



**DEPARTMENT FOR TRADE  
PROTECTION**

**MINISTRY OF ECONOMIC DEVELOPMENT  
AND TRADE**

**UKRAINE**

**A GUIDE TO THE COMPLETION OF AN  
ANTI-SUBSIDY APPLICATION**

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## 1. GENERAL INFORMATION

This Guide has been designed to assist Ukrainian producers in preparing a properly documented application that can be acted upon by the Department for Trade Protection of the Ministry of Economic Development and Trade of Ukraine (“the Department” and “the Ministry”). It is designed to illustrate what information is needed in order to initiate an investigation against allegedly subsidised imports that are causing injury to a Ukrainian industry. This Guide should be used in conjunction with the Application Form.

Aspiring applicants are advised to liaise with the Department **throughout the process of compiling the application**. This may assist in a proper understanding of the information required by the Department and assist the Department in understanding the industry and the product.

Parties should use the electronic version of the Application Form – which can be found in the following webpage: [\[add\]](#) – to ensure that information is presented in the format requested (Word).

## 2. THE REGULATORY FRAMEWORK APPLICABLE TO ANTI-SUBSIDY INVESTIGATIONS

Anti-subsidy proceedings are conducted in terms of the Law “On protection of national industry against subsidized imports” (the Law). This document can be found in the website of the Ministry of Economic Development and Trade at <http://www.me.gov.ua/LegislativeActs/List?lang=uk-UA>

Article 1 of the Law contains definitions. You are kindly requested to read them. Succinctly, the main terms are presented below:

**(1) anti-subsidizing investigation** shall mean investigation of a fact of granting a subsidy under the provisions of this Act; ...

**(4) governmental body** shall mean legislative or executive authority of a country of origin or exporting country (customs union or economic group);

**(5) exporter** shall mean a subject of economic and legal relations exporting products (goods) from a country;

**(6) injury** shall mean the serious injury caused to the national industry or threaten to cause serious injury to the national industry or sufficient impediment to the national producer to create or expand production of the like products. The procedure of determination of injury is described in the Article 13 of this Act;

**(7) import** shall mean importing products (goods) delivered to the customs territory of an importing country, when destined for consumption in this country; ...

**(10) countervailing measures**, pursuant to the provisions of this Act, shall mean the provisional or definitive measures to be applied in the course of anti-subsidizing investigation or resulted therefore; ...

**(12) exporting country** shall mean a country of origin of products imported to Ukraine. An exporting country could be a country acting as an agent (customs union or economic group) with exception of those effecting transshipment through the country of export or not producing the like products or having no comparable price of such products;

**(13) country of origin** shall mean a country (customs union or economic group) where products have been manufactured or subject to sufficient processing or finishing; ...

**(17) recipient** shall mean a subject of economic and legal relationships receiving money or profit resulted from traffic of products being subsidized under provisions hereof; ...

**(20) subsidy** shall mean financial or other support provided by the government for production, processing, sale, transportation, export, consumption of the like products resulted in enjoyment of privileges (benefit) by a subject of economic and legal relations of an exporting country. The peculiarities of interpretation of subsidy are described in the Article 6 of this

Act;

**(21) non-actionable subsidy** shall mean a subsidy, which does not justify countervailing measures to be applied thereto;

**(22) actionable subsidy** shall mean a subsidy, which justifies countervailing measures to be applied thereto;

**(23) subsidized import** shall mean a delivery of products (goods) to the territory of an importing country, which enjoy subsidizing privileges and benefits granted for production, processing, transportation or exporting of such products;

**(24) product** shall mean any product manufactured for trading;

**(25) like product** shall mean an identical product i.e. alike in all respects to the product under consideration, or in the absence of such product, another product, which although not alike in all respects, has characteristics closely resembling those of the product under investigation;

**(26) product under investigation** shall mean an imported product introduced to the commerce of Ukraine, which is subject to anti-subsidizing investigation described in an appropriate notice on initiation and performance of investigation in question;

**(27) Ukrainian producers** shall mean the producers of the like products manufactured in Ukraine.

### 3. **WHY DOES THE MINISTRY NEED TO ACT IN ACCORDANCE WITH THE APPLICABLE RULES?**

Any action taken under the Law can become an international trade issue because WTO rules set strict limits to the Members' right to use the anti-subsidy instrument. Therefore, any action undertaken under the Law must be in compliance not only with the terms of the Law, as they may be interpreted by the Government of Ukraine and the country's internal judiciary system, but also with the WTO rules.

As a Member of the WTO, Ukraine is bound by the provisions of the WTO Agreement on Subsidies and Countervailing Measures (the SCM Agreement). Accordingly, investigations must be conducted in line with the requirements under the SCM Agreement as interpreted by panels and the Appellate Body. This Agreement, as well as other WTO Agreements, can be found at <http://www.wto.org/english/docs e/legal e/legal e.htm>

### 4. **WHO SHOULD FILL OUT THE APPLICATION FORM?**

The Application Form may be filled out by the company(ies) that submit the application or by someone on its(their) behalf.

In case that there is more than one Ukrainian producer submitting the application, it is highly recommended that the applicant companies engage a third party to prepare a single Application Form on their behalf. This third party should amalgamate the data for the several complaining companies and assess it. Where a third party is engaged, please note that annexed to the Application Form, the individual replies to certain sections (see footnote 3 to the Application Form) will have to be provided. This is required for verification purposes.

### 5. **SUPPORTING DOCUMENTATION**

An application must be thoroughly documented and the applicant must provide the best information available to them and, wherever possible, give supporting documentary evidence from commercial or publicly available and reliable sources.

All **calculations** should be explicitly shown as well as the sources of all the data used, noting the period to which the data refer. In preparing an application, the applicant should always ensure that it maintains the original calculation sheets for

verification by the Department. The applicant should be in a position to indicate how any information was derived, including any costs allocations that may have been made.

Unless indicated otherwise, **all** value figures must be stated in Ukrainian Hryvnias (UAH).

## **6. CONFIDENTIALITY**

Article 31 of the Law recognises parties submitting information to the Ministry the right to request that it be treated in confidence. As a result of this right, public officials are obliged not to disclose such information and to set up and apply mechanisms ensuring its protection (non-disclosure).

On the other hand, Article 31 also recognises the right of interested parties to acquire a certain level of knowledge of the information submitted by other parties. Without this right, they could not properly defend their interests. Because of this, Article 31 requires parties to submit non-confidential summaries of information submitted in confidence.

Paragraphs 14 to 18 of the Introduction to the Application Form detail the requirements that applicant companies must comply with. Particular attention should be paid to paragraph 17. Typically, the information referred between brackets in paragraph 16 may be considered to be confidential. However, even with respect to this information, the applicant must justify the request for confidential treatment. We recall that the Ministry has the right to disregard information where the party submitting it does not comply with all of the requirements set forth in Article 31.

## **7. ISSUES THAT AN ANTI-SUBSIDY COMPLAINT SHOULD COVER**

Article 15(2) of the Law enumerates the specific information that you must submit in the application:

1. identity of the applicant, composition of the applicant, proof of capability of the persons in question, the volume and value of the production of the like product by the applicant in Ukraine. Where a written application is made on behalf of the national industry, the application shall identify:
  - the industry, on behalf of which the application is made, a description of the volume and value of production of the like product in Ukraine;
  - a list of all known national producers of the like product (or associations of national producers of the like product) and to the extent possible, a description of the volume and value of production of the like product in Ukraine.
2. a complete description of the allegedly subsidized product, the names of the country or countries of origin or export in question;
3. the identity of each known exporter or foreign producer and a list of known persons (physical or legal) importing the product in question;
4. evidence with regard to the existence, amount and nature of the subsidy in question and evidence that a subsidy is actionable;
5. evidence, including information on evolution the volume of the allegedly subsidized imports and the effect of these imports on prices of the like product in the market of Ukraine and consequent impact of the imports on the national industry, as demonstrated by relevant factors and indices having a bearing on the state of the national industry such as those listed in paragraphs three and five of the Article 13 of this Act.

This Guide is aimed at explaining, using examples, what the Department exactly needs from you in order to assess whether an investigation may be initiated. **You should therefore read this Guide before starting any research.** If you have still doubts, seek our assistance.

The Department, **without evidence supporting particular statements, cannot move forward.** If you have serious problems with obtaining certain evidence, you should discuss it with us. The Department will try to give you ideas on how to address this issue. If you can convince us that you cannot obtain certain information, the Department may try to obtain it directly. The evidentiary standard is somewhat flexible; thus we may allow some information to be submitted after initiation. This may for instance apply in case of some injury factors. However, for that to be possible, you must explain to us why a particular piece of information is not essential for the initiation determination. Ultimately, the Ministry will decide if this is the case or not.

An anti-subsidy application should provide the Department with information on the applicant, the product and all interested parties. In addition, the application must clearly set out data establishing a *prima facie* case of subsidisation, material injury (or threat thereof) and a causal link between the subsidized imports and the injury. **The more detailed the application is, the easier it will be for the Department to determine whether it is properly documented and whether it contains *prima facie* proof of those constitutive elements.**

The Department has the right to address questions to you during the evaluation of an application formally submitted for its consideration. This will happen if you submit a request which is manifestly incomplete. When information is missing, the Department will inform you of the need to submit it. If the required information is not available, and you have not convinced us that you have made reasonable efforts to obtain it, the application is likely to be rejected. Since the Ministry's decision to initiate an investigation can be challenged before domestic courts and reviewed by international dispute settlement mechanisms, **the Ministry can only initiate proceedings based on requests which are factually well-grounded and which contain solid economic and legal analysis.**

In the following, we explain what information is required under each of the specific sections of the Application Form.

## 6.1 General information

The following comments are relevant to the questions in **Section A** of the Application Form. The information requested in this section is to be submitted by each applicant company.

In this section information is required on the applicant company(ies) and legal representative, if applicable.

The Department must know who the contact person at the applicant is. The contact person should be somebody that has been involved with the completion of the Application Form and that would be in a position to answer questions the Department might raise.

Where the applicant is a chamber, an association or a legal/consulting firm applying on behalf of the Ukrainian producer(s), the names of the officials in charge of the application in the company(ies) should be provided.

If the Ukrainian producer(s) decide to appoint a legal representative to represent it(them) in the anti-subsidy investigation, a **power of attorney must be submitted**. Without this form the Department cannot engage in any contact with the representative. This is to protect both the applicant and Department and to prevent the unauthorised release of any information that might be regarded as confidential. Without a power of attorney, the Department will only liaise with the contact person identified in the reply to question A-2. A form is annexed to the Application Form.

As regards corporate information, this should be provided by each applicant company and should be attached to the Application Form. The same applies to the information requested under section A-5. All injury information needs to be reconciled to the financial statements. They will enable the Department to conduct a desk top verification of the information submitted in section E of the Application Form, as is required by Article 15(3) of the Law.

## 6.2 Products

The following comments are relevant to the questions in **Section B** of the Application Form. While a common reply to section B-1 may be provided, sections B-2 and B-3 should be replied by each applicant company.

The imported product that you request to be investigated must be defined in detail. Note that in section B-1 of the Application Form it is the imported product that has to be defined and **not** the product manufactured by the Ukrainian industry. The scope of the investigation, and of any measures eventually imposed, is determined by the imported product, which is referred to in the Application Form as the “allegedly subsidised product” or “IP”. Without a proper description of the allegedly subsidised product, the Ministry will not be in a position to initiate an investigation. Many information must be gathered and analysed, for instance on the volume of imports of the subsidized product. If we do not have a proper description, it will not be possible for the Department to obtain proper data and the analyses will be flawed.

The IP should be described in terms of all the criteria listed in question B-1.1. Please supply as much information on the allegedly subsidised product as possible, including samples, photographs and/or brochures. Note that when, for instance, we request a brochure, it is not the brochure of the product manufactured by a Ukrainian producer. It is rather the brochure presenting the product that a foreign supplier is exporting to Ukraine. Such information may be obtained in the website of exporter(s).

It is important that detailed information be provided regarding any differences between the allegedly subsidised product and the like product produced by the Ukrainian industry (section B-2.4). These differences may affect a proper comparison and therefore affect the injury assessment.

## 6.3 Interested parties

The following comments are relevant to the questions in **Section C** of the Application Form. A common reply to this section may be provided, except for question C-1.4 which must be replied separately by each applicant company.

The Department is obliged to inform all interested parties of the initiation of an investigation. If it is subsequently shown that there are interested parties, e.g.

exporters, that have not been properly informed of the investigation, this may lead to a significant retardation in the finalisation of any investigation. It is thus important not only to provide the names of exporters and importers, but also their contact details. It is advisable that you specifically conduct an Internet search for producers/exporters of the allegedly subsidised product in each exporting country and for importers in Ukraine. You should include in the application documentary proof indicating how their identities were established, e.g. printouts from Internet web pages.

It is also very important to submit details on the identity and contact details of all Ukrainian producers of the like product. Industry standing under Article 15(8) of the Law cannot be assessed without this information. In this regard, it must be shown that producers expressly supporting the application should account for no less than 25% of the total production volume of the like product.<sup>1</sup> Accordingly, the Department will require not only contact details of the producers, but will also of the actual production volumes.

## 6.4 Subsidisation

The following comments are relevant to the questions in **Section D** of the Application Form. A common reply to this section may be provided.

The applicant is required to identify the programmes covered by the application and then, for each programme, submit information showing that it is a specific subsidy (see subsidy definition above). Finally, the applicant will have to estimate the subsidy amount.

### 6.4.1 List of subsidy programmes (*Section D-2.1 of the Application Form*)

Please list of the programmes that you understand the suppliers in the country(ies) covered by the application are using. Information on these programmes can be obtained from a variety of sources. First, and foremost, you are advised to check whether any of the main users of the anti-subsidy instrument (Australia, Canada, the European Union and the United States) has already investigated that product. Check the websites of their investigating authorities.<sup>2</sup>

You may also check petitions, where they are available. This is for instance the case in Canada<sup>3</sup> and the United States.<sup>4</sup> Australia's information may also be accessed freely.<sup>5</sup> Public applications are particularly useful because they allow obtaining quickly the supporting evidence to prove the existence of subsidies and the specific companies/industries that may avail of them.

<sup>1</sup> This provision contemplates a second test that must also be met.

<sup>2</sup> Australia: <http://www.adcommission.gov.au/cases/Pages/default.aspx>, Canada: <http://www.cbsa-asfc.gc.ca/sima-lmsi/hist-eng.html>, European Union: <http://trade.ec.europa.eu/tidi/completed.cfm> and United States: <http://enforcement.trade.gov/stats/inv-initiations-2000-current.html>

<sup>3</sup> The list of ongoing investigations can be accessed at <http://www.cbsa-asfc.gc.ca/sima-lmsi/i-e/menu-eng.html> Then, select the desired investigation, e.g. Carbon and alloy steel line pipe and then "List of exhibits and information". Inside, the public versions of the petitions are available for download.

<sup>4</sup> US petitions are available in the page <https://edis.usitc.gov/edis3-external/Login.html?jsessionid=0A884511EC5D615A56DA622CC2D639CB> Free registration is required to access EDIS. Once inside, the desired investigation must be selected and all public documents, including petitions, can be accessed and downloaded.

<sup>5</sup> See <http://www.adcommission.gov.au/cases/Pages/default.aspx> Go to "Public Record" of the relevant investigation. Non-confidential documents, including petitions, can be downloaded.

The WTO website can also be useful in this search. First, you can check the 6-monthly reports on countervailing actions that Members are required to submit to the WTO. These reports inform of all anti-subsidy investigations initiated, as well as of countervailing measures imposed. They can be accessed at the following WTO page: [http://www.wto.org/english/tratop\\_e/scm\\_e/scm\\_e.htm](http://www.wto.org/english/tratop_e/scm_e/scm_e.htm) Another source of information are the bi-annual notifications that each Member must submit to the SCM Committee listing all subsidies under its jurisdiction.<sup>6</sup> These notifications can also be accessed through the link above. Other WTO-related documents that help identifying subsidy programmes are the minutes of the meetings of the SCM Committee, available at the above link, as well as the Trade Policy Review reports, available at [http://www.wto.org/english/tratop\\_e/tpr\\_e/tp\\_rep\\_e.htm#chronologically](http://www.wto.org/english/tratop_e/tpr_e/tp_rep_e.htm#chronologically).

Information about subsidies may also be obtained from publicly available reports. Some countries monitor regularly the existence of subsidy programmes and make these reports available through the internet.<sup>7</sup> Research by international organisations, non-governmental organisations (e.g. Global Subsidies Initiative, available at <http://www.globalsubsidies.org/>) or consulting firms (e.g. KPMG and PwC) may also provide insight in subsidy programmes. Press-clippings often provide hints of subsidy programmes.

Finally, examination of the key laws of the country(ies) covered by the application should also permit obtaining information regarding subsidy programmes. Legislation is often published in official gazettes, many of which are accessible through the internet. A list of official gazettes, with links to access them, can be found at [https://en.wikipedia.org/wiki/List\\_of\\_government\\_gazettes](https://en.wikipedia.org/wiki/List_of_government_gazettes)

In case the application would cover subsidies in the European Union, normative acts adopted by the EU institutions are to be found at the following website: <http://eur-lex.europa.eu/en/legis/index.htm>. In addition, the website of the Competition Directorate contains a search engine of state aid cases, through which one can obtain information on national subsidies investigated by the European Commission. This is available at [http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy\\_area\\_id=3](http://ec.europa.eu/competition/elojade/isef/index.cfm?clear=1&policy_area_id=3).

#### 6.4.2 Financial contribution (*Section D-2.2 of the Application Form*)

Once you have identified the programmes to be targeted, you have to *prima facie* demonstrate that each programme, separately, is a subsidy. To determine the existence of a subsidy, you must first prove the existence of a financial contribution. The following types of financial contributions exist:

- (a)(1) there is a *financial contribution* by a government or any public body within the territory of a Member (referred to in this Agreement as "government"), i.e. where:
- (i) a government practice involves a *direct transfer of funds* (e.g. grants, loans, and equity infusion), *potential direct transfers of funds or liabilities* (e.g. loan guarantees);
  - (ii) *government revenue that is otherwise due is foregone or not collected* (e.g. fiscal incentives such as tax credits)<sup>1</sup>;
  - (iii) *a government provides goods or services* other than general infrastructure, or *purchases goods*;
  - (iv) *a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above*

<sup>6</sup> Often, though, subsidy programmes are not notified.

<sup>7</sup> The US keeps a register of subsidies, accessible at [http://esl.trade.gov/esel/groups/public/documents/web\\_resources/search-page.hcsp](http://esl.trade.gov/esel/groups/public/documents/web_resources/search-page.hcsp). Australia also has a similar publicly accessible register, accessible at <http://www.adcommission.gov.au/adssystem/referencematerial/Pages/Subsidies-Register.aspx>

*which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;*

or

(a)(2) there is any form of *income or price support* in the sense of Article XVI of GATT 1994;

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<sup>1</sup> In accordance with the provisions of Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III of this Agreement, the exemption of an exported product from duties or taxes borne by the like product when destined for domestic consumption, or the remission of such duties or taxes in amounts not in excess of those which have accrued, shall not be deemed to be a subsidy.

For instance, a programme which contemplates the provision of bank loans constitutes a financial contribution because giving a loan entails the direct provision of funds. If a company does not have to pay for instance a tax that is otherwise due (i.e. that other companies have to pay), there is a financial contribution as income is foregone or not collected. An exemption from payment of import duties normally constitutes a financial contribution. In this case, however, there is an exception to this rule which is contained in footnote 1, cited in the box above. A third example of a financial contribution is the provision of goods or services.

Where a programme is not *prima facie* demonstrated to fall under anyone of the types of financial contributions listed in the above-quoted provision, that programme does not constitute a financial contribution and hence the Department cannot investigate it.

6.4.3 *By a government or any public body (Section D-2.3 of the Application Form)*  
Only programmes involving a financial contribution by a government or a public body can be investigated by the Department. Government is defined as any “legislative or executive authority of a country of origin or exporting country”. What is important to take into account in the above definition is that “government” includes all public authorities in the country(ies) at stake, and not only the central government. Thus, programmes set up or maintained by sub-central, including municipal, authorities may be subject to anti-subsidy investigations.

In turn, public body is neither defined under the Law nor in the WTO SCM Agreement. The WTO’s Appellate Body (AB) has found that “public body” must be an entity that possesses, exercises or is vested with governmental authority. The AB has further stated that evidence that an entity is, in fact, exercising governmental functions may serve as evidence that it possesses or has been vested with governmental authority, particularly where such evidence points to a sustained and systematic practice.

In line with the above, the AB has indicated that the existence of formal links – for example, the mere fact that a government is the majority shareholder of an entity – is not sufficient to demonstrate that the government exercises meaningful control over the conduct of that entity, much less that the government has bestowed it with governmental authority. Hence, proof of Government shareholding, alone, will not suffice to demonstrate that a particular entity constitutes a “public body”. In sum, in case you intend to argue that a financial contribution is made by a “public body”, please gather as much information as possible to support a conclusion that the entity at stake possesses, exercises or is vested with governmental authority.

Financial contributions between private companies are excluded from the sphere of

measures that can be investigated by the Department because there is no involvement from a government or any public body. An exception to this rule occurs when private companies act upon the direction or entrustment of a government or a public institution. In sum, if a private bank provides a loan to a private company, there is no government involvement and hence this financial contribution – under the form of the provision of a loan – cannot be examined by the Department. This is not the case, however, where it could be proven that the private bank granted the loan to the private company because of pressure from the government. Where this situation occurs, even if the measure is between private parties, the Department could investigate it and impose countervailing duties based on it if other requirements are met (see below).

#### 6.4.4 *Benefit (Section D-2.4 of the Application Form)*

Benefit is a separate and different legal element from financial contribution. While the financial contribution requirement is met if a programme falls under any of the categories listed in the provisions cited in section 6.4.2 above, the determination of the existence of a benefit requires normally an economic analysis. Sometimes these analyses will have to be sophisticated, for instance when assessing whether a benefit has been conferred by way of government purchase of shares in a private company.

When will a financial contribution confer a benefit? According to the AB, a financial contribution will only confer a ‘benefit’, *i.e.*, an advantage, if it is provided on terms that are more advantageous than those that would have been available to the recipient on the market. Thus, for instance in order to determine whether a financial contribution in the form of a loan granted by a public bank confers a benefit to Company A, you should first try to obtain information on the interest rate that the public bank charges to Company A and second, on the interest rate that a commercial bank in that country would charge for a comparable loan to Company A. If the interest rate applied by the public bank is lower than that applied by the commercial bank, the financial contribution would confer a benefit to Company A.

In case that the financial contribution took the form of the government not collecting taxes, you would first have to provide information on the taxes normally payable by a company in the country at stake and then, on the tax rate effectively paid by Company A. If the tax rate applied to Company A were to be lower than that normally applied to other companies, the financial contribution would confer a benefit to Company A.

Where a company receives a grant, the benefit is automatic.

How to obtain information necessary to prove the benefit? It depends on the nature of the programme.

- Generally, programmes entailing tax reductions or exemptions only require that the applicant find the “normal” tax rate. Reports published annually by consulting firms such as PwC or KPMG for most countries in the world should be examined. World Bank’s “Doing business in...” is another option.
- Where the programme takes the form of an exemption from payment (or reduction) of customs duties, the customs dept. of the country at stake may be a good starting point to find the customs duties generally applicable. The WTO’s [Tariff Analysis Online](#) and [Tariff Download Facility](#) are online tools on bound and applied tariffs.<sup>8</sup>

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<sup>8</sup> The EU has publicly available information on applied tariffs all over the world, through its website <http://madb.europa.eu/mkaccdb2/indexPubli.htm> JETRO also has tariff information in its website: <http://www.jetro.go.jp/en/jetro/library/tariff/>

- Where a public company offers goods or services in the market, you will have to try to obtain first the price at which the goods or services are sold by the public company and then find information regarding the price at which similar goods or services are sold by private companies (if private companies are active at all).
- If you find problems in gathering the required supporting data, please contact the Department.

#### 6.4.5 *Specific (Section D-2.5 of the Application Form)*

Subsidies generally available to all companies cannot be attacked. Only specific subsidies are actionable under the Law. A subsidy is specific in the following circumstances:

First, when the subsidy is limited to one or more companies;

Second, when it is limited to an industry or a group of industries (but is not generally available);

Third, when it is specific to companies located in one or more regions of the country (but is not generally available); and

Fourth, when the subsidy is contingent upon export performance (export subsidies) or contingent upon the use of domestic over imported goods (import substitution subsidies).

What happens if in law a subsidy does not meet any of the above four criteria? Can it still be considered to be specific? Yes. The SCM Agreement and the Law set forth that even when a subsidy is not *in law* specific, it can be found to be specific where “there are reasons to believe that the subsidy may in fact be specific”. The factors to be taken into account are: 1) use of a subsidy programme by a limited number of certain enterprises, 2) predominant use by certain enterprises, 3) the granting of disproportionately large amounts of subsidy to certain enterprises, and 4) the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. Press-clippings can help support your claims, as well as statistics relating to the companies/industries that avail of certain subsidy programmes. If you find problems in gathering the required supporting data, please contact the Department.

#### 6.4.6 *Calculation of the subsidy rate (Section D-3 of the Application Form)*

The final step is to estimate the aggregate subsidy rate for all the programmes found to constitute specific subsidies. The amount of subsidy should be determined separately for each programme, depending on the facts. This is explained with a hypothetical case in which an exporter has availed of two programmes:

The first programme is contingent upon export performance. Through this programme, a company exporting more than 30% of its output is exempt from paying corporate income tax. The taxable benefits were USD1 million and the normal tax rate is 30%. The company should have therefore paid USD300,000 as corporate income tax. This is the amount of the subsidy (because it did not have to pay anything at all). The subsidy rate for this particular programme results from dividing the subsidy amount (USD300,000) by the export turnover of the company (because this is an export subsidy). If the total export turnover is USD15 million, the subsidy rate will be  $0.3/15 = 2\%$ .

The second programme consists of a grant of USD100,000 to attend an export fair in Ukraine. This fair concerns cheese, the product for which you request the start of the investigation. Again, this is an export subsidy. The amount of the subsidy is equivalent to the grant, i.e. USD100,000. How will you calculate the subsidy rate if the exporter in addition to exporting cheese also exports other dairy products? The subsidy is aimed at fostering exports of cheese. Hence, the subsidy amount should be divided with the export turnover for cheese products.

Say that, out of the USD15million in exports, USD3million corresponds to cheese products. The subsidy rate will therefore be  $0.1/3 = 3.33\%$ .

The aggregate subsidy rate therefore is  $2\% + 3.33\% = 5.33\%$ .

The above is a theoretical example. In real life, you may not be in a position to have access to all the information which would allow making such an accurate calculation. The standard set forth in the Law is not one of perfection. The Department will only request that you submit the information that is reasonably accessible to you, taking into account the specifics of each case. If you find problems in calculating the amount of subsidisation, please contact the Department.

No investigation can be initiated where the subsidy rate is *de minimis*. Unlike dumping, the *de minimis* threshold varies depending on the stage of development of the country(ies). Thus, for developed countries, no investigation can be initiated if the subsidy margin is less than 1%. In case of developing countries, investigations may not be initiated in case the subsidy rate is less than 2%.

## 6.5 Material injury or threat thereof

The following comments are relevant to the questions in **Section E** of the Application Form. The information requested in sections E-2 (company specific production data), E-5 (average selling price data and, if applicable, cost of production data, both on a per-type or model basis), E-6 to E-13 is to be submitted by each applicant company.

A *prima facie* case that the Ukrainian producers submitting the application are experiencing material injury, or threat thereof, must be established for the purpose of initiation. If the investigation is initiated, all or a major proportion of the Ukrainian producers of the like product must participate in the investigation by providing a reply to the questionnaire that the Department will send them. Failure to do so, the investigation **will have to be terminated**, in compliance with the Law and the WTO SCM Agreement to which Ukraine is signatory.

In terms of its national and international obligations, the Department must consider the evolution of the **volume of the allegedly subsidised imports into Ukraine**. For this reason statistics from the [State Statistics Service of Ukraine](#) must be submitted. Please indicate if the tariff heading(s) under which the allegedly subsidised product is classified covers other products. If so, please estimate the volume of imports of the allegedly subsidised product. You will need to justify the estimation.

Secondly, you must provide information on the **effect of the imports of the allegedly subsidised product on the prices of the like product manufactured and sold by the Ukrainian producers**. This information should allow the Department to analyse if imports caused a decrease of the prices, or impeded the increase of the prices, of the domestic industry or if prices of imports are below the prices of the domestic industry (i.e. if prices of imports undercut prices of the Ukrainian industry).

In addition, the Department must evaluate the **impact of the imports on the performance of the domestic industry**. The Law enumerates 14 variables which must be examined in order to assess that impact. While it is not absolutely required that the applicant submit definitive information on all these factors prior to initiation, their submission will allow the Ministry to take a solid decision on whether a *prima facie* case of material injury has been made. Where the domestic industry only

produces a single product, the information to be provided should be readily available from its financial statements and production records. If the domestic industry produces various products, the information for the like product will have to be separated from that of other products manufactured and sold by the applicant in Ukraine. If you have questions on how to do so, please contact the Department for assistance.

Please reply to all questions in the Application Form, submitting evidence that support your allegations. If you have questions concerning them, please contact the Department.

If the applicant considers that it is not yet suffering actual injury, but that a threat of material injury does exist, then the applicant is requested to reply to the questions posed in section E-14.

## 6.6 Causality

The following comments are relevant to the questions in **Section F** of the Application Form. Section F-1 is common, while section F-2 should be replied by each applicant company.

The applicant must submit evidence to show *prima facie* that the injury or threat thereof is caused by the subsidised imports. It is therefore important to draw links between the presence of the allegedly subsidised product into the Ukrainian market and the injury claimed to be suffered by the applicant. Normally, a clear link is visible where imports of the allegedly subsidised product increase and there is an equal decrease in the applicant's sales. The presence of price undercutting reinforces the causal link. A decrease in the profits for the like product, or any losses incurred in the sales thereof, following the appearance of the allegedly subsidised imports, are also strong causality indicators.

The applicant is, however, also required to indicate which other factors contributed to the injury. This might include natural disasters, strikes, changes in consumer demand, technological advances, decreased export volumes, etc.

## 8. INVESTIGATION PROCESS

Once received, the application will go through a number of processes prior to initiation. First, the Department will have to determine whether the application is properly documented. During this process the Department will scrutinise all information supplied in the Application Form and specifically investigate whether the necessary substantiating documentation has been appended to the application. It will therefore save considerable time if you ensure that you have submitted copies of all supporting documentation on which you relied in completing the application.

Once the Department is satisfied that it has received a properly documented application, it may arrange for verification of the information contained in the application to confirm its accurateness and completeness. It is therefore important that you maintain copies of all working documents and files used in the preparation of the application. The Department will also of its own conduct further research, as it is required to do in terms of Article 15(3) of the Law, to confirm whether the information on subsidies and injury appear to be accurate and whether all interested parties have been identified.

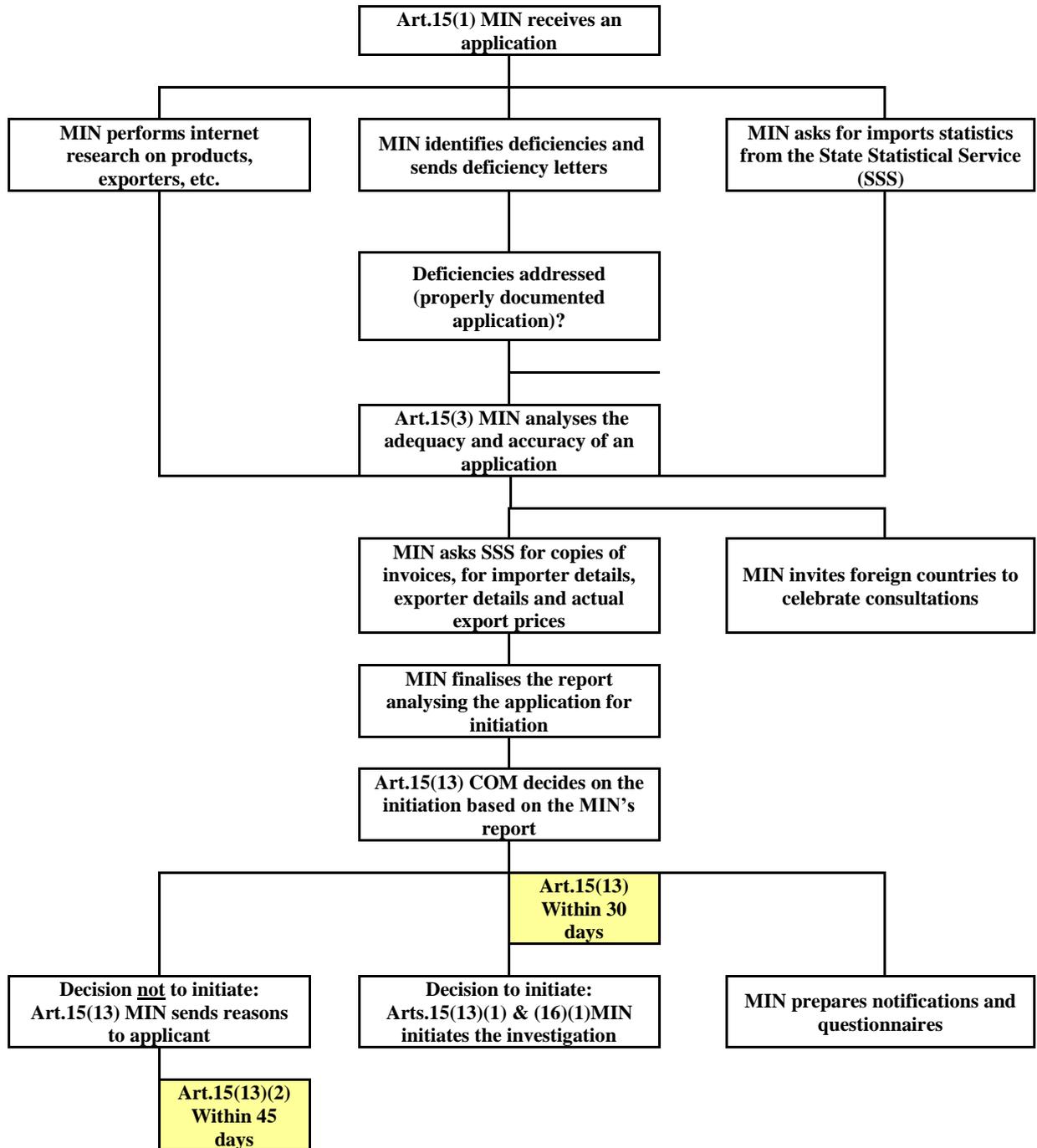
Once the Department is satisfied that all requirements have been met and that the application establishes a *prima facie* case of injurious subsidisation, it will submit the result of its analyses to the Commission which will take the decision to initiate (or not) the anti-subsidy investigation. All interested parties will be informed of the investigation and asked to participate. Domestic producers of the like product will be sent an injury questionnaire to elicit information that had not submitted prior to initiation and update the information contained in the application. Again, the more complete your application, the less pressure will be placed on you to supply the information within a reasonably short period after initiation of an investigation. After receipt of all parties' comments, you will have the opportunity to access the public file kept by the Department to study the non-confidential responses of all interested parties. Following the Department's analyses, the Commission may proceed to a preliminary finding, which could result in the imposition of provisional duties.

The full investigation process is as outlined below<sup>9</sup>:

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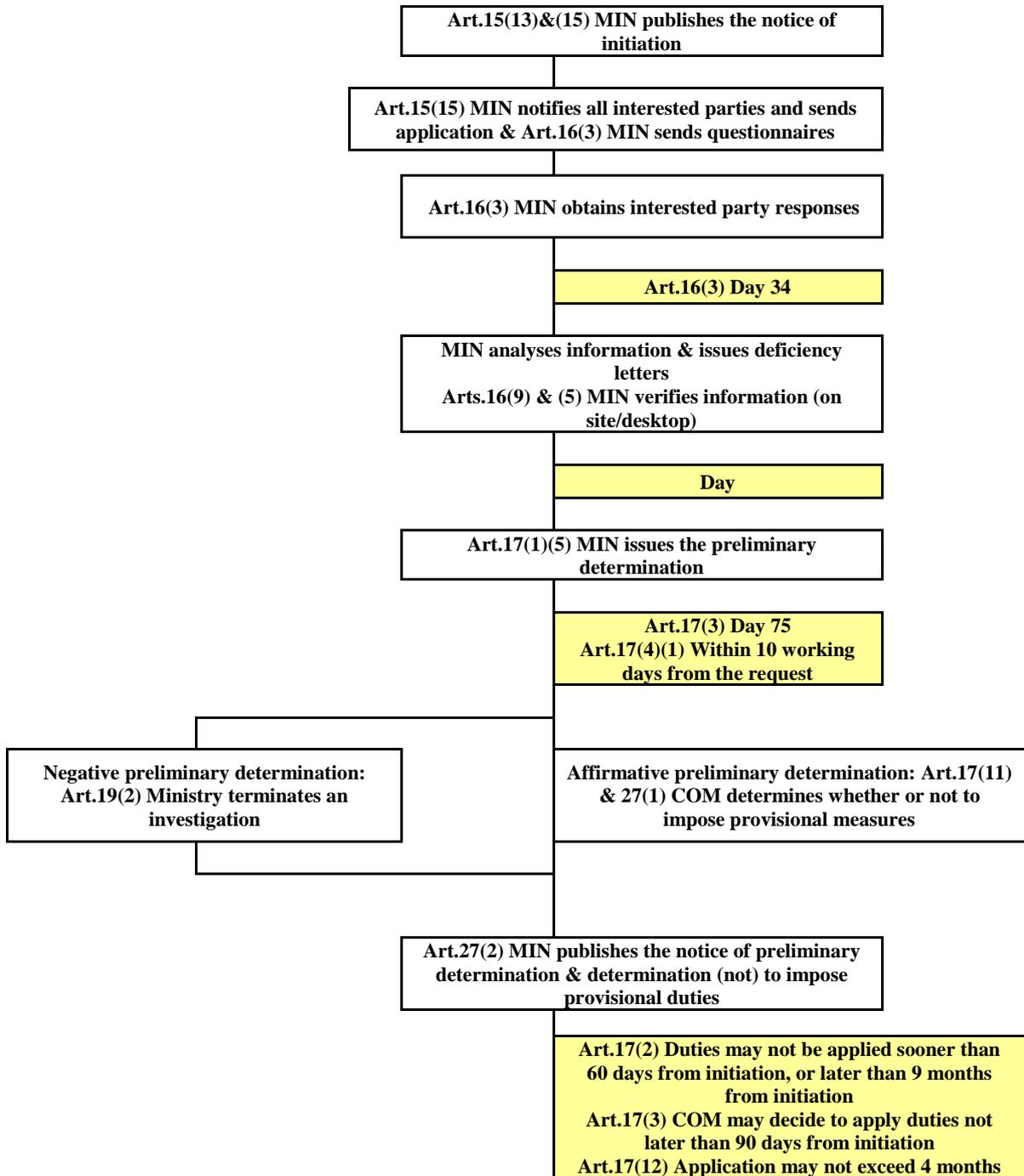
<sup>9</sup> It reflects the deadlines without extensions. Where possible, reference is made to the relevant provision of the Law.

## PRE-INITIATION PROCEDURE



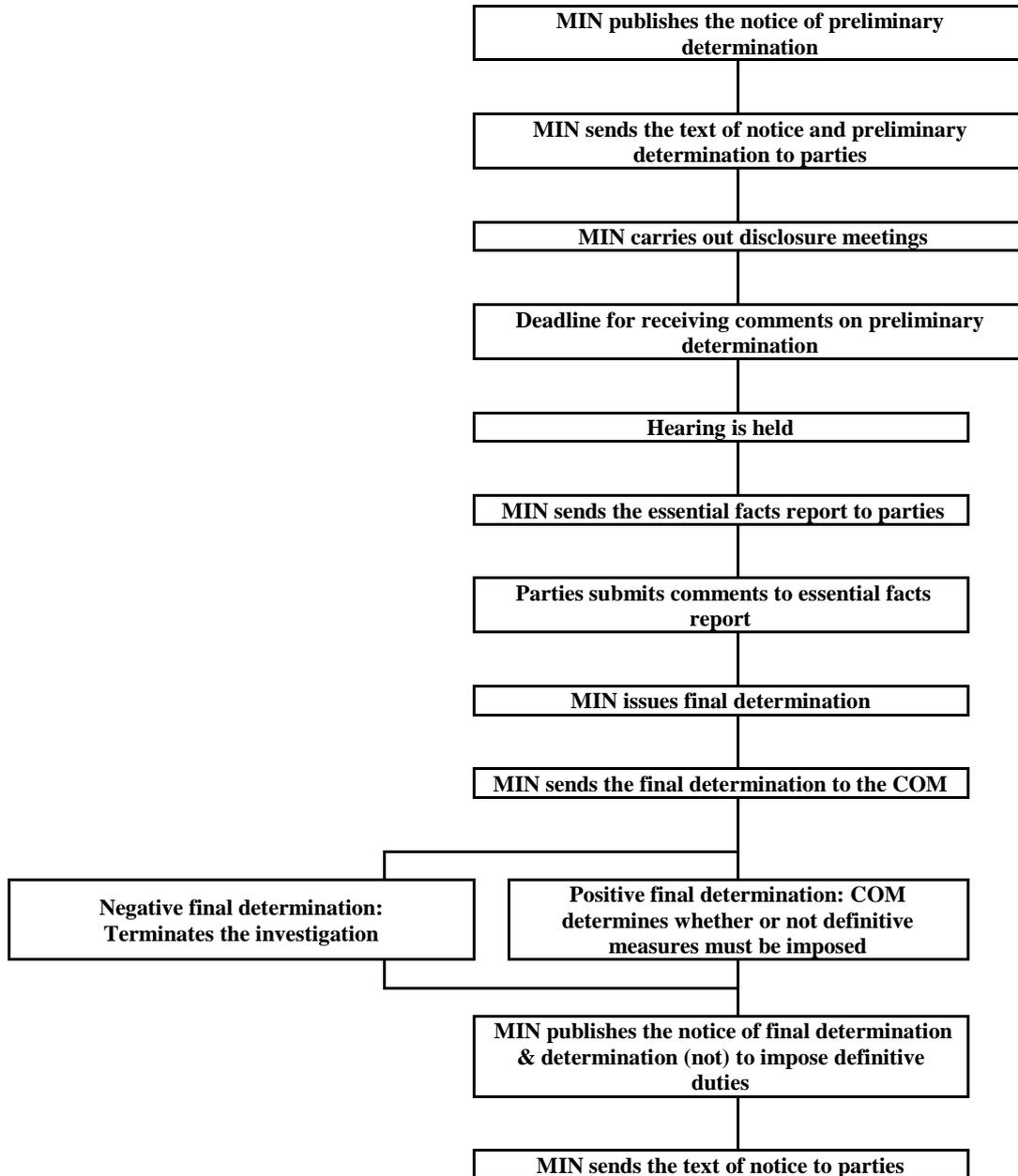
Acronyms: COM (Commission), MIN (Ministry of Economic Development and Trade), SSS (State Statistical Service)

## PRELIMINARY INVESTIGATION PROCEDURE



Acronyms: COM (Commission), MIN (Ministry of Economic Development and Trade)

## FINAL INVESTIGATION PROCEDURE



Acronyms: COM (Commission), MIN (Ministry of Economic Development and Trade)