COMMISSION REGULATION (EC) No 1678/2003

of 26 August 2003

amending Commission Regulation (EC) No 362/1999 imposing a provisional anti-dumping duty on imports of steel ropes and cables and accepting undertakings offered by certain exporters, *inter alia*, in Poland and amending Decision 1999/572/EC accepting undertakings offered in connection with the anti-dumping proceedings concerning imports of steel wire ropes and cables originating, *inter alia*, in Ukraine

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

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), as last amended by Regulation (EC) No 1972/2002 [2], and in particular Articles 8 and 9 thereof,

After consulting the Advisory Committee,

Whereas:

A. PREVIOUS PROCEDURE

1. Poland

(1) On 30 July 1998, an anti-dumping proceeding was initiated by the Commission on imports of steel ropes and cables (SWR) originating, *inter alia*, in Poland [3].

(2) Provisional measures were imposed by Commission Regulation (EC) No 362/1999 [4]. In parallel, the Commission accepted a price undertaking from, *inter alia*, the Polish exporting producer Drumet SA ('Drumet') pursuant to Article 2(1) of Regulation (EC) No 362/1999. Imports of SWR produced and directly exported to the Community by Drumet were exempted from the anti-dumping duty by Article 1(3) of the same Regulation. Exemption from the duty is, *inter alia*, conditional on presentation of a valid undertaking invoice accompanying goods subject to an undertaking, and no such undertaking invoice should be issued for exports of SWR not in conformity with the obligations of the undertaking (clause 4.2 of the undertaking).

(3) This proceeding ultimately resulted in a definitive anti-dumping duty being imposed pursuant to Council Regulation (EC) No 1796/1999 [5] in order to eliminate the injurious effects of dumping. Drumet continued to be exempted from the definitive duties by virtue of and subject to its undertaking.

[1] OJ L 56, 6.3.1996, p. 1.
[2] OJ L 305, 7.11.2002, p. 1.
[3] OJ C 239, 30.7.1998, p. 3.
[4] OJ L 45, 19.2.1999, p. 8.
[5] OJ L 217, 17.8.1999, p. 1.

2. Ukraine

(4) On 20 May 1998, an anti-dumping proceeding was initiated by the Commission on imports of SWR originating, *inter alia*, in Ukraine [6].

(5) It was considered appropriate to combine this proceeding with the proceeding referred to in recital 1 and a definitive anti-dumping duty was imposed pursuant to Regulation (EC) No 1796/1999 in order to eliminate the injurious effects of dumping.

(6) The Commission accepted, *inter alia*, a price undertaking from the Ukrainian exporting producer Joint Stock Company Silur ('Silur') pursuant to Article 1(1) of Commission Decision 1999/572/EC [7]. Imports of certain types of SWR produced and directly exported to the Community by Silur were exempted from the anti-dumping duty pursuant to Article 2(1) of Regulation (EC) No 1796/1999. Exemption from the duty is, *inter alia*, conditional on presentation of a valid undertaking invoice accompanying goods subject to an undertaking. No such undertaking invoice should be issued for exports of SWR not falling into the scope of the undertaking (clause 4.2 of the undertaking).

B. FAILURE TO COMPLY WITH THE UNDERTAKING

1. Drumet (Poland)

(7) Drumet's undertaking applies to imports into the Community of SWR which have been produced and sold directly (i.e. invoiced and shipped) by this company to its first unrelated customers in the Community (clause 2 of the undertaking). Any other exports than those directly to its first unrelated customers in the Community are thus not covered by the terms of the undertaking and subject to the anti-dumping duty (27,9 %).

[6] OJ C 155, 20.5.1998, p. 11.
[7] OJ L 217, 17.8.1999, p. 63.

(8) Drumet also undertook not to circumvent the provisions of the undertaking, *inter alia*, 'by any other means', according to clause 6 of the undertaking.

(9) During the course of 2002, the Commission gathered information from various sources according to which it had reason to believe that, since September 1999, around 30 % of Drumet's sales into the Community were not made directly, i.e. not invoiced and shipped directly to first unrelated customers in the Community but made to a related company in the Community instead (the importer). As Drumet had issued undertaking invoices accompanying SWR apparently in conformity with the undertaking, these sales to the importer had been exempted from the duty. Drumet was requested, on two occasions, to inform the Commission about any related importers in the Community. In both cases, namely in May and in August 2002, Drumet replied that they 'do not have any shares in any customers of its SWRs in the EC', and that they ' …(have)… no direct or indirect relationships … with any Community importers…' and that the importer '…is an independent company'.

(10) The Commission then sought information from the competent trade register of the Member State in which the importer is located. According to this information, it was established that Drumet's main shareholder also held 50 % of the shares of the importer in question from June 1999 until July 1999 and 95 % of the shares of the importer from July 1999. Therefore, the two companies had to be considered to be related, within the meaning of Article 4(2) of the basic Regulation, as both of them were controlled by the same person. As the undertaking only applies to sales to unrelated customers in the Community and Drumet had issued undertaking invoices for sales to the importer, a breach of the undertaking appeared to have occurred. Drumet was consequently informed of the essential facts and considerations on the basis of which the Commission's acceptance of the undertaking might be withdrawn (preliminary disclosure) and a definitive anti-dumping duty imposed in its place. A period was granted within which representations could be made both in writing and orally.

(11) Drumet submitted comments and requested to be heard orally. Contrary to what had been stated before (cf. recital 9), Drumet actually admitted that both companies had indeed been related for a certain period. However, Drumet submitted a copy of a trusteeship agreement following which Drumet's main shareholder had allegedly sold his shares to the Managing Director of the importer in July 1999. It was further alleged that Drumet's main shareholder had never acted or signed on behalf of the importer. Drumet argued that in view of these aspects, the two companies ceased to be related as from July 1999.

(12) The Commission does not share this view. First, the trusteeship agreement stipulates that Drumet's main shareholder continues to hold himself out as a shareholder of the importer vis-à-vis all third parties. Second, he is not allowed to divulge either the existence of the agreement, nor its content. Third, one of the provisions of the agreement actually states that he is a shareholder of the importer in question. Therefore, the Commission concluded that the trusteeship agreement had not removed the existing relationship of the two companies. Finally, the argument that Drumet's main shareholder had never acted on behalf of the importer or signed any documents was considered irrelevant. Indeed it is normal commercial practice that companies are legally represented by their management and their Managing Director and not by their shareholders. In the case of the importing company, there was no indication that its Managing Director would not be managing and representing it.

(13) Drumet further submitted a contract on the transfer of shares which was acknowledged by a notarial act. However, according to this contract, Drumet's main shareholder had sold his shares of the importer to the importer's Managing Director only in October 2002 whilst Drumet was arguing that the two companies had ceased to be related since July 1999 (cf. recital 11).

(14) The Commission concluded that the two companies had indeed been related from June 1999 until October 2002 and that sales to the importer had unduly benefited from the exemption to the anti-dumping duty contrary to the provisions of the undertaking as referred to in recital 7.

(15) It was also concluded that the company had clearly given misleading information concerning the relationship, thus also committing a breach of the undertaking within the meaning of clause 6 of the undertaking by '*any other means*' as referred to in recital 8 above.

(16) As breaches of the undertaking had occurred, Drumet was informed of the essential facts and considerations on the basis of which the Commission's acceptance of the undertaking would be withdrawn and of the recommendation to impose a definitive anti-dumping duty in its place (final disclosure). A period of 10 days was granted within which representations could be made in writing.

(17) Drumet submitted comments and requested to be heard orally. The company submitted a legal opinion emitted by a professor of law of the country in which the importer is located which stated that under this type of trusteeship agreement, the trustor is to be considered as the economic owner of the shares. It was therefore submitted that the importer's Managing Director, through the trusteeship agreement, had obtained the economic ownership over the importer. During a hearing it was however not denied by Drumet's representatives that the transfer of shares had not been officially transferred before October 2002 which implied that Drumet's main shareholder continued to be the formal owner of the importer until that date. The argument was therefore rejected.