Council Implementing Regulation (EU) No 1251/2009 of 18 December 2009 amending Regulation (EC) No 1911/2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating, inter alia, 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 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community[(1)] ('the basic Regulation'), and in particular Articles 9(4) and 11(4) thereof,

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

Whereas:

A. PREVIOUS PROCEDURE

(1) By Regulation (EC) No 1995/2000[(2)], the Council imposed a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate ('UAN') originating, inter alia, in Russia. That Regulation will hereinafter be referred to as 'the original Regulation' and the investigation that led to the measures imposed by the original Regulation will be hereinafter referred to as 'the original investigation'.

(2) Following an expiry review initiated in September 2005 ('the expiry review'), the Council, by Regulation (EC) No 1911/2006[(3)], renewed for five years these measures at their current level. The measures consist of specific duties.

B. PRESENT PROCEDURE

1. *REQUEST FOR A REVIEW*

(3) A request for a new exporter review ('the present review') pursuant to Article 11(4) of the basic Regulation was lodged by Joint Stock Company Acron ('the applicant'), an exporting producer in Russia. The request was limited in scope to dumping as far as the applicant is concerned.

(4) The applicant alleged that it did not export UAN to the Union during the period of investigation on which the anti-dumping measures were based, that is, the period from 1 June 1998 to 31 May 1999 ('the original investigation period') and that it is not related to any of the exporting producers of UAN which are subject to the

abovementioned anti-dumping measures. The applicant further alleged that it began exporting UAN to the Union after the end of the original investigation period.

2. *INITIATION OF A 'NEW EXPORTER' REVIEW*

(5) The Commission examined the prima facie evidence submitted by the applicant and considered it sufficient to justify the initiation of a review pursuant to Article 11(4) of the basic Regulation. After consulting the Advisory Committee and after the Union industry concerned had been given the opportunity to comment, the Commission initiated by Regulation (EC) No 241/2009[(4)], a review of Regulation (EC) No 1911/2006 ('measures in force') with regard to the applicant.

(6) Pursuant to Article 2 of Regulation (EC) No 241/2009, the anti-dumping duty of 20,11 EUR/tonne imposed by Regulation (EC) No 1911/2006 on imports of UAN produced and sold for export to the Union by the applicant was repealed. Simultaneously, pursuant to Article 14(5) of the basic Regulation, customs authorities were directed to take appropriate steps to register these imports.

3. *PRODUCT CONCERNED*

(7) The product concerned by the current review is the same as in the original investigation, i.e. a solution of urea and ammonium nitrate, a liquid fertiliser commonly used in agriculture, originating in Russia ('the product concerned'). It consists of a mixture of urea, ammonium nitrate and water. The product concerned is currently falling within CN code 3102 80 00.

4. *PARTIES CONCERNED*

(8) The Commission officially informed the applicant, the representatives of the exporting country and the association of Union producers about 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.

(9) The Commission sent questionnaires to the applicant and its related companies and received replies within the deadlines set for that purpose. The Commission sought and verified all information deemed necessary for the determination of dumping. The Commission carried out verification visits at the premises of the applicant and its related company:

— JSC Acron, Novgorod, Russia,

— Agronova International Inc., Hallandale, USA ('Agronova').

5. *REVIEW INVESTIGATION PERIOD*

(10) The 'new exporter' review investigation period covered the period from 1 January 2008 to 31 December 2008 ('RIP').

C. **RESULTS OF THE INVESTIGATION**

1. *'NEW EXPORTER' QUALIFICATION*

(11) The investigation confirmed that the applicant had not exported the product concerned during the original investigation period and that it had begun exporting to the Union after this period.

(12) Furthermore, the applicant was able to demonstrate that it was not related to any of the exporters or producers in Russia which are subject to the anti-dumping measures in force on imports of the product concerned originating in Russia.

(13) In this context, it is confirmed that the applicant should be considered a 'new exporter' in accordance with Article 11(4) of the basic Regulation.

2. *DUMPING*

2.1. DETERMINATION OF NORMAL VALUE

(14) The applicant had no domestic sales in Russia of the product concerned. Whenever domestic prices cannot be used in order to establish normal value, another method has to be applied. In accordance with Article 2(3) of the basic Regulation, the Commission instead calculated a constructed normal value, as follows:

(15) Normal value was constructed on the basis of the manufacturing costs incurred by the applicant plus a reasonable amount for selling, general and administrative costs ('SG&A costs') and for profits, in accordance with Article 2(3) and (6) of the basic Regulation.

2.1.1. ***Adjustment of natural gas costs on the domestic Russian market***

(16) Regarding the cost of manufacturing, it should be noted that gas costs represent a major proportion of the manufacturing cost and a significant proportion of the total cost of production. In accordance with Article 2(5) of the basic Regulation, it was examined whether the costs associated with the production and sales of the product concerned were reasonably reflected in the records of the applicant.

(17) It was established that the domestic gas prices paid by the applicant were abnormally low. By way of illustration, they amounted to between one fourth and one fifth of the export price of natural gas from Russia. In this regard, all available data indicates that domestic gas prices in Russia were regulated prices, which are far below market prices paid in unregulated markets for natural gas. Since gas costs were not reasonably reflected in the applicant's records, they had to be adjusted accordingly. In the absence of any undistorted gas prices relating to the Russian domestic market, and in accordance with Article 2(5) of the basic Regulation, gas prices had to be established on 'any other reasonable basis, including information from other representative markets'.

(18) The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs and adjusted to reflect local distribution cost. Waidhaus, being the main hub for Russian gas sales to the Union, which is both the largest market for Russian gas and has prices reasonably

reflecting costs, can be considered a representative market within the meaning of Article 2(5) of the basic Regulation.

(19) Following disclosure, the applicant submitted several claims linked to the (i) legal basis of the gas adjustment made on the one hand and (ii) to the methodologies applied for the gas adjustment on the other hand.

2.1.1.1. **Legal basis of the gas adjustment**

(20) The applicant claimed that any adjustment of the gas price paid on the Russian domestic market would be unwarranted because its accounting records fully reflected the costs associated with the production of the product concerned in Russia. The applicant further argued that in accordance with Article 1 of the basic Regulation, normal value must always be established with regard to the exporting country and that consequently it was contrary to that article to base findings on information from producers in other third countries.

(21) As to the applicant's argument about the alleged breach of Article 1 of the basic Regulation it should be noted that Article 1 only describes the general concept of dumping but the detailed rules on establishing dumping are set out in Article 2 of the basic Regulation. Article 2(5) of the basic Regulation provides for the possibility to use data from other representative markets including a third country if costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned. The applicant's argument in this respect had therefore to be rejected.

(22) The applicant also invoked the existence of natural competitive advantages in Russia such as the large availability of natural gas and favourable conditions of supply which would explain the price difference between the natural gas sold domestically and the one exported. The applicant also alleged that Russian domestic gas prices would be cost covering.

(23) With regard to the existence of natural advantages the applicant did not address the fact that domestic prices for natural gas were regulated in Russia and could not therefore be considered to reasonably reflect a price normally payable in undistorted markets. The applicant did also not submit any evidence in support of these claims. Furthermore, as regards costs, even if gas prices paid by the applicant covered the unit cost of production and sales of gas incurred by its provider, this argument is irrelevant since the market price of gas is not necessarily linked to the costs of its production and sales. These claims had therefore to be rejected.

(24) The applicant claimed further that an investigation under the basic Regulation should not cover the case of subsidisation of upstream products. It is noted that Article 2(5) of the basic Regulation aims to determine whether costs associated with the production and sale of the like product are reasonably reflected in the records of the party concerned. This was found not to be the case for the reasons set out above in recital (17). This is different from the determination of the existence of subsidies which

was not subject to the present investigation. The applicant's argument therefore had to be rejected.

(25) In this context, the applicant also argued that even if particular market situations exist within the meaning of Article 2(3) of the basic Regulation, these would only refer to the market of the product concerned, i.e. UAN as such which cannot be extended to the market conditions of the upstream product. However, as it results from recital (24) above, the adjustment for natural gas prices was done on the basis of Article 2(5) of the basic Regulation which, as mentioned above in recital (21) explicitly entitles the Institutions to use the cost of production coming from other representative markets. The applicant's argument therefore had to be rejected.

(26) The applicant finally argued that Article 2(5) of the basic Regulation is limited to the examination of the compliance of the company's records with the generally accepted accounting principles of the third country concerned and does not require that costs are in line with costs in unregulated markets.

(27) It should be noted that in accordance with Article 2(5) of the basic Regulation two requirements need to be met in order for the costs to be calculated on the basis of the records kept by the exporter: (i) records must be kept in accordance with the generally accepted accounting principles ('GAAP') of the country concerned; and (ii) records must reasonably reflect the costs associated with the production and sale of the product concerned. If, as in the present case, the second requirement is not met because the costs are not reflected in the records, the costs must be adjusted. The applicant's argument therefore had to be rejected.

2.1.1.2. **Methodology applied for the gas adjustment**

(28) The applicant claimed that during the RIP of the current investigation gas prices fluctuated significantly and that normal value should be established on a monthly (or at least quarterly) basis rather than on a yearly basis.

(29) It should be noted that although gas prices fluctuated during the RIP, these fluctuations were not considered exceptional or particularly significant. Indeed, the market for natural gas is generally characterised by rather important price fluctuations. The applicant could not show that there were any specific circumstances and that the price fluctuations during the RIP were significantly beyond usual fluctuations. Therefore there was no reason to deviate from the methodology used in the investigation leading to the measures in force. Secondly, information on which basis – according to the applicant – normal values should have been established was only partly available, since the necessary information from the US companies, i.e. SG&A and profit, was only available on a yearly basis. Therefore, even if one would follow the applicant's argument, no meaningful calculation of monthly or quarterly values would have been possible. The applicant's argument therefore had to be rejected.

(30) The applicant also claimed that Waidhaus is not an appropriate reference market given the allegedly non-competitive pricing on gas in Germany and relationships