

## COMMISSION DECISION

of 25 June 2007

repealing Decision 2005/704/EC accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of certain magnesia bricks originating in the People's Republic of China

(2007/440/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

- (4) The terms of the undertaking also oblige the Company to provide the Commission with regular and detailed information in the form of a quarterly report of its sales of the product concerned to the European Community.

Having regard to the Treaty establishing the European Community,

- (5) For the purpose of ensuring compliance with the undertaking, the Company also undertook to allow on-the-spot verification visits at its premises in order to verify the accuracy and veracity of data submitted in the said quarterly reports and to provide all information considered necessary by the Commission.

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community<sup>(1)</sup> (the basic Regulation), and in particular Articles 8 and 9 thereof,

After consulting the Advisory Committee,

(b) *Other provisions of the undertaking*

Whereas:

- (6) In addition, and as stipulated in the undertaking, the acceptance of the undertaking by the European Commission is based on trust and any action which would harm the relationship of trust established with the European Commission shall justify the immediate withdrawal of the undertaking.

## A. EXISTING MEASURES

- (1) In October 2005, the Council, by Regulation (EC) No 1659/2005<sup>(2)</sup>, imposed a definitive anti-dumping duty on imports of certain magnesia bricks originating in the People's Republic of China ('the product concerned').

- (7) Furthermore, and as stipulated in the undertaking, any changes in circumstances occurring during the period of implementation of the undertaking from those circumstances prevailing at the time of acceptance of the undertaking which were relevant to the decision to accept the undertaking may give rise to the withdrawal of the undertaking by the European Commission.

- (2) The Commission, by Decision 2005/704/EC<sup>(3)</sup>, accepted a price undertaking offered by Yingkou Qinghua Refractories Co. Ltd, ('the Company').

## 2. Verification visit to the Company

## B. BREACHES OF THE UNDERTAKING

- (8) In this regard, a verification visit was carried out at the premises of the Company in the People's Republic of China.

## 1. The undertaking

(a) *Obligations of the company with regard to the undertaking*

- (3) In the framework of the undertaking, the Company agreed, inter alia, not to sell the product concerned to the European Community below certain minimum prices (MIPs) laid down in the undertaking.

- (9) Two days before the verification visit, the Company submitted revised versions of the undertaking reports for the second and third quarter of 2006. The revisions submitted concerned — inter alia — a prolongation of the terms of payment for five transactions. These adjustments for the time allowed for payment have led to prices below the MIP.

<sup>(1)</sup> OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 2117/2005 (OJ L 340, 23.12.2005, p. 17.)

<sup>(2)</sup> OJ L 267, 12.10.2005, p. 1.

<sup>(3)</sup> OJ L 267, 12.10.2005, p. 27.

- (10) Furthermore, the verification visit established a change in the pattern of trade to the European Community after imposition of anti-dumping measures. During the investigation period of the investigation that led to the imposition of the existing measures, the Company sold to the Community exclusively the product concerned. After imposition of measures the Company started to sell also other products to its clients in the Community.
- (11) Such a change in the pattern of trade affects the undertaking insofar as it constitutes a serious risk of cross-compensation, i.e. the product not covered by the undertaking may be sold at artificially low prices in order to compensate the MIP for the product covered by the undertaking.
- (12) In order to further assess whether such compensation actually took place, the Company was requested to provide copies of invoices of the product not covered by the undertaking, issued to other clients inside and outside the European Community.
- (13) The Company argued that an analysis of prices of other products is not meaningful to identify cross-compensation since the qualities and associated prices of these products may vary from client to client. In order to address those concerns, the Company was asked to provide a price list broken down by different qualities and clients but refused to do so and alleged that it concerned confidential information for products not covered by measures.
- (14) Finally, the Company provided copies of five invoices for products not covered by the undertaking, issued in 2005 and 2006. One invoice was issued to a customer buying at the same time the product covered by the undertaking, another invoice concerned a customer inside the Community that did not buy the product concerned from the Company. The remaining invoices were issued to customers outside the Community.
- (15) Taking into account the various qualities purchased by these five customers, it was found that the price charged to the customer in the Community, who bought also the product covered by the undertaking, was significantly lower than the price charged for similar qualities to the other client in the Community who did not buy the product covered by the undertaking. A similar price difference applied to the other clients outside the Community. This pricing policy is therefore considered as a clear indication that cross-compensation actually took place.

### 3. Reasons to withdraw acceptance of the undertaking

- (16) The obligation of the Company to respect the MIP for all sales of the product covered by the undertaking was not met, as described in recital 9 above.
- (17) Furthermore, a change in the pattern of trade since the imposition of measures has led to a significant risk of cross-compensation which no longer allows the Commission to effectively monitor the undertaking and therefore renders the undertaking impractical.
- (18) It appears that this change in the pattern of trade allowed the Company to compensate customers in the Community for sales subject to the MIP by artificially low prices for the product not covered by the undertaking.
- (19) This change in the pattern of trade is considered as a relevant change in circumstances compared to those prevailing at the time of acceptance of the undertaking and should lead, taking into account the findings set out above in recitals 10 to 12, to the withdrawal of the undertaking.
- (20) In addition, by withholding the price lists for products not covered by the undertaking, the Company failed to comply with the obligation to provide relevant information in accordance with Article 8(7) of the basic Regulation and the provisions of the undertaking.
- (21) Furthermore, the unwillingness of the Company to provide these price lists harmed the relationship of trust which formed the basis for the acceptance of the undertaking.

### 4. Written submissions

#### (a) Proportionality

- (22) With regard to the price violation, the Company admitted that a price violation occurred. The Company argued, however, that the sales prices of all other transactions were strictly in compliance with the MIP. Moreover, it was submitted that the final price was not significantly lower than the MIP. The Company claimed that, on this basis, the withdrawal of the undertaking would be disproportionate to the breaches that occurred.
- (23) In response to these arguments, regarding the issue of proportionality, it should be pointed out that in accordance with the undertaking, the Company undertook to ensure that the Net Sales Price of all sales covered by the undertaking shall be at or above the MIPs set out in the undertaking.

- (24) Moreover, the basic Regulation contains no direct or indirect requirement that a breach of an undertaking must relate to a minimum percentage of sales or must relate to a minimum percentage of the MIP.
- (25) This approach has also been confirmed by the jurisprudence of the Court of First Instance which has ruled that any breach of an undertaking is sufficient to justify the withdrawal of acceptance of an undertaking <sup>(1)</sup>.
- (26) Accordingly, the arguments presented by the Company with regard to proportionality do not alter the Commission's view that a breach of the undertaking occurred and that the withdrawal of the undertaking would be proportionate to that breach.

*(b) Change in the pattern of trade*

- (27) With regard to the change in the pattern of trade, the Company submitted that it did not deliberately change its pattern of trade in order to compensate customers in the Community for sales subject to the MIP by artificially low prices for the product not covered by the undertaking.
- (28) It was argued that the price increase caused by the imposition of anti-dumping measures and the consequential decline in sales to the EU of the product concerned has led the Company to develop new products outside the scope of measures in order to maintain trade with the Community.
- (29) In response to these arguments, it should be underlined that the change in the pattern of trade as such constitutes a serious risk of cross-compensation, regardless for what reason it occurred. It is standing practice of the Commission not to accept price undertakings if the risk of cross-compensation is high. Consequently, if such a change in the pattern of trade occurs during the period of application of an undertaking, the change in itself is sufficient enough for the Commission to withdraw the undertaking, because it renders a proper monitoring of the undertaking impractical, regardless of whether or not a cross-compensation actually took place.
- (30) Accordingly, the arguments presented by the Company in this respect do not alter the Commission's view that the change in the pattern of trade had led to a significant risk of cross-compensation.

*(c) Compensation scheme*

- (31) The Company further submitted that it is a reasonable strategy and common business practice to offer favourable prices when trying to penetrate a market with a new product and that therefore it cannot be concluded that compensation actually took place, in particular since the volume of sales of the new product were nowhere near enough to fully compensate the loss in sales of the product covered by the undertaking.
- (32) In response to this submission, it has to be stressed that a favourable price was only offered to a client buying both the product covered by the undertaking and other products. It was not offered to another client in the EU which does not buy the product covered by the undertaking. Therefore, the very high price charged to the other client in the EU for a similar quality undermines this argumentation and strengthens the argument that cross-compensation actually took place.
- (33) Furthermore, as concerns the issue of materiality and proportionality, it should be stressed that there is no requirement on the Commission to demonstrate that a drop in sales of the product concerned has been offset by an equivalent rise in sales of new products when assessing whether cross-compensation has taken place.

*(d) Information to be provided*

- (34) Additionally, the Company contested having denied providing a price list for products not covered by the undertaking but argued that it does not have a universal price list since different prices apply to different customers in different regions.
- (35) In reply to this submission, it has to be recalled that the Company has been asked to provide those price lists that are available in order to overcome that problem, but was unwilling to do so since it was alleged that it concerned confidential information for products not covered by measures.
- (36) Accordingly, the arguments presented by the Company in this respect do not alter the Commission's view that the Company failed to comply with the obligation to permit verification of pertinent data in accordance with Article 8(7) of the basic Regulation.

<sup>(1)</sup> In this context, see case T-51/96 *Miwon v Council* (ECR 2000, p. II-1841) paragraph 52; case T-340/99 *Arne Mathisen AS v Council* (ECR 2002, p. II-2905) paragraph 80.

**C. REPEAL OF DECISION 2005/704/EC***Article 2*

(37) In view of the above, the acceptance of the undertaking should be withdrawn and Decision 2005/704/EC should be repealed. Accordingly, the definitive anti-dumping duty imposed by Article 1(2) of Regulation (EC) No 1659/2005 on imports of the product concerned from the Company should apply,

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, 25 June 2007.

HAS DECIDED AS FOLLOWS:

*Article 1*

Decision 2005/704/EC is hereby repealed.

*For the Commission*  
Peter MANDELSON  
*Member of the Commission*

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