Council Regulation (EC) No 237/2008 of 10 March 2008 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96 of the anti-dumping duty on imports of ammonium nitrate originating, inter alia, in Ukraine

COUNCIL REGULATION (EC) No 237/2008

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terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96 of the anti-dumping duty on imports of ammonium nitrate originating, *inter alia*, in Ukraine

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

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 Article 11(3) thereof,

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

Whereas:

A. PROCEDURE

1. Measures in force

(1) On 22 January 2001 the Council imposed, by Regulation (EC) No 132/2001[(2)], a definitive anti-dumping duty (the existing measures) of EUR 33,25 per tonne on imports of ammonium nitrate falling within CN codes 3102 30 90 and 3102 40 90 and originating, *inter alia*, in Ukraine. The investigation that led to the existing measures will be referred to as the original investigation.

(2) On 17 May 2004, following a partial interim review, by Regulation (EC) No 993/2004[(3)] the Council exempted from the anti-dumping duties imposed by Regulation (EC) No 132/2001 imports to the Community of the product concerned produced by companies from which undertakings would be accepted by the Commission. By Commission Regulation (EC) No 1001/2004[(4)], undertakings were accepted for a period of 6 months and by Commission Regulation (EC) No 1996/2004[(5)] for a further period until 20 May 2005. The purpose of these undertakings was to take account of certain consequences of the enlargement of the European Union to 25 Member States on 1 May 2004.

(3) By Regulation (EC) No 945/2005, following an interim review limited in scope to the definition of the product concerned, the Council decided that the definition of the product concerned should be clarified and that the measures in force should apply to the product concerned when incorporated in other fertilisers, in proportion to their content of ammonium nitrate, together with other marginal substances and nutrients.

Changes to legislation: *There are currently no known outstanding effects for the Council Regulation (EC) No 237/2008. (See end of Document for details)*

(4) Following an expiry review initiated in January 2006, the Council, by Regulation (EC) No 442/2007[6], renewed these measures at their current level for two years. The measures consist of specific duties.

2. Request for a review

(5) A request for a partial interim review pursuant to Article 11(3) of the basic Regulation was lodged by Open Joint Stock Company (OJSC) Azot Cherkassy (the applicant), an exporting producer from Ukraine. The request was limited in scope to dumping as far as the applicant is concerned.

(6) In its request pursuant to Article 11(3) of the basic Regulation, the applicant claimed that the circumstances with regard to dumping, on the basis of which the measures in force were established, had changed and that these changes were of a lasting nature. The applicant further alleged that a comparison of normal value based on its own costs or domestic prices and export prices to the Community would lead to a reduction of dumping significantly below the level of the current measures. Therefore, it claimed that the continued imposition of measures at the existing levels was no longer necessary to offset dumping.

3. Investigation

(7) Having determined, after consulting the Advisory Committee, that the request contained sufficient *prima facie* evidence, the Commission announced on 19 December 2006 the initiation of a partial interim review pursuant to Article 11(3) of the basic Regulation by a notice of initiation published in the *Official Journal of the European Union*[7].

(8) The review was limited in scope to the examination of dumping in respect of the applicant. The investigation of dumping covered the period from 1 October 2005 to 30 September 2006 (the review investigation period or RIP).

(9) The Commission officially informed the applicant, the representatives of the exporting country and the association of Community 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.

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

(11) In order to obtain the information deemed necessary for its investigation, the Commission sent the questionnaire to the applicant and received the reply within the deadline set for that purpose.

(12) The Commission sought and verified all information deemed necessary for the determination of dumping. The Commission carried out verification visits at the applicants premises in Cherkassy.

(13) Interested parties were informed of the essential facts and considerations on the basis of which it was intended to recommend that the present review be terminated and that the existing anti-dumping measures be maintained on imports of the product concerned by the applicant, and the parties were given an opportunity to comment. The comments received were duly considered and taken into account, where appropriate.

B. PRODUCT CONCERNED AND LIKE PRODUCT

1. Product concerned

(14) The product concerned is the same as in the original investigation as clarified by Regulation (EC) No 945/2005, namely solid fertilisers with an ammonium nitrate content exceeding 80 % by weight originating in Ukraine, 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 (hereinafter referred to as AN). AN is a solid nitrogen fertiliser commonly used in agriculture. It is manufactured from ammonia and nitric acid, and its nitrogen content exceeds 28 % by weight in prilled or granular form.

2. Like product

(15) This review investigation confirmed what was established in the original investigation — that AN is a pure commodity product, and its quality and basic physical characteristics are identical whatever the country of origin. The AN manufactured and sold by the applicant on its domestic market in Ukraine and the one exported to the Community have the same basic physical and chemical characteristics and essentially the same uses. Therefore, these products are considered to be like products within the meaning of Article 1(4) of the basic Regulation. Since the present review was limited to the determination of dumping as far as the applicant is concerned, no conclusions were reached with regard to the product produced and sold by the Community industry in the Community market.

C. RESULTS OF THE INVESTIGATION

1. Normal value

(16) In order to establish the normal value, it was first verified that the total domestic sales of the applicant were representative in accordance with Article 2(2) of the basic Regulation, namely that the total volume of such sales represented at least 5 % of the total export sales volume of the applicant to the Community. The investigation showed that the applicant sold only one type of AN and that this type was sold in representative quantities on the domestic market.

(17) The Commission subsequently examined whether the domestic sales of AN could be regarded as having been made in the ordinary course of trade in accordance with Article 2(4) of the basic Regulation, by comparing domestic net sales price with the calculated cost of production.

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(18) When the applicants cost of production was assessed, it was found that gas costs were not reasonably reflected in the applicants records. It should be noted that energy costs, such as gas, represent a major proportion of the manufacturing cost and a significant proportion of the total cost of production.

(19) As regards gas costs, it was found that Ukraine is importing the majority of the gas consumed in the production of AN from Russia. In this regard, all available data indicate that Ukraine imports natural gas from Russia at prices which are significantly below market prices paid in unregulated markets for natural gas. The investigation revealed that the price of natural gas from Russia when exported to the Community was approximately twice as high as the domestic gas price in the Ukraine. Therefore, as provided for in Article 2(5) of the basic Regulation, the gas costs borne by the applicant were adjusted on the basis of information from other representative markets.

(20) Following disclosure, the applicant argued that any adjustment of its gas price paid on the domestic market would be unwarranted because the accounting records of the company fully reflected the costs associated with the activity of production and sales of the like product in the country of origin.

(21) However, when the cost of production of the like product under Article 2(5) of the basic Regulation is examined, it must be determined whether the costs as booked in the companys accounts reasonably reflect the costs associated with the production and sale of the product under investigation. For the reasons set out in recital 19, this was found not to be the case.

(22) Furthermore, the applicant claimed that its normal value should be based on its sales of the product concerned on its domestic market alleging that there is no reason to consider that these sales were not made in the ordinary course of trade. In this regard, it should be noted that in order to establish whether domestic sales were made in the ordinary course of trade by reason of price, namely whether they were profitable, it must first be established whether the costs of the applicant were a reliable basis within the meaning of Article 2(5) of the basic Regulation. Only after costs have been reliably established, can it be determined which methodology to establish normal value should be used. As outlined in recitals 28 and following, since the comparison of domestic net sales price with the adjusted cost of production during the RIP showed that no domestic sales were made in the ordinary course of trade, domestic prices of the applicant could not be used for the establishment of the normal value.

(23) The applicant also argued that the investigation was based on data during the RIP and that the conclusions did therefore not take into account developments after this period such as, in particular, the continuous increase of gas prices and the increase in domestic consumption of fertilisers in Ukraine. In this respect, it should be recalled that in accordance with Article 6(1) of the basic Regulation, for the purpose of a representative finding, an investigation period is to be selected which, in the case of dumping, is normally to cover a period of not less than six months immediately before to the initiation of the proceeding. It is also recalled that in line with usual Community practice, the RIP concerning dumping lasted one year.

(24) It was considered whether the development of gas prices in Ukraine subsequent to the RIP should have been taken into consideration when determining the dumping margin of the applicant. In this regard, it should be noted that in accordance with Article 6(1) of the basic Regulation, information relating to a period subsequent to the investigation period is, normally, not to be taken into account. In line with consistent Community practice, this was interpreted as meaning that events relating to a period subsequent to the IP can only be taken into account if they are manifest, undisputed and lasting. In this regard, although an increase in gas prices could be observed after the RIP, it could not be established with sufficient certainty that this price increase was indeed of a lasting nature. It was found that the information available on future developments of gas prices in Ukraine consisted in mere estimates rather than verifiable information in relation to actual gas prices. Article 6(1) allows the use of information and data outside the IP (or in cases of reviews the RIP) only under very exceptional circumstances. The situation in the present case was not considered such as to justify the use of data or information outside the RIP. Furthermore, the applicant did not substantiate its arguments as no evidence was submitted to show that data relating to a period after the RIP are more representative than those relating to the RIP. The argument was therefore rejected.

(25) As for the fact that the consumption of fertilisers in Ukraine has increased after the RIP, the applicant did not explain or show to what extent this fact could have an impact on the findings made on the basis of the information related to the RIP. Thus, the applicant did not submit sufficient information on the basis of which meaningful conclusions could have been drawn, nor was any other information available which could have supported the applicant's claim in this regard. Since any conclusions on this basis would have been speculative the applicants claim was rejected.

(26) The adjusted gas price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs. Waidhaus, being the main hub for Russian gas sales to the EU, 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.

(27) The applicant further argued that Ukraine purchases gas at similar market conditions as the Community and that the prices paid for gas by the applicant in 2007 were higher than the gas price at the Ukrainian-Russian border in the same period. However, the applicant did not submit any evidence to substantiate its claims and has thus failed to show that the conditions mentioned in recital 24 for taking into account events relating to a period subsequent to the RIP are fulfilled. The argument was therefore rejected.

(28) The comparison of domestic net sales price with the adjusted cost of production during the RIP showed that no domestic sales were made in the ordinary course of trade pursuant of Article 2(4) of the basic Regulation.

(29) It was therefore considered that domestic prices did not provide an appropriate basis for the establishment of the normal value and another method had to be applied.