COMMISSION REGULATION (EEC) No 3421/90

of 26 November 1990

imposing a provisional anti-dumping duty on imports of aspartame originating in Japan and the United States of America

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community [1], and in particular Article 11 thereof,

After consultations within the Advisory Committee as provided for in the above Regulation,

Whereas :

A. PROCEDURE

(1) The Commission received a complaint lodged by the Holland Sweetener Company Vof (hereafter referred to as HSC), the sole producer of aspartame in the Community. The complaint contained evidence of dumping of this product originating in Japan and the United States of America and of material injury resulting therefrom, which was considered sufficient to justify the initiation of proceeding.

(2) The Commission accordingly announced, by a notice published in the *Official Journal of the European Communities* [2], the initiation of an anti-dumping proceeding concerning imports into the Community of aspartame (hereafter referred to as APM) falling eithin CN code ex 2924 29 90, originating in Japan and the United States of America and commenced an investigation.

(3) The Commission officially advised the exporters and importers known to be concerned, the representatives of the exporting country and the complainant and gave the parties directly concerned the opportunity to make their views known in writing and to request a hearing.

(4) All exporters, some importers and the Community producer made their views known in writing. Submissions were also made by associations representing consumers of APM.

(5) The investigation of dumping covered the period from 1 January until 31 December 1989.

(6) The Commission sought and verified all the information it deemed to be necessary for the purpose of a preliminary determination and carried out investigations at the premises of the following :

(a) *Community producer :*

Holland Sweetener Company Vof, Maastricht, The Netherlands

(b) *Japanese producer/exporter :*

Ajinomoto Co. Ltd Tokyo, Japan

(c) *US producer/exporter :*

The NutraSweet Company, Deerfield, USA

(d) *Importer related to the Japanese producer/exporter :*

Deutsche Ajinomoto, GmbH, Hamburg, Germany

(7) The Commission requested and received detailed written and oral submissions from the Community producer, the exporters and a number of importers, and verified the information provided to the extent considered necessary.

B. PRODUCT UNDER CONSIDERATION

(8) APM is a sweetening ingredient with a taste profile similar to sugar but a smaller caloric value.

(9) The main applications for APM are in the soft drink, food and dairy industries. APM is also used in the table top market i.e. the low calorie tablets and powder used to sweeten coffee and tea.

(10) Although APM is produced worldwide under different technologies the product is uniform and there are no major differences in physical or chemical characteristics.

(11) APM produced by the US exporter was sold, domestically as well as for export to the Community, under the brand name of NutraSweet. The Japanese product was exported to the Community under the same NutraSweet brand name, whereas for domestic sales the brand name of Pal was used.

[1] OJ No L 209, 2. 8. 1988, p. 1.
[2] OJ No C 52, 3. 3. 1990, p. 12.

C. DUMPING

(a) The United States of America

I. *Normal value*

(12) To determine whether domestic sales may be considered sufficiently representative as a basis for normal value the Commission found that on the US domestic market, by far the largest market for APM in the world, domestic sales exceeded export sales to the Community and consequently were made in a sufficient quantity to constitute a viable market and serve as a basis for the establishment of normal value.

(13) The Commission also examined whether these sales were made in the ordinary course of trade. For this purpose, a comparison was made between the average cost of production during the investigation period and the prices for all dometic sales made during that period at ex-factory level. This comparison revealed that all domestic sales were made at prices which permitted during the investigation period recovery of all costs reasonably allocated.

(14) In view of the fact that prices varied, the Commission has calculated normal value on the basis of the weighted average price of all domestic sales in accordance with Article 2 (13) of Council Regulation (EEC) No 2423/88 (hereafter referred to as the Regulation).

(15) The US exporter and NutraSweet AG (hereafter referred to as NSAG), the related company, argued that there were differences in the price-elasticity of aspartame between the US and Community markets because of a higher degree of health awareness, and therefore preference for APM in the US. In addition the Community market for APM developed later than the US market and the product would therefore be less known by Community consumers. Consequently domestic prices in the US would not permit a proper comparison and should not be used to establish normal value. Normal value should instead be established on the basis of constructed value.

(16) The Commission accepts that, in general, there must be a difference in price elasticity between the US and the Community market since a difference in price could not otherwise exist. Such difference in price elasticity is indeed a prerequisite for price differentiation and if adjustments had to be made for it dumping could never be sanctioned.

(17) The exporter also claimed that, since it sold under patent on the US market, while on the Community market the patents had lapsed, no protective measures should be taken on the basis of a normal value based on domestic prices, since these prices would not allow a proper comparison.

(18) The Commission cannot accept this claim as justified. Injurious price discrimination is condemned by the Community and international law irrespective of the reasons and motives underlying such discrimination. The patent in the US does not as such determine the domestic price level. If the exporter uses its position as patent holder to practise higher prices domestically than for export sales, such a practice results from his free commercial decision. There is no reason why this price differentiation, to the extent that it leads to material injury to the Community industry, should escape from the application of anti-dumping rules.

(19) The Commission accordingly established normal value on the basis of the weighted average domestic price, net of all discounts, in accordance with Article 2 (3) (a) of the Regulation, i.e. on the basis of the price actually paid in the ordinary course of trade for the like product intended for consumption in the USA.

II. *Export price*

(20) Export prices were established on the basis of sales made by the US exporter directly to independent customers. These sales, which represented the majority of US exports to the Community, were made either directly to the customers in the Community or to customers in the USA for subsequent export to the Community. Export prices were therefore determined on the basis of the price actually paid or payable for the product sold for export to the Community in accordance with Article 2 (8) (a) of the Regulation.

(21) The exporter claimed that some of its sales which were made in the USA but were subsequently exported to the Community should not be included as export sales.

(22) The Commission did not consider that these sales should be excluded from the exports to the Community especially since the producer was aware of the final destination of the product. These sales were consequently included as export sales to the Community.

(23) The US producer also exported to the Community through NSAG, the related company located in Switzerland. For the purpose of the preliminary determination of dumping the Commission did not take into account the prices of the export sales

through NSAG. In any case their inclusion would not have affected the level of the provisional duty (see recital 66).

(b) **Japan**

(24) During the on-the-spot investigation in Japan, the Japanese exporter did not provide the information requested by the Commission and deemed necessary to establish normal value. In particular, the Commission was not in a position to verify the company's domestic sales. The information made available by the company only allowed verification of less than 1% of domestic sales. The Commission was also not in a position to verify costs of production since the company refused to provide evidence relating to a substantial part of the investigation period.

(25) The Commission therefore concluded that the company in question, despite specific requests by the Commission prior to the investigation, refused access to essential information and has significantly impeded the investigation. Such behaviour justifies the use of available information, in accordance with the provisions of Article 7 (7) (b) of the Regulation.

(26) All of Ajinomoto's export sales to the Community were made via NSAG in Switzerland. The Commission, in accordance with Article 7 (2) (b) of the Regulation, proposed to both the company and the country in question to carry out an on-the-spot investigation at the premises of the company. The Swiss authorities however raised objections to the Commission's proposal and no adequate on-the-spot investigation could consequently take place at the premises of the company.

(27) The Commission decided that, in view of the refusal by the exporter to provide the necessary information and taking into account the fact that it was not possible to verify the export prices it appeared reasonable to apply the findings on dumping for the US exporter to the exporter in Japan as most reliable information available to the Commission.

D. COMPARISON

(28) For the purpose of a fair comparison between normal value and export price, due allowance in the form of adjustments was made in accordance with Article 2 (9) and (10) of the Regulation, to both the export price and the normal value for the differences affecting price comparability.

(29) In this context the Commission granted allowances for salesmen's salaries, transportation, insurance, handling, storage, credit terms and commissions.

E. DUMPING MARGIN

(30) Normal value was compared with the export prices on a transaction by transaction basis. The preliminary examination of the facts shows the existence of dumping in respect of APM originating in the United States of America, the margin of dumping being equal to the amount by which the normal value as established exceeds the price for export to the Community.

(31) The weighted average margin of dumping exceeded 100 %.

(32) For the reasons set out under recitals 24 to 27 the same dumping margin is applied to the Japanese exporter.

F. INJURY

I. *The Community market for APM*

(33) Until 1986/87 the US and Japanese exporters benefited from patent protection in the Community and were the only meaningful suppliers to the Community market. When the patents expired, Holland Sweetener Co. started operating. Today, these three companies account for practically 100 % of sales and consumption in the Community.

(34) On this basis the Commission has established that the Community market increased from (...) kilos in 1986 to (...) kilos in 1989 i.e. by 215 % [1].

II. *Volume and market share of dumped imports*

(35) The US exporter claimed that the APM exports of US and Japanese origin to the Community should not be cumulated as the US exports represented less than (...) of the total APM sales of Nutra-Sweet AG to the Community and were consequently too small to cause injury to the Community industry.

(36) Independently of whether this figure is correct — it does not correspond to the findings made in the investigation — the Commission is of the opinion that the imports from both Japan and the USA should be considered globally rather than individually as suggested by the US exporter. In both cases, the product imported is identical and sold under the same brand name and identical conditions. Significant quantities of the imports are channelled through the same related company, NSAG, a joint venture of the two exporters set up for the sole purpose of selling both the Japanese and US origin product under the same brand name to the Community. Imports imports of US and Japanese origin can easily substitute each other on the Community market. Under these conditions, the cumulation appears justified even if in the investigation period sales of APM originating in the US were relatively limited.

[1] In accordance with Article 8 of the Regulation which deals with the non-disclosure of business secrets, certain figures have been omitted from the published version of this Regulation.

(37) Even though the appearance of Holland Sweetener Co., on the Community market led to the US and Japanese Imports losing market share which dropped from (. . .) in 1986 to (. . .) during the investigation period, the imports of APM from the US and Japan increased in absolute terms from (. . .) kilos in 1986 to (. . .) kilos in 1987, to (. . .) kilos in 1988 and increased further to (. . .) kilos during the investigation period.

III. *Volume and market share of the Community producer*

(38) The Community producer's sales in the Community increased from (...) kilo in 1987 to (. . .) kilos in 1988 and further to (. . .) kilos during the investigation period. The Community producers' share of the EC market increased from (. . .) in 1987 to (. . .) in 1988 and further to (. . .) in 1989.

IV. *Prices*

(39) As regards the prices of Japanese and US APM, it was found that these prices were already significantly below the Community producer's prices in 1988 and decreased, despite this difference, by a further 23,8 % from 1988 to the investigation period to levels which did not allow them to be profitable.

(40) As regards the Community producer, it was found that its prices fell by 7,6 % between 1988 and the investigation period. Notwithstanding this decrease, prices for US and Japanese products undercut the prices of the Community producer by an average margin of 6 % during the investigation period. This price situation made it impossible for the Community producer to reach break-even, let alone to ensure profitability for its operation.

V. *Conclusions*

(41) To determine whether the Community industry concerned suffered material injury the Commission took account of the following factors :

— The Community producer began selling in 1988 and obtained a small part of the Community market which is still almost totally held by the US and Japanese exporters. In its first years of production the Community producer did not only have to cope with the expected costs and problems involved in setting up a production facility but also with a dramatic price drop by its US and Japanese competitors which continued to hold the largest part of the Community market.

— The depression of prices resulted in considerable losses for the Community industry and prevented it from increasing its utilization of production capacity which would have allowed it to benefit from economies of scale. At the end of the investigation period the losses had reached a dimension which is directly threatening the viability of the industry.

(42) The abovementioned factors led the Commission to the conclusion that, for the purpose of its preliminary findings, the Community industry suffered material injury within the meaning of Article 4 (1) of the Regulation.

(43) NSAG claimed that the Community industry could not have suffered material injury because their market share increased and because of favourable future business prospects once the US market is open to other suppliers in 1993, including the complainant.

(44) The Commission considers that the gain in market share by the Community producer is the necessary consequence of its appearance on the market which before 1987 was almost totally in the hands of NSAG. The acquisition of a still relatively small market share must be viewed against the heavy losses incurred by the Community producer following the drop in prices for APM. The resulting threat for the continuation of its commercial activity can by no means be negated because of the possibility of positive business prospects in the medium term on the US market.

G. CAUSATION

(45) In its examination of the extent to which the material injury suffered by the Community APM industry was caused by the effects of the dumping described above, the Commission found that the lowering of the export prices by NSAG coincided with the appearance of the complainant on the Community market. The drop in prices exerted a continuous downward pressure on prices of APM in the Community, while at the same time, the volume of US and Japanese exports increased substantially. This led the Community producer to sell at price levels well below its cost of production, prevented the industry from increasing its capacity utilization to an adequate extent and consequently led to increased costs and considerable losses.

(46) NSAG claimed that the drop in prices in the Community was not related to the appearance of the complainant on the market, but was caused by market forces. More particularly prices of other sweeteners, were held responsible for the decrease in APM prices.

(47) While there might have been competition between APM and various other sweeteners, the Commission is of the opinion that this competition was also present, arguably to a different degree because of differences in consumer behaviour, on the US market where prices for APM remained stable. Given the evolution of the Community APM market which expanded by considerable margins, there was no obvious reason for NSAG, which even after 1987 remained by far the most important supplier of APM to the Community market, to drop its prices to levels which did not cover costs.

(48) NSAG also claimed that the losses made by the Community producer were normal and in line with what is to be expected for a product like APM during the first four years of production. They also pointed out that difficulties in the production process were responsible for high start up costs and delays and that these costs should be borne by the shareholders of HSC.

(49) The Commission accepts that the Community producer was faced with considerable start-up costs. However, the Community producer was not only confronted with the usual difficulties a new industry encounters when starting operations, but with substantial price depression caused by the market leader for APM. The decision to drop prices to loss-making levels clearly lies in the sphere of responsibility of NSAG and the US and Japanese exporters, and the effects of such pricing policy cannot be attributed to difficulties in HSC's production process.

(50) The investigation revealed no factors other than dumped imports which might have contributed to the injury suffered by the Community industry. The dumped imports taken in isolation have consequently to be considered as causing material injury to the Community industry.

H. COMMUNITY INTEREST

I. *General considerations*

(51) The purpose of the imposition of anti-dumping duties is to eliminate dumping practices which cause injury to an industry in the Community and to re-establish a situation of fair competition on the Community market. This is all the more necessary where unfair trade practices threaten the very existence of the Community industry. Leaving effectively only one supplier in the Community market could not be in the general interest of the Community.

(52) The imposition of anti-dumping duties will make APM in the Community more expensive but only to the extent required to eliminate the injury caused. The demand for APM in the Community largely exceeds the existing production capacity in the Community. There will consequently be a continued demand for imports from third countries. It can therefore not be expected that the re-establishment of fair market conditions will have the consequence of excluding foreign competition from the market.

(53) The US exporter claimed that taking anti-dumping measures would negate its position as original patent holder, the recognition of which would constitute a principle of public policy.

(54) The Commission points out that the US exporter benefited in full from the patent protection in the Community until the patents expired between 1986 and 1988. Until that time, the US exporter held, together with the Japanese exporter with which it cooperates, a 100 % share in an expanding market and was thus able to obtain compensation for its intellectual and financial efforts relating to the invention of the product and the marketing thereof. It is normal and, in fact, an intended consequence of limiting the duration of patents that, with their expiry, competition emerges in the formerly protected market. To shield such legitimate competition from the effects of dumping, even by the former patent holder, is by no means contrary to public policy objectives.

II. *Interests of the Community industry*

(55) The dramatic losses incurred by the Community producer lead to the conclusion that the viability of the industry is at risk if measures are not taken to protect this industry from the effects of dumped imports. The closure of Community production would not only make the Community market entirely dependent on imports from the US and Japan, but would also lead to the loss of several hundred jobs. The Commission consequently considered it necessary and in the interest of the Community industry to impose protective measures on the imports of APM.

III. *Interests of other parties*

(56) The Commission received a number of submissions from end-users of APM in the Community which are mainly the producers of low calorie soft drinks and other low-calorie food products. The end-users claimed that a duty on the imports of APM would increase their costs, have the effect of removing competition and slow down the expected growth of the APM market.

(57) The Commission did not receive any substantiating evidence justifying the increase in costs for the end-users and the effect of possible increases on the prices of their products.

(58) The Commission is of the opinion that the interests of the end-users are not served by the elimination of the sole Community producer, since this would restrict competition to effectively one source of supply, much of the exports from Japan and the United States of America being exported through their joint venture company in Switzerland.

(59) If fair trading is ensured, prices are likely to increase but can be expected to remain at levels well below the prices applicable in the United States of America. In this connection, it should be stressed that the level of prices for APM in the US did not prevent the American APM market from growing impressively.

(60) The Commission is consequently of the opinion that the interest of the end-users would not be negatively affected, but indeed in the longer term would be best served by protective measures which would contribute to prices remaining at competitive levels, while not creating an obstacle to further growth of the APM-market.

IV. *Conclusion*

(61) Having considered the various arguments of the exporters, the Commission concludes that it is in the Community's general interest to eliminate the injurious effects of the dumped imports and that the benefits of such protection clearly outweigh any short term effects, particularly on price.

I. DUTY

(62) In order to eliminate the injury suffered by the Community industry, and to guarantee its survival, it is considered necessary that the measures taken allow the industry concerned to obtain a normal profit which it has been deprived of through the effects of imports at dumped prices.

(63) Consequently, it is essential that the provisional duties to be imposed should cover the difference between prices of Japanese and US APM and the price level required for the Community industry to cover its costs and to make a reasonable profit.

(64) The Community industry argued that a responsable profit margin, for what is considered an infant industry, should be a 25 % return on investment (ROI). It claimed that a 25 % ROI was used as a standard rate within DSM Chemicals BV, one of the main shareholders of Holland Sweetener Company VoF, and that Monsanto, the company which owns NutraSweet, also considered a 20 % return on equity (ROE) to be the overall company target.

(65) The Commission accepts that a reasonable margin for profit should include an element for return on investment and return on equity. It appears doubtful, however, that the ROI/ROE figures quoted are an appropriate benchmark for the specific situation in which the Community producer operates. Under these conditions, the Commission considers that for the purpose of provisional determination, an adequate annual return, allowing a balanced long term development should be 8 % on turnover before tax. On this basis, the Commission established a reference price with which the weighted average import prices were compared.

(66) To determine the level of the duty, price differences thus established have been expressed as an amount in ECU per kilo/AMP. The result of this calculation leads to the following provisional anti-dumping duties to be imposed in order to eliminate the injury suffered:

Ajinomoto Co Ltd:	ECU 29,95 per kilo,
NutraSweet Co Ltd:	ECU 27,55 per kilo.

(67) Since the dumping margins found for all the exporters concerned exceed the injury level the above duties will be imposed in accordance with Article 13 (3) of the Regulation.

(68) For those companies which did not make themselves known, the Commission considered it appropriate to impose duties at the same level i.e. ECU 29,95 per kilo for APM originating in Japan and ECU 27,55 per kilo for APM originating in the USA.

(69) Indeed, it would constitute a bonus for non-cooperation to hold that the duties for these producer/exporters were any lower that the anti-dumping duty determined.

(70) A period should be fixed within which the parties concerned may make their views known and request a hearing. Furthermore, it should be stated that all findings made for the purpose of this Regulation are provisional and may have to be reconsidered for the purpose of any definitive duty which the Commission may propose.

HAS ADOPTED THIS REGULATION:

Article 1

1. A provisional anti-dumping duty of ECU 27,55 per kilogram (net weight) is hereby imposed on imports of aspartame corresponding to CN code ex 2924 29 90 (Taric code: 2924 29 90 * 50) originating in the United States of America.

2. A provisional anti-dumping duty of ECU 29,95 per kilogram (net weight) is hereby imposed on imports of aspartame corresponding to CN code ex 2924 29 90 (Taric code: 2924 29 90 * 50) originating in Japan.

3. The provisions in force concerning customs duties shall apply.

4. The release for free circulation in the Community of the products referred to in paragraphs 1 and 2 shall be subject to the provision of a security, equivalent to the amount of the provisional duty.

Article 2

Without prejudice to Article 7 (4) (b) of Regulation (EEC) No 2423/88, the parties concerned may make known their views in writing and apply to be heard orally by the Commission within one month of the date of entry into force of this Regulation.

Article 3

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

Subject to Articles 11, 12 and 13 of Regulation (EEC) No 2324/88, Article 1 of this Regulation shall apply for a period of four months, unless the Council adopts definitive measures before the expiry of that period.

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

Done at Brussels, 26 November 1990.

For the Commission

Frans ANDRIESSEN

Vice-President