REGULATIONS

COUNCIL IMPLEMENTING REGULATION (EU) No 905/2011

of 1 September 2011

terminating the partial interim review concerning the anti-dumping measures on imports of certain polyethylene terephthalate (PET) originating in India

THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [1] (the basic Regulation) and in particular Article 11(3) thereof,

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

Whereas:

1. PROCEDURE

1.1. Measures in force

(1) By Regulation (EC) No 2604/2000 [2], the Council imposed a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) originating, inter alia, in India ('the original investigation'). Following an expiry review, the Council, by Regulation (EC) No 192/2007 [3] imposed a definitive anti-dumping duty for a further period of five years. The anti-dumping measures were amended by Council Regulation (EC) No 1286/2008 [4] following a partial interim review ('the last review investigation'). The measures were set at the injury elimination level and consist of specific anti-dumping duties. The rate of the duty ranges between EUR 87,5 and EUR 200,9 per tonne for individually named Indian producers with a residual duty rate of EUR 153,6 per tonne imposed on imports from other producers ('the current duties').

(2) By Regulation (EC) No 2603/2000 [5], the Council imposed a definitive countervailing duty on imports of PET originating, inter alia, in India. Following an expiry review, the Council, by Regulation (EC) No 193/2007 [6] imposed a definitive countervailing duty for a further period of five years. The countervailing measures were amended by Regulation (EC) No 1286/2008 following the last review investigation. The countervailing measures consist of a specific duty. The rate of the duty ranges between EUR 0 and EUR 106,5 per tonne for individually named Indian producers with a residual duty rate of EUR 69,4 per tonne imposed on imports from other producers ('the current countervailing measures').

(3) By Decision 2000/745/EC [7] the Commission accepted undertakings offered by several exporting producers setting a minimum import price (MIP) ('the undertaking').

1.2. Request for a review

(4) A request for a partial interim review pursuant to Article 11(3) of the basic Regulation was lodged by Reliance Industries Limited, an Indian exporting producer of PET ('the applicant'). The request was limited in scope to dumping and to the applicant. The applicant at the same time also requested the review of the current countervailing measures. The residual anti-dumping and countervailing duties are applicable to imports of products produced by the applicant and sales of the applicant to the Union are governed by the undertaking.

(5) The applicant provided prima facie evidence that the continued application of the current duty at its current level was no longer necessary to offset dumping. In particular, the applicant claimed that there had been significant changes in the production costs of the company and that these changes led to a substantially lower dumping margin since the imposition of the current duties. A comparison made by the applicant of its domestic prices and its export prices to the Union suggested that the dumping margin was substantially lower than the level of current duties.

[1] OJ L 343, 22.12.2009, p. 51.
[2] OJ L 301, 30.11.2000, p. 21.
[3] OJ L 59, 27.2.2007, p. 1.
[4] OJ L 340, 19.12.2008, p. 1.
[5] OJ L 301, 30.11.2000, p. 1.
[6] OJ L 59, 27.2.2007, p. 34.
[7] OJ L 301, 30.11.2000, p. 88.

1.3. **Initiation of a partial interim review**

(6) Having determined, after consulting the Advisory Committee, that the request contained sufficient prima facie evidence to justify the initiation of the partial interim review ('this review'), the Commission announced, by a notice of initiation [1] published in the *Official Journal of the European Union* on 10 June 2010, the initiation of a partial interim review pursuant to Article 11(3) of the basic Regulation limited to the examination of dumping as far as the applicant is concerned.

1.4. **Product concerned and like product**

(7) The product under review is polyethylene terephthalate (PET) having a viscosity of 78 ml/g or higher, according to the ISO Standard 1628-5, currently falling within CN code 3907 60 20 and originating in India ('the product concerned').

(8) The investigation revealed that the product concerned produced in India and sold to the Union is identical in terms of physical and chemical characteristics and uses to the product produced and sold on the domestic market in India. It is therefore concluded that products sold on the domestic and export markets are like products within the meaning of Article 1(4) of the basic Regulation. Since this review was limited to the determination of dumping as far as the applicant is concerned, no conclusions were reached with regard to the product produced and sold by the Union industry on the Union market.

1.5. **Parties concerned**

(9) 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.

(10) All interested parties who so requested and showed that there were particular reasons for being heard were granted a hearing.

(11) In order to obtain the information deemed necessary for its investigation, the Commission sent a questionnaire to the applicant and received a reply within the deadline set for that purpose.

(12) The Commission sought and verified all information deemed necessary for the determination of dumping. The Commission carried out a verification visit at the premises of the applicant in Mumbai, India.

1.6. **Review investigation period**

(13) The investigation of dumping covered the period from 1 April 2009 to 31 March 2010 ('the review investigation period' or 'RIP').

2. **RESULTS OF THE INVESTIGATION**

2.1. **Lasting nature of the alleged change of circumstances during the RIP**

(14) In accordance with Article 11(3) of the basic Regulation, it was examined whether the circumstances with regard to dumping have changed significantly and whether such change was of a lasting nature.

(15) The applicant claimed that the changes in its normal value and export prices since the original investigation establishing its dumping margin were the result of a significant change in production costs. The change in its cost of production was claimed to be linked to the reduction of customs duties applicable to imports in India of the basic raw material used in its production process. Furthermore, the applicant also claimed that the reduction of customs duties led to a reduction in export incentives which resulted in changed domestic sales prices used to determine the normal value.

(16) However, it was found that, in spite of the reductions of custom duties and export incentives, the domestic sales prices of the company used to determine the normal value in the RIP were higher than the prices used in the original investigation establishing the applicant's dumping margin. The higher domestic sales prices resulted, inter alia, from the increased cost of certain raw materials and other inputs.

(17) As far as export prices to the Union in the RIP were concerned, they were determined pursuant to Article 2(8) and (9) of the basic Regulation. However, it had to be analysed in particular whether the existence of a price undertaking under which the applicant was obliged to sell its product to the Union market at a price above a MIP set for each month during the RIP has influenced the export prices of the applicant. It was concluded, for the reasons set out below, that the exports to the Union were indeed influenced by the price undertaking. In this regard, given that the applicant had to comply with the undertaking MIP obligations, it chose not to export to the Union during specific months of the RIP when its export prices to other export markets were below the MIP.

[1] OJ C 151, 10.6.2010, p. 15.

(18) It was observed that the applicant sold its product to the Union only during six months of the RIP. On the other hand, it sold products throughout the period to other export markets where it did not have to comply with the obligation set in the price undertaking. It was noted that export prices to third countries in the months during which the applicant did not export to the Union were significantly lower than the established MIP. Therefore, in the light of the above, it can be reasonably assumed that the applicant's sole reason for not selling products to the Union in the remaining months was that it had to comply with its undertaking and could not sell below the MIP set.

(19) The applicant contested the finding that the reason for not selling products to the Union market was linked to the existing undertaking. The applicant argued that in regard to its sales in the RIP to other large export markets there were months during which there were no sales and thus irregular sales were not a specific feature of the Union market. It also claimed that a monthly comparison of the import prices of the product concerned to the Union from all other exporting countries and/or the import prices of the product concerned originating in India with the monthly MIP of the company would show that the applicant would have been able to sell products to the Union in all months of the RIP without breaching its undertaking.

(20) The applicant's arguments cannot be accepted because, on the one hand, the company focussed its activity on selected individual markets which are driven by their own market specificities and do not give indications as to why the company did not sell to the Union. On the other hand, the comparisons made by the applicant were based on overall statistical data whereas the findings of this review are based on company-specific data which is a more relevant and reliable source from which to draw conclusions. The arguments presented by the applicant were also not fully valid, e.g. in some months, overall import prices to the Union were indeed higher than the MIP, while in other periods overall import prices were lower —, no general conclusions could thus be drawn from them. However, it is undisputed that the applicant had sales to the Union only in the months when the overall import prices to the Union were at the level or higher than the MIP.

(21) The applicant's argument that it would have been able, should it have wanted, to sell products on the Union market during the six months period it was selling products on other export markets at a price lower than its MIP is rejected as speculative and non-substantiated. The applicant did not put forward any other argument as to the reasons why it did not sell products to the Union during those six months while at the same time it was selling the same products on other export markets at a price lower than its MIP. Therefore, it was concluded that the applicant did not sell products to the Union during a certain period because of the need to comply with its undertaking. In consequence, the export prices charged on the Union market in the RIP are not reliable.

(22) A comparison was also made between the sales prices of the applicant to the Union market and the prices achieved on other export markets for which no price undertaking existed. It was observed that export prices to those markets without price obligations were consistently lower throughout the RIP.

(23) The applicant questioned the conclusions drawn from the comparison of prices to the Union and other exports markets, claiming that when analysed on a country-by-country basis, there are several other export markets where prices charged are above the prices charged on the Union market. However, in this respect, the comparison of average prices is more relevant than the individual differences on a country-by-country comparison which will be linked to the size as well as to distinctive competitive factors at play on those individual markets.

(24) Consequently, the export prices on third markets better reflect the company's normal pricing behaviour. The price differential between export prices to the Union and export prices to the rest of the world indicates that there are strong economic arguments to induce the applicant to sell at lower prices to the Union if there were no MIP. Under these circumstances it is considered that any newly calculated dumping margin based on the export prices to the Union in the RIP would thus be set on the basis of prices that have not changed significantly and in a lasting manner. The same conclusion applies to the applicant's claim, as mentioned in recital 5, that a comparison of its domestic prices and its export prices to the Union would show a dumping margin lower than the level of current duties.

(25) In light of the above, the condition set in Article 11(3) of the basic Regulation that circumstances with regard to dumping changed significantly is not met. Therefore, the continued imposition of the measures at their current level is necessary to offset dumping.

(26) After disclosure, the applicant insisted that its prices charged on the Union market are fully reliable. Since these export prices increased significantly between the original investigation period and the RIP, the company's export behaviour should be considered also to have changed significantly and lastingly during this period. Therefore the company's dumping margin would allegedly also have decreased significantly and in a lasting manner.

(27) It furthermore argued that the lasting change in circumstances is not necessarily the determining element for the assessment to be made after initiating a review but it is more relevant whether the continued imposition of the duty is necessary to offset dumping. It referred to the fundamental principle set out in Article 11(1) and of the basic Regulation and Article 11.1 of the WTO Anti-dumping Agreement that anti-dumping measures shall remain in force only as long as, and to the extent that, they are necessary to counteract dumping which is causing injury. In this respect, the applicant claimed that the analysis of the necessity should be a prospective assessment that would require at the very least the likely or probable recurrence of dumping at the level previously established.

(28) Article 11(1) of the basic Regulation provides that 'An anti-dumping measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury'. This principle is carried through to treatment of interim reviews, such as in the case at hand, where Article 11(3) of the basic Regulation provides, inter alia, that '[…] An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied […].' The aforementioned provision sets the benchmark to be met where an interested party considers that the level of measures is too low or too high and consequently requests a review of those measures. Once such a review is initiated, Article 11(3) of the basic Regulation goes on to explicitly provide that 'in carrying out investigations pursuant to this paragraph, the Commission may, inter alia, consider whether the circumstances with regard to dumping […] have changed significantly […]. In these respects, account shall be taken in the final determination of all relevant and duly documented evidence'. Therefore Article 11(3) provides for an additional assessment criterion (i.e. a significant change in circumstances) in case of interim reviews that should be looked at during the investigation in addition to the initiation requirement (i.e. assessing whether the measures at the current level still necessary) as claimed by the applicant.

(29) It should also be noted that it is standard practice in interim review investigations to examine the lasting nature of the changed circumstances found during an investigation. Indeed, in this respect, the case law of the General Court of the European Union [1] confirms that 'when assessing the need to continue existing measures the institutions have a wide discretion, which includes the option of carrying out a prospective assessment of the pricing policy of the exporters concerned'. The evidence at hand shows that the export prices charged by the applicant on the Union market do not reflect the applicant's actual pricing policy and therefore, as concluded in recital 21, the export prices charged on the Union market in the RIP are not reliable and consequently any newly calculated dumping margin based on these prices would thus be set on the basis of prices that have not changed significantly and in a lasting manner, as stated in recital 24.

(30) Despite the conclusion that export prices to the Union have not changed significantly and in a lasting manner, consideration was given to the applicant's arguments and to whether the measures at their current level are still necessary to counteract dumping. In this regard, the applicant claimed that sinceits dumping margin would be significantly below that found in the original investigation and its export behaviour in other markets would confirm that the change in the dumping margin reflects the trend that can reasonably be expected in the future, the current level of measures is manifestly excessive. However, these arguments were found not to be supported by the facts. First, concerning the applicant's export behaviour on other markets, it was found that, contrary to the claim in the applicant's request, the prices to these markets were, on average, almost 10 % lower than those to the Union. These third country export markets comprise a number of countries of different market size, with some of them unlikely to have domestic production of PET. These markets are hence defined by their own individual characteristics of competition leading to prices and trends different from those on the Union market. Second, in light of these findings, even if it were found that the current level of measures should be changed on the grounds that it was no longer necessary to counteract dumping, it is not possible to determine with a reasonable degree of accuracy what would be the appropriate level in the absence of reliable export prices which result from and reflect the normal conditions on the Union market.

(31) Finally the applicant considered that an adjustment could be made in accordance with Article 2(10) of the basic Regulation and in particular with its point (k) for 'differences in other factors […] if it is demonstrated that they affect price comparability as required under this paragraph'.

(32) Given the conclusion reached above that export prices did not change in a significant and lasting manner, it is not possible to establish a dumping margin. For this reason, the claim for an adjustment is irrelevant and thereby rejected.

3. TERMINATION OF THE INVESTIGATION

(33) In view of the findings that circumstances with regard to dumping did not change significantly and lastingly, it is considered that this review should be terminated without amending the level of the duty for the applicant. Therefore the anti-dumping measures imposed by Regulation (EC) No 1286/2008 on imports of PET produced by the applicant should remain unchanged.

[1] Case T-143/06 *MTZ Polyfilms* v *Council of the European Union* [2009] ECR II-4133, at paragraph 48.

4. **DISCLOSURE**

(34) The applicant as well as the other parties concerned were informed of the essential facts and considerations on the basis of which it was intended to propose to terminate this review. Comments received were not such as to change the above conclusion.

5. **FINAL PROVISION**

(35) This review should therefore be terminated without any amendment to Regulation (EC) No 192/2007,

HAS ADOPTED THIS REGULATION:

Article 1

The partial interim review of the anti-dumping measures applicable to imports of polyethylene terephthalate currently falling within CN code 3907 60 20 and originating, inter alia, in India, is hereby terminated without amending the measures in force.

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, 1 September 2011.

For the Council
The President
M. DOWGIELEWICZ