant.ru/cons/cgi/online.cgi?req=doc&base=LAW&n=293753&fld=134&dst=100018,0&rnd=0.64457856991245#09757108465307627> (accessed on 20 Sep. 2019).

² Part 2, s. IX, Arts 48–49.

³ http://www.eurasiancommission.org/ru/act/trade/podm/Documents/3_EEC_Decision_%E2%84%961_07.03.2012.pdf (accessed on 20 Sep. 2019).

⁴ Paragraph 30.

- (1) Each Member-State is allowed to request the Board of the Eurasian Economic Commission to abolish or amend its decision within fifteen calendar days after publication thereof by submitting the relevant request;
- (2) The Chairman of the Board of the Eurasian Economic Commission sends the relevant request and materials, based on which the relevant decision has been adopted, to the Council of the Eurasian Economic Commission;
- (3) The Council of the Eurasian Economic Commission considers the relevant materials and adopts its decision within ten calendar days;
- (4) If the Member-State does not agree with a decision of the Council of the Eurasian Economic Commission or the relevant Council decision has not been adopted within ten days, it could refer this issue for the consideration of the Eurasian Intergovernmental Council and/or Supreme Eurasian Economic Council within thirty calendar days after official publication of a decision. For the period of consideration of the issue by the Eurasian Intergovernmental Council and/or Supreme Eurasian Economic Council, the decision in question shall be suspended. Notably, the EAEU regulations do not stipulate the terms within which this issue could be considered by the Eurasian Intergovernmental Council and/or Supreme Eurasian Economic Council.

The above procedure has already been applied by different Member-States in many proceedings.

1.1 Safeguard Measures Applied to Imports of Grain Combines and Parts Thereof Notwithstanding the Country of Origin and Export

This safeguard investigation was initiated on 6 July 2012.⁵ Following its results, on 25 June 2013 the Board of the Eurasian Economic Commission applied safeguard duties for the period of three years.⁶ Kazakhstan was against

application of safeguard duties, and on 5 July 2013, sent a request to the Eurasian Economic Commission to abolish the decision on application of safeguard duties.⁷ The decision on application of safeguard duties was suspended⁸ and the case was submitted for the consideration of the Supreme Eurasian Economic Council that on 25 September 2013 ruled⁹ (1) to replace safeguard duties by quotas and (2) if within first half of the first year of quota application Kazakhstan exhausts for more than 70%, a review shall be conducted within ninety days to liberalize the quota faster. The relevant amendments were introduced on 16 October 2013.

The whole period of suspension of safeguard measures was more than three months and the investigation was terminated with violation of maximum terms, i.e. 12 months.¹⁰

1.2 Anti-Dumping Measures on Imports of Ferrosilicon Manganese with Origin in Ukraine

The investigation was initiated on 26 December 2014.¹¹ On 3 June 2016 a decision on application of anti-dumping duty was adopted¹² and on 15 June 2016 Belarus requested the Eurasian Economic Commission to consider termination of the decision.¹³ On 1 July 2016 the decision was suspended.¹⁴ The Eurasian Intergovernmental Council ultimately decided to leave the decision in the initial wording and applied the relevant anti-dumping duties on 28 October 2016.¹⁵

As a result, anti-dumping duties have not been applied for almost 4 months and the investigation was terminated with violation of maximum terms, i.e. maximum eighteen months.¹⁶

1.3 Anti-Dumping Measures on Imports of Bars from Ukraine

On 20 November 2013 the Department for the Internal Market Protection initiated the relevant investigation.¹⁷ On 11 November 2014, a report was

Notes

⁵ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/notice_initiation_am.pdf (accessed on 20 Sep. 2019).

⁶ https://docs.eaeunion.org/docs/ru-ru/0143980/clcd_26062013_143 (accessed on 20 Sep. 2019).

⁷ https://docs.eaeunion.org/docs/ru-ru/0044869/oa_05072013; https://docs.eaeunion.org/docs/ru-ru/0044865/oa_05072013 (accessed on 20 Sep. 2019).

⁸ https://docs.eaeunion.org/docs/ru-ru/0144686/oa_05072013 (accessed on 20 Sep. 2019).

⁹ https://docs.eaeunion.org/docs/ru-ru/0144141/icd_26092013_42 (accessed on 20 Sep. 2019).

¹⁰ Under paragraph 217 (1) of the Protocol on Application of Special Safeguard, Anti-Dumping and Countervailing Measures to the Third Countries.

¹¹ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD20_notice_initiation.pdf (accessed on 20 Sep. 2019).

¹² http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD20_notice_fin.pdf (accessed on 20 Sep. 2019).

¹³ https://docs.eaeunion.org/docs/ru-ru/01410505/oa_15062016_2 (accessed on 20 Sep. 2019).

¹⁴ https://docs.eaeunion.org/docs/ru-ru/01410648/oa_01072016_3 (accessed on 20 Sep. 2019).

¹⁵ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD20_decision_9.pdf (accessed on 20 Sep. 2019).

¹⁶ Art. 5.10 of the Agreement on Implementation of Art. VI of the General Agreement on Tariffs and Trade 1994.

¹⁷ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/corrigendum_initiation_rods.pdf (accessed on 20 Sep. 2019).

published with recommendations to terminate investigation with application of anti-dumping measures.¹⁸ However, the decision on application of anti-dumping measures has not been adopted. On 12 November 2014, the investigation was extended for three months. The same was done on 16 February 2015. Both extensions passed and an updated report on the results of the investigation with recommendations to apply the same anti-dumping measures was published on 14 May 2015.¹⁹ However, the decision on application of the said measures has not been adopted.

Without any explanations and without any further official actions within two extended periods (e.g. no requests have been sent to the interested parties and no decisions of any authorities have been adopted), on 29 March 2016 an updated report with the same anti-dumping measures was published.²⁰ At the same time, in the press there were reports that the domestic industry is very disappointed with the situation where measures are blocked by certain Member-States. In this specific case, most probably, adoption of anti-dumping measures was blocked due to the fact that one of the major Ukrainian producers subject to anti-dumping measures was an affiliated company of other producers located in Kazakhstan (both producers were in the same holding). Eventually, on 31 March 2016, the initial anti-dumping measures were applied.²¹

In the end, the investigation has been terminated two years and three months after initiation and anti-dumping measures have been applied almost two years after the period of the investigation (nine months of 2013), for which all data was collected and analysed in the course of the investigation.

1.4 Anti-Dumping Measures Related to Imports of Herbicides from EU

On 16 January 2017, an anti-dumping investigation was initiated.²² On 7 March 2018, the first report

with recommendations to apply anti-dumping measures was published,²³ and on 31 May 2018, a second report with the same wording was published again.²⁴ Moreover, on 31 May 2018 the Department for Internal Market Protection published a notice on investigation termination with application of measures,²⁵ but the Board of the EAEU has not adopted the relevant decision and thus, the said measures have not been de facto applied.

On 7 June 2018, Kazakhstan requested abolishment of the decision on application of anti-dumping measures.²⁶ In the absence of the relevant decision by the Council of the Eurasian Economic Commission within the relevant deadline, on 18 June 2018, Kazakhstan submitted a request for consideration of this issue by the Eurasian Intergovernmental Council and thus, on 19 June 2018, the decision on application of anti-dumping measures was suspended.²⁷

There were several meetings of the Eurasian Intergovernmental Council at which this issue has been discussed. However, only on 30 April 2019 the Eurasian Intergovernmental Council ruled that the initial decision on application of anti-dumping duties must be amended.²⁸ On 20 June 2019, a new decision was adopted.²⁹ The said decision contains, indeed, historical amendments:

- (1) Many types of herbicides have been excluded from the scope of application of the measures on a country-to-country basis (even herbicides that have not been initially excluded according to the reports of the Department for Protection of the Internal Market);
- (2) the decision has directly set out the mechanism for price monitoring at the internal market after application of anti-dumping measures and has prescribed that in case of unjustified price increases by the domestic industry, the Department for Internal Market Protection shall initiate an investigation within one month to investigate violation of customer rights.

In practice, anti-dumping duties have been applied with considerable violations of maximum terms, i.e. for almost

Notes

¹⁸ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/report_comments_rods.pdf (accessed on 20 Sep. 2019).

¹⁹ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD13_report_final.pdf (accessed on 20 Sep. 2019).

²⁰ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD13_report_dated29032016.pdf (accessed on 20 Sep. 2019).

²¹ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD13_notice_fin.pdf (accessed on 20 Sep. 2019).

²² www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD23_notice_initiation.pdf (accessed on 20 Sep. 2019).

²³ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD23_report_final.pdf (accessed on 20 Sep. 2019).

²⁴ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD23_report_dated_29052018.pdf (accessed on 20 Sep. 2019).

²⁵ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD23_notice_fin.pdf (accessed on 20 Sep. 2019).

²⁶ https://docs.eaeunion.org/docs/ru-ru/01418032/oa_07062018 (accessed on 20 Sep. 2019).

²⁷ https://docs.eaeunion.org/docs/ru-ru/01418078/oa_19062018 (accessed on 20 Sep. 2019).

²⁸ https://docs.eaeunion.org/docs/ru-ru/01421678/icd_06052019 (accessed on 20 Sep. 2019).

²⁹ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD23_decision_104.pdf (accessed on 20 Sep. 2019).

one year and more than 2.5 years after the period of investigation (2016).

Needless to say, the above examples are very important for foreign producers, exporters, importers and customers subject to investigation as they demonstrate that there are efficient instruments for suspending, amending or even abolishing of the relevant decisions on trade defence remedies application. Moreover, taking into account that reconsideration of a decision on application of trade defence remedies may take much time from three months to more than a year (in the absence of exact terms set out by the EAEU regulations) and during this period duties shall be suspended, eventual application of trade defence remedies may be not in compliance with WTO rules in terms of violation of terms for conducting investigations and for adopting decisions not on the basis of the most recent data. These circumstances may be also preferable for foreign producers, exporters, importers and customers as they may be grounds for challenging the relevant remedies in the WTO or in other institutions.

However, of course, such an approach is not in the interests of the domestic industry because, firstly, application of measures is postponed, even in situations when the grounds for application thereof have been proven in the course of investigation, e.g. dumping and serious injury in case of anti-dumping measures. Secondly, there is also a risk that somebody could challenge the relevant measures.

2 CHANGED CIRCUMSTANCES REVIEWS UPON REQUEST OF END CUSTOMERS OF PRODUCTS SUBJECT TO MEASURES

On 17 October 2014, an initial anti-dumping investigation related to imports of railway wheels with origin in Ukraine was initiated.³⁰ On 23 December 2015 a decision on application of anti-dumping measures of 4.75%³¹ was adopted. This result was gained, among others, thanks to active participation of customers, who were strongly against application of measures because the Russian producers have insufficient production capacities and a monopoly position on the EAEU market that may result in unreasonably high prices.

Russian producers of railway wheels were against the above decision and thus, on 28 February 2017, they initiated a changed circumstances review with substantiation that the anti-dumping measures are insufficient to eliminate dumping and injury caused.³² On 7 March 2018, a decision on amendments of the anti-dumping duty from 4.75% to 34.22% was adopted with substantiation that import from Ukraine after application of initial anti-dumping duty has increased considerably, while prices of the imports decreased simultaneously and the injury has been continuing.³³

On 13 June 2019, for the first time in the history of the EAEU trade defence instruments, Belarusian and Kazakh railway car producers/railway-car repair companies initiated one more changed circumstances review with substantiation that Russian producers have considerably increased their prices for the car wheels and refused to supply the wheels on appropriate terms.³⁴ The situation was so critical for the end customers of car wheels that on 17 June 2019, the Department for Internal Market Protection published a report with recommendations on temporary suspension of anti-dumping measures³⁵ and on 26 July 2019, the Board of the Eurasian Economic Commission adopted decision on suspension of the anti-dumping duties by June 2020.³⁶

Notably, this example is unique and such results were possible only thanks to active participation of end customers (i.e. twenty-nine end customers have actively participated as well as sent numerous letters to the Department for Internal Market Protection describing problems with insufficient supply of wheels by Russian producers after increase of the initial anti-dumping duties) and their governments (i.e. at least five official consultations have been conducted between different Russian, Belarusian, Kazakh authorities and end customers). Of course, the railway wheels case demonstrates to foreign producers, exporters, importers and customers that there is an additional possibility to revise applied trade defence remedies and in order to employ it, it is crucial to engage many end customers into proceedings and ensure their active participation. However, such an instrument is quite burdensome for both the domestic industry and other interested parties (e.g. foreign producers, exporters and customers) because all of the above procedures are quite long and

Notes

³⁰ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/notice_initiation_wheels.pdf (accessed on 20 Sep. 2019).

³¹ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD19_notice_fin.pdf (accessed on 20 Sep. 2019).

³² http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD19R1_notice_initiation.pdf (accessed on 20 Sep. 2019).

³³ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD19R1_notice_fin.pdf (accessed on 20 Sep. 2019).

³⁴ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD19R2_notice_initiation.pdf (accessed on 20 Sep. 2019).

³⁵ http://www.eurasiancommission.org/ru/act/trade/podm/investigations/PublicDocuments/AD19R2_notice_publication.pdf (accessed on 20 Sep. 2019).

³⁶ https://docs.eaeunion.org/docs/ru-ru/01422528/clcd_26072019_125 (accessed on 20 Sep. 2019).

the achieved results could be reconsidered quite soon by the interested parties with different interests.

3 CONCLUSIONS

The recent trade defence proceedings in the EAEU clearly demonstrate that it is crucial to elaborate more efficient instruments to address the interests of the different Member-States and end customers already at the stage of investigation. In our view, the Protocol shall stipulate cases when the decision on application

of trade remedies could be adopted with exclusion of certain Member-States, for instance: when the relevant country does not have its own producers of the products subject to investigation, but has large end customers, using such products as raw materials. There may be certain additional criteria, to name but a few: producers of the EAEU are not in a position to satisfy total demand on the market due to insufficient production volumes and/or have a monopoly position on the market that may result in unjustified price increase etc.