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TRADE REMEDIES REGULATION IN THE EUROPEAN UNION: MAIN CHARACTERISTICS

This article makes an attempt to characterize the legal base of the trade remedies in the European Union which comprises such instruments as anti-dumping, countervailing measures and safeguards. The paper analyses the three-layer hierarchy of the legal mechanism in the sphere from the basic agreements establishing the European Union common commercial policy, special EU regulations and directives on trade remedies to the EU Council resolutions, which are adopted on a case-by-case basis. The author also emphasizes the important role of bilateral agreements signed between the European Union and other countries which include measures to protect trade in general and trade remedies issues, in particular. The paper also discusses the main aspects of institutional regulation of trade remedies in the European Union.

Keywords: trade remedies, European Union, Ukraine, WTO, GATT.

Problem setting. Despite the broad liberalization of international trade in goods and the reduction of trade barriers, global markets still experience the effects of unfair trade practices such as dumping, illegitimate subsidies, as well as increased imports in an excessive quantities. Generally, anti-dumping and countervailing duties are used in relation to those exporters who engage in “unfair” trade practices, causing material injury to domestic producers. These practices can take the form of products distribution below their “normal” price or of benefiting from government-provided subsidies. As for safeguards in international trade, these instruments can be used even in case there is no unfair trade practice, but an import has increased to an extent that serious injury has been suffered by domestic producers.

Like other actors in international trade, the European Union acts to counteract the damage which may be caused to its domestic industry. Thus, some European legal norms are urgent in need of "defending the interests of the Community in order to comply with the rules of free competition and its restoration, in case of its violation"¹.

Purpose of the research. This paper aims at understanding these legal norms, the main characteristics of trade remedies legal regulation in the European Union, in particular, its legal mechanism in a broad sense.

Analysis of recent publications on the issue. Some aspects of trade remedies legal regulation were analyzed by the following national and foreign researchers as V. Golubeva, O. Vishnyakov, N. Konovalov, I. Kapush, O. Kochergina, A. Mazaraki, V. Muraviov, V. Opryshko, S. Osyka, V. Pushkarev, V. Pyatnytsky, V. Bael, W. Muller, A. Sapir, E. Vermulst, and others.

Main materials and justification of the obtained results. It should be noted that in the first stages, namely after the adoption of the GATT Agreement in 1947 and during the first years of its application at the international level, the main countries that used trade defense instruments as a tool of trade protection were the United States, Canada, Australia and New Zealand². The European Union has become one of the main actors in the use of trade remedies since the late 1970s. During the same period, the first EU legislation on trade defense measures came into force. In particular, the European Union signed the first GATT Antidumping Code in 1968, and later other international agreements in the area of anti-dumping, countervailing measures and safeguards. In general, as some researchers point out, the evolution of the EU trade defence legislation has always been characterized by a high level of accuracy of substantive law in relation to the detection of dumping, harm to the Community and the interest of the Community as well as the strict observance of procedures and legislative requirements.³

The current period of regulation of trade remedies in the European Union has begun with the implementation of the results of the Uruguay Round of negotiations under the GATT in the Community

¹ Muller, W., Khan N., Chisterer, N.H. (1998). *EC Anti-dumping Law – a commentary on Regulation 384/96*. Willey.

² Muller, W., Khan, N., Chisterer, N.H. (1998). *EC Anti-dumping Law – a commentary on Regulation 384/96*. Willey.

³ Muller, W., Khan N., Chisterer, N.H. (1998). *EC Anti-dumping Law – a commentary on Regulation 384/96*. Willey.

legislation. Thus, the first specialized documents regulating this type of trade protection measures, namely Regulation (EC) 3283/94, Regulation (EC) 384/96 and Commission Decision No 2277/96/ECSC were adopted in 1994. Commission Decision No 2277/96/ECSC laid the foundations for anti-dumping regulations on goods covered by the Treaty Establishing the European Coal and Steel Community, namely iron, steel products included in Annex 1 to this Treaty. At the same time, Regulation (EC) 384/96 was applied to "any dumped product", which included, among other things, agricultural products.

When analyzing the overall legal mechanism in the sphere, it should be noted that the legal regulation of trade remedies in the EU is characterized by a three-layer hierarchy. In particular, at the first level are the main international agreements laying the foundations for the functioning of the European Union as a whole and constitute the basis for legal regulation of the relations in the field of anti-dumping, countervailing measures and safeguards. This is an Article 133 of the Amsterdam Treaty establishing the European Community, Article 74 of the Treaty establishing the European Coal and Steel Community, and the Treaty on European Union. For example, Art. 133 of the Treaty establishing the European Community (Amsterdam consolidated version) states that such actions are part of the EU's common commercial policy, and it is the exclusive competence of EU bodies, rather than national bodies of the member states¹. Also, as part of the common trade policy, trade defense measures in general apply to non-EU third countries, given that the EU is a customs union with an integrated internal market. It should be mentioned that, in general, the Treaty on European Union and the Treaty establishing the European Coal and Steel Community are the basic legal instruments of the EU, acting as a primary legislation, establishing the specifics and rules for the application of other EU legislative acts, defining the competence of the Union bodies and, therefore, directly extending their norms to trade defense measures as well as to any sphere of EU relations.

Additionally, international agreements concluded by the EU are legally binding for the EU institutions and, under some conditions, are binding for the member states². This principle also belongs to the WTO agreements, which means that GATT/WTO agreements in the sphere of trade remedies are explicitly binding for countries, which are members of the European Union.

At the second level of legislation in the sphere, there are special EU legal documents that contain general rules. Therefore, the main type of acts regulating anti-dumping, countervailing measures and safeguards in the European Union are the documents that fall under the secondary legislation of the EU, having a direct effect on the national legal order of the member states. Thus, these rules are directly applied by member states of the Community. Consequently, the main type of legislation regulating anti-dumping measures and other trade remedies in the European Union are the regulations. Regarding the legal nature of the regulations as legislative acts of the European Union, we note that, in accordance with the principles of European law, in particular the EU Treaty and the Community Treaty on Coal and Steel, the regulations of the Commission and the Council of the EU belong to secondary legislation of the EU, which has direct effect in the national legal order of the members³. Here the opinion of Y. Tikhomirov can be mentioned, implying that "regulations and general decisions are different from the norms of international law by the fact that they have the same legal force throughout the Community and are fully applied."⁴ In general, in scientific literature, the prevailing opinion is that the regulations can be identified with the laws of domestic law, because "according to their normative features, the regulations correspond to the concept of "normative legal act", "law" in the domestic law, but in their legal nature, they are left with unilateral acts of the EU"⁵. Consequently, the regulations are applied by the Member States at the level of the law and are directly applicable.

¹ Treaty establishing the European Community (Amsterdam consolidated version) (adopted 07 February 1992, entered into force 01 November 1993). <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997E133>> (2017, November, 05).

² Treaty establishing the European Community (Amsterdam consolidated version) (adopted 07 February 1992, entered into force 01 November 1993) art 182. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997E133>> (2017, November, 05).

³ Treaty establishing the European Community (Amsterdam consolidated version) (adopted 07 February 1992, entered into force 01 November 1993) art 182. <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A11997E133>> (2017, November, 05).

⁴ Тихомиров, Ю. (1995). *Международное и внутреннее право: динамика соотношений. Электронная библиотека law.edu.ru.* <<http://law.edu.ru/article/article.asp?articleID=151749>>

⁵ Луць, Л. (2003). *Європейські міждержавні правові системи та проблеми інтеграції з ними правової системи України (теоретичні аспекти).* Київ: Ін-т держави і права ім. В. М. Корецького НАН України.

The main current legal acts in the area of trade remedies comprise Regulation (EU) 2016/1036, Regulation (EU) 2016/1037, Regulation (EU) 2015/478, Regulation (EU) 2015/755, Regulation (EU) 2015/476, etc. All these documents have been recently modified and came into force throughout 2015 – 2016, containing the updated detailed norms in relation to anti-dumping, countervailing measures and safeguards.

The third level of legal norms is formed by the European Commission regulations or EU Council resolutions that are adopted on a case-by-case basis in the application of measures and are based on the main directives.

As for geographical orientation, the aforementioned legal acts apply to imports of goods originating in third countries, which are not members of the European Union. Also, the Agreement on European Economic Area also does not allow such measures to be applied to products originating in Iceland, Norway and Liechtenstein, except for certain branches of the economy, these countries have not implemented *acquis communautaire* in their domestic law.¹ It is also interesting that these basic legal documents do not contain different rules for WTO member states and for those who are not part of this international organization. Therefore, anti-dumping investigations against non-WTO members are based on Community legal instruments.

In addition, some researchers add other legal documents to legislation on trade remedies². It can be agreed that, for example, Regulation (EU) 2015/1843 in the field of the common commercial policy aims to ensure the effective exercise of the rights of the EU under international trade rules. Also, actions to protect trade include measures against unfair prices in the field of maritime transport (Regulation (EU) 2016/1035), air transport (Regulation (EC) No 868/2004), etc. It should be mentioned also the important role of the Union Customs Code in regulation of some aspects of anti-dumping measures, in particular, on country of origin of goods, customs zone, etc.

Also, we note the important role of bilateral agreements signed between the European Union and other states which include measures to protect trade in general and trade remedies issues, in particular. Such legal rules prevail over internal regulations and decisions of the EU. For example, according to the Agreement on the European Economic Area, the possibility of applying anti-dumping measures by the Community against other signatories to the Agreement is limited to those areas of the economy where these states did not implement the EU law, in particular, this applies, for example, to the application of anti-dumping or countervailing measures concerning goods of the fishing industry of Norway³. The EU-Turkey Customs Union Agreement dated 1996, for example, does not impede each of the parties to apply trade remedies against the other party in accordance with the GATT/WTO rules⁴. Other bilateral agreements, such as the Association Agreement between the European Union and Ukraine, also contain the obligation of the parties to use antidumping, countervailing measures and safeguards in accordance with the GATT/WTO rules and national legislation without the introduction of special procedures, being based on a fair and transparent system⁵. Moreover, a number of other trade and economic treaties and cooperation agreements contain rules on the priority of seeking opportunities to achieve a "friendly solution to antidumping cases" (agreements with Brazil, Korea, India and Mexico)⁶.

Regarding the interaction of EU trade remedies laws with the legislation governing other legal relationships within the Community, in particular, for example, agricultural issues, then according

¹ Agreement on the European Economic Area (adopted 02 May 1992, entered into force 01 January 1994). <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1994.001.01.0003.01.ENG> (2017, November, 05).

² Giannakopoulos, T. (2006). *A concise Guide to the EU Anti-dumping/Anti-subsidies Procedures*. Alphen aan den Rijn: Kluwer Law International.

³ Agreement on the European Economic Area (adopted 02 May 1992, entered into force 01 January 1994). <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.L_.1994.001.01.0003.01.ENG> (2017, November, 05).

⁴ Decision No 1/95 of the EC-Turkey Association Council (adopted 22 December 1995, entered into force 15 May 2006). <http://trade.ec.europa.eu/doclib/docs/2003/december/tradoc_115267.pdf> (2017, November, 06).

⁵ Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part (signed 21 March 2014, entered into force 1 September 2017). <http://trade.ec.europa.eu/doclib/docs/2016/november/tradoc_155103.pdf> (2017, November, 06).

⁶ Teh, R., Prusa, T., Budetta, M. (2007). Trade remedy provisions in regional trade agreements. *WTO Staff Working Paper, No. ERSD-2007-03*. <<http://hdl.handle.net/10419/72063>> (2017, November, 06).

to Art. 22 of the Council Regulation (EU) No 384/96, anti-dumping measures are introduced "to complement" the existing agricultural import regime within the European Union. However, given the specific nature of the mechanism for the protection of the Community's internal market through agricultural agreements, these measures in general have little significant practical effect on the internal market of agricultural products in the European Union and rarely apply to commodity producers of agricultural products.

The institutional regulation of trade remedies lays within the main bodies of the European Union – the European Commission and the Council of the European Union, since their consideration and application of these measures falls within the competence of the Community. According to the Art. 155 of the Treaty on European Union and the Art. 8 of the Treaty establishing the European Coal and Steel Community, the European Commission possesses executive powers in this area, in particular, with respect to anti-dumping investigations, the application of interim measures, the termination of the initiated investigations, etc. Thus, trade investigations are carried out by the Trade Directorate of the European Commission by initiative of the national producers. On the other hand, the question of the application of definitive anti-dumping measures falls within the competence of the Council of the European Union, which is the legislative body. In addition, the Council of the EU has the right to cancel the decision of the European Commission to stop the investigation without imposing measures. In accordance with the Treaty on European Union, EU Council decisions on measures are also adopted in the form of regulations and they are always preceded by a corresponding proposal from the Commission.

Consequently, anti-dumping, countervailing measures and safeguards in the European Union can only be applied if both main bodies of the community – the European Commission and the Council of the European Union give their consent, which means that their application should receive support from most of the countries of the community. It should be noted, therefore, that there is a specific feature of the institutional regulation of anti-dumping measures in the EU, given that the last decision on the application of measures is taken by the Council of Ministers at the level of ministers of the member states of the community, which is thus, to some extent, a political decision. This procedure differs from the procedure for applying trade defense measures in countries (for example, in the USA, decisions of the Department of Commerce are taken administratively)¹ According to certain scholars, this procedure is not totally efficient, being a disadvantage of the European legislation, since the adoption of decisions on the use of such instruments is an executive rather than a legislative one². However, the fact that adoption of these decision still lays within the competence of the Council of the European Union, which is the last resort in the application of anti-dumping measures by the community, indicates the desire of the member states to have control over the resolution of important issues that could potentially have a political repercussion. Also, there should also be cooperation between the member States and the Commission in the collection of information on the investigation³.

The European Parliament, as the legislative body of the European Union, also has a considerable influence on the formation of trade defence remedies policy in the EU. There is a well-established procedure and practice of consulting the Commission and the Council with the European Parliament on amending the basic regulations in force on this issue. Also, the Commission's responsibilities include annual reporting and providing the information to the European Parliament on trade remedies policy and taken measures. Consequently, the European Parliament has consultative and advisory functions regarding anti-dumping measures in the EU. Although, it must be mentioned that earlier there were cases when the European Parliament itself decided on such measures on its own initiative⁴.

Also, in resolving disputes on antidumping, countervailing measures and safeguards, the Court of Justice of the European Union, which is the Community's judicature, and the Court of First Instance of the European Communities, have jurisdiction.

Conslusions: As a conclusion, it must be said that basic legislation in the sphere of trade remedies, in particular, on anti-dumping, countervailing measures and safeguards in the EU have a three-tier structure,

¹ Muller, W., Khan N., Chisterer, N.H. (1998). *EC Anti-dumping Law – a commentary on Regulation 384/96*. Willey.

² Muller, W., Khan N., Chisterer, N.H. (1998). *EC Anti-dumping Law – a commentary on Regulation 384/96*. Willey.

³ Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (adopted 08 June 2016, entered into force 30 June 2016). <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32016R1036>> (2017, November, 06)

⁴ Muller, W., Khan, N., Chisterer, N.H. (1998). *EC Anti-dumping Law – a commentary on Regulation 384/96*. Willey.

first having entered into force in 1996. These are, firstly, the basic agreements which lay the foundations of the trade regulation in the European Union in general, such as the Treaty establishing the European Community, etc. As a second element the main thematic Community regulations and directives on anti-dumping, countervailing measures and safeguards should be mentioned. And finally, the European Commission regulations or EU Council resolutions, which are adopted on a case-by-case basis when measures are applied, are the important type of legal documents in the sphere. To sum up, all these legal acts on trade remedies originate and operate in accordance with GATT/WTO rules, while having their own specifics and scope.

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