Council Regulation (EC) No 1176/2008 of 27 November 2008 amending Council Regulation (EC) No 713/2005 imposing a definitive countervailing duty on imports of certain broad spectrum antibiotics originating in India

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THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community[(1)] (the basic Regulation), and in particular Articles 15 and 19 thereof,

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

Whereas:

A. PROCEDURE

I. Previous investigation and existing measures

(1) 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 packings for retail sale (the product concerned) falling within CN codes ex 2941 10 10, ex 2941 10 20 and ex 2941 90 00 originating in India. The rate of the duty ranges between 17,3 % and 30,3 % for individually named exporters with a residual duty rate of 32 % imposed on imports from other exporters.

II. Initiation of a partial interim review

(2) Following the imposition of the definitive countervailing duty, the Government of India (GOI) made submissions that the circumstances with regard to two subsidy schemes (the Duty Entitlement Passbook Scheme and the Income Tax Exemption under Section 80 HHC of the Income Tax Act) have changed and that these changes are of a lasting nature. Consequently, it was argued that the level of subsidisation was likely to have decreased and thus measures that had been established partly on these schemes should be revised.

(3) The Commission examined the evidence submitted by the GOI and considered it sufficient to justify the initiation of a review in accordance with the provisions of Article 19 of the basic Regulation. After consultation of the Advisory Committee, the

Changes to legislation: *There are currently no known outstanding effects for the Council Regulation (EC) No 1176/2008. (See end of Document for details)*

Commission initiated by a notice published in the *Official Journal of the European Union*[3], an *ex-officio* partial interim review of Regulation (EC) No 713/2005.

(4) The purpose of the partial interim review investigation is to assess the need for the continuation, removal or amendment of the existing measures in respect of those companies which benefited from one or both the changed subsidy schemes where sufficient evidence was provided in line with the relevant provisions of the notice of initiation. The partial interim review investigation would also assess the need, depending on the review findings, to revise the measures applicable to other companies that cooperated in the investigation that set the level of the existing measures and/or the residual measure applicable for all other companies.

III. Investigation period

(5) The investigation covered the period from 1 April 2006 to 31 March 2007 ('the review investigation period' or 'RIP').

IV. Parties concerned by the investigation

(6) The Commission officially informed the GOI and those Indian exporting producers who cooperated in the previous investigation, were mentioned under Regulation (EC) No 713/2005 and were listed in the notice of initiation of the partial interim review, that were found to benefit from any of the two allegedly changed subsidy schemes, as well as the Community producers of the initiation of the partial interim review investigation. Interested parties had the opportunity to make their views known in writing and to request a hearing. The written and oral comments submitted by the parties were considered and, where appropriate, taken into account.

(7) In view of the apparent number of parties involved in this review, the use of sampling techniques for the investigation of subsidisation was envisaged in accordance with Article 27 of the basic Regulation.

(8) Only two exporting producers made themselves known and provided the information requested for sampling. Therefore, the use of sampling techniques was not considered necessary.

(9) However, one of the aforesaid exporting producers stated in its sampling reply that it did not receive benefits under the two allegedly changed subsidy schemes (i.e. the Duty Entitlement Passbook Scheme and the Income Tax Exemption under Section 80 HHC of the Income Tax Act) during either the investigation period that led to the measures in force or the RIP. Moreover, this company did not cooperate in the original investigation, and no particular need was identified to adapt the residual measure applicable to all other companies, including this one. Thus, the company did not fulfil the eligibility provisions of the scope of the partial interim review investigation as set out in point 4 of the notice of initiation and could not therefore participate in this review investigation. The company in question was informed accordingly.

(10) The Commission sent questionnaires to the sole cooperating exporting producer which was eligible for this review (Ranbaxy Laboratories Ltd) and to the GOI. Replies were received from both that producer and the GOI.

(11) The Commission sought and verified all information it deemed necessary for the determination of subsidisation. Verification visits were carried out at the premises of the following interested parties:

1. Government of India

   Ministry of Commerce, New Delhi;

2. exporting producers in India

   Ranbaxy Laboratories Ltd, New Delhi.

V. Disclosure and comments on procedure

(12) The GOI and the other interested parties were informed of the essential facts and considerations upon which it was intended to propose to amend the duty rate applicable to the sole cooperating Indian producer and prolong existing measures for all other companies which did not cooperate with this partial interim review. They were also given a reasonable time to comment. All submissions and comments were taken duly into consideration as set out below.

B. PRODUCT CONCERNED

(13) The product covered by this review is the same product as the one concerned by Regulation (EC) No 713/2005, namely amoxicillin trihydrate, ampicillin trihydrate and cefalexin not put up in measured doses or in forms or packings for retail sale falling within CN codes ex 2941 10 10, ex 2941 10 20 and ex 2941 90 00 originating in India.

C. SUBSIDIES

I. Introduction

(14) On the basis of the information submitted by the GOI and the sole cooperating exporting producer and the replies to the Commission's questionnaire, the following schemes, which allegedly involve the granting of subsidies, were investigated:

(a) Advance Authorisation Scheme (formerly known as Advance Licence Scheme);

(b) Duty Entitlement Passbook Scheme;

(c) Export Promotion Capital Goods Scheme;

(d) Focus Market Scheme;

(e) Income Tax Schemes:
   — Export Income Tax Exemption Scheme,
   — Income Tax Incentive for Research and Development;

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(f) Export Credit Scheme.

(15) The schemes (a) to (d) 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 'Export and Import Policy' documents, which are issued by the Ministry of Commerce every five years and updated regularly. One Export and Import Policy document is relevant to the RIP of this case; i.e. the five-year plan relating to the period 1 September 2004 to 31 March 2009 (EXIM policy 04-09). In addition, the GOI also sets out the procedures governing the EXIM policy 04-09 in a 'Handbook of Procedures — 1 September 2004 to 31 March 2009, Volume I' (HOP I 04-09). The Handbook of Procedure is also updated on a regular basis.

(16) The Income Tax Schemes specified above under (e) are based on the Income Tax Act of 1961, which is amended yearly by the Finance Act.

(17) The Export Credit Scheme specified above under (f) 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.

(18) In accordance with Article 11(10) of the basic Regulation, the Commission invited the GOI for additional consultations with respect to both changed and unchanged schemes with the aim of clarifying the factual situation as regards the alleged schemes and arriving at a mutually agreed solution. Following these consultations, and in the absence of a mutually agreed solution in relation to these schemes, the Commission included all these schemes in the investigation of subsidisation.

II. Specific schemes

1. Advance Authorisation Scheme (AAS)

(a) Legal basis

(19) The detailed description of the scheme is contained in paragraphs 4.1.1 to 4.1.14 of the EXIM policy 04-09 and chapters 4.1 to 4.30 of the HOP I 04-09. This scheme was called Advance Licence Scheme during the previous review investigation that led to the imposition by Regulation (EC) No 713/2005 of the definitive countervailing duty currently in force.

(b) Eligibility

(20) The AAS consists of six sub-schemes, as described in more detail in recital 21. 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 the EXIM policy 04-09, 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

(21) 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 authorisation;

(ii) annual requirement: such an authorisation is not linked to a specific export product, but to a wider product group (e.g. chemical and allied products). The authorisation holder can — up to a certain value threshold set by its past export performance — import duty free any input to be used in manufacturing any of the items falling under such a product group. It can choose to export any resultant product falling under the product group using such duty-exempt material;

(iii) intermediate supplies: this sub-scheme covers cases where two manufacturers intend to produce a single export product and divide the production process. The manufacturer-exporter who produces the intermediate product can import duty-free input materials and can obtain for this purpose an AAS for intermediate supplies. The ultimate exporter finalises the production and is obliged to export the finished product;

(iv) deemed exports: this sub-scheme allows a main contractor to import inputs free of duty which are required in manufacturing goods to be sold as 'deemed exports' to the categories of customers mentioned in paragraph 8.2(b) to (f), (g), (i) and (j) of the EXIM policy 04-09. According to the GOI, deemed exports refer to those transactions in which the goods supplied do not leave the country. A number of categories of supply is regarded as deemed exports provided the goods are manufactured in India, e.g. supply of goods to an EOU or to a company situated in a special economic zone (SEZ);

(v) ARO: the AAS holder intending to source the inputs from indigenous sources, in lieu of direct import, has the option to source them against AROs. In such cases the Advance Authorisations are validated as AROs and are endorsed to the indigenous supplier upon delivery of the items specified therein. The endorsement of the ARO entitles the indigenous supplier to the benefits of deemed exports as set out in paragraph 8.3 of the EXIM policy 04-09 (i.e. AAS for intermediate supplies/deemed export, deemed export drawback and refund of terminal excise duty). The ARO mechanism refunds taxes and duties to the supplier instead of refunding the same to the ultimate exporter in the