COUNCIL REGULATION (EC) No 437/2004

of 8 March 2004

imposing definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of large rainbow trout originating in Norway and the Faeroe Islands

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), in particular Article 9 thereof,

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

Whereas:

A. PROVISIONAL MEASURES

(1) The Commission, by Regulation (EC) No 1628/2003 [2] (the provisional Regulation) imposed a provisional anti-dumping duty on imports of large rainbow trout falling within CN codes 0302 11 20, 0303 21 20, 0304 10 15 and 0304 20 15, originating in Norway and the Faeroe Islands.

(2) It is recalled that the investigation of dumping and injury covered the period from 1 October 2001 to 30 September 2002 (investigation period or IP). The examination of trends relevant for the injury analysis covered the period from 1 January 1999 to 30 September 2002 (analysis period).

B. SUBSEQUENT PROCEDURE

(3) Following the imposition of provisional duties on imports of large rainbow trout originating in Norway and the Faeroe Islands, some interested parties submitted comments in writing. The parties who so requested were also granted an opportunity to be heard orally.

(4) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive anti-dumping duties and the definitive collection of amounts secured by way of provisional duties. They were also granted a period within which they could make representations subsequent to this disclosure.

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

(6) The Commission continued to seek and verify all information it deemed necessary for the definitive findings. In addition to the verification visits undertaken at the companies mentioned in recital 6 of the provisional Regulation, it should be noted that after the imposition of provisional measures, on-spot verification visits were carried out at the premises of the following companies and Associations:

— Federation of European Aquaculture Producers (FEAP), Boncelles, Belgium,

— Syndicat national des industries du saumon et de la truite fumés, Paris, France,

— P/F PRG Export and its related producer P/F Luna, Gøta, Faeroe Islands,

— P/F Vestsalmon and its related producer P/F Vestlax, Kollafjørður, Faeroe Islands,

— P/F Bakkafrost, Glyvrar, Faeroe Islands,

— P/F Faeroe Salmon, Klaksvik, Faeroe Islands,

— P/F Faeroe Seafood, Torshavn, Faeroe Islands,

— P/F Landshandilin, Torshavn, Faeroe Islands,

— P/F Navir, Argir, Faeroe Islands,

— P/F Viking Seafood, Strendur, Faeroe Islands.

(7) Some parties argued that the selected IP was not appropriate as the prices were extremely low during that period and have since recovered. In this respect, it should be recalled that, as per Article 6(1) of the basic Regulation, for the purpose of a representative finding, an investigation period shall be selected which, in the case of dumping shall, normally, cover a period of not less than six months immediately prior to the initiation of the proceeding. In other words, the IP is basically determined by the date of initiation. However, it is also recalled that in line with usual Community practice, the IP concerning dumping had a duration of one year. This period which is usually long enough to cover also

[1] OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 1972/2002 (OJ L 305, 7.11.2002, p. 1).
[2] OJ L 232, 18.9.2003, p. 29. Regulation as last amended by Regulation (EC) No 117/2004 (OJ L 17, 24.1.2004).

seasonal changes in demand and thus ensuring a representative finding, in particular by excluding that short-lived fluctuations on the Community market or on the home markets of the exporting country carry a disproportional overweight in the findings. Article 6(1) of the basic Regulation also sets the rules under which circumstances occurring after the IP can be taken into account. Accordingly, information relating to a period subsequent to the investigation period shall, normally, not be taken into account. In line with consistent Community practice, this has been 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. Nothing found in this investigation suggests that the data relating to a period after the initiation are more representative than those relating to the IP. Events before the IP are in any event taken into account in the analysis period. The argument was therefore rejected.

C. **PRODUCT CONCERNED AND LIKE PRODUCT**

(8) The Norwegian exporting producers and the Norwegian Ministry of Fisheries argued that fresh/chilled and frozen trout should not be considered as like products because they do not share the same physical characteristics since frozen trout is a processed product using fresh as its raw material. They further claimed that frozen trout competes only to a limited degree with fresh trout and is to a large extent intended for different markets than the fresh products. It was also noted that authorities in the USA have consistently not included frozen products in the context of antidumping proceedings concerning salmon originating in Norway. Similarly, they submitted that in the recent antidumping proceeding concerning salmon originating in Norway, the Faeroes Islands and Chile, the Community Institutions found that frozen fillets from Chile competed with fresh salmon products from the Community industry only to a limited degree. On the basis of these arguments they requested that frozen whole fish and fillets be excluded by the proceeding.

(9) In this respect it should be noted that in assessing whether the product concerned should be deemed to be alike to large rainbow trout produced in the Community, it was initially considered whether the various types of and presentations of large rainbow trout, i.e. fillets or whole fish, fresh or frozen, shared the same basic physical, technical and/or chemical characteristics. In this respect it was considered that, in contrast to procedures such as smoking or marinating, the freezing of large rainbow trout does not alter the basic characteristics of the product, but solely allows its storage for a deferred consumption. Moreover, the present investigation has established that fresh and frozen large rainbow trout are interchangeable. In addition, in the recent investigation ([1]) concerning salmon where a similar argument was made, it was determined that the product concerned included whole fish, gutted fish and various types of portion fillets, whether fresh, chilled or frozen and that such presentations of salmon constituted a single product which itself was deemed to be alike in all respects to that produced by the Community producers and sold in the Community market, and thus this case does not support the submission made. Finally, arguments concerning practice in the USA were not considered relevant in the context of this investigation, since the product scope of the anti-dumping investigations carried out by the USA authorities was different. On the basis of the above, the request that frozen whole fish and fillets should be excluded from the proceeding could not be accepted.

(10) The same parties also argued, that live trout should not be covered by the product concerned that producers of live trout should not be considered for the definition of the Community industry, and that producers of trout should be distinguished from companies involved in the slaughtering, packing, freezing and filleting of fish. In this respect it should be noted that live trout is not covered by the investigation and thus not accounted in for the total production of the product concerned in the Community. Furthermore, live trout is indeed neither the product concerned nor are producers of live trout included in the definition of the Community industry. However, in respect of the submission that the trout growers should be distinguished, it was established that all the sampled cooperating producers included in the definition of the Community industry grow the fish and then slaughter it and pack it, or fillet it. In some cases they further process it and/or freeze it. This distinction between producing companies and processing companies does therefore not exist in the Community industry and the argument was thus rejected.

(11) It was further argued that part of the production of large rainbow trout in the Community is destined for producing roe, and that fish grown to maturity to this end constitutes a product of a much inferior quality and therefore can not be considered as alike to the product concerned. It was also submitted in this regard that the basic physical characteristics change significantly because of lower fat content and the colour of flesh of the fish matured for producing roe. In this respect, it should be firstly noted that the alleged changes in fat content and the colour of flesh are only significant when the fish is fully matured, but not before. The fish is,

([1]) OJ L 133, 29.5.2003, p. 1.

however, slaughtered before the full maturity, and accordingly the quality of the fish is not affected to that extent that it cannot be sold on the market for human consumption. In this respect, it should be further noted that fully matured trout also produces lower quality roe. For that reason, there is no added value for growing trout to full maturity, even for producing roe. Accordingly, the fish grown to lesser than full maturity and producing roe as a by-product can therefore be sold on the market at prices equal or lower to non mature trout, depending on its stage of maturity and on the market conditions. Therefore, allowing fish mature does not alter its basic physical characteristics unless full maturity is reached. This latter event, is however, not in the interest of growers as explained above. As for the differences in quality these are duly taken into consideration in determining the different types of fish subject to the investigation and as such were accounted for in the dumping calculations and in the injury assessment. The argument was therefore rejected.

(12) In the absence of any other information submitted by interested parties, the conclusions drawn in recitals 9 and 10 of the provisional Regulation are hereby confirmed.

D. **DUMPING**

1. **Claims made by parties in Norway and the Faeroe Islands**

(13) A number of parties in both Norway and the Faeroe Islands argued that, since their production of large rainbow trout was geared mainly towards the supply of the Japanese market, the dumping calculations did not take sufficient account of alleged physical differences between the quality types sold to that market and those sold to the European and domestic market. They questioned the appropriateness of allocating costs of production on the basis of turnover. Instead they claimed that the Commission should have accepted the calculations submitted in the questionnaires, whereby the cost of production for non-superior quality grades was reduced by the absolute difference in average sales prices, expressed in NOK/kg, between superior and non-superior quality grades.

(14) The cost of production calculations submitted by the companies in their questionnaire replies could not be accepted since, as mentioned in recital 46 of the provisional Regulation, the companies could not substantiate that all Japan quality trout were destined for the Japanese market, nor that the specific costs relating to such fish had not in fact been incurred by all fish during the production cycle. In addition, the methodology proposed by the companies had the effect of eliminating certain costs rather than reallocating them over all units of production and the sampled producers did not have an established system to identify costs on the basis of differences between the various quality grades of the product concerned and had never previously used the methodology proposed. Moreover, although it is acknowledged that the major part of both Norwegian and Faroese trout exports is destined for the Japanese market, it cannot be excluded that so-called Japan quality trout is sometimes exported to other markets. If one accepts the argument made by the parties that the primary production objective is to supply trout meeting Japanese standards, it is only correct to apportion costs, such as extra pigmentation in the feed, across all fish produced. The allocation of production costs on the basis of turnover, also foreseen in the absence of a more appropriate method by Article 2(5) of the basic Regulation, is indeed the best method to reflect differences in those cases where the same costs are incurred for all products but the quality finally obtained is different.

(15) In addition, the sampled producers in the Faeroe Islands argued that they considered the methodology they proposed of adjusting costs by the differences in resale values between the different categories of trout was in line with generally accepted accounting principles. As already referred to in recital 56 of the provisional Regulation, the methodology used by the sampled producers does not allocate costs to the products on the basis of how these costs are actually incurred, nor does it distribute production costs to the products in a manner that properly reflects their relative sales values. On the contrary, it has the effect of failing to recognise all production costs since it is based on simply reducing costs for lower quality products by an amount equal to the difference between their sales prices and those of higher quality product. Therefore, this methodology cannot be considered to be in line with generally accepted accounting principles.

(16) In conclusion, the use of turnover as the basis of production cost allocation, in accordance with Article 2(5) of the basic Regulation, means that any alleged physical differences in the quality types of the product concerned are appropriately reflected in the calculations since this method, by its nature, allocates more production cost to those fish having the greater sales value, such as superior quality trout. The arguments in recitals 11 and 12 above are therefore rejected and the approach set out in recital 46 of the provisional Regulation is hereby confirmed.

(17) A number of Norwegian parties argued that the cost of acquisition calculations in respect of each producer, which were based on sales destined for consumption on the domestic market (recital 30 of the provisional Regulation), only represented a small part of the total

domestic sales and would therefore not be representative. In considering this claim, the methodology used to determine the cost of acquisition, as set out in recitals 29 to 32 of the provisional Regulation was also re-examined. It was concluded that the exclusion of sales which were not made in the ordinary course of trade and the construction of the costs in the cases were sales by product types were not profitable could lead to the inclusion in the cost of acquisition of elements not only relating to costs, but also involving a notion of profit. It was therefore established that the carrying out of an ordinary course of trade exercise at the level of the producers would not be fully appropriate. Accordingly, it was decided to base the 'cost of acquisition' exclusively on the costs incurred by the sampled producers, these costs still being allocated to the products in the way described in the last sentence of recital 46 of the provisional Regulation. Moreover, in order to ensure a maximum of representativity, it was decided that the costs of acquisition so calculated for each sampled producer should be weighted by the quantities of all sales made domestically by those producers to independent domestic customers to give an overall cost of acquisition for each product type sold by the sampled producers.

(18) It was also submitted that the representativity of domestic sales by Norwegian exporters should have been assessed on the basis of the combined domestic sales of the three exporters for each product type rather than for each exporter separately (recital 34 of the provisional Regulation). However, the approach adopted of assessing the representativity of domestic sales for each exporter separately, is consistent with the established practice of considering the circumstances and determining the results of each exporter forming part of a sample separately before determining the overall result for the sample. This representativity test is in no way linked to the question of whether individual duties or a single country wide duty, as in this case, is being applied. Accordingly, the argument is rejected and the approach set out in recitals 26 to 28 of the provisional Regulation is confirmed.

(19) A number of Norwegian parties also argued, at a late stage of the investigation, that the calculation of the cost of acquisition for trout fillets is inaccurate as it is based on the cost of acquisition for 'superior' quality fish, as indicated in recital 33 of the provisional Regulation, and as the codes used for fillets include a range of different qualities. They maintained that 'superior' quality fish is not used for fillets, which are generally made from 'other' quality fish, or sometimes 'ordinary' quality fish, qualities as defined in recital 28 of the provisional Regulation. Nevertheless, they considered that even basing the calculation on 'other' quality fish would not be accurate since this category itself covered a range of different qualities. Although expressly requested during the verification visits, these parties did not supply information that would permit a more detailed calculation, nor otherwise substantiate the above claim. The approach adopted is considered the most reasonable since, by taking the cost of acquisition for fresh gutted head-on superior quality fish (the most commonly sold type) and adjusting this by the percentage difference between the selling prices for that product and for the fillets, quality differences involved are actually reflected in the calculation. It should be noted that companies were requested in the questionnaire to immediately contact the officials in charge, should they have any queries or request any clarification on the main aspects of the questionnaire itself, as for example the part concerning the product description, which they never did. At this stage of the investigation, the abovementioned remarks concerning the range of qualities within the product codes used can no longer be taken into consideration. The methodology set out in recital 33 of the provisional Regulation is therefore confirmed.

(20) A Norwegian party maintained that the profit margins used in constructing the costs of acquisition and normal values were unrealistically high (recitals 31 and 38 of the provisional Regulation). In this context, it is to be noted that in view of the revision of the methodology used to establish the cost of acquisition, no profit margin has now been used at the level of the sampled producers. The profit margins used at the level of the sampled exporters, in the limited number of cases where values were constructed, were in the range 12 % — 21 % with the average being close to 15 %. These figures came from the sampled companies' own verified data relating to their profitable sales and therefore cannot be considered to be excessive. The argument is therefore rejected. One Norwegian party argued that only considering profitable sales in constructing the cost of acquisition and normal value in the cases indicated in recitals 31 and 36 of the provisional Regulation would be against WTO rules. This argument cannot be accepted. Indeed, in view of the revision of the methodology used to establish the cost of acquisition, the question no longer arises for the cost of acquisition. The approach followed in testing the profitability of domestic sales of exporters for the determination of normal value, is consistent with the provisions contained in Article 2(4) of the basic Regulation, which are in conformity with WTO rules. The claim is therefore rejected.

(21) Parties in the Faeroe Islands claimed that, in the absence of domestic sales, normal values should be determined on the basis of information concerning export sales to third countries, which was requested as part of the questionnaire for the investigation (recitals 50 and 51 of the provisional Regulation). In this respect it should be

noted that the request for certain information in an investigation does not prejudge in any way the further analysis or restrict the choice of methodologies to those making use of that information only. The construction of normal values on the basis of the cost of production in the country of origin is the first alternative listed at Article 2(3) of the basic Regulation for cases where there are no domestic sales. The use of constructed normal value, instead of exported prices to third countries, as the basis for the determination of normal value is also the consistent practice of the Community in the absence of representative domestic sales. No arguments were presented nor any reasons found as to why the use of export prices to third countries would have been more appropriate in this case than a constructed normal value. The argument is therefore rejected and the approach set out in recitals 50 and 51 of the provisional Regulation is confirmed.

(22) A number of Norwegian parties identified certain sales to wholesalers and distributors as having being incorrectly excluded from the domestic sales. The calculations were amended in order to take account of these sales.

(23) Four Norwegian companies argued that the codes used in the investigation to identify the different types of the product concerned were not sufficiently detailed for the purpose. It should be noted that the product coding system is based on the widely accepted system of classification used in the industry, the purpose of which is to distinguish between the various qualities of product. It is therefore considered an appropriate basis to ensure a proper comparison between the normal value and export price for the same quality and presentation of the product concerned. The argument is therefore rejected for the same reasons mentioned in recital 17.

(24) One Norwegian exporter claimed an adjustment in respect of certain domestic sales to retailers on the basis that they were at a different level of trade than its sales to the Community. This argument was accepted and the normal value calculations were amended accordingly.

(25) A number of parties submitted comments regarding the inclusion of certain items in the cost of production data and the correct identification of domestic sales transactions where those to traders were being excluded. For those claims which were found to be justified the dumping calculations were amended accordingly. A clerical error found in the cost of acquisition calculation for one Norwegian producer, which had led to an understatement of the cost of acquisition, was also corrected.

2. **Post IP events in the Faeroe Islands**

(26) Some parties in the Faeroe Islands argued that the level of production and exports from the Faeroe Islands had significantly decreased since the IP and that, as a consequence, Faroese exports to the EC will be *de minimis* in the future. On this basis, it was claimed that the proceeding should be terminated in respect of the Faeroe Islands. In this respect, it should be noted that, according to Article 6(1) of the basic Regulation, information relating to a period subsequent to the IP shall, normally, not be taken into account. Findings should therefore be limited to the IP except in cases where the effects of new circumstances can be proved to be manifest, undisputed, lasting, not open to manipulation and do not stem from deliberate action by interested parties. It was verified that the claimed reduction in production and exports had indeed taken place. However, even if the claimed decreases would bring Faroese exports to the EC below the de-minimis level in the near future, there are insufficient elements to conclude that such a decrease would be lasting. Moreover, even if a lasting decrease in production and exports in general would actually take place, it would not be possible to conclude from this fact that exports to the EC would also decrease in a lasting way given that EC exports only amount to around 11 % of the production and that therefore any slight change in the supply of, for example, the Japanese market may result in significant increases of the exports to the Community. This type of situations would only be verifiable over a more extended period of time. The claim is therefore rejected.

3. **Dumping calculations**

(27) Some claims having been accepted, and the calculations refined, the amount of dumping finally determined, expressed as a percentage of the CIF net at Community frontier price, is as follows:

Norway, country wide margin	24, 8 %
Faeroe Islands:	
P/F PRG Export (for goods produced by P/F Luna)	54,5 %
P/F Vestsalmon (for goods produced by P/F Vestlax)	30,0 %
Cooperating but non-sampled companies	42,6 %
All other companies	54,5 %

E. **COMMUNITY INDUSTRY**

(28) The Norwegian Ministry of Fisheries argued that the percentage of the Community industry's production in relation to the total Community production is below 25 %, and therefore the proceeding should be terminated due to the lack of support for the case. This submission was based firstly, on the argument that the production of the Community industry which should not include