Council Implementing Regulation (EU) No 451/2011 of 6 May 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of coated fine paper originating in the People's Republic of China

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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 14(1) thereof,

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

Whereas:

1. PROVISIONAL MEASURES

(1) The Commission, by Regulation (EU) No 1042/2010[(2)] ('the provisional Regulation') imposed a provisional anti-dumping duty ('the provisional measures') on imports of coated fine paper ('CFP') originating in the People's Republic of China ('PRC').

(2) The proceeding was initiated following a complaint lodged on 4 January 2010 by CEPIFINE, the European association of fine paper manufacturers ('the complainant') on behalf of producers representing a major proportion, in this case more than 25 % of the total Union production of coated fine paper. The complaint contained *prima facie* evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the initiation of a proceeding.

2. SUBSEQUENT PROCEDURE

(3) Subsequent to the disclosure of the essential facts and considerations on the basis of which it was decided to impose provisional anti-dumping measures ('the provisional disclosure'), several interested parties made written submissions making known their views on the provisional findings. The parties who so requested were granted the opportunity to be heard.

(4) The Commission continued to seek and verify all information it deemed necessary for its definitive findings.

(5) One group of cooperating Chinese exporting producers ('the exporting producer') claimed that it should have been heard prior to the imposition of provisional measures given that, according to that group, a provisional Regulation is an individual measure in the sense of Article 41 of the Charter of Fundamental Rights of the European Union[(3)].

(6) With respect to the above stated claim, the following points should be highlighted: The basic Regulation delineates the rights of parties in the framework of anti-dumping proceedings and in this particular matter Article 7 sets out the procedural steps for imposition of provisional measures. Article 7 of the basic Regulation states, inter alia, that provisional measures, if any, can be imposed within 9 months from the initiation of a case. In the present proceeding the Commission conducted its investigation in line with the provisions of Article 6 of the basic Regulation and imposed provisional measures in line with the provisions of Article 7 of the basic Regulation while all interested parties that had requested so were heard and had the adequate opportunities to submit information and make comments. The Court of Justice has consistently held that 'even if … the principle of the right to a hearing requires exporters to be informed of the essential facts and considerations on the basis of which it is intended to impose provisional duties, a failure to respect that right cannot in itself have the effect of vitiating the regulation imposing definitive duties where, in the course of the procedure for the adoption of the latter regulation, the defect vitiating the procedure for the adoption of the corresponding regulation imposing provisional duties was remedied[(4)]'. In the present case, the Commission fulfilled its obligations to disclosure under the basic Regulation and the right to a fair hearing of the exporting producer was respected during the procedure leading to the adoption of this Regulation.

(7) The provisional nature of measures adopted pursuant to Article 7 of the basic Regulation is *inter alia* reflected in the maximum period of six months for which they may be imposed as well as the fact that any provisional duty is secured only by guarantee. Furthermore, the Commission never prevented any party from coming forward with requests to hold more hearings prior to the 9 month deadline stipulated by law for the imposition of provisional measures should they have considered that there was a need to be heard further at that stage.

(8) The exporting producer requested access to data used from the sole company in the United States of America (USA) that provided information in line with the provisions of Article 2(7)(a) for the establishment of normal value. It was claimed that otherwise the party was prevented from having access to the evidence on the basis of which provisional measures were imposed and that this both violated the party's rights of defence and was contrary to the principle of good administration. The same party claimed that disclosure of confidential data pertaining to specific parties could be made available to the legal representatives of the group of the exporting producer. The legal representatives would undertake the obligation to guarantee the confidentiality of companies' business secrets. The claim was backed by reference to the USA and the Canadian systems and to the Court of Justice of the European Union in *G.J. Dokter and Others v Minister van Landbouw, Natuur en Voedselkwaliteit*.

(9) These requests had to be rejected. The exporting producer's request referred to access of confidential data on prices provided by the aforesaid US company. The Commission could not grant the access to such detailed confidential business information. Giving access to such data would have been against Union law, notably Article 19 of the Basic Regulation since it would have led to an unauthorised disclosure of limited and sensitive business data of the US company. As to the proposed methodology on disclosing company's business secrets to legal representatives of other interested parties, unlike in the USA and Canadian systems, no such process is provided for by the basic Regulation. It is thus clearly outside the established EU legal framework for anti-dumping proceedings. In any event, the Court case cited above does not support any claim of access to confidential information. The judgment also refers to some inherent limits of the principle of the right of defence.

(10) The exporting produceralso requested access to evidence concerning: rolls used in web-fed printing produced by the Union producers, detailed information about one representative Union producer's legal status, the activities and financial data of selected mills, detailed data related to the Union industry's cost of production and product control numbers of the products of representative Union producers. Some of the requested information was outside the scope of the investigation as it related to products not covered by the investigation or the activity of Union producers that does not involve the production of CFP. Concerning other information requested, the Commission was not in a position to grant access to it, since pursuant to Article 19 of the basic Regulation this would have constituted an unauthorised disclosure of confidential business secrets.

(11) The exporting producer also requested the disclosure of the names of the companies which opposed the investigation and did not request confidential treatment. Such a disclosure would have revealed the identity and position of producers that requested confidentiality; therefore it was not possible to reveal this information.

(12) The provisional disclosure was as detailed as possible without disclosing confidential information and was thus not in breach of the exporting producer's fundamental rights, its rights of defence or of the principle of good administration.

(13) The injury analyses performed in the present anti-dumping and the parallel anti-subsidy investigation are identical, since the definition of the Union industry, the representative Union producers and the investigation period are the same in both investigations. For this reason, comments on injury aspects put forward in any of these proceedings were taken into account in both proceedings.

2.1. Investigation period

(14) It is recalled that, as set out in recital (13) of the provisional Regulation, the investigation of dumping and injury covered the period from 1 January 2009 to 31 December 2009 (the ‘investigation period’ or ‘IP’). The examination of trends relevant for the assessment of injury covered the period from 1 January 2006 to the end of the IP (‘the period considered’).

3. PRODUCT CONCERNED AND LIKE PRODUCT

3.1. **Product concerned**

(15) Following provisional measures, the exporting producer and the complainant submitted further comments concerning the product definition. Some of these comments were a repetition of comments already addressed in the provisional Regulation.

(16) The exporting producer reiterated that there is no substantial difference concerning basic characteristics between CFP in sheets and rolls suitable for use in sheet-fed printing machines ('the product concerned') and rolls suitable for use in web-fed presses and that, therefore, CFP for web-fed printing should not have been excluded from the product scope. The party also argued that the Commission's finding that these products are not interchangeable was not supported.

(17) It is recalled that the investigation found that CFP used in web-fed and sheet-fed printing processes are distinct product groups and are not interchangeable as described in recitals (18) and (20) of the provisional Regulation. The exporting producer itself also acknowledged that these products are not fully interchangeable.

(18) It should be noted as well that no rolls for use in web-fed presses were imported from the PRC during the period considered. It may also be considered unlikely that these products would be imported in the future as sourcing these products from long distance is economically not viable for the reasons mentioned in recital (20) of the provisional Regulation.

(19) It was further claimed by the exporting producer that the criteria defined in the provisional Regulation in recital (16), namely the technical characteristic of resistance to picking, was not appropriate to distinguish between CFP suitable for use in web-fed printing on the one hand and CFP used in sheet-fed printing on the other hand. It further claimed that the exclusion of web rolls was made on an arbitrary basis alleging that web-fed rolls produced by Union producers do not meet the criteria set in recital 16 of the provisional Regulation as regards the characteristics of resistance to picking.

(20) The exporting producer also argued that the Commission fell short of its obligation to examine objectively the evidence presented by that exporting producer to the Commission's services before the provisional Regulation, namely the results of the testing conducted in its own laboratory measuring the resistance to picking of web rolls produced by the Union producers.

(21) The test results presented by the exporting producer consisted of a summary of the test results performed in its own laboratory. Crucially, the results were not made available for inspection and comments by other interested parties, in particular, the Union industry, nor did the exporting producer submit a meaningful non-confidential summary thereof despite repeated reminders.

(22) It is recalled that at the provisional stage the Commission concluded that the objectivity and reliability of the test was insufficient to base conclusions thereon. No further detailed information was provided by the exporting producer which could help

further assess the reliability of the test. Since no non-confidential version of this test was provided, the companies whose web rolls were allegedly tested could not respond to the conclusions of the test. The Commission thus could not objectively check whether the submitted test results were reliable and correct and could be relied upon for the purposes of the investigation. On the basis of the facts available to the Commission, conclusions reached at provisional stage about the objectivity and reliability of the test could not be reconsidered since the information submitted under confidentiality could not be counterchecked by any reliable sources.

(23) After the imposition of the provisional measures, the exporting producer presented the results of a further test conducted on its behalf by an external test laboratory and reiterated that CFP used in web-fed printing has been arbitrarily excluded from the scope of the investigation. The test reports stated that the resistance to picking has been measured on 25 samples of web-fed rolls provided and identified by the exporting producer to the laboratory as paper samples produced by Union producers. According to this report, none of the paper met both criteria set in recital 16 of the provisional Regulation.

(24) The assessment of the test report brought to light that, first of all, the test report by the external laboratory related mostly to products for which these results were irrelevant as most of the samples tested were not in fact web rolls; secondly, the test report related to products which were not sufficiently identified as it could not be ascertained from the test report whether the paper tested was for sheet-fed printing or web-fed printing as the paper brand described in the report existed in both formats. Furthermore the test report provided no assurance that the sampled rolls indicated were indeed the ones that were tested.

(25) In response to the external laboratory's test report, the complainant provided the results of the testing performed by one of the Union producers on the same samples of web rolls that were allegedly tested by the external laboratory. This test showed different results. The complainant attributed the differences to possibly different test conditions and thus a potential non-compliance with the ISO 3783:2006 standard, i.e. the standard according to which resistance to picking set in recital (16) of the provisional Regulation should be measured.

(26) After disclosing the definitive findings, the exporting producer questioned the Commission's objectivity in rejecting the test result of the external laboratory. It claimed that the testing was carried out blindly by the independent expert and in accordance with the relevant ISO standard. It provided an affidavit of its manager explaining the sourcing process of the samples used in the testing in order to prove the independence, correctness and representativeness of the testing.

(27) Firstly, the objectivity of the external laboratory test report was never questioned by the Commission and in this regard it is irrelevant that the testing was carried out blindly. On the other hand, doubts were raised as to the assurances on the selection and origin of the samples tested and not on the test itself. The arguments of the exporting producer did not remove these doubts as these were not comprehensive