

## I

*(Acts whose publication is obligatory)*

**COUNCIL REGULATION (EC) No 1965/98**

**of 9 September 1998**

**imposing a definitive anti-dumping duty on imports of polysulphide polymers originating in the United States of America and collecting definitively the provisional duty imposed**

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<sup>(1)</sup>, and in particular Article 9(4) thereof,

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

Whereas:

— Kömmerling Chemische Fabrik GmbH & Co., Pirmasens, Germany,

— Chemetall GmbH, Frankfurt/Main, Germany.

(5) The 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 to make representations subsequent to this disclosure.

(6) The oral and written comments submitted by the interested parties were considered, and, where deemed appropriate, taken into account in the definitive findings.

**A. PROCEDURE**

(1) By Regulation (EC) No 617/98<sup>(2)</sup> (hereinafter referred to as the 'provisional duty Regulation') the Commission imposed a provisional anti-dumping duty on imports into the Community of polysulphide polymers (hereinafter referred to as 'PSP') falling within CN code ex 4002 99 90 and originating in the United States of America (hereinafter referred to as 'USA').

(2) Following the imposition of provisional anti-dumping measures, several interested parties submitted comments in writing.

(3) The parties who so requested were granted an opportunity to be heard by the Commission.

(4) The Commission continued to seek and verify all the information it deemed necessary for the purpose of its definitive findings. Verification visits were carried out at the premises of the following industrial users of PSP:

**B. PRODUCT CONCERNED AND LIKE PRODUCT**

(7) The exporting producer in the USA requested that solid PSP be excluded from the scope of the present investigation. In this context it should be noted that the complaint lodged by the Community industry and the investigation carried out following this complaint did not distinguish between liquid and solid PSP, nor did it explicitly cover solid PSP. Given the significantly bigger market of liquid PSP and the fact that the Community industry produces only liquid PSP, the investigation carried out was exclusively based on the situation on the United States of America and Community market of liquid PSP.

The provisional duty Regulation, however, did not make a distinction between solid and liquid PSP, and anti-dumping measures were consequently applicable to all PSP. As the investigation carried

<sup>(1)</sup> OJ L 56, 6. 3. 1996, p. 1. Regulation as last amended by Regulation (EC) No 905/98 (OJ L 128, 30. 4. 1998, p. 18).

<sup>(2)</sup> OJ L 82, 19. 3. 1998, p. 25.

out after the imposition of provisional measures has shown that solid PSP is a different product in terms of physical and technical characteristics from liquid PSP as a result of a different molecular structure and as it was established that solid PSP could not be converted into liquid PSP, solid PSP is excluded from the scope of the present investigation.

As no other argument has been raised on this subject, the conclusions reached in recital 12 of the provisional duty Regulation are confirmed.

### C. DUMPING

#### 1. Normal value

(8) The exporting producer requested that the normal value be constructed for all PSP product types, since the particular market situation, in accordance with Article 2(3) of Regulation (EC) No 384/96 (hereinafter referred to as 'the basic Regulation'), did not allow for a proper comparison to be made. It claimed that this particular situation resulted from the fact that the product concerned was sold in a variety of market segments in the USA, such as construction, insulating glass sealant, aerospace and automotive, whereas it was predominantly sold in the insulating glass sealant market in the Community. This claim was not accepted since the fact that domestic and export sales are made into different market segments does not in itself constitute a particular market situation in the sense of Article 2(3) of the basic Regulation.

(9) The exporting producer also claimed that the particular structure of the United States of America PSP market should be taken into account in order to determine the reasonable amount for profit to be used for the construction of normal value. It was claimed that this amount should be based only on this producer's sales on the insulating glass sealant market. This claim had to be rejected since, in accordance with Article 2(6) of the basic Regulation, the amount for profit should be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporting producer under investigation and not to only a part of the production and sales as the producer concerned claimed.

(10) As no other new arguments have been presented, the remaining findings set out in recitals 13 and 14 of the provisional duty Regulation are confirmed.

#### 2. Export price

(11) In the absence of new arguments from the exporting producer concerning the establishment of the export price, the provisional findings as set out in recital 15 of the provisional duty Regulation are confirmed.

#### 3. Comparison

(12) The exporting producer reiterated its request that its export prices in German marks be adjusted to take into consideration the currency conversion factor. This issue was re-examined and since it was established that a sustained movement of the exchange rate of the United States dollar to the German mark has indeed taken place, in accordance with Article 2(10)(j) of the basic Regulation, an adjustment for currency conversions was made to the export price. The adjustment was calculated on the basis that the exporting producer had 60 days to reflect the sustained movement in exchange rates for the transactions in question.

(13) As no other new arguments concerning the comparison between export price and normal value have been brought forward, the remaining findings set out in recitals 16 and 17 of the provisional duty Regulation are confirmed.

#### 4. Dumping margin

(14) In the absence of new arguments concerning the determination of the dumping margin, the methodology set out in recitals 19 and 20 of the provisional duty Regulation is confirmed.

(15) The dumping margin definitively established as a percentage of the cif price at Community frontier level is as follows:

— Morton International Inc., Chicago: 47,5 %.

As this company is deemed to represent 100 % of the US production of the product concerned, the residual dumping margin definitively established is also set at 47,5 %.

### D. INJURY

#### 1. Sales prices in the Community market

(16) With reference to recital 28 of the provisional duty Regulation, it should be pointed out that, on the basis of the information available at that time, it was found, that during the whole period under examination prices charged by the exporting producer in the Community market decreased by 4 % on average. However, after the imposition of

provisional anti-dumping measures, the Commission was able to establish that the exporting producer had failed to list all credit notes issued to Community-based customers and the resulting net sales prices in the detailed transaction listing contained in its reply to the questionnaire. These credit notes reflected the fact that this producer granted significant price discounts.

- (17) Taking into account the net sales prices after adjusting for all the credit notes, the evolution of prices charged by both the Community industry and the exporting producer to certain large Community-based customers within the whole period under examination indicates that, contrary to the price evolution described in recital 28 of the provisional duty Regulation, the exporting producer decreased its prices by more than the Community industry. The decrease in sales prices started in 1996 when the exporting producer lowered its prices by 10 %. In the same year, the Community industry reduced its prices to the same customers by 6 %. At the beginning of 1997, the exporting producer again reduced its prices by a further 6 %, leading to an overall decrease in sales price of 16 %.

## 2. Price undercutting

- (18) As a rule, the methodology applied by the Commission when calculating price undercutting consists in using the exporting producer's sales prices charged to the first independent customers in the Community market, net of all types of rebates or discounts.

These prices are then compared with the Community industry's relevant selling prices, also net of all types of rebates or discounts. Applying this rule in the present case and in order to ensure a reliable undercutting exercise, sales prices of individual PSP-product types were compared by Member States and on a customer-by-customer basis. It follows that in cases where certain PSP-product types were sold in certain Member States by the exporting producer and not by the Community producer, or vice versa, actual price comparison was not possible — nor would it have been meaningful.

- (19) On the basis of the methodology described above, contrary to the claims made by the exporting producer, no arbitrary selection of transaction has been made. In fact, as much as 70 % of the volume of all transactions made by the exporting producer was compared with up to 90 % of the operations made by the Community industry in the Community market. This is considered to be a high degree of representativeness for the price-undercutting calculation.

- (20) Taking into account the exporting producer's credit notes to Community-based customers reflecting this producer's policy of price discounts, the resulting revised undercutting margins ranged from 0,5 to 36 % depending on the customer, the PSP-product type and the transaction. The average undercutting was found to be 3,7 %.

## 3. Situation of the Community industry

- (21) The exporting producer claimed that the Commission had failed to establish injury since, during the period under examination, the Community industry's production increased by 5 % and investments were made to increase production capacity by 28 %. The exporting producer also claimed that the Community industry had significantly increased its market share, which was only 4 % in 1988.

- (22) In this respect, it should be noted that the Community industry started its PSP activity in the Community in 1991. It is therefore normal that certain economic indicators such as production, production capacity, sales and market share have overall shown a positive development since 1991. It should also be noted that the volume of consumption increased by 5 % during the period under investigation and that the amount of investments which were necessary to increase production capacity were very limited. Furthermore, the investigation has confirmed that the Community industry's profitability had been highly negative during the whole period under investigation as a result of its highly depressed sales prices.

## 4. Conclusion

- (23) On the basis of the above, it was considered that the exporting producer had not supplied any evidence demonstrating that the provisional findings with respect to injury (recitals 24 to 45 of the provisional duty Regulation) were not valid. On the contrary, the findings made after the publication of the provisional duty Regulation with respect to export prices indicating that significant price undercutting had taken place, reinforce the provisional findings which are therefore confirmed.

## E. CAUSATION OF INJURY

### 1. Effect of dumped imports on the Community industry

- (24) There are only two suppliers on the Community market. Whereas the Community industry is not able to supply the whole of the Community demand, the exporting producer has a production capacity in excess of Community demand. In addition, there are a few large users on the market who

require a greater volume of PSP than can be delivered by the Community industry. Given this situation and the price policy practised by the exporting producer, it was found that the Community industry faced particular difficulties in price negotiations.

- (25) As a matter of fact, large industrial users are obliged to rely on the exporting producer for a certain amount of their PSP needs. This leads to a situation where there is basically no competition for these volumes in the Community market and the exporting producer is able to obtain higher prices for this part of Community consumption.

The above situation underlines the fact that the true extent of the downward pressure of the Community industry's prices cannot be explained by the relatively low average price undercutting margins determined above. Rather the true extent of the downward pressure is revealed if the determination of price undercutting is limited to that part of the market for which competition existed between the two suppliers. A price undercutting margin on this basis is significantly higher than the one determined on the basis of all imports.

- (26) As a result, the exporting producer was able to maintain and even increase its market share. Although the value of consumption decreased by 1 % from 1994 up to the end of the investigation period, the exporting producer was able to increase its share in the value of the market by 2 %, while at the same time the Community industry's share decreased by 6 %.
- (27) On this basis, it can be concluded that low-priced dumped imports had caused the downward pressure on the Community industry's prices and had therefore caused the Community industry's profit shortfall, thus material injury.

## 2. Competition from substitute products, evolution of consumption

- (28) According to the exporting producer, the Commission failed to take into account the fact that the product concerned was a separate market within a larger market for alternative polymers. The larger market for alternative polymers had allegedly had a significant influence on the demand and prices for PSP, as users could easily switch from PSP to other polymers when PSP prices rose above a certain threshold. Certain PSP users claimed that the demand for polyurethane-based sealant, the main PSP competitor, had allegedly increased its share of

the Community sealant market from 9 to 12 % during the period under examination.

- (29) Despite this alleged increase in consumption for substitute products, it was concluded that competition therefrom had had a very limited impact, if any, on the situation of the Community industry. Although consumption of polyurethane-based sealant increased by 3 %, volume-wise PSP consumption increased more. Moreover, substitute products would only affect the consumption of PSP if the latter's price was increased above a certain threshold. The decreasing level of PSP prices indicated that this did not occur. Furthermore, the switch from PSP to other polymer-based sealant necessitates substantial investments, the recovery of which is likely to cause a substantial increase in the price of the sealant compounds using polymers other than PSP.
- (30) The exporting producer questioned the provisionally established development of Community PSP-consumption claiming that the market showed signs of steady growth from 1994 up to the end of the investigation period (March 1997). It was further argued that the loss of 20 % of the Community industry's sales value in 1996 was the result of a brief downturn in the construction industry.
- (31) In this respect it should be noted that to claim that there had been steady growth in PSP-consumption, that there was competition from substitute products and that the decrease in sales made by the Community industry was due to a brief downturn in the construction industry is contradictory. In actual fact, the investigation showed that the overcapacity in the glass insulation industry, the main market for PSP in the Community, had led to slight down- and upturns in consumption, as the evolution of consumption from 1994 to March 1997 indicates. However, it was considered that the market conjuncture, being equal for all the operators in the market, should have had similar effects on all of them.
- (32) The investigation has shown that this was not the case. Despite the downturn in the sales of the Community industry in 1996, the exporting producer's sales volume increased by 8 % and its sales value by 6 % in 1996 compared to 1995, its market share increased by 5 % in terms of volume and by 6 % in terms of value. These performances coincided with a decrease in the Community industry's market share both in terms of volume (- 16 %) and value (- 25 %).

- (33) Contrary to the exporting producer's statement, the decrease of 20 % in the value of sales made by the Community industry between 1994 and 1996 could not be attributed to the downturn in the construction industry. The evolution of consumption was positive between 1994 and 1996. Moreover, the investigation confirmed the findings set out in recital 34 of the provisional duty Regulation, namely that a major customer had not ordered any PSP from the Community industry in 1996 and preferred to rely entirely on low-priced supplies from the exporting producer.
- (34) Consequently, the Community industry's share of the Community market in 1996, both in terms of volume and value, was at its lowest. Market share in terms of volume recovered only at the end of the investigation period, whereas, as a result of the exporting producer's pricing policy, at the end of the investigation period as compared to 1994, 6 % of the value of the market had been lost. In addition, considering that consumption increased by 5 % or 838 tonnes during that period, the exporting producer obtained the major part of the new orders, namely around three-quarters.

### 3. Conclusion

- (35) The claims made by the exporting producer on the cause of the material injury to the Community industry were not considered to be founded. On the contrary, the continued investigation has revealed that price undercutting was more harmful because of the price policy applied by the exporting producer to Community-based users. Therefore, in the absence of any new material arguments in connection with the findings in recitals 47 to 61 of the provisional duty Regulation, the provisional conclusion that high volumes of low-priced dumped PSP had caused material injury to the Community industry is confirmed and that any possible negative effects that may have existed as a result of changes in the consumption are not such as to break the causal link.

## F. COMMUNITY INTEREST

### 1. Community industry

- (36) Some interested parties argued that the Community producer was found to be competitive and viable and that even if no anti-dumping measures were imposed, this producer would not stop

the production of PSP in view, in particular, of the investments made and the positive developments expected in the Community market.

- (37) The investigation has shown that market conditions were not sound during the period under examination. Resale prices were lower than the relative costs of production and the accumulation of financial losses could not be sustained indefinitely by the Community industry. In the present case, despite its structural viability and competitiveness, the Community industry, being the minor player in the Community market, would be in a position to benefit from any improvement in the market situation only if effective competition conditions were restored.

### 2. Consequences for employment

- (38) Importers related to the exporting producer also argued that the Commission had failed to consider the impact of imposing anti-dumping measures on their business which was comparable to the Community industry's business.
- (39) During the whole period under investigation it was found that the number of people employed by the Community industry who were directly involved in the production and sale of PSP had decreased by 7 %. In the light of recitals 67 and 68 of the provisional duty Regulation, it was concluded that the consequences on employment of not taking measures would not be confined solely to a reduction in direct employment but would also make a considerable number of jobs uncertain in other related businesses.

On the other hand it is recalled that the measures proposed are not such as to close the Community market to the exporting producer. Therefore it is considered that employment in related sales companies in the Community, which in any event is lower than that of the Community industry, would not be unduly affected.

### 3. Interest of Community users

- (40) The importers related to the exporting producer claimed that users considered that the impact of anti-dumping measures on their costs and prices would be negative and that the fragile balance that existed between PSP and substitute products would be affected.

(41) The investigation has shown that the price level above which users may be likely to switch from PSP to alternative polymers is determined by the following factors: technically PSP is the most adequate polymer for insulating glass; it is easily workable and very reliable as a sealant for such applications, the PSP layer which is necessary to insulate glass requiring around 25 % less volume than alternative products such as polyurethane.

As a result, only if current PSP prices were increased by more than 20 % is it likely that consumption of PSP would be affected.

(42) Moreover, as stated in recital 29 above, substantial investments would be necessary to produce other polymer-based sealant compounds in order to replace PSP and this would certainly cause an increase in their resale price in the Community market. Therefore, it is considered that the level of the measures proposed is not such as to cause a switch from PSP to other polymers.

(43) As far as the impact of the anti-dumping duties on the users' activities is concerned, it was considered that the negative impact of these measures should be viewed in the light of the higher price level prevailing in the Community market when it was supplied by a single supplier, namely the exporting producer.

On the one hand, it is not foreseeable that the price level in the Community will increase by the full amount of the anti-dumping duty, as the Community industry would also benefit from an increase in its sales volume.

On the other hand, as indicated above, the possible return to a monopoly situation in the Community market, based on the experience gained since the entry into the market of the Community producer, would also have negative effects on sales prices. Such a situation may be encountered again should the Community industry be forced to leave this market as a result of injurious dumping by the exporting producer.

(44) On the basis of the above facts and considerations, it is considered that, in spite of the imposition of anti-dumping measures, the presence of two suppliers in the Community market would be largely beneficial to users in the long term.

(45) Among the comments received from users was one which argued that the imposition of anti-dumping duties would lead to an increase in their prices and thus endanger their competitiveness not only in the Community but also in the export markets such as Asia. As far as the Community market is concerned, it was claimed that anti-dumping duties will put certain users in an advantageous position compared to others, since anti-dumping duties will affect more those who relied on higher supplies from the exporting producer. This is particularly true for the main user in the Community market. Consequently, it was claimed that competition among users will be distorted.

(46) As far as the first argument is concerned, it should be recalled that anti-dumping duties cannot affect the competitiveness of exports to third countries. Indeed, anti-dumping duties are either not due when the product in question is imported under the inward processing regime or are reimbursed when it is re-exported as such or incorporated into another product. The fact that this would constitute an additional administrative burden cannot be considered as a valid argument against the imposition of anti-dumping duties.

As far as the dependence on imported PSP is concerned, it is considered that the decision of a user to rely more on one source of supply was taken according to individual interest regardless of any anti-dumping considerations. Therefore such an individual decision cannot provide guidance for assessing the general interest of users.

(47) It was also claimed that the imposition of anti-dumping duties could result in a product shortage with the main supplier, the exporting producer, retreating from the market or reverting to the sale of the end product incorporating PSP. It is considered that the first possibility seems extremely improbable: the Community market is the exporting producer's largest market. As to the second argument, it seems possible that the exporting producer might revert to the sale of the end product independently from the imposition of duties on PSP. However, there is no indication that the exporting producer has sufficient production capacity to supply the largest worldwide market, namely the Community market, with PSP based sealant mainly intended for glass insulation applications.

#### 4. Conclusion

- (48) As apart from the above assessed arguments and claims, no new evidence and claims were received in connection with the Community interest investigation, it is confirmed that no compelling reasons have been found which would indicate that it is not in the Community interest to impose anti-dumping measures in the present proceeding.

### G. ANTI-DUMPING MEASURES

#### 1. Injury elimination level

- (49) The definitive measures should be such as to prevent further injury being caused to the Community industry by dumped imports from the USA. The injury margins established with reference to recitals 82 and 83 of the provisional duty Regulation were thus re-calculated in the light of the new findings concerning the exporting producer's resale prices in the Community market.
- (50) With reference to recital 82 of the provisional duty Regulation, it was still considered that the amount of duty necessary to remove the effects of injurious dumping should raise the prices of imports to a level corresponding to one at which the Community industry would be able to cover its costs of production and obtain a reasonable profit on sales.
- (51) The exporting producer argued that the target profit of 9 % used in the injury elimination calculation at the provisional stage had not been adequately justified and that the calculations had been based on an arbitrarily selected sample of transactions which favoured the conclusion that the exporting producer had been underselling. The values used in some transactions had been underestimated, with the result that the Commission arrived at an inflated injury margin.
- (52) It is considered that this minimum profit margin permits the Community industry to cover its needs when making long-term investments and enables it to recover from the accumulation of losses in the last few years. Moreover, this is a reasonable rate of return which the Community industry could expect in the absence of injurious dumping. Given the absence of any evidence to demonstrate that the target profit was too high and given that it was far below the profit margin that the exporting producer considered as reasonable to apply when constructing normal value in the USA, the target profit of 9 % is confirmed. As far as the alleged selection of sales transactions is concerned, the same argument has been put forward concerning the determination of price undercutting and has been answered in recital 19 above.

- (53) Accordingly, injury elimination levels determined on a PSP product-type basis were compared with the selling prices of corresponding PSP product types originating in the USA at industrial user level, taking due account of all discounts. The positive difference, expressed as a percentage of the cif, net Community frontier value of the transactions compared, was found to be 13,2 %.

#### 2. Level and form of the anti-dumping measures

- (54) Based on the above conclusions on dumping, injury, causal link and Community interest, it was considered what form and level of anti-dumping measures would have to be taken in order to remove the trade-distorting effects of injurious dumping and to restore effective competitive conditions to the Community market.

##### 1. Level of the anti-dumping measure

- (55) Since the injury margin determined was lower than the dumping margin found, in accordance with Article 9(4) of the basic Regulation, the former was used in order to determine the level of the measures.

##### 2. Undertakings

- (56) After final disclosure was made, the exporting producer offered a price undertaking. This offer has been examined and it was found that the price increases offered in the price undertaking were not such as to remove the injury caused to the Community industry and therefore did not meet the requirements of Article 8(1) of the basic Regulation. Moreover, it is considered that given the duopolistic supply structure of the Community market, price undertakings are not appropriate. Furthermore, PSP originating in the USA is imported in a variety of types and packaging and is also sold to Community-based customers under different sales conditions which significantly affect the import and resale prices. This renders the monitoring of a price undertaking almost impractical and unmanageable.

Based on the foregoing, the Commission therefore decided, after consultation, that the price undertaking offered could not be accepted. The Commission has informed the exporting producer accordingly.

##### 3. Definitive anti-dumping duty

- (57) On the above basis, definitive measures, in the form of an *ad valorem* duty of 13,2 %, should be imposed on imports of PSPs originating in the USA.

**H. COLLECTION OF THE PROVISIONAL DUTIES**

- (58) In view of the magnitude of the dumping margins found for the exporting producers and in the light of the seriousness of injury caused to the Community industry, it is considered necessary that the amounts secured by way of provisional anti-dumping duties for transactions involving the product concerned should be definitively collected,

HAS ADOPTED THIS REGULATION:

*Article 1*

1. A definitive anti-dumping duty is hereby imposed on imports of liquid polysulphide polymers originating in the United States of America. The product as described falls within CN code ex 4002 99 90 (TARIC code 4002 99 90 \* 11).

Solid polysulphide polymers falling within CN code ex 4002 99 90 (TARIC code 4002 99 90 \* 19) are not within the scope of this Regulation.

2. For the purpose of this Regulation, the rate of duty applicable to the net free-at-Community-frontier price before duty shall be 13,2 %.

*Article 2*

The amount provisionally secured by Regulation (EC) No 617/98 shall be definitively collected unless it was secured for imports of solid polysulphide polymers, in which case it shall be released.

*Article 3*

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

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

Done at Brussels, 9 September 1998.

*For the Council*

*The President*

W. SCHÜSSEL

---