COUNCIL REGULATION (EC) No 235/2004

of 10 February 2004

amending Regulation (EC) No 2320/97 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in, *inter alia*, Romania in so far as it concerns imports into the European Community of products manufactured by Petrotub SA and Republica SA

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community, and in particular Articles 233 and 253 thereof,

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 (the basic Regulation) ([1]), in particular Article 2(1) and (11) thereof,

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

Whereas:

A. **PROCEDURE**

(1) On 9 January 2003, the Court of Justice of the European Communities (ECJ) in its judgment in case C-76/00 P (the Judgment) set aside the previous judgment of the Court of First Instance of the European Communities of 15 December 1999 in joined cases T-33/98 and T-34/98 (*Petrotub and Republica* v *Council*) ([2]). By its Judgment, the ECJ effectively annulled Council Regulation (EC) No 2320/97 of 17 November 1997 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic ([3]) (definitive anti-dumping Regulation or the contested Regulation), in so far as it concerned imports into the Community manufactured by Petrotub SA and Republica SA.

(2) It is recognised by the Courts ([4]) that, in cases where a proceeding consists of several administrative steps, the annulment of one of these steps does not annul the complete proceeding. The anti-dumping proceeding is an example of such a multi-step proceeding. Consequently, the annulment of parts of the definitive anti-dumping Regulation does not imply the annulment of the entire procedure prior to the adoption of the Regulation in question. On the other hand, according to Article 233 of the Treaty, the Community institutions are obliged to comply with the Judgment of the Court of Justice. Accordingly, the Community institutions, in so complying with the Judgment, have the possibility to remedy the aspects of the contested Regulation which led to its annulment, while leaving unchanged the uncontested parts which are not affected by the Judgment ([5]).

(3) Following the Judgment, a notice was published concerning anti-dumping measures on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Romania ([6]), announcing that Petrotub SA and Republica SA were no longer subject to the anti-dumping measures imposed by the definitive anti-dumping Regulation.

(4) This Regulation seeks to correct, with respect to Petrotub SA and Republica SA, the aspects of the contested Regulation found to be inconsistent with Community law in the Judgment, and which thus led to the annulment of the contested Regulation. All other findings made in the contested Regulation, which were not contested within the time limits for a challenge and thus were not considered by the Courts and did not lead to the annulment of the contested Regulation, remain valid.

B. **PRODUCTS UNDER CONSIDERATION**

(5) The categories of products under consideration are the same as the ones considered in the definitive anti-dumping Regulation i.e.:

(a) seamless pipes, of iron or non-alloy steel, of a kind used for oil and gas pipelines, of an external diameter not exceeding 406,4 mm; and

(b) seamless tubes of circular cross-section, of iron or non-alloy steel, cold-drawn or cold-rolled, other than precision tubes; and

(c) other tubes of circular cross-section, of iron or non-alloy steel, other than threaded or threadable, of an external diameter not exceeding 406,4 mm manufactured by Petrotub SA and Republica SA and currently classifiable within CN codes ex 7304 10 10, ex 7304 10 30, 7304 31 99, 7304 39 91 and 7304 39 93. These CN codes are given only for information.

([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]) [1999] ECR II-3837.
([3]) OJ L 322, 25.11.1997, p. 1. Regulation as amended by Regulation (EC) No 190/2000 (OJ L 23, 28.1.2000, p. 1).
([4]) *IPS* v *Council* [1998] ECR II-3939.
([5]) Case C-458/98 P *IPS* v *Council* [2000] ECR I-08147.
([6]) OJ C 30, 8.2.2003, p. 14.

C. **NEW ASSESSMENT OF THE FINDINGS BASED ON THE JUDGMENT OF THE ECJ**

1. **Preliminary remark**

(6) In this Regulation, the aspects of the Judgment that are addressed are the calculation of the dumping margin of Petrotub SA and the determination of the normal value of Republica SA.

(7) Petrotub's dumping margin was, as described in recital 22 of the definitive anti-dumping Regulation, calculated on the basis of a comparison of the weighted average normal value established for Petrotub SA with the prices of all its individual exports. This was considered necessary in order to reflect the full degree of dumping being practised and because a pattern of Petrotub's export prices which differed significantly among different purchasers, regions or time periods had been established.

According to the Judgment, this method, which is set out in the second sentence of Article 2(11) of the basic Regulation, can only be used if, in addition to a finding of an export pattern which differs significantly among different purchasers, regions or time periods, it is explained why the two first methods specified in the first sentence of Article 2(11) (which are also called 'symmetrical methods') do not allow for these differences in the pattern of export prices to be taken appropriately into account and thus to reflect the full degree of dumping being practised. However, in the definitive anti-dumping Regulation the Council, duly having mentioned in recital 22 that there was a pattern which differed significantly among different purchasers, regions or time periods, only concluded that the first of the two symmetrical methods (the average-to-average method) did not reflect the full degree of dumping being practised in that context, without addressing the second symmetrical method (the transaction-to-transaction method). Thus, this Regulation reassesses and corrects the results of the investigation leading to the imposition of the definitive anti-dumping duty on imports from Petrotub SA by assessing the applicability of the second symmetrical method in the light of the requirements contained in the Judgment. This second symmetrical method foresees a comparison of individual normal values and individual export prices to the Community on a transaction-to-transaction basis.

(8) Secondly, in the definitive anti-dumping Regulation, sales made by Republica SA using debt compensation were considered as having been made in the ordinary course of trade. In paragraph 86 of its Judgment, the ECJ held that this conclusion was not accompanied by an appropriate statement of reasons, as the mere statement in recital 19 of the definitive anti-dumping Regulation, that it had been found that 'sales made using compensation were indeed made in the ordinary course of trade' did not contain any explanatory element of such a kind as to enlighten the parties concerned about the reasons which led the Council to come to its conclusions. This Regulation therefore now provides the necessary statement of reasons, in accordance with Article 253 of the Treaty.

(9) Since the information necessary, in order to remedy the shortcomings found by the ECJ in the definitive anti-dumping Regulation and which led to its annulment, was available to the Commission at the time of adopting the definitive anti-dumping Regulation and still is so now, no further investigation was necessary with respect to Petrotub SA, Republica SA or other parties. The required motivation can therefore be based on the existing information, collected in the framework of the investigation which led to the imposition of definitive measures.

2. **Dumping margin of Petrotub SA**

(10) According to Article 2(11) of the basic Regulation the second symmetrical method bases the calculation of the dumping margin on a comparison of individual normal values of the different types of the product concerned with the corresponding individual export prices on a transaction-to-transaction basis.

(11) This method can only be applied if a number of conditions are met. A transaction by transaction comparison excludes by definition the use of averages (be it on the domestic sales side or on the export sales side). To be comparable, transactions can only be used if made on the same day, on both the domestic and the export side. Any deviation from this principle by using prices of transactions not made on the same day would be arbitrary. Only domestic and export sales relating to the same or a comparable product type can be used for a transaction by transaction comparison, otherwise the comparison cannot be valid. Domestic sales can only be used if they are in the ordinary course of trade. Domestic sales must be made in the ordinary course of trade in a quantity amounting to at least 5 % of the volume of the export transactions, in accordance with Article 2(2) of the basic Regulation. The identification of sales not made in the ordinary course of trade at the level of the transaction was made in accordance with Article 2(2) of the basic Regulation. Under the second symmetrical method, export prices cannot be compared to constructed normal values. Finally, it is considered that this method can only be representative if a sufficiently large volume of export transactions and domestic sales transactions are covered.

(12) On this basis it was examined whether the transaction-to-transaction calculation could be applied. It was found that the volume of export transactions, which could be compared, amounted to 66,6 %. However, only 9,5 % of the volume of domestic sales, which were made in the ordinary course of trade, could be used to determine normal value. In other words, the overwhelming majority of domestic sales would not have been taken into consideration in the dumping calculation. This low use of transaction data is therefore not a sufficiently representative basis with regard to the determination of normal value, which is the benchmark for any dumping analysis of export transactions. On this basis the transaction-to-transaction method was not upheld as an appropriate method to calculate the dumping margin in this case.

(13) Therefore, given that the use of the second symmetrical method would not have provided representative results, this method would also not have enabled to take into account the significant differences in the pattern of export prices. Consequently, the third method, namely the comparison of weighted average normal values to individual export prices (asymmetrical method), had to be applied, as in the presence of a pattern of export prices, it was found that neither the first nor the second symmetrical method would have enabled these differences to be taken into account.

3. **Normal value of Republica SA**

(14) As explained in recital 8, the ECJ found that the Council did not satisfy the requirements of the obligation to state reasons when in recital 19, fifth paragraph of the contested Regulation, it merely stated that sales made using compensation were made in the ordinary course of trade. This reasoning is therefore now set out below.

(15) During the investigation, which led to the imposition of definitive anti-dumping duties, Republica SA claimed that a substantial volume of its domestic sales was made on the basis of debt compensatory arrangements. It was alleged that sales prices of the product concerned delivered on the basis of such a compensatory arrangement could not be negotiated, because Republica SA was forced to take suppliers in the compensatory circuit with the result that sales prices to those suppliers were considerably lower than normal prices and therefore not comparable to normal market prices. Republica SA argued that sales on the basis of compensatory arrangements should therefore have been disregarded from the domestic sales for the calculation of normal value, as they could not be considered to have been made in the ordinary course of business.

(16) It should be underlined that the payment by compensatory agreement as described in recital 15 of this Regulation should be distinguished from the existence of compensatory arrangements in the sense of Article 2(1) of the basic Regulation. Whereas payment by compensatory arrangement, as described by Republica SA in its submission and in recital 15 of this Regulation, was found to be effectively a settlement of bills where receivables and payables were compensated without affecting the price conditions of the goods delivered, a compensatory arrangement, within the meaning of Article 2(1) of the basic Regulation, refers to an agreement, where goods and/or services are swapped between supplier and client and where the invoiced price is based on the difference of the value of such goods and/or services, thus not reflecting the real value of the goods delivered.

(17) During the on-site investigation at Republica's premises it was found that certain domestic sales, which were wrongly reported as having been made subject to standard cash payment terms, were found in fact to have been settled by means of compensation in a compensatory agreement. The form of compensation that took place was made by the netting of receivables and payables for the same amounts between Republica SA and its client acting, as the case may be, at the same time as supplier of some other goods or services. Sometimes one or more third parties were involved, e.g. in the case where Republica SA sells to a client which uses the receivable it has on a third party to settle its debt towards Republica SA. This type of settlement of transactions by compensatory agreement is common in economies with low liquidity and the investigation showed that it did not influence the original price setting of the transactions. Moreover, it was found that when Republica SA insisted on cash payments from its clients (e.g. when it needed cash in order to pay its personnel), sales prices were actually set lower than in the case of payment under a compensatory agreement, in order to reward the client for this cash payment. It was concluded that Republica's payment by compensation did not fall under the concept of compensatory agreement as described in Article 2(1) of the basic Regulation, as it was found that the compensatory agreements to which Republica SA was a party did not influence the sales prices quoted.

(18) It can therefore be concluded that the argument raised by Republica SA in respect of sales settled by means of compensation and the influence on domestic sales prices does not reflect reality and therefore also that sales made by Republica SA under compensatory arrangements were made in the ordinary course of trade.

4. **Conclusion**

(19) The use of the second symmetrical method for the determination of the dumping margin of Petrotub SA is not warranted because the volume of domestic sales, which could be used to determine normal value, is not sufficiently representative to make the comparison under this method. Therefore, this method cannot take into account significant differences in the pattern of export prices, i.e. cannot reflect the full degree of dumping. Accordingly, as neither the first nor the second symmetrical method would, albeit for different reasons, reflect the full degree of dumping being practised, the third method provided for in Article 2(11) of the basic Regulation had to be applied. Consequently, its application and the results of its application as detailed in recitals 22 and 23 of the contested Regulation are confirmed.

(20) For the reasons outlined in recitals 16 and 17 sales made by Republica SA using debt compensation were found to be made in the ordinary course of trade.