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SPECIFICS OF TRADE REMEDIES REGULATION IN THE LAW OF THE EUROPEAN UNION

This article characterizes the peculiarities of the European Union legal mechanism of trade defense measures, particularly, anti-dumping, countervailing measures and safeguards. The paper analyses common international norms implemented in the EU law together with the unique features present in EU regulations in the sphere. The author also emphasizes the importance of the Union interest as an element in applying measures, discussing that this approach allows maintaining the balance of various interest groups within the Union. The author also presents some shortcomings of EU legislation in the field of trade defense measures. The author concludes that the European Union law to some degree complements and improves the WTO rules on the application of trade defense measures, resulting in a clearer and more understandable use of these instruments for the protection of the internal market.
Keywords: GATT, European Union, trade remedies, Ukraine, WTO.

Problem setting. Along with the fact that EU trade law and EU trade policy have been formed under the influence of the rules and principles of the multilateral trade agreements of the World Trade Organization and are characterized by a certain openness of the domestic market, the European Union is still an active user of trade protection measures, which, according to the definition of many foreign scientists, are at the heart of its common trade policy. International regulation of trade defense measures is based on the law of the World Trade Organization, namely through special international agreements. Since the European Union as an organization and individual member states are active users of these trade instruments, WTO rules in this area are implemented in the European Union's legal order. In addition, European law on anti-dumping, countervailing and safeguard measures contains other terms and conditions that are not part of the WTO's legal framework, which need to be highlighted separately.

Aim of the research. The author analyzes main peculiarities of the legal regulation of trade remedies in the European Union, more specifically legal norms, which differ from WTO agreements.

Recent publications analysis on the issue. Trade remedies legal regulation has been analyzed by the following 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 grounding of the obtained results. Antidumping measures in the European Union, as in other jurisdictions, can be applied as a result of a special formal investigation procedure in accordance with the law. Basic Regulation (EC) No 2016/1036 introduces conditions, under which a particular case is investigated and measures are applied. It should be noted that the general structure of the Regulation is similar to the Agreement on Implementation of Article VI of the General Agreement of Tariffs and Trade 1994. The rules defining dumping and injury, together with a study of Union interest are contained in Articles 2, 3 and 21 of the Regulation. Thus, dumping is defined as "the sale of goods in the Union market at a price lower than normal"[1], which is usually the price at which a similar product is sold on the state export market under normal trade conditions. Moreover, as professor S. Osyka determines, if the European Commission can not determine the export price or it can be considered unreasonable, such a price may be constructed: a) on the basis of the price at which the imported goods are first sold on the market to an independent buyer; b) on a different basis[2]. Concerning the definition of a similar product

[1] *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> (2018, February, 28).
[2] Осика, С.Г. (2003). *Правове регулювання імпорту: антидемпінгові заходи*: монографія. Київ: Центр дослідження СОТ, розв. торг. права і практики, 320 – 321.

in the EU anti-dumping legislation, it is sufficiently narrow and clear and fully in line with its definition of the relevant WTO agreement, namely an identical product, that is, similar in all to the product under consideration, or, in the absence of such a product, to another product, although not the same in everything, but which characteristics are very similar to the characteristics of the product in consideration[1]. According to the established practice, for the purpose of determining the fact of dumping, a comparison is made between the normal value and the export price of goods, as determined by the "unbiased basis", and, if necessary, an adjustment of the price is made, so that it is possible to compare. Thus, Article 2 of Regulation (EC) No 2016/1036 stipulates that the presence of dumping is established by means of the following actions: 1) the usual price of the goods in the exporting country is calculated; 2) the usual price of the product is calculated on the EU market; 3) comparing prices; 4) the presence or absence and size of the dumping margin is calculated, that is, the difference between the normal value of the goods and the export price; 5) general calculations are made regarding the damage and its size; 6) calculates the degree of growth of dumping imports, the impact of this import on EU producers, etc.[2] Consequently, all major terms and procedures relating to trade defense measures in the EU are in line with WTO rules.

The rules of protection against subsidized imports from non-EU countries are also regulated by the special Regulation (EC) No 2016/1037, the norms of which also coincide with the provisions of the relevant WTO Agreement on Subsidies and Countervailing Measures. This basic subsidy regulation defines three essential requirements for the application of measures, in particular, the existence of a specific subsidy, the existence of harm, which are mandatory requirements of the WTO Agreement, but also the EU's interest in the application of measures that is an additional provision of the European commercial law. Thus, according to Article 2 of the Subsidies Regulation, as in accordance with the GATT/WTO rules, there is financial assistance from the government of the exporting country or country of origin, or a benefit in the sense of Article XVI of the GATT 1994, and there is a benefit obtained in this way. Thus, imports is considered subsidized in the presence of both criteria: 1) if it is carried out subject to provision of financial assistance from the state or, in some cases, private entities, for example, in the case of granting loans, direct transfers, tax breaks, etc.; and 2) if such assistance provides certain benefits[3]. However, according to professor N. Musis, even when it is possible to identify the recipient of grants, in practice there are certain exceptions to the application of measures, in particular, measures do not apply if subsidies are granted to enterprises for research, for the implementation of the policy of state regional development, in order to facilitate adaptation manufacturers to new economic conditions, etc.[4]

In order to detect the fact of dumping under EU rules, a comparison is made between the export price of a given product and the normal price of a similar product, which is defined as goods that are identical or wholly similar. Therefore, the correct definition by the Commission of a similar product is very important for an anti-dumping investigation, since both too narrow and too broad understanding of the term may be beneficial to importers or exporters in each individual case and may result in invalid results in the case. Article 2 of the EU Anti-Dumping Regulation also gives a detailed assessment of the concept of the normal value of a similar commodity in the ordinary course of trade.

The measures are applied when actions constitute a material injury for domestic producers of goods, that is, by virtue of Regulation (EC) 2016/1036, significant damage to the EU producer, or the threat of causing material damage to the EU producer, or to prevent the creation or expansion of an EU producer a similar product[5]. It should be noted that the latter criterion is an additional norm only of the Union law,

[1] *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> (2018, February, 28).
[2] *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> (2018, February, 28).
[3] *Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised 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:32016R1037> (2018, February, 28).
[4] Мусис, Н. (2005). *Все про спільні політики Європейського Союзу*. Київ: «КІС», 410.
[5] *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> (2018, February, 28).

which is not required by the WTO rules. The very procedure for determining the damage is in accordance with the procedure defined in the relevant WTO agreement, which provides for a detailed analysis of dumping imports and the determination of the impact of this import on the prices of such goods in the EU, in particular, the volume of dumped imports is determined during the investigation, the impact of dumping on import prices in the EU, the further effects of imports for national commodity producers, etc. At the same time, as S. Osyka states in his study, the notion of a commodity producer in the EU in the regulations on trade defense measures corresponds to the concept of a national commodity producer contained in the WTO agreements, which is defined as a set of EU producers of similar goods[1].

In addition, it is necessary to note the special feature of the collection of duties when applying the measure, namely in the EU special regulations, that the amount of duty not only should not exceed the dumping or compensation difference, but it should be even lower if it is sufficient to eliminate the damage to the industry of the Union[2],[3]. This differs from the provisions of the Agreement on implementation of Article VI of GATT 1994 and the Agreement on subsidies and countervailing measures that do not require lesser duty in this case. That is, it can be said that such a special law of the EU is more favorable to importers from third countries and provides for the collection of only the amount of duty sufficient to cover the damage.

One of the peculiarities of implementing a common EU trade policy is the notion of Union interest, which is an important element of trade defense measures legislation. This concept can be found in the primary law of the Union, in particular, Articles 24, 21 and 17 of the Treaty on European Union include the term "interests of the European Union", "fundamental interests", "EU general interest"[4]. It should be noted that the existence of such a rule in the EU legislation on trade defense measures is not required by the rules of the WTO legal framework, therefore, it is primarily an additional provision of the European Union law entitled "WTO plus" in accordance with the terminology of the European Commission[5]. As one of the objectives of the application of trade defense measures is the protection of national producers of goods and sectors of the EU economy, the application of anti-dumping, countervailing and safeguards measures can not only provide additional competitive advantages to producers but also harm other union entities. The idea of including this aspect of legislation in the field of trade defense measures is the need to balance interests of different actors, industries, etc., where there can often be contradictions. According to B. Horvatny, the purpose of observing this principle is the desire to avoid a situation where the negative effect of the measures application for the European Union will outweigh the benefits[6]. The requirement for a Union benefit analysis was included as a mandatory provision from the outset, while the very notion of Union interest was formed gradually. That is, the test for the interest of the Union in each case requires the European Commission to thoroughly investigate all possible consequences and ensure that measures are applied to an adequate harm. In particular, the interests of all parties in economic relations, in particular potential consumers of these goods in the EU, which may be affected by the application of measures, are taken into account. The application of this principle in practice differs depending on the type of trade defence measures. Thus, in the basic regulations governing the legal relationship in the field of trade defence measures, namely Regulation (EU) of the European Parliament and Council 2015/478 of 11 March 2015 on common rules for imports and Regulation (EC) 2015/755 of the European Parliament and

[1] Осика, С.Г. (2003). *Правове регулювання імпорту: антидемпінгові заходи*: монографія. Київ: Центр дослідження СОТ, розв. торг. права і практики, 320 – 321.

[2] *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> (2018, February, 28).

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[5] Communication from the Commission to the Council and the European Parliament on modernization of trade defense instruments adapting trade defence instruments to the current needs of the European economy, COM (2013) 191, 3. <http://trade.ec.europa.eu/doclib/docs/2013/april/tradoc_150837.pdf> (2018, February, 28).

[6] Horvatny, B. (2014). The Concept of "Union Interest" in EU External Trade Law. *Acta Juridica Hungarica, 3,* 261-276.

of the Council of 29 April 2015 on common rules for imports from certain third countries, this aspect is only indicated as "where the interests of the Community so require"[1]. At the same time, regulations on anti-dumping and countervailing measures are already more detailed, defining certain limits of this concept. In particular, most important elements of the Union's criterion of interest are the following: – determining whether the intervention should be based on an assessment of all different interests in general, including the interests of the domestic industry, users and consumers; – conclusions should be made only when all parties have an opportunity to express their opinion; – special attention is paid to the need to eliminate the effects of dumping and subsidies and to restore effective competition; – interested parties can provide information to the Commission in order to provide an appropriate basis for the consideration of all points of view; – information should be taken into account only if it is supported by evidence; – it is prohibited to apply measures that can be inferred that their use is of interest to the Union[2],[3].

In practice, when applying the measures, the EU Council has repeatedly noted that the study of the Union interest is based only on a purely economic analysis and focuses on the economic impact of the use or non-use of tools[4], which does not allow to agree with the statements of some scholars that it is an instrument of the Union's foreign trade policy[5]. It can be noted here that only the economic effect of measures on the territory of the Union is taken into account and not non-economic factors. On the other hand, it is often pointed out by researchers that in analyzing possible consequences of all groups of subjects, in particular, domestic producers, users of goods for industrial purposes and consumers, greater importance is placed on interests of commodity producers from the territory of the EU among other groups, given that the main purpose of applying EU trade defence measures is to "restore fair competition"[6]. Therefore, the interests of other groups of entities are given a secondary role in such a process, which is often the subject of criticism among scholars. In addition, another drawback is that the union interest is not a sufficient factor in the EU legislation, which makes it possible to review the existing measures to protect trade. In our opinion, this provision requires revision and amendments to the law, as the effects of the application of the measures may change over a period of time. Consequently, even if the current changes to the Regulation have led to better informing other potential stakeholders and the openness and involvement of all participants, the question remains to be assessed and analyzed by the Commission itself on the factors influencing the Union's interest, that is, which aspects should prevail in achieving the result. Thus, the question of the presence or absence of EU interest in the application of measures is a feature of the European legal order, an extremely important element of the process itself and is investigated at the final stage of the investigation.

Also, the distinction of European law is the fact that Article 15 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, which specifies special provisions for the application of measures to products originating in developing countries, was not reflected in the basic anti-dumping legislation or generally in trade policy with developing countries. Such decisions may be taken by the Union during the investigation on a case-by-case basis, according to the situation.

An important feature in antidumping, antisubsidy or safeguard investigations in the European Union is the definition of the normal value of goods when imported from a country that does not have a market

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[1] *Regulation (EU) 2015/755 of the European Parliament and of the Council of 29 April 2015 on common rules for imports from certain third countries* (adopted 29 April 2015, entered into force 08 June 2015). <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:32015R0755> (2018, February, 28).

[2] *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).

[3] *Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised 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:32016R1037> (2018, February, 28).

[4] *Regulation (EC) 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam* (adopted 05 October 2006, entered into force 05 October 2006). <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2006:275:0001:0041:EN:PDF> (2018, February, 28).

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[6] Horvatny, B. (2014). The Concept of "Union Interest" in EU External Trade Law. *Acta Juridica Hungarica, 3,* 261-276.

economy status. It should be noted, for example, that EU antidumping legislation distinguishes between countries with a market economy status and a non-market economy status, which affects the very procedure of conducting an investigation and leads to different attitudes towards different states. This aspect is the subject of criticism by many scholars, since it is considered that the use of such a classification by the Union may be caused by economic or political interests[1]. In accordance with Article 2 (7) of Regulation (EC) 1225/2009, in this case, in the study of the normal value of goods by the European Commission, the data of a third country with a market economy status shall be taken into account. Thus, according to the Regulation (EC) 2016/1036, the relevant third market economy country should be selected with due regard to any reliable information available at the time of selection and time limits and, if possible, a market economy status country should be used[2]. As can be seen from the foregoing, the rules of choosing the analogue country are rather vague and fuzzy and completely devised at the discretion of the Commission. Also, when investigating goods from a country that does not have a market economy status but is a member of the WTO, for example, the People's Republic of China, Vietnam, Kazakhstan, etc., for the use of the general methodology in the investigation, commodity producers must prove that "for this manufacturer or producers prevail market economy conditions for the production and sale of the like product", and in the other case the analogous state is chosen[3]. Many scholars point out that in this case, precisely the election of that country can greatly affect the normal value of the goods and the price difference, taking into account the practice of the European Commission to allow complainants in their application to offer such a third state[4]. The answer to this was the publication in 2013 of the European Commission's recommendations for choosing an analogue country in the course of investigations containing the following clear, objective criteria for determining the country concerned: a) goods produced in the territory of a third state are identical or similar to their physical characteristics to the goods in respect of which the investigation is being conducted; b) the volume of sales of goods to consumers in a third country in comparison with the export of goods for which an investigation is conducted from a country with a non-market economy status; c) the size of the market and the nature of the competition for the given product in the third-country market. This document, although not yet officially available, has been used by the European Commission for recent years in order to achieve a more transparent procedure for this aspect of the investigation[5].

Considering the peculiarities of EU law on trade defense measures as part of the European Union's trade law, it is also important to emphasize the effect of the special Regulation (EC) 654/2014 of the European Parliament and of the Council of 15 May 2014 on the rights of the Union in the application and enforcement of international trade in goods, which amends Regulation (EC) 3286/94, which is more commonly known as the Trade Barriers Regulation. This Union law establishes a procedure that allows enterprises and EU countries to require EU institutions to study any trade barriers introduced by non-EU countries in order to protect the interests of companies and EU workers. The document is intended to eliminate harm or adverse trade effects arising from such trade barriers in accordance with the rules of international trade. Thus, in accordance with this Regulation, complaints may be filed on behalf of the industry, one or more enterprises or an EU Member State, which imposes barriers to trade. The complaint should contain sufficient evidence of the existence of trade barriers and adverse trade effects. In accordance with Regulation (EC) No 654/2014, complaints must be submitted to the European Commission in writing,

[1] Zhang, N. (2013). Continue to Fight the Anti-dumping War: Arguments Against the European Union's Antidumping Policies from the Perspective of Chinese Footwear Enterprises and Exporters. *International Trade Law Journal, 35,* 2-9.

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[4] De Kok, J. (2016). The Future of EU Trade Defense Investigations against Imports from China. *Journal of International Economic Law, 19,* 515 – 547.

[5] De Kok, J. (2016). The Future of EU Trade Defense Investigations against Imports from China. *Journal of International Economic Law, 19,* 515 – 547.

which has 45 days to decide whether the complaint is admissible[1]. This period may be suspended at the request of the complainant, if necessary, to obtain additional information. If the complaint is considered to be admissible, an announcement of an investigation into a particular product and country is published in the Official Journal of the European Union. The Regulation states that on the basis of an investigation carried out by the Commission, the Council of the EU may adopt any "measures that are in accordance with existing international obligations and procedures", in particular, to suspend tariff actions, introduce new or increased customs duties, introduce or increase quantitative restrictions on the import, etc., if this is of interest to the Union, which compares this instrument with other measures of trade protection. Consequently, the purpose of the document is to ensure the effective exercise of the rights of the Union under international trade agreements in order to protect its economic interests in order to enable the national Union producers to use formal procedures and to react quickly and flexibly on the basis of procedures and time limits established by international trade agreements. Most scholars consider the EU Trade Barriers Regulation an additional instrument of the Union in the field of trade law, along with trade defence measures[2].

Consequently, it can be concluded that the European Union legislation on trade defense measures has been adopted in accordance with the relevant WTO rules on antidumping, illegitimate subsidies and safeguards, reflecting an appropriate balance of rights and obligations. However, in addition, the legislation contains important special rules, which are inherent in the EU law only in this area:

– The decisive element in the application of measures is the introduction of a test of harm as a second necessary condition for the application of final measures. The practice of the Union to apply measures only to the extent that it is sufficient to alleviate the damage caused contributes to the fact that only cases where such actions have actually caused material damage are taken into account;

– In order to determine the existence of dumping, illegitimate subsidy or safeguards and the assessment of harm, the practice of the Union is to apply the interpretation of the law on identical goods in the narrow sense, which in turn limits the number of applications filed;

– the decisive feature of the Union's legislation is that trade defense measures can only be applied if there is an interest of the Union in such measures that results in comparisons between the benefits of various stakeholders, in particular, the interest of national producers, consumers in the EU, industry interests, etc.;

– Another feature of the EU legislation is the preliminary disclosure of the results of an investigation, which is not a mandatory requirement of the WTO rules, and has been introduced to better protect the interests of the parties to the proceedings. Through this pre-disclosure procedure, exporters and importers become more informed about the most significant facts and key findings on which the decision is taken on the application or non-application of measures, and thereafter, an additional period is proposed during which additional comments may be made by the parties as necessary;

– European legislation differs mainly in establishing lower anti-dumping duties;

– the EU approach is more predictable, since the amount of anti-dumping measures for a particular product is set only once in the next five years or during their period of operation, which differs from the practice of revision of their size for each year, which is practiced, for example, in the USA.

Consequently, it can be said that the European Union law to some degree improves the WTO rules on the application of trade defense measures for the more clear and understandable use of these instruments for the protection of the internal market. On the other hand, domestic researchers also emphasize the following shortcomings of EU legislation in the field of trade defense measures. In their view, it is too broad to apply confidentiality provisions, which prevents importing companies from seeing allegations of investigation, insufficient transparency of the investigation itself, very brief deadlines for objection to the allegations; the possibility of using disputed and not always adequate temporary measures, etc.

[1] Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular, those established under the auspices of the World Trade Organization (adopted 15 May 2014, entered into force 17 July 2014). <http://eur-lex.europa.eu/legal-content/GA/ALL/?uri=uriserv:OJ.L_.2014.189.01.0050.01.ENG> (2018, February, 28).

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Conslusions: Thus, despite the fact that EU legislation on trade defense measures is often criticized by the scientists through certain additional provisions, which complement the rules of international trade agreements of the WTO that lead to a high degree of protectionism of the internal market. In practice, a well-considered approach is used in practice, in particular by using the Union's interest in applying measures or charging for smaller duties. This approach still allows maintaining the balance of the various interest groups within the Union.

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