Council Implementing Regulation (EU) No 285/2013 of 21 March 2013 terminating the partial reopening of anti-dumping investigation concerning imports of ethanolamines originating in the United States of America and terminating the expiry review pursuant to Article 11(2) and the partial interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009

COUNCIL IMPLEMENTING REGULATION (EU) No 285/2013

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community[(1)] ('the basic Regulation'), and in particular Article 9(2) and Article 11(2) and (3) thereof,

Having regard to the proposal submitted by the European Commission after having consulted the Advisory Committee,

Whereas:

1. **PROCEDURE**

1.1. **Existing measures**

(1) On 2 February 1994, the Council imposed, by Regulation (EC) No 229/94[(2)] ('the original Regulation'), definitive anti-dumping duties on imports of ethanolamines ('product concerned') originating in the United States of America ('USA'). On 20 July 2000 and following an expiry review investigation, these measures were extended for five years by Council Regulation (EC) No 1603/2000[(3)] (the 'first expiry review Regulation').

(2) On 23 October 2006, following the second expiry review investigation, the measures were extended for five more years by Council Regulation (EC) No 1583/2006[(4)] (the 'second expiry review Regulation').

(3) On 19 January 2010 and following a third expiry review investigation, the anti-dumping duties on imports of ethanolamines originating in the USA were imposed for two more years by Council Implementing Regulation (EU) No 54/2010[(5)] (the 'third expiry review Regulation').

(4) On 9 April 2010, The Dow Chemical Company ('Dow Chemical') filed an application for partial annulment of Implementing Regulation (EU) No 54/2010.

Changes to legislation: *There are currently no known outstanding effects for the Council Implementing Regulation (EU) No 285/2013. (See end of Document for details)*

(5) On 12 March 2011, the European Commission (the 'Commission') published a Notice of impending expiry in the Official Journal[6].

(6) Following a request lodged by BASF AG, Ineos Europe AG, and Sasol Germany GmbH (the 'Union industry'), the Commission initiated an expiry review on 21 January 2012 (the 'fourth expiry review')[7].

(7) A partial interim review limited to dumping as regards Dow Chemical was initiated on 11 April 2012[8].

(8) Following an application lodged[9] on 9 April 2010, the General Court annulled by its judgment of 8 May 2012 in Case T-158/10[10] (the 'Judgment'), the third expiry review Regulation in so far as it concerns Dow Chemical.

1.2. **Partial reopening**

(9) Following the Judgment, a notice[11] was published concerning the partial reopening of the third expiry review investigation concerning imports of ethanolamines originating in the USA. The reopening was limited in scope to the implementation of the Judgment as far as the determination of a likelihood of a continuation or recurrence of dumping during the review investigation period (the 'RIP'), including the spare production capacity of ethanolamines in the USA, is concerned.

(10) In that notice, parties were informed that, in view of the Judgment, imports into the European Union of ethanolamines manufactured by Dow Chemical are no longer subject to the anti-dumping duties imposed by the third expiry review Regulation and that definitive anti-dumping duties paid pursuant to that Regulation on imports of ethanolamines should be repaid or remitted in accordance with the applicable customs regulation.

(11) The Commission officially advised the exporting producers, the importers and users known to be concerned and the Union industry of the partial reopening of the investigation. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the notice.

(12) All parties who so requested within that time limit, and who demonstrated that there were particular reasons why they should be heard, were granted the opportunity to be heard.

(13) Representations were received from two exporting producers, three Union producers and a user of the product concerned.

2. **IMPLEMENTATION OF THE JUDGMENT**

2.1. **Preliminary remark**

(14) It is recalled that the reason for the annulment of the contested Regulation was the General Court's finding that the third expiry review Regulation contained two errors of assessment: (i) a finding of continued dumping during RIP and, therefore, on that basis, a finding of a likelihood of continuation of dumping; and (ii) the determination

that the spare production capacity of ethanolamines in the United States amounted to 60 000 tonnes.

2.2. **Comments of interested parties**

(15) The Union industry acknowledged that the Judgment questioned the methodologies employed by the Institutions to quantify the spare capacity production in the USA. However, the Union industry maintained its position that basing the actual production capacity on 90 % of the nameplate capacity, as the institutions had done, is overly conservative as it is common and accepted for companies to exceed the nameplate capacity. Basing themselves on published market data allegedly sourced from PCI Xylenes & Polyesters ('PCI'), they concluded that there was indeed spare capacity in 2008 and onwards.

(16) Moreover, the Union industry considered that market conditions had not changed materially since the publication of the third expiry review Regulation and found several reasons to conclude that there is a likelihood of a recurrence of dumping. In this respect, it invoked the continuation of the US production capacity over domestic demand since the RIP; the material capacity expansions in third countries after 2009 which would have made US export markets increasingly self-sufficient; the existence of anti-dumping measures imposed or likely to be imposed soon in third countries; the increase of MEG (monoethylene glycol) capacity production from 2009 onwards; and the proposal in the USA to include some of the ethanolamines in the list of products with potential harmful effects to health which could ultimately have an impact in domestic consumption.

(17) Dow Chemical expressed its doubts about the legality of the re-opening of the investigation, arguing that there is no specific provision in the basic Regulation allowing for that. This exporting producer also alleged that the re-opening would be in conflict with the 15-month statutory deadline set out in Article 11(5) of the basic Regulation for the completion of review investigations.

(18) Dow Chemical further claimed that the Judgment would not require any implementing measure and that the Commission could not legally remedy the aspects of the contested Regulation since each of the substantive grounds that led to the adoption of the Regulation was either annulled by the General Court or contested. Dow Chemical therefore considered that the only legal way to remedy those aspects of the third expiry review Regulation would be to repeal the existing measures.

(19) A user in the Union, Stepan Europe ('Stepan'), submitted that the legal consequence of the judgment could only be that the measures imposed by the third expiry review Regulation should be withdrawn as they had been imposed on the basis of an erroneous analysis. Similar views were expressed by the exporting producer Huntsman Petrochemical Corporation LLC ('Huntsman'). Indeed, Stepan and Huntsman argued that the Court held that, during the RIP, the country-wide dumping margin was negative and therefore no continuation of dumping could be established. Stepan considered that the institutions should hence have examined if there was a

likelihood of recurrence of dumping; yet the third expiry review Regulation had been silent on this.

(20) Moreover, Stepan stressed that, would the notion of continuation of dumping be interpreted on an individual company basis, the institutions should have concluded that there was no continuation of dumping for Dow Chemical as, according to the Court, the company represented more than 85 % of all imports from the USA, and therefore they should have considered whether dumping by Dow Chemical was likely to recur. For the other exporting companies, it was established that there had been dumping and therefore the institutions should have established whether dumping was likely to continue. The likelihood of continuation of dumping analysis was mainly based, according to Stepan, on a country–wide spare capacity in the USA of 60 000 tonnes. Given the Court's finding that the institutions erred in assessing the spare capacity in the USA and given that, according to Stepan, the spare capacity was closer to at the most 8 000 tonnes, it was no longer possible to sustain that the other exporting companies were likely to continue dumping. The institutions would have needed to also analyse and establish the likelihood of recurrence of dumping.

(21) Hunstman also based its analysis on the assumption that the Judgment confirmed that there was no spare capacity in the USA during the RIP and that it was therefore unlikely that an increased amount of ethanolamines would be exported into the Union on that basis. They claimed that it was therefore also not necessary to analyse other factors such as the impact of trade defence measures in third countries, the possible development of demand in the USA and in other markets or the downward pressure of prices. Moreover, Huntsman argued that, in the light of the Court's finding of the lack of spare capacity in the USA during the RIP, it was no longer possible for the Commission to re-analyse the likelihood of recurrence of dumping and of injury and to conclude in the framework of this partial re-opening that there was a likelihood of recurrence of injurious dumping. Yet, were the Commission able to revisit the likelihood of recurrence of dumping and of injury, Huntsman considered that there would be no evidence to demonstrate that the requirements of Article 11(2) of the basic Regulation would be met. As regards the likelihood of recurrence of dumping, Huntsman opined that, on the basis of the finding that during the RIP there was no dumping for Dow Chemical, the biggest exporter by far, there was no likelihood of recurrence of dumping on a country-wide basis after the RIP if the anti-dumping duties would be withdrawn.

(22) According to Huntsman, the recurrence of injury would be unlikely in view of the absence of unused production capacity which results in very little leeway for increasing exports to the Union after the RIP. Huntsman maintained that such conclusion is corroborated by the fact that, according to the SRI report[(12)], the expected growth of consumption in the USA does not differ significantly from that of the other markets.

(23) Huntsman raised that if the Union industry would have suffered from any injury, this would have been attributed to the effects of the economic crisis and not to imports from the USA. The mere exacerbation of the negative impact of the crisis

through imports could not permit a finding of a likely recurrence of injury caused by the mentioned imports.

2.3. **Analysis of comments**

(24) In respect of the alleged illegality of the reopening (recitals 17-18), it is recalled that in case C-458/98 P (the 'IPS judgment'), the Court of Justice recognised that in cases where a proceeding consists of several administrative steps, the annulment of one of those steps does not annul the complete proceeding. The anti-dumping proceeding is an example of such a multi-step proceeding. Consequently, the annulment of the amending Regulation in relation to one party does not imply the annulment of the entire procedure prior to the adoption of that Regulation[(13)]. Moreover, according to Article 266 of the Treaty on the Functioning of the European Union (TFEU), the Union institutions are required to comply with the judgment. In the light of the above, the claim that there is no legal basis for the partial reopening of a review investigation was found to be unwarranted.

(25) The claim that the introduction of deadlines to conclude anti-dumping investigations prevents the Commission from extending the investigation beyond the 15-months statutory limit (recital 17 above) was also found to be unwarranted. It is considered that this deadline is not relevant for the implementation of a Court judgment. Indeed, such deadline only governs the completion of the initial review investigation from the date of initiation to the date of definitive action, and does not concern any subsequent action that might have to be taken for instance as a result of judicial review. The consequence of accepting such claim would make it impossible for the institutions to take account of the General Court's findings (as Article 266 TFEU requires). Indeed, the General Court's judgment will always be handed down at a time when the deadline for the investigation has expired. Furthermore, it is noted that any other interpretation would mean that, for example, a successful legal action brought by one party would be without any practical effect for that party if the expiry of the time limit to conclude the original investigation would not permit the implementation of a judgment of the General Court. This would be at odds with the principle that all parties should have the right to effective judicial review.

(26) Concerning the claim that the Commission would not be able to legally remedy the errors of assessment found to be contained in the contested Regulation and that the only mean to implement the judgment is to repeal the existing measures (recital 18 above), the following should be noted. The Court has already established that the annulment of a Regulation also implies the possibility of remedying the aspects of the amending Regulation which led to its annulment, while leaving unchanged the uncontested parts which are not affected by the judgment — as was held in the IPS judgment. The institutions are therefore required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part[(14)]. The procedure for replacing an illegal measure may thus be resumed[(15)]. Hence, this claim is also considered to be unwarranted.