Council Implementing Regulation (EU) No 824/2011 of 12 August 2011 terminating the partial reopening of the anti-dumping interim review investigation concerning imports of polyethylene terephthalate (PET) film originating in India

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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 and Article 11(3) and (6) thereof,

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

Whereas:

1. **PROCEDURE**

1.1. **Existing measures**

(1) By Regulation (EC) No 1676/2001[(2)] (the original Regulation) the Council imposed a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) film originating, inter alia, in India. On 8 March 2006, by Council Regulation (EC) No 366/2006[(3)] (the amending Regulation) and following a partial interim review investigation, the anti-dumping duty on imports of PET film originating in India was amended.

(2) On 6 November 2007, by Council Regulation (EC) No 1292/2007[(4)] (the review Regulation) and following an expiry review the definitive anti-dumping duty on imports of PET film originating in India was confirmed.

(3) MTZ Polyfilms Ltd (MTZ Polyfilms), an Indian exporting producer which cooperated with the above investigations, obtained an individual duty rate by the original Regulation. This duty rate was revised by the amending Regulation.

(4) On 19 May 2006, MTZ Polyfilms lodged an application[(5)] at the General Court ('the Court of First Instance' before the entry into force of the Lisbon Treaty) seeking the annulment of the amending Regulation in so far as it applies to MTZ Polyfilms.

(5) By its judgment of 17 November 2009 in Case T-143/06[(6)], the General Court annulled the amending Regulation to the extent that it imposed an anti-dumping duty on MTZ Polyfilms (the judgment). The General Court found that the amending Regulation

Changes to legislation: *There are currently no known outstanding effects for the Council Implementing Regulation (EU) No 824/2011. (See end of Document for details)*

was adopted on an incorrect legal basis. It considered, in particular, that Article 11(3) of the basic Regulation could not serve as a legal basis allowing the institutions, when determining the export price, not to apply the methodology prescribed by Article 2(8) and (9) of the basic Regulation.

(6) On 13 May 2011, by Implementing Regulation (EU) No 469/2011[(7)] the definitive anti-dumping duty on imports of PET film originating in India was amended in view of the expiry of the up till then parallel countervailing duty on 9 March 2011.

1.2. **Partial reopening**

(7) On 20 May 2010 a notice[(8)] was published in the *Official Journal of the European Union*. In the notice parties were informed that, in view of the judgment of the General Court mentioned in recital 5, imports into the European Union of PET film manufactured by MTZ Polyfilms were no longer subject to the anti-dumping measures imposed by the amending Regulation and the review Regulation, and that definitive anti-dumping duties paid pursuant to these regulations for the product concerned manufactured by MTZ Polyfilms should be repaid or remitted.

(8) The notice also partially reopened the relevant anti-dumping interim review investigation concerning imports of PET film originating, inter alia, in India in order to implement the above judgment of the General Court as far as MTZ Polyfilms is concerned.

(9) Moreover, by the same notice, MTZ Polyfilms was invited, should it consider that aspects of the findings which led to the adoption of the amending Regulation other than the one mentioned in recital 5 were no longer valid, to present a duly substantiated request for review in accordance with the provisions of Article 11(3) of the basic Regulation.

(10) The Commission officially advised MTZ Polyfilms, the representatives of the exporting country, the other Indian exporting producers which cooperated in the investigation that led to the adoption of the amending Regulation, 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 be heard within the time limit set out in the notice.

(11) Representations were received from two exporting producers in India (one being the party directly concerned, i.e. MTZ Polyfilms) and the Union industry.

2. **IMPLEMENTATION OF THE JUDGMENT**

2.1. **Preliminary remark**

(12) As a preliminary remark it is important to note that MTZ Polyfilms did not reply to the invitation referred to in recital 9.

2.2. **Comments of interested parties**

(13) MTZ Polyfilms argued that a partial reopening of a review investigation is illegal because there is no specific provision in the basic Regulation allowing for a possibility to reopen an investigation. The same company also submitted that the Commission's reference in the notice referred to in recital 7 to the judgment in the IPS case (IPS judgment)[(9)] was erroneous as that judgment concerned an anti-dumping proceeding which had been initiated in a different legal framework as under the basic Regulation in force at that time, an anti-dumping proceeding consisted of several stages which included the initial investigation and all subsequent review investigations. The IPS judgment therefore dealt with the possibility of opening a new investigation within the framework of an ongoing proceeding. The distinction between a proceeding and an investigation had been written out of the basic Regulation in 1995 and, in the present case, the Commission had not initiated a new investigation in the framework of a proceeding but reopened an investigation which, according to MTZ Polyfilms, had already been concluded by the imposition of definitive measures.

MTZ Polyfilms submitted that the IPS case could not serve as a precedent because it was based on Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community[(10)] (the old basic Regulation), under which mandatory deadlines, in particular the maximum time for concluding a review investigation of 15 months from the date of initiation, did not yet apply. It argued that in this case, the 15 months deadline had lapsed soon after the reopening on 20 May 2010, since the amended measures were imposed more than 14 months after the initiation of the partial interim review investigation. Finally, according to MTZ Polyfilms, the judgment required no implementing measures, since the judgment is clear in all material aspects, simple and without any specific reservation and/or qualification annulling the amending Regulation as far as it concerned imports into the Union of PET film manufactured by MTZ Polyfilms.

(14) Another Indian exporting producer of PET film, which had cooperated with the interim review, argued that, as in calculating its dumping margin the institutions had applied the same approach as the one which had been condemned by the General Court in its judgment, the institutions should now also revise the methodology for calculating dumping of this company, resulting in the absence of a dumping margin.

(15) The Union industry claimed that, since the General Court had annulled the amending Regulation in so far as it imposed an anti-dumping duty on MTZ Polyfilms, the individual duty rate calculated and imposed in 2001 should be reimposed as, in the interim review, MTZ Polyfilms was still found to be dumping by a considerable margin. In this respect, it also pointed to a long-standing pattern of circumvention and origin fraud allegedly practised by the Indian exporters. Moreover, it alleged that there was a huge existing overcapacity in India and that in several other major world markets trade defence measures were in place against Indian PET film, which would inevitably lead to greater import volumes on the Union market of PET film manufactured by MTZ Polyfilms.

(16) The Union industry also called on the Commission to ensure the registration of imports as it considered that the two conditions for such registration laid down in Article 10(4) of the basic Regulation had been met.

2.3. **Analysis of comments**

(17) In respect of the alleged illegality of the reopening, it is recalled that in its IPS judgment the General Court 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. 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. This 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 Court of Justice judgment — as was held in case C-458/98 P[11] (the IPS appeal case). 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.

(18) The claim that the introduction of deadlines to conclude anti-dumping investigations prevents the Commission from following the approach underlying the IPS case was also found to be unwarranted. It is considered that this deadline is not relevant for the implementation of a Court of Justice 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. It should be noted that the General Court has not handed down any judgments which apply this reasoning, as that would make it impossible to finalise any anti-dumping investigation which was annulled by the General Court in order 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 point in time when the deadline for the investigation has expired.

(19) Concerning the claim of the other Indian exporting producer of PET film, it is recalled that the General Court annulled the amending Regulation only to the extent that it imposes an anti-dumping duty on MTZ Polyfilms. As a consequence, the judgment is no basis for revisiting the approach and/or calculations with regard to other exporting producers. Therefore, this claim has to be rejected.

(20) Concerning the Union industry's claim mentioned in recital 15, the reasoning in recital 17 is equally valid, i.e. case-law has established that, if the Court of Justice judges that an illegality has taken place, the Commission can resume an investigation procedure at the point just before the illegality occurred. Therefore, there is no immediate need to resort to previously established data, as argued by the Union industry.

(21) Concerning the Union industry's request for registration of imports, based on the information in the request and according to the statistical data available to the