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(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

COUNCIL REGULATION (EC) No 847/2009

of 15 September 2009

amending Regulation (EC) No 682/2007 imposing a definitive anti-dumping duty 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 Articles 8 and 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) Following an investigation (the original investigation), the Council, by Regulation (EC) No 682/2007 ⁽²⁾ (the original Regulation), imposed definitive anti-dumping duties on imports of certain prepared or preserved sweetcorn in kernels falling within CN codes ex 2001 90 30 and ex 2005 80 00 and originating in Thailand. The measures took the form of an *ad valorem* duty. Regulation (EC) No 954/2008 ⁽³⁾ amended Regulation (EC) No 682/2007 with regard to the rate of duty imposed on one company and on 'all other companies'. The duty rates range between 3,1 % and 14,3 %. Imports from two Thai exporting producers, namely Malee Sampran Public Co. Ltd (Malee) and Sun Sweet Co. Ltd (Sun Sweet), from whom undertakings had been accepted by Commission Decision 2007/424/EC ⁽⁴⁾ and which fulfilled the conditions set out in Article 2 of Regulation (EC) No 682/2007, were exempted from the duty.

2. Grounds for a review

- (2) At the time of imposition of definitive measures, the Council exceptionally allowed cooperating exporting producers who were not able to submit a sufficiently substantiated undertaking offer within the deadline set in Article 8(2) of the basic Regulation to complete their offer within 10 calendar days from the entry into force of the original Regulation. Ten further undertaking offers were completed within this deadline. The two undertaking offers accepted, as well as those 10 further offers, include fixed minimum import prices.
- (3) Upon disclosure of the 10 further offers, the Community industry opposed the acceptance of price undertakings by stating that fixed minimum import prices were no longer an effective form of the measure because of the increasing price of the product concerned, as defined in recital 16, as well as of its main raw material and inputs.

- (4) In order to reassess the appropriateness of undertakings as an effective form of anti-dumping measures, the Commission deemed it necessary to reassess the acceptability and workability of the undertakings offered and of those accepted.

3. Investigation

- (5) Having determined, after consulting the Advisory Committee, that sufficient evidence existed for the initiation of a partial interim review, the Commission announced on 16 September 2008, by a notice of initiation published in the *Official Journal of the European Union* ⁽⁵⁾, the initiation of a partial interim review in accordance with Article 11(3) of the basic Regulation.
- (6) The review was limited in scope to the examination of the form of the measure applicable to the two Thai exporting producers from whom undertakings had been accepted and the 10 Thai exporting producers with pending undertaking offers.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1.

⁽²⁾ OJ L 159, 20.6.2007, p. 14.

⁽³⁾ OJ L 260, 30.9.2008, p. 1.

⁽⁴⁾ OJ L 159, 20.6.2007, p. 42.

⁽⁵⁾ OJ C 237, 16.9.2008, p. 18.

- (7) The Commission officially advised the exporting producers, the representatives of the exporting country, the Community producers and their association as well as importers of the initiation of the partial interim review. 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) In order to obtain the information deemed necessary for the investigation, the Commission sent questionnaires to the 12 exporting producers concerned as well as to the Community producers. The Community producers and seven out of the 12 Thai companies replied to the questionnaire.
- (9) Five Thai companies with pending undertaking offers did not reply at all to this review questionnaire and were considered as not cooperating within the meaning of Article 18 of the basic Regulation. The information submitted by one Thai company had to be disregarded due to incompleteness of the confidential questionnaire reply. In addition, this company did not provide a meaningful non-confidential version of the questionnaire reply. The company argued that due to significant structural changes within the company, including a name change, it was difficult to react efficiently to the questionnaire. Another Thai company also refused to provide a meaningful non-confidential version of the questionnaire reply. The companies concerned were informed about the proposed application of Article 18 of the basic Regulation and were given the opportunity to comment. The latter company claimed that it was impossible for it to furnish a meaningful non-confidential reply of its data submitted due to the sensitivity of the information contained. It is noted that whereas this argument is acceptable for parts of the questionnaire dealing with the companies costs and prices, this argument cannot be accepted for other parts of the questionnaire such as operating statistics, general information, etc. The first company submitted further confidential information. However, even considering that this first company may be in a phase of restructuring, basic information has to be given in order to allow for an assessment of the situation of the company. Despite the additional information submitted at a later stage, this minimum requirement was not met, given that no details about certain cost items were given. Moreover, no meaningful non-confidential version of the reply was provided.
- (10) It was thus considered that no decisive arguments were submitted to reverse the decision to apply Article 18 of the basic Regulation.
- (11) All other producing companies cooperated by replying to the questionnaire.
- (12) Several other interested parties submitted comments. One importer stated that the imposition of measures was not justified due to the absence of dumping during the original investigation period (original IP), as defined in recital 17, and should therefore be withdrawn. In this

regard, it should be recalled that the original investigation established that injurious dumping was taking place. Moreover, this review focuses on the appropriateness of undertakings as an effective form of anti-dumping measures, and any claims regarding the findings of the original investigation other than the form of the measures cannot be taken into account. The comment therefore had to be rejected. Another importer submitted a formal request for suspension of the measures. This request is being assessed outside the current review investigation.

- (13) Verification visits were carried out at the premises of the following companies:
- (14) (a) Exporting producers in Thailand
- Lampang Food Products Co., Ltd, Bangkok,
 - Malee Sampran Public Co., Ltd, Bangkok,
 - River Kwai International Food Industry Co., Ltd, Bangkok, and,
 - Sun Sweet Co., Ltd, Chingmai;
- (b) Community Producers
- Bonduelle Conserve International, Lille-Villeneuve d'Ascq, France, and,
 - Conserve Italia SCA, San Lazzaro di Savena, Italy.
- (15) The investigation covered the period from 1 July 2007 to 30 June 2008 ('review investigation period' or 'RIP').

4. Product concerned

- (16) The product concerned is sweetcorn (*Zea mays var. saccharata*) in kernels, prepared or preserved by vinegar or acetic acid, not frozen, currently falling within CN code ex 2001 90 30, and sweetcorn (*Zea mays var. saccharata*) in kernels, prepared or preserved otherwise than by vinegar or acetic acid, not frozen, other than products of heading 2006, currently falling within CN code ex 2005 80 00, originating in Thailand.

B. FINDINGS

1. Evolution of sale prices of the product concerned

- (17) As a first step, the price developments of the product concerned were examined for the period beginning with the original IP, i.e. from 1 January 2005 to 31 December 2005 and ending with the RIP. Data for the remainder of 2008 was looked at to cross-check conclusions.
- (18) The analysis showed a clear upward trend of import prices of the product concerned from Thailand since the original IP, in particular since the end of 2006. Despite a price decrease during the RIP, prices remained significantly above the price level of the original IP. Data available for 2008 point to yet another increase.

Table 1

Import prices for imports from Thailand into the EU by quarter

Index, Q1/2005 = 100	Q1	Q2	Q3	Q4
Original IP	656	669	723	699
Index	100	102	110	107
2006	719	705	715	747
Index	110	107	109	114
2007	830	798	814	773
Index	127	122	124	118
RIP	814	773	763	740
Index	124	118	116	113
2008	763	740	768	811
Index	116	113	117	124

Source: Eurostat.

- (19) The overall evolution of the average import price of the product concerned reported by Eurostat, as set out in Table 1, was corroborated by the analysis of the verified sale prices to the EU of a representative can size (12 oz) by the Thai companies. Indeed, as shown in Table 2, the same trend as that reported by Eurostat could be observed for this can size.
- (20) Furthermore, an analysis of the Thai prices for the representative can size demonstrated an even higher price fluctuation since the original IP. Sale prices varied by more than 30 % in the period between the first quarter of 2005 and the last quarter of the RIP. Data available for the second half of 2008 confirm this evolution.

Table 2

Thai sale prices to the EU (euro/t — can size 12 oz — indexed)

Index, Q1/2005 = 100	Q1	Q2	Q3	Q4
Original IP	100	105	106	115
2006	118	119	118	123
2007	129	133	123	116
RIP	123	116	109	112
2008	109	112	121	122

Source: Investigation.

- (21) In view of the significant price variation of the product concerned since the original IP, it has to be concluded that price undertakings with fixed minimum import prices are no longer suitable.

2. Possible indexation of the minimum import prices

- (22) Although the pending undertaking offers and the accepted undertaking offers exclusively contain fixed minimum prices, it was also examined whether the two undertakings in force and the 10 pending undertaking offers could exceptionally be maintained, or respectively accepted, through an indexation of the minimum import prices.
- (23) It therefore had to be established whether there is a correlation between the price evolution of the sale prices of the product concerned and the purchase prices of the main raw material/inputs used in the production process and, should that be the case, whether they represent a significant part of the total cost of production and whether there is publicly available price information for those components.
- (24) The two main components are sweetcorn and cans, representing each between 30 and 40 % of the cost of production of the product concerned.

(a) Indexation on the evolution of purchase prices of sweetcorn

- (25) As can be seen from Table 3, average purchase prices of sweetcorn in Thailand and in the EU increased significantly compared to the original IP. Prices at the end of the RIP were significantly higher than during the original IP. Data available for the second half of 2008 confirm the price increase.
- (26) It is also evident that, other than in the EU, purchase prices in Thailand show an increasing volatility within a given year, in particular since the end of 2006. The difference between the lowest and the highest price in Thailand varied by almost 40 % in the period between the original IP and the RIP. Data available for the end of 2008 point to an even higher volatility.

Table 3

Purchase prices of sweetcorn by quarter in euro (indexed)

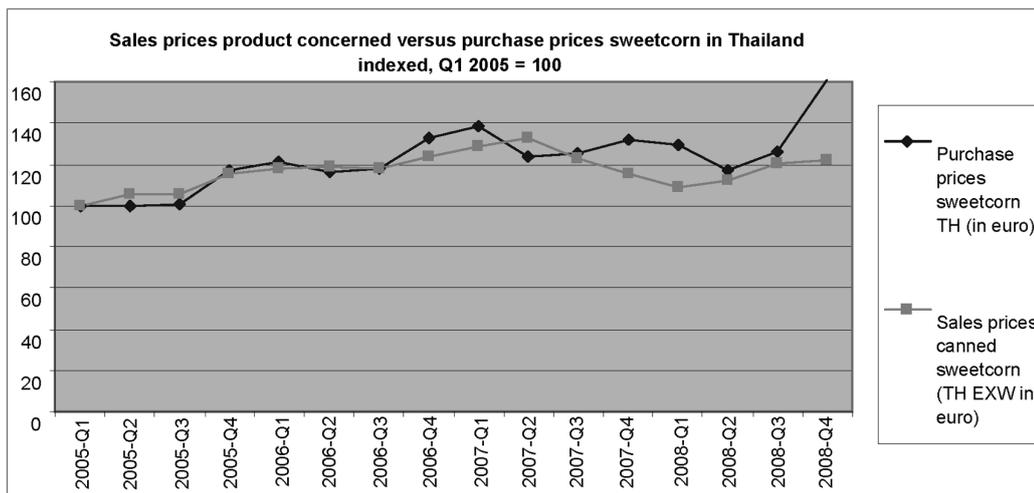
Index, Q1/2005 = 100		Q1	Q2	Q3	Q4
Original IP (2005)	Thailand	100	100	101	117
	EU	100	100	100	100
2006	Thailand	121	116	118	132
	EU	99	99	99	99
2007	Thailand	138	124	125	132
	EU	114	114	114	114
RIP	Thailand	125	132	130	117
	EU	114	114	160	160
2008	Thailand	130	117	127	161
	EU	160	160	160	160

Source: Investigation.

- (27) Even though it was found that both the sale price of the product concerned and the purchase price of sweetcorn showed an increasing volatility since the original IP, no consistent and stable correlation between both prices could be established. Although between the beginning of 2005 and the end of 2006, it could be argued that the price evolution of sweetcorn is somewhat reflected in the price evolution of the product concerned, this is no longer the case since 2007. Indeed, as illustrated in Table 4, the purchase price of sweetcorn decreased while the sale price of the product concerned increased and vice versa.

Table 4

Correlation between the sale price of the product concerned and the purchase price of sweetcorn



- (28) Moreover, the analysis showed that there is no homogeneity in the evolution of sweetcorn prices worldwide. As can be seen in Table 3 above, prices in Thailand and in the Community evolve differently.

- (29) Due to the absence of a correlation between the sale prices of the product concerned and the purchase price of sweetcorn, and in light of the divergent evolution of sweetcorn prices in Thailand and in the Community, it is evident that an indexation of the minimum import price on the price of sweetcorn is not feasible.

- (30) Moreover — and of equal importance — there is no publicly available information on the price of sweetcorn. The above data could only be obtained in the framework of a review. An indexation of the minimum price would therefore be impossible, even if a correlation had been established.

(b) *Indexation on the evolution of the purchase price of cans*

- (31) The cost of cans, the other main input, represents a part of the total cost of production that is not significant

enough to permit an indexation on can prices alone. In any case, the investigation has shown that can prices remained stable between the original IP and the RIP, i.e. no correlation whatsoever with the price of the product concerned could be established. It is therefore noted that main pre-conditions for indexation, as outlined in recital 23, are not met. The possibility to index the minimum import prices to the evolution of the price of cans was therefore not considered further.

- (32) In view of all the elements listed above, the investigation confirmed that there is no possibility to index the minimum import prices in order to address the fluctuating price of the product concerned.

3. Individual reasons not to accept pending undertaking offers

- (33) Five out of the 10 companies with pending undertaking offers did not reply to the questionnaire and have therefore been considered as non-cooperating in accordance with Article 18 of the basic Regulation. For reasons of general policy, non-cooperation should not be rewarded and thus the pending undertaking offers of those companies cannot be accepted.

- (34) It was also found that another company absorbed the anti-dumping duties, at least with regard to certain transactions. Such practice negatively affects the relationship of trust which forms the basis for acceptance of price undertakings. The undertaking offer of this company is therefore not acceptable.
- (35) Another company established a related company outside Thailand which produces the product concerned. The company offered to include this subsidiary in the undertaking offer. However, the existence of such a subsidiary constitutes a high risk of cross-compensation. The undertaking offer of this company therefore also has to be rejected.
- (36) Another company ceased production of the product concerned and leased the production facilities to a newly established related company. The undertaking offer of this company therefore also has to be rejected.

4. Individual reasons for withdrawal of an undertaking

- (37) The verification at the premises of one of the companies with an existing undertaking revealed a number of breaches, as detailed in Commission Decision 2009/708/EC ⁽¹⁾.

C. CONCLUSIONS

- (38) On the basis of the above facts and considerations, it is considered that price undertakings with fixed minimum import prices are no longer appropriate to counteract the injurious effect of dumping and that there is no possibility of indexing the minimum import prices in order to address the problem. In these circumstances, the undertaking offers should be rejected and the accepted undertakings should be withdrawn.
- (39) Moreover, eight out of the 10 pending undertaking offers should be rejected due to the individual reasons outlined above.
- (40) In addition, one of the two existing price undertakings should also be withdrawn due to non-compliance with the undertaking.
- (41) It was therefore concluded that the review investigation limited to the form of the measure should be terminated, that the undertaking offers in question should not be accepted and that the existing undertakings should be withdrawn.

- (42) All parties were informed of the essential facts and considerations on the basis of which the decision to reject the pending undertaking offers and withdraw the existing undertakings was made and were given the opportunity to comment.
- (43) Some parties argued that an undertaking cannot be withdrawn if all clauses of the undertaking have been respected. Instead, they claim, the company should be given the opportunity to revise its minimum import prices in accordance with the market evolution.
- (44) In response to this argument, it has to be underlined that the existing undertakings have first and foremost to be withdrawn, just like the pending undertaking offers have to be rejected, for general reasons of practicability. As outlined above, the review has shown that sweetcorn is no longer suitable for a price undertaking, regardless of whether or not individual companies complied with the provisions of the undertaking or whether they are willing to revise the minimum import prices. In any case, in view of the price volatility established during the review, a revision of the minimum import prices would only be feasible by introducing an indexation formula. However, the review has shown that there is no basis for it.
- (45) One company contested that their purchase prices of sweetcorn and their sale prices of the product concerned showed an increasing volatility and upward trend between the original IP and the RIP and claimed that the increase in their sale prices of the product concerned was only caused by the minimum import price. It was therefore argued that there are no reasons to withdraw the acceptance of their price undertaking.
- (46) However, data provided by the company do not corroborate the claim. The purchase prices of sweetcorn did show an increasing trend although slightly less than the average. On the other hand, their sale prices of the product concerned during the RIP were significantly above the relevant minimum import price and showed a further increasing trend in the second half of 2008.
- (47) Some parties argued further that the rejection of the pending price undertaking offers and the withdrawal of the existing price undertakings is not in line with Article 15 of the WTO Anti-Dumping Agreement which obliges WTO members to give regard to the special situation of developing countries. In response to this submission, it has to be stressed that the Commission actively considered, with an open mind, all possible options, including indexation of the fixed minimum import prices, in order to overcome the practicability problems of the undertakings. Thus, possibilities of constructive remedies have been explored in this case. However, the findings of the investigation as set out in recitals 22 to 32 did not give any leeway in this regard.

⁽¹⁾ See page 29 of this Official Journal.

(48) Other parties requested formal suspension of the measures as a result of the review findings. As already outlined in recital 12, such a request is being assessed outside the current review investigation,

HAS ADOPTED THIS REGULATION:

Article 1

1. Article 1(3) of Regulation (EC) No 682/2007 shall be deleted.
2. Article 1(4) of Regulation (EC) No 682/2007 shall be renumbered as Article 1(3).
3. Article 2 of Regulation (EC) No 682/2007 shall be deleted.

4. Articles 3 and 4 of Regulation (EC) No 682/2007 shall be renumbered as Articles 2 and 3 respectively.

5. Annex II to Regulation (EC) No 682/2007 shall be deleted.

Article 2

The partial interim review of Regulation (EC) No 682/2007 is hereby terminated with the non-acceptance of the undertaking offers.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 15 September 2009.

For the Council
The President
C. BILDT
