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(Acts adopted from 1 December 2009 under the Treaty on European Union, the Treaty on the Functioning of the European Union and the Euratom Treaty)

ACTS WHOSE PUBLICATION IS OBLIGATORY

COUNCIL IMPLEMENTING REGULATION (EU) No 1251/2009

of 18 December 2009

amending Regulation (EC) No 1911/2006 imposing a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate originating, inter alia, in Russia

THE COUNCIL OF THE EUROPEAN UNION,

B. PRESENT PROCEDURE

1. REQUEST FOR A REVIEW

Having regard to the Treaty on the Functioning of the European Union,

- (3) A request for a new exporter review ('the present review') pursuant to Article 11(4) of the basic Regulation was lodged by Joint Stock Company Acron ('the applicant'), an exporting producer in Russia. The request was limited in scope to dumping as far as the applicant is concerned.

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 9(4) and 11(4) thereof,

- (4) The applicant alleged that it did not export UAN to the Union during the period of investigation on which the anti-dumping measures were based, that is, the period from 1 June 1998 to 31 May 1999 ('the original investigation period') and that it is not related to any of the exporting producers of UAN which are subject to the abovementioned anti-dumping measures. The applicant further alleged that it began exporting UAN to the Union after the end of the original investigation period.

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

Whereas:

2. INITIATION OF A 'NEW EXPORTER' REVIEW

A. PREVIOUS PROCEDURE

- (1) By Regulation (EC) No 1995/2000⁽²⁾, the Council imposed a definitive anti-dumping duty on imports of solutions of urea and ammonium nitrate ('UAN') originating, inter alia, in Russia. That Regulation will hereinafter be referred to as 'the original Regulation' and the investigation that led to the measures imposed by the original Regulation will be hereinafter referred to as 'the original investigation'.

- (5) The Commission examined the prima facie evidence submitted by the applicant and considered it sufficient to justify the initiation of a review pursuant to Article 11(4) of the basic Regulation. After consulting the Advisory Committee and after the Union industry concerned had been given the opportunity to comment, the Commission initiated by Regulation (EC) No 241/2009⁽⁴⁾, a review of Regulation (EC) No 1911/2006 ('measures in force') with regard to the applicant.

- (2) Following an expiry review initiated in September 2005 ('the expiry review'), the Council, by Regulation (EC) No 1911/2006⁽³⁾, renewed for five years these measures at their current level. The measures consist of specific duties.

- (6) Pursuant to Article 2 of Regulation (EC) No 241/2009, the anti-dumping duty of 20,11 EUR/tonne imposed by Regulation (EC) No 1911/2006 on imports of UAN produced and sold for export to the Union by the applicant was repealed. Simultaneously, pursuant to Article 14(5) of the basic Regulation, customs authorities were directed to take appropriate steps to register these imports.

⁽¹⁾ OJ L 56, 6.3.1996, p. 1.

⁽²⁾ OJ L 238, 22.9.2000, p. 15.

⁽³⁾ OJ L 365, 21.12.2006, p. 26.

⁽⁴⁾ OJ L 75, 21.3.2009, p. 5.

3. PRODUCT CONCERNED

- (7) The product concerned by the current review is the same as in the original investigation, i.e. a solution of urea and ammonium nitrate, a liquid fertiliser commonly used in agriculture, originating in Russia ('the product concerned'). It consists of a mixture of urea, ammonium nitrate and water. The product concerned is currently falling within CN code 3102 80 00.

4. PARTIES CONCERNED

- (8) The Commission officially informed the applicant, the representatives of the exporting country and the association of Union producers about the initiation of the review. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation. All interested parties, who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.
- (9) The Commission sent questionnaires to the applicant and its related companies and received replies within the deadlines set for that purpose. The Commission sought and verified all information deemed necessary for the determination of dumping. The Commission carried out verification visits at the premises of the applicant and its related company:

— JSC Acron, Novgorod, Russia,

— Agronova International Inc., Hallandale, USA ('Agronova').

5. REVIEW INVESTIGATION PERIOD

- (10) The 'new exporter' review investigation period covered the period from 1 January 2008 to 31 December 2008 ('RIP').

C. RESULTS OF THE INVESTIGATION

1. 'NEW EXPORTER' QUALIFICATION

- (11) The investigation confirmed that the applicant had not exported the product concerned during the original investigation period and that it had begun exporting to the Union after this period.
- (12) Furthermore, the applicant was able to demonstrate that it was not related to any of the exporters or producers in Russia which are subject to the anti-dumping measures in force on imports of the product concerned originating in Russia.

- (13) In this context, it is confirmed that the applicant should be considered a 'new exporter' in accordance with Article 11(4) of the basic Regulation.

2. DUMPING

2.1. DETERMINATION OF NORMAL VALUE

- (14) The applicant had no domestic sales in Russia of the product concerned. Whenever domestic prices cannot be used in order to establish normal value, another method has to be applied. In accordance with Article 2(3) of the basic Regulation, the Commission instead calculated a constructed normal value, as follows:
- (15) Normal value was constructed on the basis of the manufacturing costs incurred by the applicant plus a reasonable amount for selling, general and administrative costs ('SG&A costs') and for profits, in accordance with Article 2(3) and (6) of the basic Regulation.

2.1.1. *Adjustment of natural gas costs on the domestic Russian market*

- (16) Regarding the cost of manufacturing, it should be noted that gas costs represent a major proportion of the manufacturing cost and a significant proportion of the total cost of production. In accordance with Article 2(5) of the basic Regulation, it was examined whether the costs associated with the production and sales of the product concerned were reasonably reflected in the records of the applicant.
- (17) It was established that the domestic gas prices paid by the applicant were abnormally low. By way of illustration, they amounted to between one fourth and one fifth of the export price of natural gas from Russia. In this regard, all available data indicates that domestic gas prices in Russia were regulated prices, which are far below market prices paid in unregulated markets for natural gas. Since gas costs were not reasonably reflected in the applicant's records, they had to be adjusted accordingly. In the absence of any undistorted gas prices relating to the Russian domestic market, and in accordance with Article 2(5) of the basic Regulation, gas prices had to be established on 'any other reasonable basis, including information from other representative markets'.
- (18) The adjusted price was based on the average price of Russian gas when sold for export at the German/Czech border (Waidhaus), net of transport costs and adjusted to reflect local distribution cost. Waidhaus, being the main hub for Russian gas sales to the Union, which is both the largest market for Russian gas and has prices reasonably reflecting costs, can be considered a representative market within the meaning of Article 2(5) of the basic Regulation.

- (19) Following disclosure, the applicant submitted several claims linked to the (i) legal basis of the gas adjustment made on the one hand and (ii) to the methodologies applied for the gas adjustment on the other hand.

2.1.1.1. Legal basis of the gas adjustment

- (20) The applicant claimed that any adjustment of the gas price paid on the Russian domestic market would be unwarranted because its accounting records fully reflected the costs associated with the production of the product concerned in Russia. The applicant further argued that in accordance with Article 1 of the basic Regulation, normal value must always be established with regard to the exporting country and that consequently it was contrary to that article to base findings on information from producers in other third countries.

- (21) As to the applicant's argument about the alleged breach of Article 1 of the basic Regulation it should be noted that Article 1 only describes the general concept of dumping but the detailed rules on establishing dumping are set out in Article 2 of the basic Regulation. Article 2(5) of the basic Regulation provides for the possibility to use data from other representative markets including a third country if costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned. The applicant's argument in this respect had therefore to be rejected.

- (22) The applicant also invoked the existence of natural competitive advantages in Russia such as the large availability of natural gas and favourable conditions of supply which would explain the price difference between the natural gas sold domestically and the one exported. The applicant also alleged that Russian domestic gas prices would be cost covering.

- (23) With regard to the existence of natural advantages the applicant did not address the fact that domestic prices for natural gas were regulated in Russia and could not therefore be considered to reasonably reflect a price normally payable in undistorted markets. The applicant did also not submit any evidence in support of these claims. Furthermore, as regards costs, even if gas prices paid by the applicant covered the unit cost of production and sales of gas incurred by its provider, this argument is irrelevant since the market price of gas is not necessarily linked to the costs of its production and sales. These claims had therefore to be rejected.

- (24) The applicant claimed further that an investigation under the basic Regulation should not cover the case of subsidisation of upstream products. It is noted that Article 2(5) of the basic Regulation aims to determine whether costs associated with the production and sale of the like product are reasonably reflected in the records of the party concerned. This was found not to be the case for the reasons set out above in recital (17). This is different from the determination of the existence of subsidies which was not subject to the present investigation. The applicant's argument therefore had to be rejected.

- (25) In this context, the applicant also argued that even if particular market situations exist within the meaning of Article 2(3) of the basic Regulation, these would only refer to the market of the product concerned, i.e. UAN as such which cannot be extended to the market conditions of the upstream product. However, as it results from recital (24) above, the adjustment for natural gas prices was done on the basis of Article 2(5) of the basic Regulation which, as mentioned above in recital (21) explicitly entitles the Institutions to use the cost of production coming from other representative markets. The applicant's argument therefore had to be rejected.

- (26) The applicant finally argued that Article 2(5) of the basic Regulation is limited to the examination of the compliance of the company's records with the generally accepted accounting principles of the third country concerned and does not require that costs are in line with costs in unregulated markets.

- (27) It should be noted that in accordance with Article 2(5) of the basic Regulation two requirements need to be met in order for the costs to be calculated on the basis of the records kept by the exporter: (i) records must be kept in accordance with the generally accepted accounting principles ('GAAP') of the country concerned; and (ii) records must reasonably reflect the costs associated with the production and sale of the product concerned. If, as in the present case, the second requirement is not met because the costs are not reflected in the records, the costs must be adjusted. The applicant's argument therefore had to be rejected.

2.1.1.2. Methodology applied for the gas adjustment

- (28) The applicant claimed that during the RIP of the current investigation gas prices fluctuated significantly and that normal value should be established on a monthly (or at least quarterly) basis rather than on a yearly basis.

- (29) It should be noted that although gas prices fluctuated during the RIP, these fluctuations were not considered exceptional or particularly significant. Indeed, the market for natural gas is generally characterised by rather important price fluctuations. The applicant could not show that there were any specific circumstances and that the price fluctuations during the RIP were significantly beyond usual fluctuations. Therefore there was no reason to deviate from the methodology used in the investigation leading to the measures in force. Secondly, information on which basis – according to the applicant – normal values should have been established was only partly available, since the necessary information from the US companies, i.e. SG&A and profit, was only available on a yearly basis. Therefore, even if one would follow the applicant's argument, no meaningful calculation of monthly or quarterly values would have been possible. The applicant's argument therefore had to be rejected.
- (30) The applicant also claimed that Waidhaus is not an appropriate reference market given the allegedly non-competitive pricing on gas in Germany and relationships between parties which factor is linked to the price formulae in the gas export contracts from Russia.
- (31) It should be noted that the alleged non-competitive domestic gas pricing in Germany was in any event considered irrelevant because it would only concern the prices at which German gas distributors sell the gas on the domestic market, and therefore, this is not linked at all to the price at which Russian exported gas is sold at Waidhaus. The applicant's argument that the German incumbents do not have an incentive to negotiate low prices for Russian imported gas at Waidhaus is a mere presumption without any factual background and evidence. Consequently, these arguments were rejected.
- (32) The applicant argued further that if the export price at Waidhaus was to be used, the Russian export duty payable for all exports should have been deducted from the Waidhaus price because it was not incurred domestically.
- (33) Indeed, the market price at Waidhaus, which was considered as representative market within the meaning of Article 2(5) of the basic Regulation, is the price after export taxes and not the prices before these taxes. From the perspective of the buyer it is the price it has to pay at Waidhaus which is relevant, and in this regard it is irrelevant what percentage of that price constitutes an export tax and what percentage is paid to the gas supplier. The latter, on the other hand will always try to maximise its price and therefore charge the highest price its customers are willing to pay. Given that this price is always well above its costs of production, allowing the gas supplier to make high profits, the market price is not primarily influenced by the amount of the export tax but by the price the market is willing to pay. It was therefore concluded that the price including the export tax, and not the price before that tax, is the undistorted market driven price. Consequently, the arguments of the applicant in this regard were rejected.
- (34) In this context, the applicant also claimed that the mark-up of the local distributor should not be added to the export price at Waidhaus, without however explaining or demonstrating why it considered that the adjustment for the local distributor would have been inappropriate. It was considered that since domestic customers were purchasing the gas from local suppliers, it had to be assumed that they would have to pay local distribution costs which are not as such included in the unadjusted Waidhaus price. Therefore it was considered that this adjustment was indeed warranted and consequently the applicant's claim was rejected.
- 2.1.2. Selling, General and Administrative costs ('SG&A costs')**
- (35) SG&A costs and profit could not be established on the basis of the 'chapeau' of Article 2(6), first sentence, of the basic Regulation because the applicant had no domestic sales in Russia of the like product. Article 2(6)(a) of the basic Regulation could not be applied, since only the applicant is subject to the investigation. Article 2(6)(b) was not applicable either, since for products belonging to the same general category of goods, natural gas is likewise by far the most important raw material and therefore manufacturing costs would very likely also need to be adjusted, for the reasons indicated in recital (17) above. In the framework of this review, no information was available to properly quantify such adjustment and to establish SG&A costs and the relevant profit margins when selling these products after such adjustment. Therefore, SG&A costs and profit were established pursuant to Article 2(6)(c) of the basic Regulation on the basis of a reasonable method.
- (36) As the Russian domestic market of products of the same general category is extremely small, information had to be obtained from other representative markets. In this respect, consideration was given to publicly available information relating to major companies operating in the nitrogen fertilisers business sector. It was found that the corresponding data from North American (namely US) producers would be the most appropriate for the purpose of the investigation, given the large availability of reliable and complete public financial information from listed companies in this region of the world. Moreover, the North American market showed a significant volume of domestic sales and a considerable level of competition from both domestic and foreign companies. Therefore, SG&A costs and profit were established on the basis of the weighted average of SG&A costs and profit from three North American producers, which were found to be amongst the largest companies in the fertilisers sector, with regard to their North American sales of the same general category of

products (nitrogen fertilisers). These three producers were considered to be representative of the nitrogen fertilisers business and their SG&A costs and profit as representative of the same type of costs normally incurred by companies operating successfully in that business segment. Furthermore, there is no indication suggesting that the amount for profit so established exceeds the profit normally realised by Russian producers on sales of products of the same general category on their domestic market.

- (37) Following disclosure the applicant contested the above described methodology claiming that the profit margin used is unreasonable and excessively high, especially in comparison to the profit margin used in previous anti-dumping investigations concerning the same product. The applicant claimed that the year 2008 on which basis SG&A and profits were established was exceptional in the US market as gas prices were fluctuating considerably and fertiliser prices were exceptionally high which yielded exceptionally high profit rates for US producers.
- (38) In general, the present review confirmed that there were no changed circumstances, in the sense of Article 11(9) of the basic Regulation, that would justify a deviation from the methodology used in the investigation leading to the measures in force. First of all, it was found that profit margins achieved by the same US producers before 2008 were similar to profit margins realised in 2008. Secondly, even if profit levels in 2008 differed from those in prior years, this is normal in a market economy where costs, prices and profits move over time. Thirdly, the market for natural gas is generally characterised as volatile. A comparison of the gas price levels on US markets and at Waidhaus in 2008 and previous years did not show any diverging trend that would have given grounds for abnormally high profits on the US market. In light of the above, it is considered that there were no grounds to deviate from the methodology described above in recital (36).
- (39) Furthermore, the applicant alleged that the test of Article 2(6)(c) on the reasonableness of the profit margin used was not applied since the profit margin exceeds the profit normally realised by other exporters or producers on products of the same general category in the domestic market of the country of origin within the meaning of Article 2(6)(c) of the basic Regulation.
- (40) The applicant did not submit any evidence in support of this claim. Since the present review was limited to the determination of dumping with regard to the applicant, no information was available concerning other producers in Russia. While noting that gas costs incurred by the applicant have had to be rejected for the reasons outlined above, the applicant's own reported profitability rate at company level for products sold on the domestic market,

after corrections for extraordinary gains and losses from financial activities, is in the same order of magnitude as the profitability rate of the US producers. In these circumstances, there are no grounds to consider that the profit margin used would exceed the profit normally realised by other exporters or producers on products of the same general category in the domestic market of the country of origin within the meaning of Article 2(6)(c) of the basic Regulation.

- (41) The Union industry objected to the above approach with regard to the determination of SG&A and profits and claimed the applicant's own SG&A should have been used. However, Article 2(6) of the basic Regulation sets out that the amounts for SG&A and profits shall only be based on actual data pertaining to the production and sale of the exporting producer concerned, when these sales were made in the ordinary course of trade. As outlined above in recitals (35) and (36), this was not the case because the applicant had no domestic sales in Russia of the like product. Therefore this argument had to be rejected.

2.2. EXPORT PRICE

- (42) The export price was established in accordance with Article 2(8) of the basic Regulation, i.e. on the basis of the price actually paid or payable for the product when sold for export from the exporting country to the Union.

2.3. COMPARISON

- (43) The normal value and export price were compared on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting price and price comparability in accordance with Article 2(10) of the basic Regulation. Accordingly, adjustments were made for differences in transport, handling, loading and ancillary costs and indirect taxes where applicable and supported by verified evidence.
- (44) Export sales of the applicant during the RIP were made via Agronova, the related trader located in the USA. The investigation has shown that the functions of the related company are solely restricted to finding customers and negotiating sales contracts. The verification revealed that Agronova's accounts did not fully reflect the totality of its operations and there were indications that although no transaction-linked commissions were paid to the company, compensation for its activities was given in other forms. For these reasons Agronova's functions were considered to be similar to those of an agent working on a commission basis. The export price was therefore adjusted by a notional commission corresponding to a trader's usual mark-up in accordance with Article 2(10)(i) of the basic Regulation.

- (45) The applicant claimed that the export price should not have been adjusted by a notional commission in accordance with Article 2(10)(i) of the basic Regulation for sales made via its related company in the USA since this company allegedly performed functions identical to those of a fully integrated export sales department and should therefore not be treated as an agent working on commission basis.

- (46) This could not be confirmed by the present investigation which revealed that concerning the functions and the way the related company is compensated for its activities by the applicant, the related company should rather be considered as an agent working on commission basis.

2.4. DUMPING MARGIN

- (47) The dumping margin was established on the basis of a comparison of a weighted average normal value with a weighted average export price, in accordance with Article 2(11) of the basic Regulation.

- (48) This comparison showed a dumping margin of 22,9 %, expressed as a percentage of the CIF frontier price, duty unpaid.

D. ANTI-DUMPING MEASURES

- (49) It is reminded that, in accordance with Article 9(4) of the basic Regulation and as outlined in recital (49) of Regulation (EC) No 1995/2000, the definitive duty in the original investigation was established at the level of the injury margin found, which was lower than the dumping margin because it was found that such lesser duty would be adequate to remove the injury to the Union industry. In the light of the foregoing, the duty established in this review should not be higher than the injury margin.

- (50) No individual injury margin can be established in this partial interim review, since it is limited to the examination of dumping as far as the applicant is concerned. Therefore, the dumping margin established in the present review was compared to the injury margin as established in the original investigation. Since the latter was lower than the dumping margin found in the present investigation, a definitive anti-dumping duty should be imposed for the applicant at the level of the injury margin found in the original investigation.

- (51) Regarding the form of the measure, it was considered that the amended anti-dumping duty should take the same form as the duties imposed by Regulation (EC)

No 1995/2000. To ensure efficiency of the measures and to discourage price manipulation it was appropriate to impose duties in the form of a specific amount per tonne. As a result, the anti-dumping duty to be imposed on imports of the product concerned produced and sold for export to the Union by the applicant, calculated on the basis of the injury margin as established in the original investigation expressed as a specific amount per tonne, should be EUR 20,11 per tonne.

E. RETROACTIVE LEVYING OF THE ANTI-DUMPING DUTY

- (52) In the light of the above findings, the anti-dumping duty applicable to the applicant shall be levied retroactively from the date of initiation of the review on imports of the product concerned which have been made subject to registration pursuant to Article 3 of Regulation (EC) No 241/2009.

F. DISCLOSURE AND DURATION OF THE MEASURES

- (53) The applicant and other parties were informed of the essential facts and considerations on the basis of which it was intended to reimpose a definitive anti-dumping duty on imports of UAN originating, inter alia, in Russia and produced and sold for export to the Union by the applicant and to levy this duty retroactively on imports made subject to registration. All parties were given an opportunity to comment.
- (54) This review does not affect the date on which the measures imposed by Regulation (EC) No 1911/2006 will expire pursuant to Article 11(2) of the basic Regulation.

G. UNDERTAKING

- (55) Following final disclosure the applicant offered an undertaking in accordance with Article 8 of the basic Regulation. The applicant stated that the offer would be based on the reasonable expectation that some of its claims made following the final disclosure would be accepted and would result in a minimum import price workable for the applicant. Since, however, none of the comments raised by the applicant were found to be warranted and since the applicant appears not interested to offer a minimum import price based on the injury elimination level established in the original investigation, any further detailed analysis of the undertaking offer as to its acceptance was considered unnecessary,

HAS ADOPTED THIS REGULATION:

Article 1

1. The table in Article 1(2) of Regulation (EC) No 1911/2006 is hereby amended by adding the following:

Country	Company	Amount of duty (per tonne)	TARIC additional code
'Russia	Joint Stock Company Acron	EUR 20,11	A932'

2. The duty hereby imposed shall also be levied retroactively on imports of mixtures of urea and ammonium nitrate in

aqueous or ammoniacal solution which have been registered pursuant to Article 3 of Regulation (EC) No 241/2009.

3. The customs authorities are hereby directed to cease the registration of imports of mixtures of urea and ammonium nitrate in aqueous or ammoniacal solution originating in Russia produced and sold for export to the Union by Joint Stock Company Acron.

4. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

Article 2

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, 18 December 2009.

For the Council

The President

Å. TORSTENSSON
