Council Regulation (EC) No 682/2007 of 18 June 2007 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain prepared or preserved sweetcorn in kernels originating in Thailand

COUNCIL REGULATION (EC) No 682/2007

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imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain prepared or preserved sweetcorn in kernels originating in Thailand

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 9 thereof,

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

Whereas:

A. PROVISIONAL MEASURES

(1) On 28 March 2006, the Commission published a notice[(2)] initiating an anti-dumping proceeding on imports into the Community of certain prepared or preserved sweetcorn in kernels originating in Thailand. On 20 December 2006, the Commission, by Regulation (EC) No 1888/2006[(3)] (the provisional Regulation) imposed a provisional anti-dumping duty on imports of the same product.

B. SUBSEQUENT PROCEDURE

(2) Subsequent to the disclosure of the essential facts and considerations on the basis of which it was decided to impose provisional anti-dumping measures, several interested parties made written submissions making their views known on the provisional findings. The parties who so requested were granted an opportunity to be heard. A meeting pursuant to Article 6(6) of the basic Regulation among one exporting producer, an Association of Thai producers, the Thai Government and the Community producers took place on 9 February 2007 at the Commission premises. The meeting was devoted to the issue of competition on the Community market for sweetcorn.

(3) The Commission continued to seek and verify all information it deemed necessary for the definitive findings.

(4) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of a definitive anti-dumping duty on imports of certain prepared or preserved sweetcorn in kernels originating in Thailand

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and the definitive collection of the amounts secured by way of the provisional duty. Parties were also granted a period within which to make representations subsequent to the disclosure of the essential facts and considerations on the basis of which definitive measures are imposed.

(5) The oral and written comments submitted by the interested parties were considered and, where appropriate, the findings have been modified accordingly.

(6) It is recalled that the investigation of dumping and injury covered the period from 1 January 2005 to 31 December 2005 ('investigation period' or 'IP'). With respect to the trends relevant for the injury assessment, the Commission analysed data covering the period from 1 January 2002 to 31 December 2005 (period considered). The period used for the findings on undercutting, underselling and injury elimination is the aforementioned IP.

C. PRODUCT CONCERNED AND LIKE PRODUCT

(7) In the absence of any comments concerning the product concerned and like product, recitals 13 to 15 of the provisional Regulation are hereby confirmed.

D. DUMPING

1. Sampling and individual examination

(8) A number of exporters and an association of Thai producers raised objections to the sampling and individual examination assessment described in recitals 16 to 20 of the provisional Regulation. In particular, it was claimed that the sample was not representative since the Commission disregarded other factors such as the size of the companies and their geographical location. Furthermore, it was claimed that it would not have been unduly burdensome to investigate more companies than the four sampled.

(9) As explained in recitals 16 to 18 of the provisional Regulation, the Commission considered that in order to reach the highest possible representativeness of the sample taking into account the time limits of the investigation, it was appropriate to include only four companies in the sample since (i) this allowed coverage of a large volume of exports and (ii) it was feasible to investigate these four companies within the time available. Article 17 of the basic Regulation does not specify any threshold beyond which the number of exporters would be considered so large as to warrant sampling, neither does it provide a precise indication on the appropriate number of parties to be included in the sample. As for the latter, the Commission itself has to judge what is feasible to investigate within the given time limit while ensuring that the sample should cover as large a part as possible of the exports in question. In this respect, the sample selected covered 52 % of the total Thai exports during the investigation period, which indeed is considered as highly representative on a volume basis.

(10) In accordance with Article 17(1) of the basic Regulation, the criteria applied for the selection of the sample was the largest representative volume of exports from Thailand into the Community that could reasonably be investigated within the time available. In view of the high representativity of the selected sample in terms of

volume, it was not considered necessary to examine other factors such as the size of the companies or their geographical location.

(11) As already mentioned in recital 20 of the provisional Regulation, to investigate more companies would have rendered the investigation unduly burdensome and would have prevented completion of the investigation in good time.

(12) The claims raised by some parties concerning recitals 16 to 20 of the provisional Regulation are therefore rejected and those recitals are hereby confirmed.

2. Normal value

(13) One exporting producer claimed that a number of mathematical errors had been made in its normal value calculation. These claims were cross-checked and it was found that no errors had been made.

(14) In the absence of any other comments in this respect, recitals 21 to 32 of the provisional Regulation are hereby confirmed.

3. Export Price

(15) Following the provisional disclosure, one exporting producer contested the findings in recital 34 of the provisional Regulation. This party claimed that all export sales of the company, including its sales of purchased product manufactured by other independent producers, should have been taken into account. This party claimed that purchased finished products should be regarded as originating from its own production as it was alleged that they were manufactured in the framework of a tolling system.

(16) In this context, it is to be noted that only products produced by the exporting producer in question can be considered when determining individual dumping margins. If an exporting producer is partly purchasing product for further resale to the Community it is, in fact, in a position similar to that of an agent or trader in respect of those purchases and such resales cannot be considered when establishing its individual dumping margin.

(17) In the investigation it was established that the exporting producer in question was actually buying from other producers part of the goods sold to the Community. It was further found that this exporter always paid for finished products and that such transactions were recorded in its accounting system as purchases of finished goods. No contractual or other evidence (e.g. so called ‘tolling’ agreement) was shown to prove that the goods were from the outset owned by the exporting producer and that the activity of the other companies was limited to a simple transformation of the products in question.

(18) Following definitive disclosure, the exporting producer in question reiterated its claims, underlining that it should be considered as a co-producer of the product purchased from other producers. However, given that the ownership of the goods produced by other parties was transferred to the exporting producer concerned only after completion of the manufacturing process, as evidenced by the purchase invoices,

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it is confirmed that this exporting producer cannot be considered as the producer, or co-producer, of the product purchased for resale.

(19) In view of the above, the claim of the exporting producer is rejected and recitals 33 and 34 of the provisional Regulation are hereby confirmed.

(20) An association of importers claimed that an adjustment pursuant to Article 2(10)(k) of the basic Regulation should have been made in order to reflect the fact that heavy flooding in Thailand had caused export prices of the product concerned to be comparatively low relative to increased cost of raw material sweetcorn after the flooding. In this respect, it should be noted that the claim was not made by any of the exporting producers themselves, nor quantified. Moreover, flooding is a relatively common occurrence in Thailand and cannot be considered as an unforeseeable event when negotiating contracts and in particular export prices. Finally, the analysis showed that the possible effect, if any, of the flooding on the price of raw material sweetcorn would have been limited only to the last quarter of the IP when, in fact, the vast majority of raw material purchases by exporting producers took place before that period. Therefore, the claim for adjustment is rejected.

4. Comparison

(21) Further to provisional disclosure, a number of exporting producers claimed that certain allowances on domestic sales (mainly relating to handling, loading and ancillary expenses and credit costs) should be granted in the dumping calculations. These claims were examined and for one company it was indeed found that an additional allowance should be granted. After this adjustment, the dumping margin for this company decreased from 4,3 % to 3,1 %.

(22) Since data from the company mentioned in recital 21 above was used in constructing the normal value of another company, as explained in recitals 29 and 31 of the provisional Regulation, the dumping margin of the latter company also decreased from 11,2 % to 11,1 % as a result of the allowance granted.

(23) In the absence of any other comments in this respect, and apart from the above changes, recitals 35 and 36 of the provisional Regulation are hereby confirmed.

5. Dumping margin

(24) In the light of the above adjustment, the amount of dumping finally determined, expressed as a percentage of the cif net free-at-Community-frontier price, before duty, is as follows:

Company	**Dumping margin**
Karn Corn	3,1 %
Malee Sampran	17,5 %
River Kwai	15,0 %
Sun Sweet	11,1 %

(25) For the cooperating companies not selected in the sample, the dumping margin was established on the basis of the weighted average dumping margin of the companies selected in the sample, pursuant to Article 9(6) of the basic Regulation. This weighted average dumping margin, expressed as a percentage of the cif Community frontier price, duty unpaid, is 12,9 %.

(26) In the absence of any comments, recital 40 of the provisional Regulation is hereby confirmed.

E. INJURY

(27) One interested party submitted that the approach followed by the Commission and described under recitals 50 and 51 of the provisional Regulation with respect to different sales channels is inconsistent with the basic Regulation and the WTO Anti-Dumping Agreement[(4)], as it would, allegedly, 'be intended to artificially reflect a higher injury and cannot be considered as properly based nor as objective and unbiased'. In support of its plea, the claimant made reference to the Report of the WTO Appellate Body of 24.7.2001[(5)] (AB) where it is held that 'the investigating authorities are not entitled to conduct their investigation in such a way that it becomes more likely that, as a result of the fact-finding or evaluation process, they will determine that the domestic industry is injured' (paragraph 196 of the AB).

(28) Firstly, the existence of the two different sales channels described by the Commission under recitals 50 and 51 of the provisional Regulation, together with its ensuing implications in terms of selling costs and sales prices, is not questioned by any party to this proceeding, and not even by the claimant. Secondly, the fact, also established under recital 51 of the provisional Regulation, that all imports from the cooperating Thai exporters pertain to the retailer's brand channel is not contested either. Rather, it is acknowledged by the claimant: 'It should be reminded that Thai sales to retailers in Europe are made under the retailers' private label'.

(29) Furthermore, it is also to be noted that the AB stated in paragraph 204 that '[…] it may be highly pertinent for investigating authorities to examine a domestic industry by part, sector or segment.' It was therefore adequate to distinguish the two separate sales channels, for certain injury indicators as appropriate, for the purpose of ensuring a fair evaluation of the injury felt by the Community industry, and of establishing whether the dumped imports from Thailand had had a direct bearing on the injury suffered by the Community industry. The injury determination has systematically covered both sales channels taken together, and in addition, has analysed separately, when appropriate, the sales under the retailer's brand.

(30) However, the AB in paragraph 204 went on to say that '[…] where investigating authorities undertake an examination of one part of a domestic industry, they should, in principle, examine, in like manner, all of the other parts that make up the industry, as well as examine the industry as a whole.' The Commission services therefore complemented below their injury analysis with regard to the three injury