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Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement

EXPLANATORY MEMORANDUM

On 23 April 2007 the Council authorised the Commission to open negotiations with the Republic of Korea with a view to conclude an EU-Korea Free Trade Agreement. The agreement was then initialled on 15 October 2009.

The agreement incorporates a bilateral safeguard clause that provides for the possibility to re-impose the MFN rate when as a result of a trade liberalisation imports take place in such increased quantities, in absolute terms or relative to domestic production, and under such conditions as to cause or threaten to cause serious injury to the Union Industry producing the like or directly competitive product.

In order for these measures to be operational, such safeguard clause must be incorporated in European Union law not least because the procedural aspects of the imposition of safeguard measures as well as the rights of interested parties, such as the right of defence, need to be specified. 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 of the EU-Korea FTA.

Proposal for a

REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

implementing the bilateral safeguard clause of the EU-Korea Free Trade Agreement

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 Articles 207(2) thereof,

Having regard to the proposal from the European Commission¹,

Having regard to the notification to the national Parliaments,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) On 23 April 2007 the Council authorised the Commission to open negotiations with the Republic of Korea.
- (2) These negotiations have been concluded and the Free Trade Agreement between the European Union and the Republic of Korea (hereinafter referred to as the Agreement) was initialled on 15 October 2009, was submitted for approval on []² and entered into application on [...].
- (3) It is necessary to lay down the procedures for applying certain provisions of the Agreement concerning safeguards.
- (4) The terms "serious injury", "threat of serious injury" and "transition period" as referred to in Article 3.5, Chapter 3 of the Agreement should be defined.
- (5) Safeguard measures may be considered only if the product in question is imported into the Union in such increased quantities and under such conditions as to cause, or threaten to cause, serious injury to Union producers of like or directly competing products as laid down in Article 3.1, Chapter 3 of the Agreement.
- (6) Safeguard measures should take one of the forms referred to in Article 3.1, Chapter 3 of the Agreement.
- (7) There should be detailed provisions on the initiation of the proceedings. The Commission should receive information including available evidence from the

¹ OJ C [...], [...], p. [...].

² Reference to Commission proposal

Member States of any trends in imports which might call for the application of safeguard measures.

- (8) If there is sufficient evidence to justify the initiation of a proceeding the Commission should publish a notice as provided for in Article 3.2.2, Chapter 3 of the Agreement in the *Official Journal of the European Union*.
- (9) There should be detailed provisions on the opening of investigations, access and inspections by interested parties to the information gathered, hearings for the parties involved and the opportunities for those parties to submit their views as provided for in Article 3.2.2, Chapter 3 of the Agreement.
- (10) The Commission should notify the Republic of Korea in writing of the initiation of an investigation and consult with the Republic of Korea as provided for in Article 3.2.1, Chapter 3 of the Agreement.
- (11) It is also necessary, pursuant to Articles 3.2. and 3.3, Chapter 3 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.
- (12) An investigation should precede the application of any safeguard measure, subject to the reservation that the Commission be allowed to apply provisional measures in critical circumstances as referred to in Article 3.3, Chapter 3 of the Agreement.
- (13) 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 be laid down, as referred to in Article 3.2.5, Chapter 3 of the Agreement.
- (14) The measures necessary for the implementation of this Regulation should be adopted in accordance with Council Decision 1999/468/EC of 28 June 1999 laying down the procedures for the exercise of implementing powers conferred on the Commission³,

HAVE ADOPTED THIS REGULATION:

Article 1

Definitions

For the purposes of this Regulation:

- (a) "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

³ OJ L 184, 17.7.1999, p. 23.

products constitutes a major proportion of the total Union production of those products;

- (b) "serious injury" means a significant overall impairment in the position of Union producers;
- (c) "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 facts and not merely on allegation, conjecture or remote possibility;
- (d) "transition period" means a period for a product from the date of entry into force of the Agreement until 10 years from the date of completion of tariff elimination or reduction, as the case may be for each product;
- (e) "Agreement" means the EU-Korea Free Trade Agreement.

Article 2

Principles

1. A safeguard measure may be imposed in accordance with the provisions set out in this Regulation where a product originating in Korea is, as a result of the reduction or the elimination of the customs duties on that product, being imported in the Union in such increased quantities, in absolute terms or relative to domestic 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) suspensions of further reduction of the rate of customs duty on the good concerned provided for under the Agreement; or
 - (b) increases of the rate of customs duty on the good to a level which does not exceed the lesser of:
 - the MFN applied rate of customs duty on the good in effect at the time the measure is taken; or
 - the base rate of customs duty specified in the Schedules to Annex 2-A pursuant to Article 2.5.2 of the Agreement.

Article 3

Initiation of proceedings

1. An investigation shall be initiated upon request by a Member State or on the Commission's own initiative if it is apparent to the Commission that there is sufficient evidence to justify such initiation.
2. The Member States shall inform the Commission should trends in imports from the Republic of Korea appear to call for safeguard measures. That information shall

include the evidence available as determined on the basis of factors laid down in Article 4. The Commission shall pass that information on to all Member States within three working days.

3. Consultation with the Member States shall take place within eight working days of the Commission's sending the information to Member States as provided for in paragraph 2 within the Committee referred to in Article 10 on the basis of the procedure referred to in Article 11.1. Where, after consultation, it is apparent that there is sufficient evidence to justify the initiation of a proceeding the Commission shall publish a notice in the *Official Journal of the European Union*. Initiation shall take place within one month of the receipt of information from a Member State.
4. The notice referred to in paragraph 3 shall:
 - (a) give a summary of the information received, and require that all relevant information is to 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(7).

Article 4

The investigation

1. Following the initiation of the proceeding, the Commission shall commence an investigation.
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. Where that information is of general interest or where its transmission was requested by a Member State, the Commission shall forward it to all Member States provided it is not confidential. If the information is confidential the Commission shall forward a non-confidential summary.
3. The investigation shall, whenever possible, be concluded within six months of the initiation of the investigation. In exceptional circumstances duly justified by the Commission, that time limit may be extended by a further period of three months.
4. The Commission shall seek all information it deems to be necessary to make a determination with regard to the criteria laid down in Article 2, as appropriate, and where it considers it appropriate, endeavour to verify this 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, changes in the level of sales, production, productivity, capacity utilisation, profits and losses, and employment.

6. Interested parties which have come forward pursuant to Article 3 (4) (b) and representatives of the Republic of Korea may, upon written request, inspect all information made available to the Commission in connection with the investigation other than internal documents prepared by the authorities of the Union or its Member States, provided that that information is relevant to the presentation of their case and not confidential within the meaning of Article 9 and that it is used by the Commission in the investigation. Interested parties which have come forward may communicate their views on the information in question to the Commission. Those views may be taken into consideration where they are backed by sufficient evidence.
7. The Commission may hear the interested parties. Such parties shall be heard where they have made a written application within the period laid down in the notice published in the *Official Journal of the European Union*, showing that they are actually likely to be affected by the outcome of the investigation and that there are special reasons for them to be heard orally.
8. 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 the information and may make use of facts available.
9. The Commission shall notify the Republic of Korea in writing of the initiation of an investigation and consult with the Republic of Korea as far in advance of applying a bilateral safeguard measure as practicable, with a view to reviewing the information arising from the investigation and exchanging views on the measure.

Article 5

Imposition of provisional safeguard measures

1. Provisional safeguard measures shall be applied in critical circumstances where a delay would cause damage which it would be difficult to repair, pursuant to a preliminary determination that there is clear evidence that imports of an originating good from the Republic of Korea have increased as the result of the reduction or elimination of a customs duty under the Agreement, and such imports cause serious injury, or threat thereof, to the domestic industry. Provisional measures shall be taken on the basis of the procedure referred to in Article 11.1.
2. Where a Member State requests immediate intervention by the Commission and where the conditions in paragraph 1 are met, the Commission shall take a decision within five working days of receiving the request.
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 laid down in Article 2 are not met, any duty collected as a result of those provisional measures shall be refunded automatically.

Article 6

Termination of investigation and proceeding without measures

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

Article 7

Imposition of definitive measures

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

Article 8

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 2.
2. 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 industry is adjusting.
3. Extensions shall be adopted in accordance with the procedures of this Regulation applying to investigations and using the same procedures as the initial measures.

The total duration of a safeguard measure may not exceed four years, including any provisional measure.

4. A safeguard measure shall not be applied beyond the expiration of the transition period, except with the consent of the Republic of Korea.

Article 9

Confidentiality

1. Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.
2. Any information of a confidential nature or any information provided on a confidential basis received pursuant to this Regulation shall not 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 it appears that a request for confidentiality is unjustified

and 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, 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 legal and natural persons concerned that their business secrets should not be divulged.

Article 10

Committee

The Commission shall be assisted by the Committee provided for in Article 4(1) of Council Regulation (EC) No 260/2009 on the common rules for imports ⁽⁴⁾. Article 4 of Council Regulation (EC) No 260/2009 shall apply *mutatis mutandis*.

Article 11

Decision making process

1. Where reference is made to this paragraph, Articles 3 and 7 of Decision 1999/468/EC shall apply.
2. When reference is made to this paragraph, Articles 4 and 7 of Decision 1999/468/EC shall apply.
3. The period laid down in Article 5(6) of Decision 1999/468/EC shall be set at one month.

Article 12

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*.

⁴ OJ L 84, 31.3.2009, p.1

This Regulation shall apply from the date of application of the Agreement. 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 Brussels,

For the European Parliament
The President

For the Council
The President