Council Implementing Regulation (EU) No 856/2010 of 27 September 2010 terminating the partial interim review of Regulation (EC) No 661/2008 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia

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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 Articles 8, 9(4) and 11(3) thereof,

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

Whereas:

A. **PREVIOUS PROCEDURE**

(1) By Regulation (EC) No 2022/1995[(2)], the Council imposed a definitive anti-dumping duty on imports of ammonium nitrate ('AN') originating in Russia, falling within CN codes 3102 30 90 and 3102 40 90. Pursuant to a further investigation in accordance with Article 12 of the basic Regulation, which established that the duty was being absorbed, the measures were amended by Regulation (EC) No 663/1998[(3)]. Following a request for an expiry and an interim review pursuant to Articles 11(2) and 11(3) of the basic Regulation, the Council, by Regulation (EC) No 658/2002[(4)], imposed a definitive anti-dumping duty of EUR 47,07 per tonne on imports of ammonium nitrate falling within CN codes 3102 30 90 and 3102 40 90 and originating in Russia. Finally, a product scope interim review pursuant to Article 11(3) of the basic Regulation was carried out and, by Regulation (EC) No 945/2005[(5)], a definitive anti-dumping duty ranging between EUR 41,42 per tonne and EUR 47,07 per tonne was imposed on imports of solid fertilisers originating in Russia with an ammonium nitrate content exceeding 80 % by weight, falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 91.

(2) Following a request for an expiry and an interim review ('the last expiry review') pursuant to Articles 11(2) and 11(3) of the basic Regulation, the Council, by Regulation (EC) No 661/2008[(6)], imposed a definitive anti-dumping duty ranging between EUR 28,88 per tonne and EUR 47,07 per tonne for a further five years.

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(3) Following the decision of the Court of First Instance of the European Communities to partially annul Regulation (EC) No 945/2005, the Council, by Regulation (EC) No 989/2009[7], amended the definitive anti-dumping duty in so far as it concerned JSC Kirovo-Chepetsky Khimichesky Kombinat.

(4) By Decision 2008/577/EC of 4 July 2008[8], the Commission accepted undertaking offers submitted by several exporting producers, including the related Russian exporting producers Joint Stock Company Acron and Joint Stock Company Dorogobuzh ('Acron' Holding Company), in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Russia and Ukraine.

B. PRESENT PROCEDURE

1. Request for a review

(5) A request for a partial interim review ('the present review') pursuant to Article 11(3) of the basic Regulation was lodged by JSC Acron, JSC Dorogobuzh and their related trading company Agronova International Inc., members of 'Acron' Holding Company ('the applicant'). The request was limited in scope to the examination of the form of the measure and in particular to the inclusion of Agronova International Inc. into the price undertaking of JSC Acron and JSC Dorogobuzh.

(6) The applicant alleged that the circumstances under which the price undertaking was granted changed, in particular that Agronova International Inc., a newly established trader in the USA, was incorporated into the 'Acron' Holding Company. The applicant further alleged that these changes were of a lasting nature.

2. Initiation of a review

(7) The Commission examined the prima facie evidence submitted by the applicant and considered it sufficient to justify the initiation of a partial interim review pursuant to Article 11(3) of the basic Regulation. After consulting the Advisory Committee, the Commission initiated[9] a review of the anti-dumping measures imposed by Regulation (EC) No 661/2008 ('measures in force') limited in scope to the examination of the form of the measures, in particular the potential effect of the inclusion of Agronova International Inc. into the price undertaking of JSC Acron and JSC Dorogobuzh.

3. Product concerned

(8) The product concerned by the present review is the same as in the last expiry review, i.e. solid fertilisers with an ammonium nitrate content exceeding 80 % by weight, originating in Russia ('the product concerned'), currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 91.

4. Parties concerned

(9) The Commission officially informed the applicant, the representatives of the exporting country and the association of Union producers of the initiation of the review. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation. All interested parties who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

(10) The Commission sent questionnaires to the applicant and received replies within the deadlines set for that purpose. The Commission sought and verified all information deemed necessary. The Commission carried out a verification visit at the premises of Agronova International Inc., Hallandale, USA ('Agronova').

5. **Review investigation period**

(11) The review investigation period covered the period from 1 July 2008 to 30 June 2009 ('RIP').

C. **RESULTS OF THE INVESTIGATION**

(12) The investigation confirmed that Agronova was a newly established trading company belonging to 'Acron' Holding company.

1. **Workability of the undertaking**

(13) The main considerations as to the inclusion of a trading company in the current undertaking were the practicability of the undertaking, i.e. the effectiveness of its monitoring and in particular assessing the risks of cross-compensation and circumvention through different sales channels and/or through the pricing of different products sold to potentially the same customers.

1.1. *High risk of cross-compensation through an undisclosed trading company*

(14) The investigation revealed that Agronova had strong interpersonal and operational links to at least one other undisclosed company active in the trading and marketing of fertiliser products. It was found that the same and only persons operating Agronova were in fact also involved in the activities of this trading company. In particular, the evidence available showed that both companies shared a common manager and a common officer during most of the RIP, while a third person (who was at the same time found to be the President of the trading company in question), although not formally employed by Agronova, was in fact carrying out its daily trading business including the conduct during the verification visit on behalf of Agronova where he was presented as an advisor of Agronova. In addition to the strong interpersonal links, it was found that both companies were operating from the same office, employing the same secretary and using the same computers and office equipment during almost the entirety of the RIP. Agronova did not reveal the existence and operations of this other trading company neither in its response to the questionnaire nor at the time of the verification visit. The Commission's request for additional information in order to clarify the situation was only partly satisfied by the applicant since it did not, inter alia,

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disclose the precise ownership of the trading company nor its detailed activities. The information provided was therefore considered insufficient.

(15) On the basis of the above, the Commission considered that the trading company referred to above was related to Agronova within the meaning of Article 143 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code ('IPCCC')[10] and should have been reported in the applicant's reply to the questionnaire. The Commission notified the applicant in accordance with Article 18(1) of the basic Regulation of its intention to base these findings on facts available and invited the applicant to comment thereon in accordance with Article 18(4) of the basic Regulation.

(16) The applicant contested that Agronova is related to the above trading company or any other company. Furthermore, on the Commission's further enquiry request, it did not provide any detailed and verifiable information on the ownership and activities of the trading company in question within the deadline set.

(17) Upon disclosure of the Commission's proposal to base findings on Article 18 of the basic Regulation, the applicant further denied any relationship between Agronova and the trading company in the sense of Article 143 of the IPCCC. As far as the precise roles of the persons involved in both companies, the applicant contested that both companies shared directors or officers. The applicant even withdrew information given before, claiming that it was wrong or imprecise. The new information given was, however, not sufficiently supported by evidence. Overall, the information and evidence provided in this regard was unclear and in some instances contradictory and therefore in general cast doubts on the reliability of the information provided.

(18) By way of example, while the applicant originally stated that the president of Agronova was also the manager of the trading company in question, this statement was later qualified by explaining that the tasks carried out in the trading company by the president of Agronova did not include any control and decision-making functions. Likewise, while the evidence provided (annual accounts) showed that another person was an 'officer' in both companies, it was later claimed that the real functions of this person were those of a legal secretary.

(19) In conclusion, the applicant did not submit any sufficiently reliable information or evidence which could show that the roles and responsibilities of each actor were defined and exercised in a way which would have excluded the existence of a relationship.

(20) The applicant also contested that the trading company in question should be considered as a trading company since it was mainly involved in marketing rather than the sale of fertiliser products. However, besides the fact that this statement was not supported by any evidence, the company also claimed at several instances to be indeed involved in the sale of fertiliser as a trader, but only for small quantities destined to markets other than Europe. The company had therefore to be considered as a trader and this argument had to be rejected.