II

(Non-legislative acts)

REGULATIONS

COUNCIL IMPLEMENTING REGULATION (EU) No 60/2012

of 16 January 2012

terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009 of the anti-dumping measures applicable to imports of ferro-silicon originating, inter alia, in Russia

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) The Council, by Regulation (EC) No 172/2008 [2] ('the original Regulation'), imposed a definitive anti-dumping duty on imports of ferro-silicon originating, inter alia, in Russia. The measures consist of an *ad valorem* duty at a rate ranging from 17,8 % to 22,7 %. The investigation which led to this Regulation will be referred to below as 'the original investigation'.

1.2. Request for a review

(2) On 30 November 2009, the European Commission ('Commission') received a request for a partial interim review pursuant to Article 11(3) of the basic Regulation ('the interim review'). The request, lodged by an exporting producer from Russia, Joint Stock Company (JSC) Chelyabinsk Electrometallurgical Integrated Plant and its related company Joint Stock Company (JSC) Kuznetsk Ferroalloy Works (hereinafter referred to jointly as 'the applicant'),was limited in scope to the examination of dumping as far as the applicant is concerned. The anti-dumping duty rate applicable to the applicant is 22,7 %, based on the applicant's dumping margin.

(3) In its request, the applicant claimed that, as far as the applicant is concerned, the circumstances on the basis of which the existing measures were imposed have changed and that these changes are of a lasting nature.

(4) The applicant provided prima facie evidence showing that, as far as the applicant is concerned, the continued imposition of the measure at its current level is no longer necessary to offset dumping. According to the information submitted in the request, the comparison of the applicant's domestic prices and its export prices to the Union indicated that the dumping margin appeared to be substantially lower than the current level of the measure.

1.3. Initiation of a review

(5) Having determined, after consulting the Advisory Committee, that sufficient evidence existed for the initiation of an interim review, the Commission decided to initiate a partial interim review in accordance with Article 11(3) of the basic Regulation, limited in scope to the examination of dumping as far as the applicant is concerned. The Commission published a notice of initiation on 27 October 2010 in the *Official Journal of the European Union* [3] ('Notice of initiation') and commenced an investigation.

1.4. Product concerned and like product

(6) The product concerned by the interim review is the same as that in the original investigation, i.e. ferro-silicon, originating in Russia, currently falling within CN codes 7202 21 00, 7202 29 10 and 7202 29 90.

(7) The product produced and sold in Russia and that exported to the Union have the same basic physical and technical characteristics and uses and are therefore considered to be alike within the meaning of Article 1(4) of the basic Regulation.

[1] OJ L 343, 22.12.2009, p. 51.
[2] OJ L 55, 28.2.2008, p. 6.
[3] OJ C 290, 27.10.2010, p. 15.

1.5. **Parties concerned**

(8) The Commission officially informed the Union industry, the applicant and the authorities of the exporting country of the initiation of the interim review. Interested parties were given the opportunity to make their views known in writing and to be heard.

(9) The Commission sent questionnaires to the applicant and received a reply within the deadline set for that purpose. The Commission sought and verified all the information it deemed necessary for the determination of dumping, and verification visits were carried out at the following locations:

— Joint Stock Company JSC Chelyabinsk Electrometallurgical Integrated Plant ('CHEM'), Chelyabinsk, Russia,

— Joint Stock Company JSC Kuznetsk Ferroalloy Works ('KF'), Kuznetsk, Russia,

and

— RFA International LP ('RFAI') in Mishawaka, USA & Nieuwdorp Zld, The Netherlands.

1.6. **Investigation period**

(10) The investigation covered the period from 1 October 2009 to 30 September 2010 (the review investigation period or 'RIP').

2. **LASTING NATURE OF CHANGED CIRCUMSTANCES**

2.1. **Introduction**

(11) As a starting point, it is recalled that, according to the case-law of the EU courts [1], when assessing the need to continue existing measures in a review based on Article 11(3) of the basic Regulation, the Institutions have a wide discretion, which includes the option of carrying out a prospective assessment of the pricing policy of the exporters concerned. It is in this context that the Institutions must examine the applicant's arguments as to why the circumstances of its situation have changed in a lasting manner, allegedly justifying a reduction or even removal of the duty.

(12) The applicant claimed that changed circumstances could be reasonably said to be of a lasting nature and thus the level of measures should be reduced or the measures should be repealed altogether as far as the applicant is concerned, as it was unlikely that in the foreseeable future there would be a recurrence of dumped imports at all or at levels similar to those established in the original investigation.

[1] See, in particular [2009] ECR II-4133. Case T-143/06 *MTZ Polyfilms Ltd* v *Council*.

2.2. **Regarding the question whether the applicant was still dumping on the EU market during the RIP** [2]

(13) Before replying to the various arguments of the applicant on the (allegedly) lasting nature of the (allegedly) changed circumstances, it is useful to first describe the Institutions' considerations regarding the question whether the applicant may still have been dumping on the EU market during the RIP.

2.2.1. *Normal value*

(14) For the determination of normal value, it was first established whether the company's total volume of domestic sales of the like product to independent customers was representative in comparison with its total volume of export sales to the Union. In accordance with Article 2(2) of the basic Regulation, domestic sales are considered to be representative when the total domestic sales volume is at least 5 % of the total volume of sales of the product concerned to the Union. It was found that the overall sales, by the company, of the like product on the domestic market were representative.

(15) For each product type sold by the company on its domestic market and found to be directly comparable with the product type sold for export to the Union, it was established whether domestic sales were sufficiently representative for the purposes of Article 2(2) of the basic Regulation. Domestic sales of a particular product type were considered sufficiently representative when the total volume of that product type sold on the domestic market to independent customers during the RIP represented at least 5 % of the total sales volume of the comparable product type exported to the Union.

(16) It was also examined whether the domestic sales of each product type could be regarded as being made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. This was done by establishing the proportion of domestic sales to independent customers on the domestic market which were profitable for each exported type of the product concerned during each of the periods.

(17) For those product types where more than 80 % by volume of sales on the domestic market of the product type were above cost and the weighted average sales price of that type was equal to or above the unit cost of production, normal value, by product type, was calculated as the weighted average of the actual domestic prices of all sales of the type in question, irrespective of whether those sales were profitable or not.

[2] As will be explained below, normal value, export price and their comparison were first calculated/performed for CHEM and KF, separately. To clarify this, in this part, the word 'company' is sometimes used rather than 'applicant', since 'applicant', as stated above, refers to CHEM and KF jointly.

(18) Where the volume of profitable sales of a product type represented 80 % or less of the total sales volume of that type, or where the weighted average price of that type was below the unit cost of production, normal value was based on the actual domestic price, which was calculated as a weighted average price of only the profitable domestic sales of that type made during each of the periods.

(19) Wherever domestic prices of a particular product type sold by the company could not be used in order to establish normal value, the normal value was constructed in accordance with Article 2(3) of the basic Regulation.

(20) When constructing normal value pursuant to Article 2(3) of the basic Regulation, the amounts for selling, general and administrative costs and for profits have been based, pursuant to the introductory phrase of Article 2(6), of the basic Regulation, i.e. on the actual data pertaining to the production and sales, in the ordinary course of trade, of the like product, by the company.

2.2.2. *Export price*

(21) The company's export sales to the Union are made through the Swiss branch of its related company RFAI which during the RIP performed all import functions in relation to the goods entering into free circulation in the Union, i.e. that of a related importer.

(22) The export price was thus established in accordance with Article 2(9) of the basic Regulation, on the basis of prices at which the imported products were first resold to an independent buyer, adjusted for all costs, incurred between importation and resale, as well as a reasonable margin for SG&A and for profits. For this purpose, in the absence of new information from independent importers concerning profits accruing, use was made of the profit rate applied in the original investigation, namely 6 %.

(23) The applicant claimed that RFAI should be treated as part of the same single economic entity (SEE) and that consequently when determining the export prices no deduction should be made for SG&A and profit of RFAI.

(24) This claim can not be accepted for the following reasons:

— the two exporting producers have their own export sales department,

— RFAI is strongly involved in the international activity of the Group (customer assistance, logistics and schedule of the deliveries, purchasing of capital goods and key raw materials, etc.),

— the Swiss branch of RFAI is performing all the functions normally performed by a related importer in the EU,

— RFAI sells ferro-silicon in its own name and for its own account to unrelated customers in the EU and elsewhere,

— RFAI has a purchase-sales relationship with the two related Russian producers KF and CHEM,

— each company drafts its own financial report and no consolidated financial report exists, and

— each company files its own tax return with the respective authorities.

Accordingly, the claim that no deduction should be made for SG&A and profit in the construction of the export price had to be rejected. The applicant's comments on this point in reply to the final disclosure will be discussed below (point 2.3).

(25) The applicant also claimed that no deduction of the anti-dumping duty should be made in the calculation of the export price in accordance with the Article 11(10) of the basic Regulation, since the duty is duly reflected in resale prices and the subsequent selling prices in the Union. With respect to this claim, the investigation has established that the weighted average resale prices of ferro-silicon in the Union have increased in comparison with the prices in the original investigation and the current resale export prices are largely more than 22,7 % higher than such prices in the original investigation. Therefore, it can be concluded that the anti-dumping duty is duly reflected in the applicant's resale prices. As a result, this claim of the applicant could be accepted and, in the calculation of the constructed export prices in accordance with Article 2(9) of the basic Regulation, no deduction of the anti-dumping duties has been carried out.

2.2.3. *Comparison*

(26) The normal value and the export price were compared on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and export price, due allowance in the form of adjustments was made for transport costs, insurance costs, terminal and handling costs, credit costs, and commissions, where applicable and justified, in accordance with Article 2(10) of the basic Regulation.

2.2.4. *Dumping margin*

(27) As provided for under Article 2(11) of the basic Regulation, the weighted average normal value by type was compared with the weighted average export price of the corresponding type of the product concerned. The outcome showed the existence of dumping.

(28) In order to calculate the dumping margin, the Institutions, as in the original investigation, noted that CHEM and KF are closely related. As in the original investigation, and in line with the Institutions' standard practice, a single dumping margin was calculated for the whole Group. In the method used for doing so in the final disclosure, the amount of dumping was calculated for each individual exporting producer before determining a weighted average rate of dumping for the group as a whole. It should be noted that this methodology was different from the methodology applied in the original investigation, where the dumping calculation was done by collapsing all relevant data with regard to domestic sales, cost of production, profitability and sales in the Union of the producing entities. The applicant claimed that applying this methodology would be contrary to Article 11(9) of the basic Regulation. This issue, too, will be returned to below (point 2.3).

2.3. **Analysis of the reactions to final disclosure relating to the dumping margin during the RIP.**

(29) The applicant submitted several comments on certain aspects of the calculations such as cost of production, SG&A, profit margin, normal value and allowances. All these comments were considered and, where appropriate, clerical errors were corrected. Accordingly, the definitive findings have been modified.

(30) In addition, the applicant requested the Commission to express the dumping amount on the basis of a cif value that they constructed themselves for the purposes of this investigation, therefore making reference to Article 2(9) of the basic Regulation. The claim was based on the grounds that the price declared to customs authorities is a transfer price which would perhaps be the correct price for customs purposes, but not a price that should be used when calculating dumping in anti-dumping proceedings. This claim has to be rejected because the difference between the export price and the normal value, i.e. the dumping amount, should be expressed on the same basis as the one which is subsequently used by customs authorities to determine any duty to be collected. This is in fact the cif value declared by the applicant to customs authorities. Consequently, the latter was used in the calculations.

(31) With regards to the calculation of the cost of production, the applicant contested the Commission approach to use the average purchase price of a main cost item from an unrelated supplier in place of the actual price paid to a related supplier of the same cost item in the construction of the normal value. This claim has to be rejected because the price charged by the related supplier was significantly lower than the price paid for the same raw material to an independent supplier. This price, therefore, cannot be considered as an arm's length price. Consequently, this cost element needed to be adjusted.

(32) Following disclosure, the applicant claimed that packing costs were not treated consistently when comparing export prices with normal values. This issue was investigated and, where applicable, clerical errors were corrected.

(33) The applicant commented also on the exclusion of the export transactions of a particular product type. The sales of this product type in the Union represented less than 5 % of the applicant's sales in the Union of the product concerned during the RIP. This point has to be rejected given that no sales of this product type were made on the domestic market neither specific cost of production had been provided. As this product type had been exported to the EU in low volumes during the RIP, it was therefore considered not appropriate to resort to constructing the normal value on the basis of manufacturing costs of other product types, thereby making adjustments for product differences.

(34) In addition and as explained above, in particular regarding two important points of the dumping margin calculation, namely: (i) the question whether CHEM, KF and RFAI form a single economic entity [1] and (ii) the calculation of an individual amount of dumping for CHEM on the one hand, and KF on the other hand [2], the applicant made detailed comments in its reaction to the definitive disclosure.

(35) Regarding the first claim, and in particular on the points put forward by the applicant in its reaction to the definitive disclosure, the following is observed.

(36) The applicant reiterated its position that the two exporting producers and the related trader RFAI are ultimately owned and controlled by the same beneficiaries and that it, therefore, would have no autonomy and simply follow the instructions of the owners of the applicant. It acknowledged all the elements listed in recital 24 above, but it disagreed to the Institutions' appreciation thereof as they would have no bearing on whether CHEM, KF and RFAI are all parts of an SEE.

(37) The Institutions reject the applicant's comments. The criteria already listed above, are, especially if all taken together, well-grounded to justify the rejection of the applicant's claim. All the elements listed in recital 24 above point at a group structure where all the companies are distinctive legal entities in which KF and CHEM performed the complete function of an exporting producers (production and export function) while RFAI operates mainly as a related trader/importer in the EU.

[1] See recital 23.
[2] See recital 27.

(38) Regarding the second claim, it is not necessary to take a final position on this matter in the context of this review investigation. This results from the combination of two reasons. First, even if this claim were accepted (in addition to the acceptance, where appropriate, of the claims referred to in recital 29 above), the applicant would still have been found dumping on the EU market, during the RIP, at a dumping margin of approximately 13 %. Second, as explained below, in any case there is currently insufficient evidence to consider the dumping margin during the RIP as a lasting one.

(39) In its reaction to definitive disclosure, the Union industry argued that, as a result of the review investigation, the duty on the applicant's products should be increased, because, assuming that all of the applicant's claims would be refused, the dumping margin found during the RIP was higher than the applicable duty. However, since, as explained below, there is insufficient evidence of a lasting change in circumstances, there is no justification for modifying the duty, neither upward nor downward.

2.4. **Analysis of the question whether there is a lasting change in circumstances justifying a reduction or removal of the duty**

(40) Nevertheless, in spite of the acceptance of certain of the applicant's claims as described above, it is still found to have been dumping on the EU market, during the RIP, at a dumping margin of at least 13 %. Moreover, as will be explained below, in any case there is insufficient evidence to consider the dumping margin during the RIP as a lasting one.

(41) The applicant based its reasoning why there is a lasting change of circumstances on the following points:

(42) (i) Firstly, the applicant referred to the changes in the export sales structure of the group, which, coupled with the exploration of new growing markets, would have contributed to higher export prices of ferro-silicon to all export markets, including in the EU, in comparison to the prices during the original investigation. However, the applicant did not provide any substantiated evidence in order to show the link between the new corporate structure, exploration of new growing markets and higher prices on the EU market. Nor did the findings of the investigation indicate such a link. On the contrary, while export prices were clearly higher in the RIP as compared to the prices observed during the investigation period of the original investigation, they have nevertheless been extremely volatile. As an example, within the RIP, the difference between the lowest and highest transaction price per tonne of the most sold model on the EU market was more than 100 %. A similar volatility could be observed on the domestic market, but the price trend on the EU market was not comparable to the price trend on the domestic market. This is also true for the 12-month period preceding the RIP which was closely looked at in the framework of a parallel refund investigation. Indeed, the export sales prices appear to have simply followed the global market prices.

(43) Following disclosure, similar arguments were used by the applicant. However, again insufficient evidence was provided. It is therefore concluded that there is insufficient evidence, at this point in time, that these higher export prices by the applicant are anything other than a consequence of the prevailing market prices (in particular those on the EU market) during the RIP. In other words, there is insufficient evidence that the changes by the applicant in its corporate export structure were the cause of these higher prices, and that therefore these prices can be expected to remain at similar (or higher) levels in the future. In particular, contrary to what the applicant implies, even assuming that the new structure has made the group more efficient, this does not mean that in the future its export prices to the EU will be high and not result in dumping.

(44) (ii) Secondly, the applicant declared that its export prices to other markets were in line with or even higher than its sales prices to the Union. Significant investments had been made to better supply other markets. Thus, a reduction or removal of the antidumping measures in relation to the applicant would not create an incentive to increase exports to the EU and/or reduce prices thereof.

(45) However, this claim cannot lead to a removal or decrease of the measures in force. It is recalled that, even according to the applicant itself, during the RIP it was still dumping. Moreover, the applicant itself highlighted that the EU remains one of its traditional markets. This is corroborated by the fact that the volumes sold by the applicant in the EU are still very significant; if one compares the sales volumes with the EU consumption during the IP of the original investigation ([1]), they would represent a significant market share (between 5 and 20 %, the precise figures cannot be disclose for reasons of confidentiality).

([1]) The Institutions use the data on EU consumption during the IP of the original investigation rather than the RIP. That is because, since this review is limited to the examination of dumping — and does not cover injury issues — the Institutions do not have verified data regarding EU consumption during the RIP.

(46) After disclosure the applicant reiterated its position that the new market opportunities would be in other markets (India, Asia and United States) rather in the EU. However, the applicant did not provide any substantial evidence to support its market strategies. The still existing dumping margin during the RIP, the lack of data on other markets and the volatility of the export sales price in the international market are all elements that do not support this claim which, therefore, has to be rejected.

(47) (iii) Thirdly, in the applicant's view, the Russian domestic market, with significant steel production, remains one of its most important markets and the demand for the like product in Russia is expected to grow. Domestic and export prices of ferro-silicon would also grow much faster than cost of production. The applicant would thus be likely to increase its sales on the domestic market further, also because, according to the applicant, the sole other Russian producer of ferro-silicon would since a recent change of ownership produce predominantly for captive consumption.

(48) Even if all these allegations are assumed to be true, it nevertheless remains the case that during the RIP, the applicant was dumping at a considerable margin, and at volatile prices. Moreover, as explained above, the volumes sold by the applicant to the EU during the RIP do not suggest that it has shifted away from that market or that it intends to do so in the near future.

(49) In its comments to the disclosure, the applicant asserted that the only reasoning presented in the disclosure by the Commission to deny the relevance of the increasing demand on the domestic market would be the significance of the dumping margin found. Furthermore, the applicant sustained that the Commission, although it acknowledged many of the key points relating to the Russian market, fails to draw the adequate conclusion from these arguments.

(50) These assertions have to be rejected. Firstly, not only the dumping findings but also the volumes findings speak against this argument. Secondly, the Institutions note that no acknowledgment was made by the Commission and no conclusive independent data was provided to support the claim that the demand for the product concerned is expected to grow in Russia and that export prices of the group would grow much faster than cost of production.

(51) (iv) Fourthly, the applicant pointed out that its Russian production sites of ferro-silicon had been working at full capacity for years, that it had no plans to increase its overall production capacity of ferro-silicon in the foreseeable future and that there were no indications to the contrary.

(52) However, a significant recovery of capacities after the financial crisis of 2009 was noted and the applicant reported an expansion of capacities by 10 %-20 % (range provided for reasons of confidentiality) as compared to the period prior to the 2009 financial crisis.

(53) Following disclosure, the applicant submitted that a comparison of the post-RIP production capacity with that during the reference period was not appropriate as the applicant would have anticipated the 2009 financial crisis and, therefore, already reduced the production capacity. This argument cannot be accepted; an expansion of reported capacities by 10 %-20 % can be observed as compared to 2007 — not 2009 when capacities were at their lowest levels. Moreover, the 2009 financial crisis cannot yet have impacted the 2007 production capacity of the applicant.

2.5. **Conclusion: insufficient evidence of lasting nature of changed circumstances**

(54) The analysis of the applicant's claims with regard to the lasting nature of the changed circumstances, as summarised above, lead to the conclusion that there is currently insufficient evidence that any changed circumstances are of a lasting nature. The applicant's export prices, and therefore its dumping margin, appear likely to continue to fluctuate, following, in particular, the development of world market prices. To the extent that the applicant has shown certain changed circumstances they can, therefore, not be considered to show that the pricing behaviour of the applicant during the RIP is of a lasting nature. It is therefore concluded that it would be premature and therefore unjustified to lower the duty at this point in time.

3. **UNDERTAKINGS**

(55) The applicant together with its related importer offered a price undertaking in accordance with Article 8(1) of the basic Regulation.

(56) The investigation confirmed that the price of the product is highly volatile. As already mentioned in recital 42 above, it was established that the applicant's sales prices in the Union during the RIP varied very significantly. The product is therefore not suited for a fixed price undertaking. Although an indexation mechanism was proposed by the exporter, it was not possible to establish a correlation between the price volatility of the finished product and the indexation source proposed, in particular as it also related to the finished product and referred to prices which were influenced by dumped imports. Therefore, the proposed indexation was considered not appropriate.

(57) As regards company specific risks, it was established that due to the complexity of the company structure, the risk of cross-compensation is very high: other products than the product concerned could be sold via a trader outside the Union to another related third country branch and then be re-sold to the Union.

(58) Finally, as the product itself exists in different qualities and is mainly imported in bulk form, it would not be possible for customs authorities to distinguish the chemical specification (potentially subject to different Minimum Import Prices) without individual analysis of each transaction, thus rendering the monitoring very burdensome, if not impracticable.

(59) The undertaking offer was therefore rejected.

4. TERMINATION OF THE REVIEW

(60) In view of the findings of dumping as well as the absence of a proven lasting nature of the changed circumstances, it is concluded that JSC Chelyabinsk Electrometallurgical Integrated Plant and its related company JSC Kuznetsk Ferroalloy Works should continue to be subject to the duty level specified in the original Regulation, i.e. 22,7 %,

HAS ADOPTED THIS REGULATION:

Article 1

The partial interim review of the anti-dumping measures applicable to imports of ferro-silicon originating, inter alia, in Russia, initiated pursuant to Article 11(3) of Regulation (EC) No 1225/2009 is hereby terminated without amending the level of the anti-dumping measure 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, 16 January 2012.

For the Council
The President
N. WAMMEN