I

(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 985/2003

of 5 June 2003

amending the anti-dumping measures imposed by Council Regulation (EC) No 1334/1999 on imports of magnesium oxide originating in the People's Republic of China

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] (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) In June 1999, the Council, by Regulation (EC) No 1334/1999 [2], imposed definitive anti-dumping duties on imports of magnesium oxide originating in the People's Republic of China (the PRC). The duties took the form of a minimum import price (MIP).

2. Initiation

(2) On 13 June 2002, the Commission announced by a notice (Notice of Initiation) published in the *Official Journal of the European Communities* [3], the initiation of a partial interim review of the anti-dumping measures applicable to imports into the Community of magnesium oxide originating in the PRC pursuant to Article 11(3) of the basic Regulation.

(3) The review was initiated on the initiative of the Commission in order to examine the appropriateness of the form of the measures in force. The current measures in the form of an MIP do not differentiate between sales made to related parties and sales made to unrelated parties, or between direct sales to the Community and indirect sales, i.e. sales not made directly from an exporter in the country concerned to an importer in the Community. This lack of differentiation between different types of sales possibly leads to circumvention problems. Indeed, parties could set the import price at an artificially high level when entering the Community, in order to avoid the payment of anti-dumping duties. This artificially high level may be attained through an agreement between related parties or because the price was inflated due to successive sales before customs clearance.

(4) Consequently, the existing measures do not appear sufficient to counteract the dumping which is causing injury.

(5) Furthermore, the current measures do not cater for situations in which imported goods have been damaged before entry into free circulation into the Community. In this respect it should be noted that, since the measures should not go beyond what is necessary for the removal of injury, due account should be taken of the possible value reduction in cases of damage before the goods enter into free circulation into the Community.

3. Investigation

(6) The Commission officially advised exporting producers, the importers, the users known to be concerned and their associations, the representatives of the exporting country concerned and the Community producers about the initiation of the proceeding.

(7) Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the Notice of Initiation.

(8) One chamber of commerce in the country concerned, as well as an association of Community producers and Community importers/traders, made their views known in writing. All parties who so requested within the set time limit and who demonstrated that there were particular reasons why they should be heard were granted the opportunity to be heard.

[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 159, 25.6.1999, p. 1.
[3] OJ C 140, 13.6.2002, p. 6.

(9) The Commission sought and verified all the information it deemed necessary for the purpose of a determination of the appropriateness of the measures in force.

B. **SALES MADE TO RELATED AND UNRELATED PARTIES**

(10) When they export to related companies in the Community, exporters subject to measures are in a position to invoice at a price above the MIP, and to subsequently compensate such a price after customs declaration. This may render the MIP ineffective, as it may mean that the product concerned is effectively still exported below the MIP to the Community. Accordingly, this could lead to subsequent resale prices in the Community which prevent that the intended effects of the measure, i.e. to remove the injurious effects of dumping, are achieved.

(11) If, however, sales made by exporters located in the PRC to related importers in the Community were subject to an *ad valorem* duty, the serious risk of such a duty evasion between related parties would be considerably reduced and any possible price manipulation would be more easily detected. Indeed, an *ad valorem* duty would be assessed in relation to the value in view of the existing rules on the determination of the customs value of goods imported into the Community as set out in the Community Customs Code [1]. For transactions made between unrelated parties, the Community Customs Code assumes that the value of imported goods for customs purposes is normally the transaction value. In order for a transaction value between related parties to be accepted by customs, the exporter must demonstrate that this value closely approximates to one of the transaction values as defined in Article 30 of the Community Customs Code. It is part of the daily activity of customs authorities to detect possible underestimates of the transaction values so determined. Indeed, if the customs authorities detect an artificially low transfer price between related parties, they will calculate a new customs value that would then be higher. The Community customs legislation [2] provides an exhaustive definition of 'related parties' for customs purposes. It is therefore part of the routine activity of the customs authorities to determine if a transaction is made between related parties, and hence the customs authorities are well equipped to identify the status of parties dealing with the product concerned. As a result, should an *ad valorem* duty be applied, customs authorities would be in a position to detect any irregular value declaration between related parties, thus making circumvention more difficult.

(12) A duty will have to be paid based on the amount of the transaction value. Should parties reduce the transaction value, this will have consequences in subsequent reviews, including anti-absorption investigations, since these low transaction values will be taken as a basis for the determination of the new export price with the potential of an increase of the dumping margin. In this context, in the case of an *ad valorem* duty, the (low) transaction values are evidenced in the relevant shipping documents.

(13) Finally, it should also be considered that the incentive for related parties to manipulate prices is higher in case of an MIP. Indeed with an MIP, price manipulations could lead to avoiding the anti-dumping duty completely. In the case of an *ad valorem* duty, on the other hand, possible price manipulations will only lead to a lower duty, as the duty is a percentage of whatever price is being charged. The risk of manipulation is therefore higher when an MIP applies than when an *ad valorem* duty applies.

(14) Community producers requested that no change in the form of the measures should be applied for transactions between related importers. They argued that there is a risk that national customs authorities will not properly identify the status of related importers. As a consequence, it is claimed that unrelated importers might hold themselves out to be related importers, thus benefiting from the *ad valorem* duty as opposed to the MIP in an unjustified manner. In this respect, as mentioned above, customs authorities are in a position to identify the status of the parties involved. Moreover, whatever its form, i.e. whether a minimum import price or an *ad valorem* duty, the effect of the duty is the same, namely to remove the effects of injurious dumping. For these reasons, even in the unlikely event that importers wrongly hold themselves out to be related, the duty will still have the same effect, whilst the overall risk of circumvention is considered to be lessened.

(15) Given the above, it is also concluded that if sales made by exporters located in the PRC to related parties in the Community were subject to an *ad valorem* duty, the risks of circumvention of the duty would be much reduced. The request by Community producers not to change the form of the measures for related importers is therefore rejected.

(16) Community producers also argued that the definition of price in the operative part of Regulation (EC) No 1334/1999 'net, free-at-Community-frontier' still allows the importer to clear the goods at the end-customer's warehouse, including all logistics costs incurred from 'cif free out' to 'franco end-customer' and that thereby the import price may be artificially high. It was therefore requested to change the wording to 'free-at-Community-port'.

[1] OJ L 302, 19.10.1992, p. 1.
[2] Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253, 11.10.1993, p. 1). Regulation as last amended by Regulation (EC) No 444/2002 (OJ L 68, 12.3.2002, p. 11).