Council Implementing Regulation (EU) No 803/2011 of 4 August 2011 repealing the countervailing duty on imports of certain broad spectrum antibiotics originating in India and terminating the proceeding in respect of such imports, following review pursuant to Article 18(2) of Council Regulation (EC) No 597/2009

COUNCIL IMPLEMENTING REGULATION (EU) No 803/2011

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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 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community[(1)], (the basic Regulation), and in particular Article 18 thereof,

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

Whereas:

1. PROCEDURE

1.1. Measures in force

(1) In May 2005, following a combined expiry and interim review (the combined review), the Council, by Regulation (EC) No 713/2005[(2)], imposed a definitive countervailing duty on imports of certain broad spectrum antibiotics, namely amoxicillin trihydrate, ampicillin trihydrate and cefalexin not put up in measured doses or in forms or packing for retail sale (the product concerned) currently falling within CN codes ex 2941 10 00 and ex 2941 90 00 originating in India. The measures took the form of an *ad valorem* duty ranging from 17,3 % to 32 %. The original measures had been imposed by Regulation (EC) No 2164/98[(3)].

(2) Following a partial interim review, the Council, by Regulation (EC) No 1176/2008[(4)], amended the countervailing duty rate applicable to one Indian exporter.

1.2. Request for an expiry review

(3) Following the publication of a notice of impending expiry[(5)] of the definitive measures in force, the Commission received a request for the initiation of an expiry review of Council Regulation (EC) No 713/2005 pursuant to Articles 18(2) of the basic Regulation, from two Union producers: DSM and Sandoz (the applicants), representing

a major proportion, in this case more than 50 % of the total Union production of certain broad spectrum antibiotics.

(4) The request was based on the grounds that the expiry of the measures would be likely to lead to a continuation or recurrence of subsidisation and injury to the Union industry.

(5) Prior to the initiation of the expiry review, and in accordance with Articles 10(9) and 22(1) of the basic Regulation, the Commission notified the Government of India (the GOI) that it had received a properly documented review request. The GOI was invited for consultations with the aim of clarifying the situation as regards the contents of the request and arriving at a mutually agreed solution. The GOI responded only very late to this invitation and, therefore, no such consultations have taken place.

1.3. **Initiation of an expiry review**

(6) Having determined, after consulting the Advisory Committee, that sufficient evidence existed for the initiation of an expiry review, the Commission announced on 12 May 2010, by a notice published in the *Official Journal of the European Union*[6] (the Notice of initiation), the initiation of an expiry review pursuant to Article 18 of the basic Regulation.

1.4. **Investigation**

1.4.1. *Investigation period*

(7) The investigation of continuation or recurrence of subsidisation covered the period from 1 April 2009 to 31 March 2010 ('the review investigation period' or 'RIP'). The examination of the trends relevant for the assessment of the likelihood of a continuation or recurrence of injury covered the period from 1 January 2007 to the end of the review investigation period (the period considered).

1.4.2. *Parties concerned by the investigation*

(8) The Commission officially advised the applicants, other known Union producers, exporting producers, importers, up-stream suppliers, users known to be concerned, and the GOI of the initiation of the expiry review. 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 of initiation.

(9) All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

(10) In view of the apparent large number of exporting producers of the product concerned in India which were named in the request, it was considered appropriate, in accordance with Article 27 of the basic Regulation, to examine whether sampling should be used. In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, the above parties were requested, pursuant to Article 27 of the basic Regulation, to make themselves known within 15 days of the initiation of the review and to provide the Commission with the information requested

in the Notice of initiation. Only three exporting producers came forward. Therefore, no sampling was applied.

(11) The Commission sent questionnaires to all parties known to be concerned and to those who made themselves known within the deadlines set in the Notice of initiation. Replies were received from three Union producers, three exporting producers and the GOI. None of the other producers replied to the questionnaire or supplied any information. None of the importers came forward during the sampling exercise and no other importers supplied the Commission with any information or made themselves known in the course of the investigation.

(12) One of the producers claimed that the assessment of the situation of the Union industry should also include data from another alleged Union producer. However, as it was found that this latter company was not a producer of the product under investigation, this claim was rejected.

(13) The Commission sought and verified all the information it deemed necessary for a determination of the likelihood of continuation or recurrence of subsidisation and resulting injury and of the Union interest. Verification visits were carried out at the premises of the following interested parties:

(a) *Union producers:*

— DSM Anti-Infectives B.V., Delft (The Netherlands), which also replied to the Commission's questionnaire on behalf of DSM Anti-Infectives Chemferm S.A., Santa Perpetua de Mogoda, (Spain). These two companies are hereafter jointly referred to as 'DSM',

— Deretil S.A. (formerly DSM Anti-Infectives Deretil S.A.), Almeria, Spain, referred to as 'Deretil', and

— Sandoz GmbH, Kundl (Austria), which also replied to the Commission's questionnaire on behalf of Sandoz Industrial Products S.A., Barcelona (Spain). Both companies are hereafter jointly referred to as 'Sandoz';

(b) *Exporting producers in India:*

— Lupin Limited, Mumbai,

— M/s Surya Pharmaceuticals Ltd, Chandigarh and Baddi, and

— Ranbaxy Laboratories Limited, Gurgaon;

(c) *Government of India (GOI):*

— Ministry of Commerce, New Delhi.

2. PRODUCT CONCERNED AND LIKE PRODUCT

(14) The product covered by this review is the same product as the one concerned by Council Regulation (EC) No 713/2005, namely amoxicillin trihydrate, ampicillin trihydrate and cefalexin not put up in measured doses or in forms or packing for retail sale currently falling within CN codes ex 2941 10 00 and ex 2941 90 00 originating in India (the product concerned).

(15) The investigation confirmed that, as in the previous review investigation, the product concerned and the products manufactured and sold by the exporting producers on the domestic market in India, as well as those manufactured and sold in the Union by the Union producers, have the same basic physical and technical characteristics as well as the same uses and are, therefore, considered to be like products within the meaning of Article 2(c) of the basic Regulation.

3. LIKELIHOOD OF CONTINUATION OR RECURRENCE OF SUBSIDISATION

3.1. Introduction

(16) As mentioned in recital 11, three exporting producers came forward and completed a questionnaire reply. However, only two of these three exporting producers reported to have sales of the product concerned to the Union during the RIP.

(17) On the basis of the information contained in the review request and the replies to the Commission's questionnaire, the following schemes, which allegedly involve the granting of subsidies, were investigated:

Nationwide schemes:

(a) Advance Authorisation Scheme (AAS);

(b) Duty Entitlement Passbook Scheme (DEPBS);

(c) Export Promotion Capital Goods Scheme (EPCGS);

(d) Focus Market Scheme (FMS);

(e) Duty Free Import Authorisation (DFIA);

(f) Export Oriented Units (EOU)/Export Processing Zones (EPZ)/ Special Economic Zones (SEZ);

(g) Export Credit Scheme (ECS); and

(h) Income Tax Exemption Scheme (ITES);

Regional schemes:

(i) Punjab Industrial Incentive Scheme; and

(j) Gujarat Industrial Incentive Scheme.

(18) The schemes (a) to (f) specified above are based on the Foreign Trade (Development and Regulation) Act 1992 (No 22 of 1992) which entered into force on 7 August 1992 (Foreign Trade Act). The Foreign Trade Act authorises the GOI to issue notifications regarding the export and import policy. These are summarised in Foreign Trade Policy (FTP) documents, which are issued by the Ministry of Commerce every 5 years and updated regularly. Two FTP documents are relevant to the RIP of this case, i.e. FTP 04-09 and FTP 09-14. The latter entered into force in August 2009. In addition, the GOI also sets out the procedures governing FTP 04-09 and FTP 09-14 in a 'Handbook of

Procedures, Volume I' ('HOP I 04-09' and 'HOP I 09-14' respectively). The Handbook of Procedures is also updated on a regular basis.

(19) Scheme (g) is based on sections 21 and 35A of the Banking Regulation Act 1949, which allow the Reserve Bank of India (RBI) to direct commercial banks in the field of export credits.

(20) Scheme (h) is based on the Income Tax Act of 1961, which is amended by the yearly Finance Act.

(21) Scheme (i) is administered by the Government of Punjab and is based on the industrial policy and incentives code of the Government of Punjab.

(22) Scheme (j) is administered by the Government of Gujarat and is based on Gujarat's industrial incentive policy.

3.2. **Advance Authorisation Scheme (AAS)**

(a) *Legal basis*

(23) The detailed description of the scheme is contained in paragraphs 4.1.1 to 4.1.14 of FTP 04-09 and FTP 09-14 and paragraphs 4.1 to 4,30 A of HOP I 04-09 and HOP I 09-14.

(b) *Eligibility*

(24) The AAS consists of six sub-schemes, as described in more detail in recital 25. Those sub-schemes differ, inter alia, in the scope of eligibility. Manufacturer-exporters and merchant-exporters 'tied to' supporting manufacturers are eligible for the AAS physical exports and for the AAS for annual requirement. Manufacturer-exporters supplying the ultimate exporter are eligible for AAS for intermediate supplies. Main contractors which supply to the 'deemed export' categories mentioned in paragraph 8.2 of FTP 04-09 and FTP 09-14, such as suppliers of an export oriented unit (EOU), are eligible for AAS deemed export. Eventually, intermediate suppliers to manufacturer-exporters are eligible for 'deemed export' benefits under the sub-schemes Advance Release Order (ARO) and back-to-back inland letter of credit.

(c) *Practical implementation*

(25) Advance authorisations can be issued for:

(i) physical exports: this is the main sub-scheme. It allows for duty free import of input materials for the production of a specific resultant export product. 'Physical' in this context means that the export product has to leave Indian territory. An import allowance and export obligation including the type of export product are specified in the advance authorisation;

(ii) annual requirement: such an andvance authorisation is not linked to a specific export product, but to a wider product group (e.g. chemical and allied products). The advance authorisation holder can — up to a certain value threshold set by its past export performance — import duty free any input to