Council Regulation (EC) No 236/2008 of 10 March 2008 concerning 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 in Russia

COUNCIL REGULATION (EC) No 236/2008

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concerning 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 in Russia

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) The measures currently in force are a definitive anti-dumping duty imposed by Council Regulation (EC) No 658/2002[(2)], on imports of ammonium nitrate originating in Russia.

2. Request for review

(2) The Commission received a request for a partial interim review pursuant to Article 11(3) of the basic Regulation.

(3) The request was lodged by two related exporting producers in Russia, belonging to the 'Acron' Holding Company, namely OJSC Acron and OJSC Dorogobuzh. These two companies, due to their relationship are treated as one legal entity for the purpose of the present investigation ('the applicant'). The request is limited in scope to the examination of dumping as far as the applicant is concerned.

(4) The applicant alleged and provided sufficient *prima facie* evidence that the circumstances on the basis of which measures were established have changed and that these changes are of lasting nature. The applicant provided *prima facie* evidence showing that a comparison between its own costs of ammonium nitrate and its export prices to the Community would lead to a reduction of dumping significantly below the level of the current measures. Therefore, the continued imposition of measures at the

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existing levels, which were based on the level of dumping previously established, would no longer be necessary to offset dumping.

3. Initiation

(5) Having determined, after consulting the Advisory Committee, that sufficient evidence existed for the initiation of a partial interim review, the Commission, on 19 December 2006, by a notice published in the *Official Journal of the European Union*[3], initiated a partial interim review of the anti-dumping measures applicable to imports of ammonium nitrate originating in Russia pursuant to Article 11(3) of the basic Regulation.

(6) This review was limited in scope to dumping, with the objective of assessing the need for the continuation, removal or amendment of the existing measures in respect of the applicant.

4. Investigation

(7) The investigation of dumping covered the period from 1 October 2005 to 30 September 2006 ('review investigation period' or 'RIP').

(8) The Commission officially advised the applicant, as well as the representatives of the exporting country and the Community industry of the initiation of the review. Interested parties were given the opportunity to make their views known in writing and to request a hearing.

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

(10) A questionnaire was sent to the applicant and its related sales companies on the Russian domestic market. The applicant as well as two of the related sales companies submitted full questionnaire replies.

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

(a) The exporting producers:
- OJSC Acron,
- OJSC Dorogobuzh;

(b) The related sales companies:
- JSC Rostragronova,
- JSC Kubanagronova.

B. PRODUCT CONCERNED AND LIKE PRODUCT

1. Product concerned

(12) The product under review is the same as in the investigations mentioned in recital (1), i.e. solid fertilizers with an ammonium nitrate content exceeding 80 % by

weight originating in Russia (the product concerned), currently classifiable 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. Like product

(13) As established in the previous investigations and confirmed in this investigation, the product concerned and the products manufactured and sold by the applicant on the Russian domestic market were found to have the same basic physical and chemical characteristics and essentially the same uses and are therefore 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

(14) In accordance with Article 11(3) of the basic Regulation, it was examined whether the circumstances on the basis of which the current dumping margin was based have changed and whether such change was of a lasting nature.

1. Normal value

(15) 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. Domestic sales of the applicant were found to be representative when compared to its export sales as they represented more than 5 % of its total export sales volume to the Community.

(16) The Commission subsequently examined whether the domestic sales could be considered as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. To this end, the cost of production of the product produced and sold by the applicant on the domestic market was examined.

(17) Gas is a main raw material component in the manufacturing process of the product concerned and represents 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 under consideration were reasonably reflected in the records of the parties concerned.

(18) It was established on the basis of data published by internationally recognised sources specialised in energy markets, that the prices paid by the applicant were abnormally low. By way of illustration, they amounted to one fifth of the export price of natural gas from Russia and were also significantly lower than the gas price paid by the Community producers. In this regard, all available data indicate that domestic gas prices in Russia were regulated prices which are far below market prices paid in unregulated markets for natural gas.

(19) 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

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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'. 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 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.

(20) Following disclosure, the applicant claimed 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 examining cost of production of the like product under Article 2(5) of the basic Regulation, it must be determined whether the costs as booked in the company's accounts are *reasonably* reflecting the costs associated with the production and sale of the product under investigation. For the reasons set out above in recital (18), this was found not to be the case. The applicant did not address the apparent significant difference between the price for gas paid on the Russian domestic market and the export price of natural gas from Russia, on the one hand, and the one paid by the Community producers, on the other hand. It did also not address the fact that domestic prices for natural gas were regulated in Russia and could not be considered to reasonably reflect a price normally payable in undistorted markets. Finally, the applicant did not explain why despite the reasons set out in recital (18), the cost of gas used for the production of the like product sold on the domestic market would be reasonably reflected in its records. This claim therefore had to be rejected.

(22) The applicant further claimed that by making a gas adjustment, *de facto* a methodology to determine normal value was used which is not foreseen by the basic Regulation. Thus, by replacing domestic gas costs by costs calculated as described above in recital (19), and due to the fact that these costs constitute major part of the total costs of the like product and therefore also of the constructed normal value, the normal value would be *de facto* determined by data from a third 'representative' market. In this regard, the applicant argued that for market economy countries, the basic Regulation foresees, however, only the following methodologies to determine the normal value:

(i) on the basis of the domestic price of the like product in the ordinary cause of trade, or alternatively, in case sales are not made in the ordinary course of trade;

(ii) on the basis of the cost of production in the country of origin (plus a reasonable amount for selling, general and administrative costs ('SG&A') and for profits) or

(iii) representative export prices of the like product to an appropriate third country. The applicant concluded that on this basis normal value should not be based on data from a third representative market.

(23) In this regard and as also outlined below in recitals (45) to (48), it should first be noted that normal value was established in accordance with the methodologies outlined in Article 2(1) to (6) of the basic Regulation. However, in order to establish whether domestic sales were made in the ordinary course of trade by reason of price, i.e. 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, it can be determined which methodology to establish normal value should be used. It is therefore wrong to claim that by determining reliable costs in accordance with Article 2(5) of the basic Regulation a new methodology to determine normal value was introduced.

(24) The applicant moreover argued that when adjusting cost in accordance with Article 2(5) of the basic Regulation, the level of the adjusted costs cannot exceed the level of the respective costs in the exporting country. Otherwise, the methodology used when adjusting cost would be in breach of Article 2(3) of the basic Regulation which stipulates that normal value of the like product shall be calculated on the basis of the costs of production in the country of origin.

(25) The cost adjustment was done in accordance with Article 2(5) of the basic Regulation. Article 2(5) of the basic Regulation does not refer to the 'cost of production in the country of origin', but explicitly entitles the Institutions to use the cost of production coming 'from other representative market' in other countries than the country of origin. The applicant's argument therefore had to be rejected

(26) Finally, the findings set out above in recitals (18) and (19) are also not in contrast to Article 1 of the basic Regulation, as claimed by the applicant. Indeed, although Article 1 of the basic Regulation indicates that normal value should be established by reference to data from the country of export, the basic Regulation makes also clear that this rule is subject to exceptions.

(27) The applicant's arguments in this respect had therefore to be rejected.

(28) The applicant further claimed that if an adjustment were to be made to its cost of natural gas on the domestic market, such adjustment should be based on either the

(i) non-regulated gas prices available in Russia, or

(ii) the average export price of Russian natural gas to the Baltic countries, or alternatively

(iii) on the basis of the actual cost of production of natural gas in Russia plus a reasonable profit margin.

(29) Firstly, the fact that the Commission could have chosen a different basis does not render the choice of Waidhaus unreasonable. The primary criterion for the choice of the basis on which to establish the gas prices is that it reasonably reflects a price normally payable in undistorted markets. It is undisputed that this condition is met with respect to the prices at Waidhaus. Secondly, the fact that the volume of gas sold