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[1] Text with EEA relevance

EN

Acts whose titles are printed in light type are those relating to day-to-day management of agricultural matters, and are generally valid for a limited period.

The titles of all other acts are printed in bold type and preceded by an asterisk.

EN

[1] Text with EEA relevance

II

*(Non-legislative acts)*

# REGULATIONS

## COMMISSION REGULATION (EU) No 1043/2011

## of 19 October 2011

## imposing a provisional anti-dumping duty on imports of oxalic acid originating in India and the People's Republic of China

THE EUROPEAN COMMISSION,

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 7 thereof,

After consulting the Advisory Committee,

Whereas:

### 1. PROCEDURE

#### 1.1. Initiation

(1) On 26 January 2011, the European Commission (the Commission) announced, by a notice published in the *Official Journal of the European Union* [2] (notice of initiation), the initiation of an anti-dumping proceeding with regard to imports into the Union of oxalic acid originating in India and the People's Republic of China (PRC) or (the countries concerned).

(2) The anti-dumping proceeding was initiated following a complaint lodged on 13 December 2010 by the European Chemical Industry Council (CEFIC) on behalf of Oxaquim S.A. (the complainant), representing a major proportion, in this case more than 25 %, of the total Union production of oxalic acid. The complaint contained prima facie evidence of dumping of the said product and of material injury resulting therefrom, which was considered sufficient to justify the opening of a proceeding.

#### 1.2. Parties concerned by the proceeding

(3) The Commission officially advised the complainant, other known Union producers, exporting producers and representatives of the countries concerned, importers, and users, and associations known to be concerned, of the initiation of the proceeding. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set in the notice of initiation. All interested parties who so requested and showed that there were particular reasons why they should be heard, were granted a hearing.

(4) In view of the apparent high number of exporting producers in the countries concerned, sampling was envisaged in the notice of initiation for the determination of dumping and injury in accordance with Article 17 of the basic Regulation. In order to enable the Commission to decide whether sampling would be necessary and if so, to select a sample, all exporting producers in the countries concerned were asked to make themselves known to the Commission and to provide, as specified in the notice of initiation, basic information on their activities related to the product concerned during the period 1 January 2010-31 December 2010. Four Indian companies, one of which did not report any sales to the Union, and three groups of companies from the PRC replied to the sampling exercise. In view of the limited number of cooperating companies or groups of companies, sampling was not considered necessary for either India or the PRC and all parties were informed that samples would not be selected.

(5) Subsequently, one group of companies from the PRC withdrew from further cooperation with the investigation at an early stage. In addition, one Indian company refused the Commission access to its production plant for a verification visit. It was consequently deemed not to cooperate pursuant to Article 18(1) of the basic Regulation and was informed of the possible consequences thereof.

(6) In order to allow exporting producers in the PRC to submit a claim for market economy treatment (MET) or to request individual treatment (IT), the Commission sent claim forms to the cooperating Chinese exporting producers, and the authorities of the PRC within the deadlines set out in the notice of initiation. One Chinese group of companies claimed MET pursuant to

[1] OJ L 343, 22.12.2009, p. 51.
[2] OJ C 24, 26.1.2011, p. 8.

Article 2(7)(b) of the basic Regulation or, failing that, IT, while another group of companies requested IT only.

(7) Questionnaires were sent to all parties known to be concerned. Replies were received from three companies in India and by two groups of companies in the PRC, and the complainant. The other Union producer did not cooperate. Questionnaire replies were also received from three users and eight importers, among which all users and four importers were visited.

(8) The Commission sought and verified all the information deemed necessary for a provisional determination of dumping, resulting injury and Union interest and carried out verifications at the premises of the following companies:

(a) *Union producers*

— Oxaquim S.A. (Spain)

(b) *Users*

— OMG Kokkola (Finland)

— P.A.G. Srl (Italy)

— Third user asked to remain unknown

(c) *Importers*

— Brenntag BV (Netherlands)

— Brenntag Sp. z o.o. (Poland)

— Norkem Limited (United Kingdom)

— Geratech Marketing (Belgium)

(d) *Exporting producers in India*

— Punjab Chemicals and Crop Protection Limited

— Star Oxochem Pvt. Ltd

(e) *Exporting producers in PRC*

— Shandong Fengyuan Chemicals Stock Co., Ltd; Shandong Fengyuan Uranus Advanced Material Co., Ltd and Qingdao Fengyuan Unite International Trade Co., Ltd (Shandong Fengyuan Group)

— Yuanping Changyuan Chemicals Co., Ltd; Shanxi Reliance Chemicals Co., Ltd and Tianjin Chengyi International Trading Co., Ltd (Shanxi Reliance Group)

### 1.3. **Investigation period**

(9) The investigation of dumping and injury covers the period from 1 January 2010 to 31 December 2010 ('investigation period' or 'IP'). The examination of the trends relevant for the assessment of injury covered the period from 1 January 2007 to the end of the investigation period (period considered).

## 2. **PRODUCT CONCERNED AND LIKE PRODUCT**

### 2.1. **Product concerned**

(10) The product concerned is oxalic acid, whether in dihydrate (CUS number 0028635-1 and CAS number 6153-56-6) or anhydrous form (CUS number 0021238-4 and CAS number 144-62-7) and whether or not in aqueous solution, currently falling within CN code ex 2917 11 00 and originating in India and the PRC. There are two types of oxalic acid: *unrefined* oxalic acid and *refined* oxalic acid. Refined oxalic acid, which is produced in the PRC but not in India, is manufactured through a purification process of unrefined oxalic acid, the purpose of which is to remove iron, chlorides, metal traces and other impurities.

(11) Oxalic acid is used in a wide range of applications, e.g. as a reducing and bleaching agent, in pharmaceutical synthesis and in the manufacture of chemicals.

### 2.2. **Like product**

(12) The investigation has shown that oxalic acid produced and sold by the Union industry in the Union, oxalic acid produced and sold on the domestic market of India and the PRC and oxalic acid imported into the Union from India and the PRC has essentially the same basic physical and chemical characteristics and the same basic end uses.

(13) Therefore, these products are provisionally considered to be alike within the meaning of Article 1(4) of the basic Regulation.

## 3. **DUMPING**

### 3.1. **India**

#### 3.1.1. *Preliminary remark*

(14) During the verification visit in India one company failed to provide requested information in either a timely manner or in the requested format. As a result the Commission was not able to verify the information submitted in response to the anti-dumping questionnaire. The company was informed in writing that it might not be considered as a cooperating party and that findings could be made on the basis of the facts available. In its response the company claimed mitigating circumstances which, however, were not such as to lead to a different conclusion. Consequently, Article 18 has been applied to this company and findings made on the basis of facts available. Accordingly, only one exporting producer from India is deemed to have cooperated with the Commission in the current investigation.

3.1.2. *Normal value*

(15) According to Article 2(2) of the basic Regulation the Commission first examined whether the domestic sales of the like product to independent customers by the exporting producer were representative. As these sales constituted more than 5 % of its sales volume of the product concerned to the Union, it is concluded that the overall sales of the like product were representative.

(16) The Commission subsequently examined whether the domestic sales of the exporting producer could be regarded as having been made in the ordinary course of trade pursuant to Article 2(4) of the basic Regulation. This was done by establishing the proportion of profitable domestic sales to independent customers of all sales of the like product.

(17) Where the profitable sales amount to at least 80 % of all sales, the normal value will be calculated on the basis of all sales, including the unprofitable ones. On the other hand, if the profitable sales account for less than 80 % but more than 20 % of all sales, and if the weighted average full cost is higher than the weighted average price, the normal value will be calculated on the basis of the profitable sales only. A sale is considered to be profitable where the unit price is equal to or above the cost of production.

(18) The Commission's analysis of domestic sales showed that 41 % of all sales of the product concerned were profitable and the weighted average full cost is higher than the weighted average price. Accordingly, the normal value is calculated as a weighted average price of the profitable sales only.

3.1.3. *Export price*

(19) The exporting producer in India exported the product concerned directly to independent customers in the Union. Therefore, pursuant to Article 2(8) of the basic Regulation, export prices are established on the basis of the prices actually paid or payable by those independent customers for the product concerned when exported to the Union.

3.1.4. *Comparison*

(20) The comparison between normal value and export price is made on an ex-works basis. For the purpose of ensuring a fair comparison between the normal value and the export price due allowances in the form of adjustments are made for differences affecting prices and price comparability in accordance with Article 2(10) of the basic Regulation.

(21) Accordingly, adjustments have been made for transport costs, insurance, handling and packaging costs, credit costs and commission.

3.1.5. *Dumping margin*

(22) In accordance with Articles 2(11) and 2(12) of the basic Regulation the dumping margin for the cooperating Indian producer is established on the basis of a comparison of the weighted average normal value with the weighted average export price.

(23) On this basis, the provisional dumping margin, expressed as a percentage of the cif Union border price, duty unpaid, is 22,8 % for Punjab Chemicals and Crop Protection Limited (PCCPL).

(24) In order to calculate the countrywide dumping margin applicable to all other exporting producers in India, the level of cooperation was established by comparing the volume of exports to the Union reported by the cooperating exporting producer with Eurostat statistics. Given that cooperation from India was low, i.e. 38 %, it is considered appropriate that the countrywide dumping margin applicable to all other exporters in India should be established on the basis of the most dumped transaction of the cooperating producer.

(25) On this basis the countrywide level of dumping is provisionally established at 43,6 % of the cif Union frontier price, duty unpaid.

3.2. **People's Republic of China**

3.2.1. *Market Economy Treatment (MET)/Individual treatment (IT)*

(26) Pursuant to Article 2(7)(b) of the basic Regulation, normal value for imports originating in the PRC shall be determined in accordance with paragraphs 1 to 6 of the said Article for those producers which were found to meet the criteria laid down in Article 2(7)(c) of the basic Regulation. Briefly and for ease of reference only, these criteria are set out in summarised form below:

— business decisions are made in response to market signals, without significant State interference, and costs reflect market values,

— firms have one clear set of basic accounting records, which are independently audited in line with international accounting standards and are applied for all purposes,

— there are no significant distortions carried over from the former non-market economy system,

— bankruptcy and property laws guarantee stability and legal certainty, and

— exchange rate conversions are carried out at market rates.

(27) One group of companies in the PRC requested MET and submitted MET claim forms for the three companies involved in the production and commercialisation of the product concerned. The information provided was subsequently verified by the Commission at the premises of the companies in question.

(28) The MET investigation demonstrated that one company failed to meet the requirements of criteria 1 to 3. First, it failed to demonstrate that its costs reflected market values due to significant State financial intervention affecting the company's cost structure in the form of, e.g. tax holidays and interest free loans. Second, the MET investigation established a number of serious shortcomings and errors in its accounting and that it was not audited in line with international accounting standards (IAS). Third, distortions carried over from the former non-market economy system were found in respect of the company's land-use rights. More particularly, the company had obtained a land-use right certificate without complying with the contractual terms or paying it in full.

(29) Furthermore, another company in the group failed to demonstrate that it fulfilled criteria 2 given the fact that it did not have independently audited accounts.

(30) The Commission disclosed the results of the MET findings to the group of companies concerned and to the complainant and gave them the opportunity to provide comments. The findings were also disclosed to the authorities of the PRC. No comments were submitted to the Commission.

(31) In view of the above it was concluded that two of the companies in the group failed to fulfil the MET criteria. In compliance with the Union's consistent practice to examine whether a group of related companies as a whole fulfils the conditions for MET, the group as a whole was refused MET.

(32) As mentioned in recital 6 above, both of the cooperating Chinese groups of companies requested IT. As it was found that both groups fulfilled all of the criteria of Article 9(5) of the basic Regulation, it was provisionally decided that they be granted IT.

3.2.2. *Analogue country*

(33) According to Article 2(7)(a) of the basic Regulation, normal value for exporting producers not granted MET has to be established on the basis of the domestic prices or constructed normal value in an analogue country.

(34) In the notice of initiation the Commission indicated its intention to use India as the appropriate analogue country for the purpose of establishing normal value and invited interested parties to comment. No comments were received. In any event, the Commission considers India as an appropriate analogue country since the only other producing country outside the Union, Japan, has a monopoly market closed to competition and manufactures oxalic acid through a unique method that is not comparable with the PRC. In contrast, Indian producers use a production method comparable with the PRC and are subject to competition on the domestic market.

3.2.3. *Normal value*

(35) The Chinese companies manufacture and export two types of oxalic acid to the Union: *unrefined* oxalic acid and *refined* oxalic acid. Refined oxalic acid, which is not produced in the analogue country, is manufactured through a purification process of unrefined oxalic acid, the purpose of which is to remove iron, chlorides, metal traces and other impurities. The extra costs for producing refined oxalic acid is estimated at 12 % as compared to the production of unrefined oxalic acid. Accordingly, the Commission considered it appropriate to establish a normal value for both types of oxalic acid.

(36) With regard to unrefined oxalic acid the normal value has been established on the basis of the normal value established for India in accordance with Article 2(7)(a) of the basic Regulation. Normal value was established, as described in recital 18 above, on the basis of profitable sales only. With regard to refined oxalic acid, which is not produced in the analogue country, in compliance with Article 2(7)(a) of the basic Regulation, the normal value has been constructed on the basis of the manufacturing costs for unrefined oxalic acid in the analogue country. The manufacturing costs are adjusted with an uplift of 12 % to take into account additional manufacturing costs (see recital 35 above) plus selling, general and administrative costs (SG&A) and profit.

(37) SG&A costs and profit were established, by analogy to Article 2(6) of the basic Regulation, by adding the SG&A and profit for domestic sales of unrefined oxalic acid by the cooperating exporting producer in the analogue country.

3.2.4. *Export price*

(38) Since both groups were granted IT, the export price has been based on the prices actually paid or payable by the first independent customer in the Union in accordance with Article 2(8) of the basic Regulation.

(39) Both exporting producers in the PRC exported oxalic acid to the Union via related traders, which added a mark-up to the price paid to the producers. This mark-up is considered when comparing the export price with the established normal value (see recital 42 below).

3.2.5. *Comparison*

(40) With regard to unrefined oxalic acid, the export price at ex-works level was compared with the normal value established for the analogue country.

(41) The export price for refined oxalic acid at ex-works level was compared with the constructed normal value (see recital 36 above).

(42) For the purpose of ensuring a fair comparison between the normal value or constructed normal value and the export price, due allowance in the form of adjustments was made pursuant to Article 2(10) of the basic Regulation. In particular, an adjustment was made pursuant to Article 2(10)(i) for commissions received by related traders.

(43) In this regard it should be noted that the Commission has found that the related traders via which the exporting producers in the PRC exported oxalic acid to the EU cannot be considered as internal sales departments since they also trade in oxalic acid and other chemical products sourced from unrelated suppliers for either export purposes and/or for domestic sales. It is therefore concluded that the functions of these traders are similar to those of an agent working on a commission basis. Accordingly, the mark-up in price by the traders has been removed to ensure a fair comparison between the export price and the normal value. The adjustment has been calculated on the basis of the profit of an EU unrelated trader and the selling, general and administrative costs of the respective Chinese trader.

(44) Moreover, further adjustments were made, where appropriate, in respect of indirect taxes, freight, insurance, handling and ancillary costs, packing and credit costs where they were found to be reasonable, accurate and supported by verified evidence.

3.2.6. *Dumping margins*

For the cooperating exporting producers

(45) Pursuant to Articles 2(11) and (12) of the basic Regulation, the dumping margins were established on the basis of a comparison of a weighted average normal value of each product type with each company's weighted average export price of the product concerned to the Union, as indicated above.

(46) On this basis, the provisional dumping margins expressed as a percentage of the cif Union frontier price, duty unpaid, are:

| Company | Provisional dumping margin |
|---|---|
| Shandong Fengyuan Chemicals Stock Co., Ltd and Shandong Fengyuan Uranus Advanced Material Co., Ltd | 37,7 % |
| Yuanping Changyuan Chemicals Co., Ltd | 14,6 % |

For all other non-cooperating exporting producers

(47) In order to calculate the countrywide dumping margin applicable to all other exporting producers in the PRC, the level of cooperation was established by comparing the volume of exports to the Union reported by the cooperating exporting producers with Eurostat statistics.

(48) Given that cooperation from the PRC was low at around 46 %, it is considered appropriate that the countrywide dumping margin applicable to all other exporters in the PRC should be based on the most dumped transaction of the cooperating exporters.

(49) On this basis the countrywide level of dumping is provisionally established at 52,2 % of the cif Union frontier price, duty unpaid.

## 4. **INJURY**

### 4.1. **Union production and Union industry**

(50) The complaint was lodged by the European Chemical Industry Council (CEFIC) on behalf of Oxaquim S.A. hereinafter 'the Complainant', a producer of oxalic acid in the Union, representing a major proportion of the total Union production during the IP. A second Union producer, Clariant, did not object to the initiation of the investigation but decided not to cooperate. There is currently no other producer of the product concerned in the Union. On this basis the two producers Oxaquim S.A. and Clariant constitute the Union industry within the meaning of Article 4(1) of the basic Regulation, representing 100 % of the Union production. They will hereinafter be referred to as 'the Union industry'.

(51) All available information concerning the two producers Oxaquim S.A. and Clariant, including information provided in the complaint and data collected from the complainant before and after the initiation of the investigation, was used in order to establish the total Union production. On this basis, the total Union production ranged between 11 000 and 15 000 tonnes during the period considered.

### 4.2. **Determination of the relevant Union market**

(52) It was found that one of the Union producers used some of its oxalic acid production as an intermediate material

for the production of oxalates (tetra-oxalate, acetosella and potassium bioxalates). This oxalic acid was simply transferred (without invoice) within the same company. This captive use of oxalic acid did not enter the free market and so is not exposed to direct competition with imports of the product concerned. By contrast, production destined for free market sales was found to be in direct competition with imports of the product concerned.

(53) In order to provide as complete a picture as possible of the situation of the Union industry, data has been obtained and analysed for the entire oxalic acid activity and it was subsequently determined whether the production was destined for captive use or for the free market.

(54) For the following economic indicators relating to the Union industry, it was found that the analysis and evaluation had to focus on the situation prevailing on the free market: sales volume and sales prices on the Union market, market share, growth, export volume, prices, profitability, return on investments and cash flow.

(55) As regards other economic indicators however, it was found, on the basis of the investigation, that they could reasonably be examined only by referring to the whole activity. Indeed, production (for both captive use and destined for the free market), capacity, capacity utilisation, investments, stocks, employment, productivity, wages, and ability to raise capital depend upon the whole activity, whether the production is captive or sold on the free market.

### 4.3. **Union consumption**

(56) Given that oxalic acid is part of a CN code that also includes other products, it was not possible to establish import volumes on the basis of Eurostat data. Accordingly, consumption was established on the basis of import volume data provided by the complainant, cross-checked against the verified data provided by the exporting producers from the countries concerned, and the total sales volume on the Union market of the Union industry.

(57) In view of the small number of suppliers and the need to protect confidential business information pursuant to Article 19 of the basic Regulation, the development of consumption during the period considered has been indexed.

*Table 1*

**Consumption in the Union**

| Index 2007 = 100 | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Total consumption | 100 | 124 | 61 | 95 |

(58) In 2008 there was a sharp increase in total consumption in the Union by 24 %, while consumption decreased by 50 % during the following year before increasing again during the IP. Overall, consumption in the EU market decreased by 5 % during the period considered.

## 5. **IMPORTS FROM THE COUNTRIES CONCERNED**

### 5.1. **Cumulative assessment of the effects of the imports concerned**

(59) The Commission examined whether imports of oxalic acid from the PRC and India should be assessed cumulatively in accordance with Article 3(4) of the basic Regulation.

(60) With regard to the effects of the imports originating in the PRC and India, the investigation showed that the dumping margins were above the *de minimis* threshold as defined in Article 9(3) of the basic Regulation and the volume of dumped imports from each of the two countries concerned was not negligible in the sense of Article 5(7) of the basic Regulation.

(61) With regard to the conditions of competition between the dumped imports from the PRC and India, on the one hand, and between the dumped imports from the PRC and India and the like product, on the other hand, the investigation revealed that they were similar. More specifically, the imported products are sold through the same sales channels and to similar categories of customers thus competing with each other and with the oxalic acid produced in the Union.

(62) In view of the above, it is provisionally considered that all the criteria set out in Article 3(4) of the basic Regulation are met and that imports from the PRC and India should be examined cumulatively.

### 5.2. **Volume and market share of dumped imports from the countries concerned**

(63) The investigation showed that the imports of oxalic acid from the PRC and India developed as follows:

*Table 2*

**Imports from the PRC and India**

| Import volumes (MT) | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| PRC and India | 7 629 | 11 763 | 4 707 | 7 969 |
| *(Index 2007 = 100)* | *100* | *154* | *62* | *104* |
| Market share | | | | |
| *(Index 2007 = 100)* | *100* | *125* | *101* | *110* |

*Source:* Information from the complainant and questionnaire replies.

(64) Imports from the countries concerned increased by 4 % in volume during the period considered while total consumption in the EU market decreased by 5 % over the same period (see Table 1 above). As shown in the Table above, there was also a significant gain in market share of 25 % between 2007 and 2008 and 10 % over the period considered.

### 5.3. **Price of dumped imports and price undercutting**

(65) Average prices of imports from the countries concerned developed as follows:

*Table 3*

**Price of imports from the PRC and India**

| Import prices (EUR/MT) | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| PRC and India | 470 | 641 | 474 | 545 |
| *(Index 2007 = 100)* | *100* | *136* | *101* | *116* |

(66) Import prices increased by 36 % between 2007 and 2008 before falling back in 2009 to prices similar to those in 2007. Prices increased again by almost 15 % in the IP. Prices increased by 16 % during the period considered. It is notable, however, that import prices decreased by 20 % between 2008 and the IP, despite the increase in the prices of the main inputs (carbon sources and energy) in this period.

(67) For the purposes of analysing price undercutting the weighted average sales prices of the Union industry to unrelated customers on the Union market, adjusted to an ex-works level, i.e. excluding freight costs in the Union and after deduction of discounts and rebates, were compared to the corresponding weighted average prices of the cooperating exporters from the PRC and India to the first independent customer on the Union market, i.e. net of discounts and adjusted where necessary to cif Union frontier price duly adjusted for customs clearance costs and post-importation costs.

(68) The comparison showed that during the IP the dumped product concerned originating in the PRC and India sold in the Union undercut the Union industry's sales prices by 16,9 % to 34,6 %. This level of undercutting was combined with a negative price development on the market thereby leading to substantial price depression.

## 6. **ECONOMIC SITUATION OF THE UNION INDUSTRY**

### 6.1. **Preliminary remarks**

(69) In accordance with Article 3(5) of the basic Regulation, the examination of the impact of dumped imports on the Union industry included an evaluation of all economic factors and indices relating to the state of the Union industry from 2007 to the end of the IP.

(70) The macroeconomic indicators (production, capacity, capacity utilisation, sales volumes, market share, employment, productivity, wages and magnitude of dumping margins) were assessed at the level of the Union industry, while microeconomic indicators (stocks, sales prices, profitability, cash flow, and return on investment, ability to raise capital and investments, production costs) were based on the information derived from the duly verified questionnaires submitted by the sole cooperating Union producer.

(71) Taking into account the fact that the data for the injury analysis is derived mainly from one source only, data relating to the Union industry had to be indexed in order to preserve confidentiality pursuant to Article 19 of the basic Regulation.

### 6.2. **Data relating to the Union industry (macro-economic indicators)**

#### 6.2.1. *Production, production capacity and capacity utilisation*

*Table 4*

**Total Union production, production capacity and capacity utilisation**

| (Index 2007 = 100) | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Total production | 100 | 101 | 89 | 106 |
| Total production capacity | 100 | 100 | 77 | 77 |
| Total capacity utilisation | 100 | 101 | 116 | 138 |

(72) The above Table includes data on the production, production capacity and capacity utilisation of the Union industry as well as, for 2007 and 2008, data of one other Union producer which ceased producing oxalic acid in 2008.

(73) As shown in the Table above, the production of the Union industry was relatively stable in 2007 and 2008 before falling sharply in 2009. Production increased during the IP. Overall, during the period considered, production increased by 6 %.

(74) Due to the closure of the production facility of one other Union producer in 2008 the production capacity of the Union industry fell sharply in 2008 by 23 %.

(75) The combination of these two factors, i.e. increase in production volume and decrease in production capacity due to the closure of a production unit by the third Union producer from 2008, led to a significant increase in capacity utilisation of 38 % over the period considered.

6.2.2. *Sales volumes and market share*

*Table 5*

**Sales volumes and market share**

| (Index 2007 = 100) | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Total sales | 100 | 97 | 61 | 86 |
| Market share (%) | 100 | 79 | 99 | 91 |

(76) The sales volumes for 2007 and 2008 include the sales of the Union producer that ceased production in 2008.

(77) While Union consumption decreased by 5 % during the period considered (see recital 58 above) the sales volume of the product concerned by the Union industry to independent customers on the Union market decreased by 14 % during the same period, which was translated by a loss in market share of 9 %.

(78) When looking at the development over the period considered, the fall of 14 % in the sales volume of the Union industry was far more pronounced than the decrease of 5 % in Union consumption. As a consequence, the market share of the Union industry also decreased significantly by 9 percentage points during the same period.

6.2.3. *Employment, productivity and wages*

*Table 6*

**Employment, productivity and wages**

| (Index 2007 = 100) | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Total number of employees | 100 | 119 | 108 | 96 |
| Total productivity (unit/employee) | 100 | 85 | 83 | 111 |
| Total yearly wages | 100 | 121 | 110 | 99 |
| Average labour costs per employee | 100 | 119 | 118 | 104 |

(79) The number of employees fell by 4 % during the period considered. It should be noted that production of oxalic acid is not labour-intensive.

(80) During the period considered the total productivity per employee increased by 11 %, as the production increased, whilst there was a fall in the number of employees.

(81) Over the total period considered wages declined by 1 %. After an initial increase in wages of 21 % between 2007 and 2008, they fell continuously up to the IP.

6.2.4. *Magnitude of the actual margin of dumping*

(82) The dumping margins are specified above in the dumping section. All margins established are significantly above the *de minimis* level. Furthermore, given the volumes and the prices of the dumped imports, the impact of the actual margins of dumping cannot be considered negligible.

6.3. **Data relating to the cooperating Union producer (Microeconomic indicators)**

6.3.1. *General remark*

(83) The analysis of microeconomic indicators (sales prices and cost of production, stocks, profitability, cash flow, return on investment, ability to raise capital and investments) was carried out at the level of the complainant only as no data was obtained from the other EU producer as described in recital 70.

6.3.2. *Average unit prices of the cooperating Union producer and cost of production*

*Table 7*

**Sales prices**

| Index 2007 = 100 | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Average unit selling price | 100 | 143 | 136 | 131 |

*Source:* questionnaire reply.

(84) Average ex-works sales prices of the Union industry to unrelated customers on the Union market increased by 31 % during the period considered.

*Table 8*

**Cost of production**

| Index 2007 = 100 | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Average COP/tonne | 100 | 103 | 102 | 98 |

*Source:* questionnaire reply.

(85) The investigation revealed that the average cost of production of the cooperating Union producer had been relatively stable over the years due to a constant improvement in their production process, which was made possible only through heavy investments (see Tables 9 and 11 above).

6.3.3. *Stocks*

(86) Given the nature of the product concerned, no stocks are held. The product concerned dries quickly and then cakes and therefore producers only produce goods for immediate shipment.

6.3.4. *Profitability, cash flow, return on investment, ability to raise capital and investments*

*Table 9*

**Profitability**

| Index 2007 = – 100 | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Profitability (in EU) | – 100 | 4 | – 2 | 3 |

*Source:* questionnaire reply.

(87) Profitability for the like product was established by expressing the pre-tax net profit of the sales of the like product by the complainant as a percentage of the turnover of these sales.

(88) After generating dramatic losses in 2007, the complainant made a small profit in 2008 before making losses again in 2009. The complainant made a small profit in the IP thanks to a decrease in some elements of the COP, as shown in Table 8 above.

*Table 10*

**Cash flow**

| Index 2007 = – 100 | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Cash flow | – 100 | 3 054 | 1 994 | 868 |

*Source:* questionnaire reply.

(89) The trend shown by the cash flow, which is the ability of the industry to self-finance its activities, reflects to a large extent the evolution of profitability. Consequently, the cash flow was negative in 2007 and, despite some improvement in 2008, it decreased between 2008 and the IP, thus weakening the financial situation of the cooperating Union producer.

*Table 11*

**Investments**

| Index 2007 = 100 | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Total Investments | 100 | 111 | 185 | 277 |

*Source:* questionnaire reply.

(90) The Table above shows that the complainant increased its investments in the product concerned, even when faced with low profitability. The investments were mainly in the implementation of new production tools and the introduction of new production processes in order to improve efficiency. The increase in investments shows that the industry has not faced difficulties in raising capital, thus demonstrating the continued viability of the industry.

(91) Investments increased by 177 % over the period considered.

(92) By increasing its investments in order to improve its production processes the industry, which is capital intensive, still showed an ability to raise capital; nevertheless, this ability is hampered by falling sales and increasing difficulties in generating cash flow.

*Table 12*

**Return on Investment (ROI)**

| Index 2007 = – 100 | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| ROI | – 100 | 13 | – 14 | – 51 |

*Source:* questionnaire reply.

(93) Despite the increase in investment, the ROI of the product concerned did not meet the expected return. Although there has been some improvement in 2008, ROI remained negative during the period considered.

(94) Therefore the industry's growth is limited and clearly disproportionate to the investments made over recent years.

## 7. CONCLUSION ON INJURY

(95) The investigation has shown that some injury indicators show a positive trend: production volume increased by 6 %, capacity utilisation increased by 38 %, investment increased by 177 %, allowing the company to achieve a somewhat relative profit (from a significant loss in 2007 to a small profit in the IP). However, as shown above, a number of indicators pertaining to the economic situation of the Union industry deteriorated significantly during the period considered.

(96) Following the closure of the production facility of one Union producer, sales volume decreased by 14 %. Employment had to be reduced by 4 % and production capacity decreased by 23 %. While consumption decreased by only 5 %, market share decreased by almost 9 %. Hence profitability was low, affecting negatively returns on investments and cash flow, especially between 2008 and the IP. The profitability level improved during the period concerned but remained very low in the IP and is insufficient to maintain production in the medium term.

(97) Even though overall production grew, the Union industry lost significant market share. At the same time, dumped imports from the countries concerned showed a significant increase.

(98) Considering the above, it is provisionally concluded that the Union industry suffered material injury during the IP within the meaning of Article 3(5) of the basic Regulation.

## 8. CAUSALITY

### 8.1. Introduction

(99) In accordance with Article 3(6) and (7) of the basic Regulation it was examined whether the material injury suffered by the Union industry has been caused by the dumped imports from the countries concerned. Furthermore, known factors other than dumped imports, which might have injured the Union industry, were examined to ensure that any injury caused by those factors was not attributed to dumped imports.

### 8.2. Effect of the dumped imports

(100) The Union consumption of oxalic acid decreased by 5 % over the period considered, while dumped imports from the countries concerned increased by more than 4 % over this period. The highest increase in dumped imports took place between 2007 and 2008, when they increased by 54 %. Imports from the countries concerned increased their market share by 25 % between 2007 and 2008, which coincided with a decrease of 21 % in the market share of the Union industry during that period.

(101) While average import prices increased by 16 % over the period considered, import prices undercut those of the cooperating Union producer by an average of 21,9 % during the IP, thereby exerting price pressure on the Union industry and preventing the cooperating Union producer from raising prices to more profitable levels.

(102) It is recalled that the Union industry faced a significant drop in its sales volume (– 14 %). However, this decrease in sales was much more pronounced than the fall in demand and led to a loss of market share of 9 %. At the same time, the market share of the countries concerned increased by 10 %. This shows that the Union industry's market share has largely been taken over by the dumped imports from the countries concerned.

(103) It is therefore considered that the continued pressure exerted by the low-priced dumped imports from the countries concerned on the Union market did not allow the Union to adapt its sales prices to the increased raw material and energy costs. This led to the loss of market share and a continuously poor profitability situation for the Union industry.

(104) In view of the above, it was provisionally concluded that the surge in the low-priced dumped imports from the countries concerned had a considerable negative impact on the economic situation of the Union industry.

### 8.3. Effect of other factors

(105) The other factors which were examined in the context of the causality are the development of demand on the Union market, the prices of raw material, the export performance of the Union industry, the imports from other countries of the product concerned and the industry's captive use of oxalic acid and the economic crisis.

#### 8.3.1. *Development of demand on the Union market*

(106) As indicated in Table 1 above, the Union consumption of oxalic acid first increased by 24 % in 2008, while it decreased by 39 % during the following year to increase again during the IP. Overall, the consumption in the EU market decreased by 5 % during the period considered. During the same period the Union industry lost market share.

(107) Although the investigation revealed that imports from the countries concerned were also affected by the fall in demand on the Union market in 2009, it is noteworthy that, over the period considered, the exporters in the countries concerned managed to increase their sales volumes and market share through the price pressure exerted on the market by the dumped imports.

(108) Accordingly, it is provisionally considered that the deterioration of the economic situation of the Union industry is caused mainly by the surge in the dumped imports from the countries concerned and the undercutting practised by exporters in the countries concerned and not by decreasing consumption. Even though the contraction in demand contributed to the injury, it could not break the causal link between the material injury suffered and the increase in dumped imports.

#### 8.3.2. *Prices of the main raw material*

(109) As shown in Table 8 above, the average cost of production remained relatively stable despite a sharp increase in the cost of the main raw material (sugar). Indeed, the investigation showed that the cost of production of the cooperating Union producer did not follow the same trend as the evolution of the prices of

one of the main raw materials in the production of oxalic acid. The sharp increase of average sugar prices by 50 % over the period considered has been mitigated by the investments made by the cooperating Union producer to improve its production processes. Overall, therefore, the net effect was a decrease of 12 % in the cost of production. Nonetheless, as shown in Table 7 above, unit sales price increased by 31 % during the period considered. It was found that the exporters in the countries concerned were subject to the same economic conditions with regard to the evolution of prices of raw materials, as unit import prices followed the same trend as the unit sales prices of the cooperating Union producer, albeit at lower levels.

(110) In the absence of injurious dumping it could be expected that prices would have been regularly adapted to reflect the development of the various components of the cost of production. However, this did not happen. The cooperating Union producer was not able to achieve the solid profit margins necessary for this capital-intensive producer and its cash flow also decreased.

(111) Accordingly, it is provisionally considered that the dumped imports from the countries concerned, which undercut the cooperating Union producer's prices, depressed the prices on the Union market and prevented the cooperating Union producer from increasing its sales prices to cover its costs or to achieve a reasonable level of profitability.

(112) Given that the raw material prices were also affecting the exporters in the countries concerned, it was provisionally concluded that the increase in the prices of raw materials could not have had an impact on the material injury suffered by the Union industry during the period considered.

8.3.3. *Export performance of the Union industry*

*Table 13*

**Export volume and unit prices**

| Index 2007 = 100 | 2007 | 2008 | 2009 | IP |
|---|---|---|---|---|
| Exports in tonnes | 100 | 80 | 140 | 152 |
| Average export price | 100 | 104 | 103 | 91 |

*Source:* questionnaire reply.

(113) Export performance was also examined as one of the known factors other than the dumped imports, which could at the same time have injured the Union industry, to ensure that possible injury caused by these other factors was not attributed to the dumped imports.

(114) The analysis showed that the export sales to unrelated parties made by the cooperating Union producer represented an important part of their total sales (around 30 %). During the period considered, the export volumes of the cooperating Union producer increased by 52 %, while the unit price of export sales decreased considerably, in contrast with the sales price of the cooperating Union producer within the Union, which increased significantly. The investigation revealed that exports played an important role in keeping capacity utilisation high to cover the fixed costs and costs of investments in machinery. Even though export sales were made at prices lower than those on the Union market, these low prices resulted from competition with low-priced oxalic acid in the export markets by the exporters from the countries concerned. The investigation showed that these exports allowed the cooperating Union producer to mitigate the injury suffered on the EU market and are thus not such as to break the causal link established between the dumped imports from the countries concerned and the injury suffered by the Union industry.

8.3.4. *Imports from other third countries*

(115) In the absence of any imports from countries other than the countries concerned, this element had no impact on the EU market.

8.3.5. *Captive use*

(116) As mentioned in recitals 52 to 55 above, captive use is limited to captive transfers within one of the Union producers, where oxalic acid is transformed into oxalates within the company. The profits made by selling oxalates are considerable and actually allowed the producer to continue its activities despite the losses on oxalic acid. Therefore this element does not contribute to the material injury suffered by the Union industry.

8.3.6. *Economic crisis*

(117) In 2009 the Union consumption of oxalic acid halved compared to 2008 due to the economic crisis, contributing to a loss in sales volume (– 40 %) and value (– 45 %) for the Union industry. However, by reducing prices in this period by around 5 % the industry was able to gain market share (11 %) and so minimise the negative effects of the crisis. Indeed, the industry was close to breakeven in 2009.

(118) Although the economic crisis in 2008-2009 might have contributed to the Union industry's poor performance, overall, this could not be considered to have an impact such as to break the causal link between the dumped imports and the injurious situation of the Union industry.

### 8.4. **Conclusion on causation**

(119) The above analysis demonstrated that there was an increase in the sales volume and market share of the countries concerned over the period considered. In addition, it was found that these imports were made at dumped prices which were significantly — almost 22 % — below the prices charged by the Union industry on the Union market for the product concerned during the IP.

(120) This increase in volume and market share of the low-priced dumped imports from the countries concerned was achieved despite an overall decrease in demand on the Union market during the period considered. The growing market share of the imports coincided with the negative development in the market share of the Union industry during the same period. At the same time a negative development in the main indicators of the economic and financial situation of the Union industry were observed as shown above.

(121) The fall in consumption on the Union market in 2009 affected negatively the performance of the Union industry. However, overall, this and the other factors could not be considered to have an impact such as to break the causal link between the dumped imports and the injurious situation of the Union industry.

(122) Based on the above analysis, which has properly distinguished and separated the effects of all known factors on the situation of the Union industry from the injurious effects of the dumped imports, it is provisionally concluded that the dumped imports from the countries concerned have caused material injury to the Union industry within the meaning of Article 3(6) of the basic Regulation.

## 9. **UNION INTEREST**

### 9.1. **Preliminary remark**

(123) In accordance with Article 21 of the basic Regulation it was examined whether, despite the provisional conclusion on injurious dumping, compelling reasons existed for concluding that it was not in the Union interest to adopt provisional anti-dumping measures in this particular case. The analysis of the Union interest was based on an appreciation of all the various interests involved, including those of the Union industry, importers and users of the product concerned.

### 9.2. **Interest of the Union industry**

(124) The Union industry consists of two producers, with factories located in different Member States of the Union, employing directly 30-50 people in the production and sale of the like product.

(125) One of the two Union producers did not object to the initiation of the investigation, but provided no further information and did not cooperate during the investigation.

(126) The Union industry has suffered material injury caused by the dumped imports from the countries concerned. It is recalled that most relevant injury indicators showed a negative trend during the period considered. In particular, injury indicators relating to the financial performance of the Union industry, such as profitability, cash flow and return on investments, were seriously affected. In the absence of measures, it is considered that the recovery in the oxalic acid sector will not be sufficient to allow the recovery of the Union industry's financial situation and might deteriorate further.

(127) It is expected that the imposition of measures will restore effective and fair trading conditions on the Union market, allowing the Union industry to align the prices of oxalic acid to reflect the cost of production. It can be expected that the imposition of measures would enable the Union industry to regain, at least part of the market share lost during the period considered, with a further positive impact on its economic situation and profitability.

(128) It was therefore concluded that the imposition of provisional anti-dumping measures on imports of oxalic acid originating in the PRC and India would be in the interest of the Union industry.

### 9.3. **Interest of importers**

(129) Questionnaire replies were received from eight unrelated importers. Three of these importers only imported small volumes of the product concerned and could transfer the price increase to their clients. Some of them indicated that they might consider removing the product from their product range if anti-dumping duties were imposed.

(130) The fourth importer claimed that its clients could use the inward processing scheme for all their end-products using oxalic acid in the production process and re-exported outside the EU. Accordingly, the impact of the imposition of anti-dumping measures on this importer would not be significant.

(131) On the basis of the above, it is provisionally concluded that the imposition of measures should not, overall, have a significant impact on the importers. In general, profit margins on oxalic acid are considerably high for importers and they expect to be able to transfer the price increases to their customers.

9.4. **Interest of users**

(132) The cooperating users accounted for 22 % of the Union consumption of oxalic acid during the IP. The investigation showed that the distinction between the uses of *unrefined* oxalic acid and *refined* oxalic acid is pertinent for the EU interest test with regard to users. The cooperating Union industry produces unrefined, whilst the other non-cooperating EU producer produces refined, which is used mainly in the pharmaceutical, food and fine metal powder extraction sectors.

(133) The users of unrefined oxalic acid claimed that the imposition of measures would lead to a price increase by the cooperating Union industry, which is the only EU supplier. On the other hand, users also mentioned that it would not be desirable to be completely dependent on foreign imports.

(134) For users producing cleaning and bleaching products, oxalic acid represents only a small part of their inputs and they could probably transfer the price increase resulting from anti-dumping duties to their clients or change the formulas of their products where possible to use substitute products in place of oxalic acid.

(135) For the users producing polishing products, oxalic acid represents a major share of their input costs and is not substitutable. It is unlikely that users would be able to fully transfer price increases to their clients due to competition from non-EU producers. However, they export 95 % of their products outside the EU and could reclaim duties in the framework of the inward processing system.

(136) For users using oxalic acid for other applications such as recycling metals from scrap, oxalic acid represents an important portion of the total production costs of the end-product for which oxalic acid is used. The market of the end-product is very volatile. Oxalic acid is not replaceable in the production process. The main Union scrap recycler currently buys all of its oxalic acid from the Union producers. With the imposition of anti-dumping duties, the industry is in a position to choose to what extent it will increase prices, if at all, in order to benefit from the imposition of duties. Therefore, the impact of the imposition of measures on this user is unclear. However, given that this user is currently making low profits on its sales of the finished product, any price increase will have a negative impact if the company is not able to pass on the price increase.

(137) 'Refined' oxalic acid is used, amongst others, for the production of powder of certain metals. Oxalic acid represents a considerable part of the total production costs. In this process oxalic acid is not replaceable. Profits in this sector can, however, be significant. As annual contracts are commonplace in this sector, in the short term, passing on price increases will not be easy. However, bearing in mind that the lowest proposed duty rate is 14,6 % and that high profits are being achieved, it would be possible to absorb any price increase in the short term.

(138) One user claimed that the production of refined oxalic acid was not sufficient to meet demand. In this regard, it was found that the shortfall in the Union between production of the refined type and consumption was around 1 000-2 000 tonnes/year. Given that the bulk of the end-products for which *refined* oxalic acid is used during the production process is exported, users could, in any event, operate under the inward processing regime if they so wished.

9.5. **Conclusion on Union interest**

(139) In view of the above, it was provisionally concluded that, overall, based on the information available concerning the Union interest, there are no compelling reasons against the imposition of provisional measures on imports of acid oxalic originating in the PRC and India.

10. **PROVISIONAL ANTI-DUMPING MEASURES**

10.1. **Injury elimination level**

(140) In view of the conclusions reached with regard to dumping, injury, causation and Union interest, provisional anti-dumping measures should be imposed in order to prevent further injury being caused to the Union industry by the dumped imports.

(141) For the purpose of determining the level of these measures, account was taken of the dumping margins found and the amount of duty necessary to eliminate the injury sustained by the Union industry.

(142) When calculating the amount of duty necessary to remove the effects of the injurious dumping, it was considered that any measures should allow the Union industry to cover its costs of production and to obtain a profit before tax that could be reasonably achieved by an industry of this type in the sector under normal conditions of competition, i.e. in the absence of dumped imports, on sales of the like product in the Union. It is considered that the profit that could be achieved in the absence of dumped imports is 8 % of turnover and that this profit margin could be regarded as an appropriate minimum which the Union industry could have expected to obtain in the absence of injurious dumping.

(143) On this basis, a non-injurious price was calculated for the Union industry for the like product. The non-injurious price was obtained by adding the above-mentioned profit margin of 8 % to the cost of production.

(144) The necessary price increase was then determined on the basis of a comparison per product type of the weighted average import price of the cooperating exporting producers in the PRC and India, duly adjusted for importation costs and customs duties with the non-injurious price of the product types sold by the Union industry on the Union market during the IP. Any difference resulting from this comparison was then expressed as a percentage of the average cif import value of the types compared.

### 10.2. **Provisional measures**

(145) In the light of the foregoing, it is considered that, in accordance with Article 7(2) of the basic Regulation, provisional anti-dumping measures should be imposed in respect of imports originating in the PRC and India at the level of the lower of the dumping and the injury margins, in accordance with the lesser duty rule.

(146) The individual company anti-dumping duty rates specified in this Regulation were established on the basis of the findings of the present investigation. Therefore, they reflect the situation found during that investigation with respect to these companies. These duty rates (as opposed to the countrywide duty applicable to 'all other companies') are thus exclusively applicable to imports of products originating in the PRC and India and produced by the companies and thus by the specific legal entities mentioned. Imported products produced by any other company not specifically mentioned in the operative part of this Regulation, including entities related to those specifically mentioned, cannot benefit from these rates and shall be subject to the duty rate applicable to 'all other companies'.

(147) Any claim requesting the application of these individual company anti-dumping duty rates (e.g. following a change in the name of the entity or following the setting up of new production or sales entities) should be addressed to the Commission [1] forthwith with all relevant information, in particular any modification in the company's activities linked to production, domestic and export sales associated with, for example, that name change or that change in the production and sales entities. If appropriate, the Regulation will be amended accordingly by updating the list of companies benefiting from individual duty rates.

(148) In order to ensure a proper enforcement of the anti-dumping duty, the residual duty level should not only apply to the non-cooperating exporting producers but also to those producers which did not have any exports to the Union during the IP.

(149) The dumping and injury margins established are as follows:

| Country | Company | Dumping margin (%) | Injury margin (%) |
|---|---|---|---|
| India | Punjab Chemicals and Crop Protection Limited (PCCPL) | 22,8 | 40,8 |
| | All other companies | 43,6 | 50,7 |
| PRC | Shandong Fengyuan Chemicals Stock Co., Ltd and Shandong Fengyuan Uranus Advanced Material Co., Ltd | 37,7 | 54,5 |
| | Yuanping Changyuan Chemicals Co., Ltd | 14,6 | 22,1 |
| | All other companies | 52,2 | 66,3 |

## 11. **FINAL PROVISIONS**

(150) Any exporting producer of oxalic acid in the PRC which has not yet made itself known, since it considered that it met neither the MET nor the IT criteria, but which considers that a separate duty rate should be established, is invited to make itself known to the European Commission within 10 days from the day following the publication of this Regulation in the *Official Journal of the European Union* [2].

[1] European Commission, Directorate-General for Trade, Directorate H, 1049 Brussels, Belgium.

[2] In such situations, the Commission will gather information in the light of the considerations expressed by the Appellate Body of the World Trade Organisation in its report in DS 397 (EC-Fasteners), in particular points 371-384 thereof (see www.wto.org). However, the fact that the Commission gathers this information does not prejudice whether and which consequences the European Union will attach to that ruling in this investigation.

(151) In the interests of sound administration, a period should be fixed within which the interested parties which made themselves known within the time limit specified in the notice of initiation may make their views known in writing and request a hearing.

(152) The findings concerning the imposition of anti-dumping duties made for the purposes of this Regulation are provisional and may have to be reconsidered for the purposes of any definitive findings,

HAS ADOPTED THIS REGULATION:

*Article 1*

1. A provisional anti-dumping duty is hereby imposed on imports of oxalic acid, whether in dihydrate (CUS number 0028635-1 and CAS number 6153-56-6) or anhydrous form (CUS number 0021238-4 and CAS number 144-62-7) and whether or not in aqueous solution, currently falling within CN code ex 2917 11 00 (TARIC code 2917 11 00 91) and originating in the People's Republic of China and India.

2. The rate of the provisional anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, of the product described in paragraph 1 and manufactured by the companies below shall be as follows:

| Country | Company | Provisional duty (%) | TARIC additional code |
|---|---|---|---|
| India | Punjab Chemicals and Crop Protection Limited | 22,8 | B230 |
| | All other companies | 43,6 | B999 |
| PRC | Shandong Fengyuan Chemicals Stock Co., Ltd; Shandong Fengyuan Uranus Advanced Material Co., Ltd | 37,7 | B231 |
| | Yuanping Changyuan Chemicals Co., Ltd | 14,6 | B232 |
| | All other companies | 52,2 | B999 |

3. The release for free circulation in the Union of the product referred to in paragraph 1 shall be subject to the provision of a security equivalent to the amount of the provisional duty.

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

*Article 2*

1. Without prejudice to Article 20 of Regulation (EC) No 1225/2009, interested parties may request disclosure of the essential facts and considerations on the basis of which this Regulation was adopted, make their views known in writing and apply to be heard orally by the Commission within 1 month of the date of entry into force of this Regulation.

2. Pursuant to Article 21(4) of Regulation (EC) No 1225/2009, the parties concerned may comment on the application of this Regulation within 1 month of the date of its entry into force.

*Article 3*

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

Article 1 of this Regulation shall apply for a period of 6 months.

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

Done at Brussels, 19 October 2011.

*For the Commission*
*The President*
José Manuel BARROSO

# COMMISSION IMPLEMENTING REGULATION (EU) No 1044/2011

## of 19 October 2011

## entering a name in the register of the traditional specialities guaranteed (Kabanosy (TSG))

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 509/2006 of 20 March 2006 on agricultural products and foodstuffs as traditional specialities guaranteed [1], and in particular the third subparagraph of Article 9(5) thereof,

Whereas:

(1) Pursuant to Article 8(2) of Regulation (EC) No 509/2006, Poland's application, received on 22 January 2007, to register the name 'Kabanosy' was published in the *Official Journal of the European Union* [2].

(2) The Czech Republic, Germany and Austria submitted objections to the registration pursuant to Article 9(1) of Regulation (EC) No 509/2006. The objections were deemed admissible under point (a) of the first subparagraph of Article 9(3) of that Regulation.

(3) By letters dated 26 January 2010, the Commission invited the Member States concerned to engage in appropriate consultations.

(4) While within the designated time-frame agreements have been reached between Austria and Poland and between the Czech Republic and Poland, no agreement has been reached between Germany and Poland. The Commission therefore has to adopt a decision in accordance with the procedure referred to in Article 18(2) of Regulation (EC) No 509/2006.

(5) The statements of objections concerned non-compliance with the conditions laid down in Articles 2 and 4 of Regulation (EC) No 509/2006.

(6) Concerning the alleged failure of compliance with Article 2 of Regulation (EC) No 509/2006 in respect of the specific character of 'Kabanosy' no manifest error was identified. By its characteristics as defined in the specification (characteristics of the meat, taste and the unique shape) 'Kabanosy' is clearly distinguished from other similar products of the same category and is thus in compliance with the definition for specific character in point (a) of Article 2(1) of that Regulation. In the specification 'Kabanosy' is described as long, thin sticks of dry sausage twisted off at one end, evenly wrinkled and folded in two, which should be considered as the product's intrinsic physical feature and therefore not as a matter of product presentation. Lastly, national standardisation of 'Kabanosy' does not impede the registration of the name since it has been established in order to define the specificity of the product and, therefore, it is covered by the derogation set out in the third subparagraph of Article 2(2) of that Regulation.

(7) As regards the objections based on non-compliance with the conditions laid down in Article 4 of Regulation (EC) No 509/2006, no manifest error was identified either. The name 'Kabanosy' does not refer only to claims of a general nature used for a set of products nor is it misleading. Therefore it is not concerned by the second subparagraph of Article 4(3) of that Regulation. The specific character is further not due to the product's provenance or geographical origin. The product specification rather establishes a quality criterion for the pig population that has an effect on the quality of the finished product and thus indeed on the specific character of 'Kabanosy'. 'Kabanosy's' main elements of its traditional character consist of both the use of traditional raw materials and traditional method of production, thus those elements are in compliance with Article 4(1) of that Regulation.

(8) Regarding the existence of several other linguistic or orthographic variations of the name, only 'Kabanosy' is sought to be registered in accordance with point (a) of Article 6(2) of Regulation (EC) No 509/2006.

(9) The protection referred to in Article 13(2) of that Regulation has not been requested. Registration without reservation of the name however allows that a registered name may continue to be used on the labelling of products not corresponding to the registered specification without the indication 'traditional speciality guaranteed', the abbreviation 'TSG' or the associated EU logo. Once 'Kabanosy' is registered it would still be possible to produce and market 'Kabanosy'-like products under the name 'Kabanosy' but without reference to EU registration. Thus the registration of 'Kabanosy' as a traditional speciality guaranteed would in no way impair other producers' rights to use a similar or even identical name for their products.

[1] OJ L 93, 31.3.2006, p. 1.
[2] OJ C 156, 9.9.2009, p. 27.

(10) In order to respect fair and traditional usage and to avoid the actual likelihood of confusion, the labelling of 'Kabanosy' should contain an indication, in the languages of the countries in which the product is marketed, informing the consumers that it has been produced following the Polish tradition.

(11) In the light of the above, the name 'Kabanosy' should be entered in the register of the traditional specialities guaranteed and the product specification should be updated accordingly.

(12) The measures provided for in this Regulation are in accordance with the opinion by the Standing Committee on Traditional Specialities Guaranteed,

HAS ADOPTED THIS REGULATION:

*Article 1*

The designation contained in the Annex I to this Regulation is hereby entered in the register of the traditional specialities guaranteed.

*Article 2*

The consolidated product specification is set out in Annex II to this Regulation.

*Article 3*

This Regulation shall enter into force on the 20th 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, 19 October 2011.

*For the Commission*
*The President*
José Manuel BARROSO

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*ANNEX I*

Products of Annex I to the EC Treaty intended for human consumption:

**Class 1.2. Meat products (cooked, salted, smoked, etc.)**

POLAND

Kabanosy (TSG)

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*ANNEX II*

APPLICATION FOR REGISTRATION OF A TSG

**COUNCIL REGULATION (EC) No 509/2006**

**'KABANOSY'**

**EC No: PL-TSG-0007-0050-22.01.2007**

1. **Name and address of the applicant group**

Name: Związek 'Polskie Mięso'
Address: ul. Chałubińskiego 8, 00-613 Warsaw

Tel. +48 228302657
Fax +48 228301648
E-mail: info@polskie-mieso.pl

2. **Member State or third country**

Poland

3. **Product Specification**

3.1. *Name(s) to be registered (Article 2 of Regulation (EC) No 1216/2007)*

'Kabanosy'

The indication 'Produced following the Polish tradition' translated into the language of the country where marketed shall appear on the labelling.

3.2. *Whether the name*

☐ is specific in itself

☒ expresses the specific character of the agricultural product or foodstuff

The name expresses the specific character of the product. In 19th century Poland and Lithuania the term 'kaban', or the diminutive form 'kabanek', referred to extensively reared young hogs which used to be fattened mainly with potatoes, and the meat they produced was customarily called 'kabanina'. 'Kabanos' is derived from the name used to designate these hogs.

3.3. *Whether reservation of the name is sought pursuant to Article 13(2) of Regulation (EC) No 509/2006*

☐ Registration with reservation of the name

☒ Registration without reservation of the name

3.4. *Type of product*

Class 1.2 — Meat products (cooked, salted, smoked, etc.)

3.5. *Description of the agricultural product or foodstuff to which the name under point 3.1 applies (Article 3(1) of Regulation (EC) No 1216/2007)*

'Kabanosy' are long, thin sticks of dry sausage twisted off at one end and evenly wrinkled. The sticks are folded in two and in the curve there is an indent where they were hung.

The surface of the 'kabanosy' is dark red in colour with a cherry tint. A cross-section reveals dark red pieces of meat and cream-coloured fat.

The 'feel to the touch' is that of a smooth, dry and evenly wrinkled surface.

'Kabanosy' have a strong taste of cured, baked pork and a delicate, smoky aftertaste redolent of caraway and pepper.

Chemical composition:

— protein content — not less than 15,0 %,

— water content — not more than 60,0 %,

— fat content — not more than 35,0 %,

— salt content — not more than 3,5 %,

— nitrate (III) and nitrate (V) content expressed as $NaNO_2$ — not more than 0,0125 %.

The above chemical composition values ensure the traditional quality of the product. The finished product yield in relation to the meat used as a raw material must be less than 68 %.

3.6. *Description of the production method of the agricultural product or foodstuff to which the name under point 3.1 applies (Article 3(2) of Commission Regulation (EC) No 1216/2007)*

Ingredients

Meat (100 kg of raw material):

— Class I pork with a fat content of up to 15 % — 30 kg,

— Class IIA pork with a fat content of up to 20 % — 40 kg,

— Class IIB pork with a fat content of up to 40 % — 30 kg.

Seasonings (per 100 kg of meat)

— natural pepper — 0,15 kg,

— nutmeg — 0,05 kg,

— caraway — 0,07 kg,

— sugar — 0,20 kg.

Other additives:

— curing mix (based on a mixture of table salt (NaCl) and sodium nitrite ($NaNO_2$)) — about 2 kg.

Feeding in the context of the production of pork intended for use in the making of 'kabanosy'

Feeding refers to fatty-meat fattening. The aim is to produce pigs with a bodyweight of up to 120 kg, characterised by a higher intramuscular fat content (more than 3 %).

— Fattening is based on late-maturing breeds, and an appropriate fattening regime makes it possible to achieve the desired intramuscular fat content. The breeds used for fattening do not carry the RN gene, and the RYR 1T gene is present in 20 % of the population.

— Fattening should be carried out in three phases – phase I up to about 60 kg, phase II up to about 90 kg, and phase III up to 120 kg,

— Fattening of animals up to 90 kg bodyweight is carried out using two types of feed mixes. The feed mixes (doses) contain:

  — as energy components: cereal middlings – wheat, barley, rye, oat, triticale or maize; maize middlings and middlings of naked oat varieties account for up to 30 % of mixes,

  — as protein components: – lupin, field bean and pea middlings, post-extraction soya meal, post-extraction rapeseed meal, rapeseed oil cake, fodder yeast or dried green fodder.

— Feed mixes (doses) for animals from 90 to 120 kg contain:

  — as energy components: wheat, barley, rye and triticale middlings. Maize middlings and middlings of naked oat varieties may not be used in mixes (doses),

  — as protein components: middlings of leguminous crops (lupin, field bean and pea), post-extraction soya meal, rapeseed oilcake or post-extraction rapeseed meal and dried green fodder.

— At no point in the feeding cycle may the following be used: vegetable oils, feed of animal origin, e.g. powdered milk, dried whey or fish meal.

— The metabolic energy content in mixes in all phases of fattening is 12-13 MJ of ME/kg of mix. The protein content in mixes should be around 16-18 % in the first phase of fattening, 15-16 % in the second phase, and about 14 % in the final phase.

— Doses for fatteners may be based on nutritive mixes alone, or nutritive mixes and bulk feed, i.e. potatoes and green fodder.

Stages in the production of 'kabanosy'

Stage 1

Preliminary cutting up of all meat ingredients. Ensuring that the pieces of meat are of a uniform size (about 5 cm in diameter).

Stage 2

Traditional curing (dry method) for about 48 hours, using a curing mix.

Stage 3

Class I meat is reduced to around 10 mm in size, Class IIA and Class IIB meat to around 8 mm in size.

Stage 4

Mixing of all meat ingredients and seasonings: natural pepper, nutmeg, caraway and sugar.

Stage 5

Stuffing into thin sheep casings of between 20 and 22 mm in diameter and twisting-off at one end of sticks of about 25 cm in length.

Stage 6

Settling at a temperature not exceeding 30 °C for 2 hours. Preliminary drying of the surface, 'settling' of the ingredients within the sticks.

Stage 7

Drying of the surface and traditional smoking in hot smoke (for about 150 minutes) and baking until a temperature of at least 70 °C is reached inside the sticks.

Stage 8

Smoking is stopped and the 'kabanosy' are left in the smoke room for about 1 hour, after which they are chilled and refrigerated to below 10 °C.

Stage 9

Drying at 14-18 °C and 80 % humidity for 3-5 days until the desired yield is obtained (not exceeding 68 %).

3.7. *Specific character of the agricultural product or foodstuff (Article 3(3) of Commission Regulation (EC) No 1216/2007)*

The specific character of 'kabanosy' derives from several attributes that are typical of the product:

— tenderness, succulence and specific properties of the meat,

— exceptional taste and aroma,

— uniform, characteristic shape.

Tenderness, succulence and specific properties of the meat

Pork from pigs of late-maturing breeds fattened to a bodyweight of about 120 kg and having the genetic traits described in point 3.6 is an essential ingredient of 'kabanosy' which influences the specific nature of the sausage. Compliance with these requirements yields an intramuscular fat content in excess of 3 %, ensuring that the meat possesses the appropriate gustatory and technological properties that are essential for the production of 'kabanosy'. The use of such raw materials and conformity to the traditional method of production, with special regard to the stages of mincing, curing and smoking, ensures that 'kabanosy' are exceptionally tender and succulent. Another characteristic of 'kabanosy' is the clearly audible noise they make when they are broken in two. This is the result of the meat's tenderness and the way in which 'kabanosy' are prepared, in particular, drying and smoking.

Exceptional taste and aroma

Their taste and aroma are the features which set 'kabanosy' apart from other sausages. These features are the result of the use in the production process of appropriately selected seasonings and the proportions thereof: natural pepper, nutmeg, caraway, sugar and the specific smoking process, which further enhances the product's flavour.

Uniform, characteristic shape

The specific character of 'kabanosy' is linked mainly to their unique shape. 'Kabanosy' are long, thin sticks of dry sausage twisted off at one end and evenly wrinkled.

3.8. *Traditional character of the agricultural product or foodstuff (Article 3(4) of Regulation (EC) No 1216/2007)*

Traditional method of production and storage

Kabanosy, or thin, dried and smoked pork sausages in sheep casings, were eaten throughout Poland as early as the 1920s and 1930s. They were produced in small, local butchers' establishments under the same name, but in different regional varieties. The main differences concerned the seasonings used, but also the quality of the sausages themselves. The cookery books and food publications of the day, like M. Karczewska's 'Wyrób wędlin i innych przetworów mięsnych sposobem domowym', published in Warsaw in 1937, provided recipes and helped to standardise production techniques for 'kabanosy', enabling brand consolidation and quality improvements. These sausages tasted good and preservation techniques like smoking and drying meant that they could be kept for long periods.

After 1945 standardisation was introduced in an attempt to improve product quality. 'Kabanosy' were officially released for consumption by the Decree of the Ministers for Provisions, Industry and Commerce of 15 September 1948 (Journal of Laws 1948/44, item 334). Technological and production aspects were subsequently standardised (Standard No RN-54/MPMIM1-Mięs-56 of 30 December 1954), and in 1964 the Polish Meat Industry Headquarters in Warsaw issued a standard recipe for 'Kabanosy' based on traditional production methods (Internal Regulations No 21).

'Kabanosy' were extremely popular during Communist times (1945-89); everybody used to buy them. They graced elegant tables on special occasions and were equally suitable as picnic food for travellers, as gifts or as a snack with vodka. Together with ham and bacon, they also became a Polish export speciality.

Traditional ingredient – pork

'Kabanosy' are made from specially fattened hogs which used to be known as 'kabany'. The term 'kaban' features in the 1834 epic poem 'Pan Tadeusz' by Poland's national bard Adam Mickiewicz. Originally used to refer to wild boars, hogs and even horses, by the 19th century, according to the 1863 Encyklopedyja Powszechna, Volume 13, the term was universally used to designate a well fed, fat young hog. The hogs were specially fattened up to obtain delicate, exquisite meat with a high intramuscular fat content which gave the products made from it a strong, specific taste, tenderness and succulence. The term 'kabanina', derived from 'kaban', was also widely used. According to the definition in the Polish dictionary published in Vilnius in 1861, it usually referred to pork.

The meat of pigs kept for the production of 'kabanosy' must have an intramuscular fat content of more than 3 %; this is the marbling that confers on the product the desired tenderness, succulence and excellent taste. The use of such meat has a decisive influence on the quality of the final product and its specific character, and is in keeping with the traditional method of production.

3.9. *Minimum requirements and procedures to check the specific character (Article 4 of Regulation (EC) No 1216/2007)*

With regard to the specific character of 'kabanosy', the following in particular should be subjected to checks:

(1) Quality of raw materials used in production (pork, seasonings), including:

— technological suitability of the meat;

— type of fattening;

— curing time;

— seasonings used in the production of 'kabanosy' and the proportions in which they are used.

(2) 'Kabanosy' smoking process

In the course of an inspection, the following must be checked:

— maintenance of the temperature required for traditional smoking in hot smoke and the heating temperature;

— maintenance of the duration and temperature of repeat smoking in cold smoke;

— use of beech chips for smoking in cold smoke.

(3) Quality of the finished product:

— protein content;

— water content;

— fat content;

— sodium chloride content;

— nitrate (III) and nitrate (V) content;

— taste and aroma.

(4) Shape of the product.

Frequency of checks

Checks on the abovementioned stages must be carried out once every 2 months. If all these stages are proceeding correctly, the frequency of the checks may be reduced to two per year.

If irregularities occur at any stage, the frequency of checks on that stage must be increased (to once every 2 months). Checks on other stages may be carried out once every 6 months.

4. **Authorities or bodies verifying compliance with the product specification**

4.1. *Name and address*

Name: Główny Inspektorat Jakości Handlowej Artykułów Rolno-Spożywczych
Address: ul. Wspólna 30, 00-930 Warsaw, POLAND

Tel. +48 226232901
Fax +48 226232099
E-mail: —

☒ Public ☐ Private

4.2. *Specific tasks of the authority or body*

The above inspection authority is responsible for checks on the entire specification.

# COMMISSION IMPLEMENTING REGULATION (EU) No 1045/2011

## of 19 October 2011

## concerning the non-approval of the active substance asulam, in accordance with Regulation (EC) No 1107/2009 of the European Parliament and of the Council concerning the placing of plant protection products on the market, and amending Commission Decision 2008/934/EC

**(Text with EEA relevance)**

THE EUROPEAN COMMISSION,

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

Having regard to Regulation (EC) No 1107/2009 of the European Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC [1], and in particular Articles 13(2) and 78(2) thereof,

Whereas:

(1) In accordance with Article 80(1)(c) of Regulation (EC) No 1107/2009, Council Directive 91/414/EEC [2] is to apply, with respect to the procedure and the conditions for approval, to active substances for which completeness has been established in accordance with Article 16 of Commission Regulation (EC) No 33/2008 of 17 January 2008 laying down detailed rules for the application of Council Directive 91/414/EEC as regards a regular and an accelerated procedure for the assessment of active substances which were part of the programme of work referred to in Article 8(2) of that Directive but have not been included into its Annex I [3]. Asulam is an active substance for which completeness has been established in accordance with that Regulation.

(2) Commission Regulations (EC) No 451/2000 [4] and (EC) No 1490/2002 [5] lay down the detailed rules for the implementation of the second and third stages of the programme of work referred to in Article 8(2) of Directive 91/414/EEC and establish lists of active substances to be assessed, with a view to their possible inclusion in Annex I to Directive 91/414/EEC. These lists included asulam.

(3) In accordance with Article 3(2) of Commission Regulation (EC) No 1095/2007 of 20 September 2007 amending Regulation (EC) No 1490/2002 laying down further detailed rules for the implementation of the third stage of the programme of work referred to in Article 8(2) of Council Directive 91/414/EEC and Regulation (EC) No 2229/2004 laying down further detailed rules for the implementation of the fourth stage of the programme of work referred to in Article 8(2) of Council Directive 91/414/EEC [6] the notifier withdrew its support for the inclusion of that active substance in Annex I to Directive 91/414/EEC within 2 months from entry into force of Regulation (EC) No 1095/2007. Consequently, Commission Decision 2008/934/EC of 5 December 2008 concerning the non-inclusion of certain active substances in Annex I to Council Directive 91/414/EEC and the withdrawal of authorisations for plant protection products containing these substances [7] was adopted on the non-inclusion of asulam.

(4) Pursuant to Article 6(2) of Directive 91/414/EEC the original notifier (hereinafter 'the applicant') submitted a new application requesting the accelerated procedure to be applied, as provided for in Articles 14 to 19 of Regulation (EC) No 33/2008.

(5) The application was submitted to the United Kingdom, which had been designated rapporteur Member State by Regulation (EC) No 1490/2002. The time period for the accelerated procedure was respected. The specification of the active substance and the supported uses are the same as were the subject of Decision 2008/934/EC. That application also complies with the remaining substantive and procedural requirements of Article 15 of Regulation (EC) No 33/2008.

(6) The United Kingdom evaluated the additional data submitted by the applicant and prepared an additional report. It communicated that report to the European Food Safety Authority (hereinafter 'the Authority') and to the Commission on 6 November 2009. The Authority communicated the additional report to the other Member States and the applicant for comments and forwarded the comments it had received to the Commission. In accordance with Article 20(1) of Regulation (EC) No 33/2008 and at the request of the Commission, the Authority presented its conclusion on the risk assessment of asulam to the Commission on 23 September 2010 [8]. The draft assessment report, the additional report and the conclusion of the Authority were reviewed by the Member States and the Commission within the Standing Committee on the Food Chain and Animal Health and finalised on 14 July 2011 in the format of the Commission review report for asulam.

[1] OJ L 309, 24.11.2009, p. 1.
[2] OJ L 230, 19.8.1991, p. 1.
[3] OJ L 15, 18.1.2008, p. 5.
[4] OJ L 55, 29.2.2000, p. 25.
[5] OJ L 224, 21.8.2002, p. 23.
[6] OJ L 246, 21.9.2007, p. 19.
[7] OJ L 333, 11.12.2008, p. 11.
[8] European Food Safety Authority; Conclusion on the peer review of the pesticide risk assessment of the active substance asulam. EFSA Journal 2010;8(12):1822. [71 pp.]. doi:10.2903/j.efsa.2010.1822. Available online: www.efsa.europa.eu/efsajournal.htm

(7) During the evaluation of this active substance, concerns were identified. Those concerns were, in particular, the following. It was not possible to perform a reliable consumer exposure assessment as data were missing concerning the presence and toxicity of the metabolite sulfanilamide, as well as concerning the presence of other potentially significant metabolites that were not analysed in the available residue trials and processing studies. Furthermore, no data was available on the toxicological relevance of the impurities in the technical specification of the active substance. In addition, a high risk to birds was identified.

(8) The Commission invited the applicant to submit its comments on the conclusion of the Authority. Furthermore, in accordance with Article 21(1) of Regulation (EC) No 33/2008, the Commission invited the applicant to submit comments on the draft review report. The applicant submitted its comments, which have been carefully examined.

(9) However, despite the arguments put forward by the applicant, the concerns referred to in recital 7 could not be eliminated. Consequently, it has not been demonstrated that it may be expected that, under the proposed conditions of use, plant protection products containing asulam satisfy in general the requirements laid down in Article 5(1)(a) and (b) of Directive 91/414/EEC.

(10) Asulam should therefore not be approved pursuant to Article 13(2) of Regulation (EC) No 1107/2009.

(11) For plant protection products containing asulam, where Member States grant any period of grace in accordance with Article 46 of Regulation (EC) No 1107/2009, this period should expire on 31 December 2012 at the latest as laid down in the second paragraph of Article 3 of Decision 2008/934/EC.

(12) This Regulation does not prejudice the submission of a further application for asulam pursuant to Article 7 of Regulation (EC) No 1107/2009.

(13) In the interest of clarity, the entry for asulam in the Annex to Decision 2008/934/EC should be deleted.

(14) It is therefore appropriate to amend Decision 2008/934/EC accordingly.

(15) The Standing Committee on the Food Chain and Animal Health did not deliver an opinion. An implementing act was deemed to be necessary and the chair submitted the draft implementing act to the appeal committee for further deliberation. The appeal committee did not deliver an opinion,

HAS ADOPTED THIS REGULATION:

*Article 1*

**Non-approval of active substance**

The active substance asulam is not approved.

*Article 2*

**Transitional measures**

Member States shall ensure that authorisations for plant protection products containing asulam are withdrawn by 31 December 2011.

*Article 3*

**Period of grace**

Any period of grace granted by Member States in accordance with Article 46 of Regulation (EC) No 1107/2009 shall be as short as possible and shall expire on 31 December 2012 at the latest.

*Article 4*

**Amendments to Decision 2008/934/EC**

In the Annex to Decision 2008/934/EC, the entry for 'asulam' is deleted.

*Article 5*

**Entry into force and date of application**

This Regulation shall enter into force on the 20th 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, 19 October 2011.

*For the Commission*
*The President*
José Manuel BARROSO

# COMMISSION IMPLEMENTING REGULATION (EU) No 1046/2011

## of 19 October 2011

## establishing the standard import values for determining the entry price of certain fruit and vegetables

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Implementing Regulation (EU) No 543/2011 of 7 June 2011 laying down detailed rules for the application of Council Regulation (EC) No 1234/2007 in respect of the fruit and vegetables and processed fruit and vegetables sectors [2], and in particular Article 136(1) thereof,

Whereas:

Implementing Regulation (EU) No 543/2011 lays down, pursuant to the outcome of the Uruguay Round multilateral trade negotiations, the criteria whereby the Commission fixes the standard values for imports from third countries, in respect of the products and periods stipulated in Annex XVI, Part A thereto,

HAS ADOPTED THIS REGULATION:

*Article 1*

The standard import values referred to in Article 136 of Implementing Regulation (EU) No 543/2011 are fixed in the Annex hereto.

*Article 2*

This Regulation shall enter into force on 20 October 2011.

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

Done at Brussels, 19 October 2011.

*For the Commission,*
*On behalf of the President,*
José Manuel SILVA RODRÍGUEZ
*Director-General for Agriculture and Rural Development*

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 157, 15.6.2011, p. 1.

*ANNEX*

**Standard import values for determining the entry price of certain fruit and vegetables**

*(EUR/100 kg)*

| CN code | Third country code (1) | Standard import value |
|---|---|---|
| 0702 00 00 | EC | 31,1 |
| | MA | 43,8 |
| | MK | 53,3 |
| | ZA | 35,6 |
| | ZZ | 41,0 |
| 0707 00 05 | TR | 142,5 |
| | ZZ | 142,5 |
| 0709 90 70 | EC | 33,4 |
| | TR | 133,8 |
| | ZZ | 83,6 |
| 0805 50 10 | AR | 54,2 |
| | CL | 60,5 |
| | TR | 65,3 |
| | UY | 56,8 |
| | ZA | 75,9 |
| | ZZ | 62,5 |
| 0806 10 10 | BR | 217,2 |
| | CL | 71,4 |
| | MK | 110,6 |
| | TR | 122,0 |
| | ZA | 64,2 |
| | ZZ | 117,1 |
| 0808 10 80 | AR | 61,9 |
| | BR | 62,6 |
| | CA | 105,4 |
| | CL | 99,9 |
| | CN | 58,0 |
| | NZ | 119,3 |
| | US | 82,9 |
| | ZA | 94,8 |
| | ZZ | 85,6 |
| 0808 20 50 | AR | 50,6 |
| | CN | 63,2 |
| | TR | 129,3 |
| | ZZ | 81,0 |

(1) Nomenclature of countries laid down by Commission Regulation (EC) No 1833/2006 (OJ L 354, 14.12.2006, p. 19). Code 'ZZ' stands for 'of other origin'.

# COMMISSION IMPLEMENTING REGULATION (EU) No 1047/2011

## of 19 October 2011

## on the issue of licences for the import of garlic in the subperiod from 1 December 2011 to 29 February 2012

THE EUROPEAN COMMISSION,

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

Having regard to Council Regulation (EC) No 1234/2007 of 22 October 2007 establishing a common organisation of agricultural markets and on specific provisions for certain agricultural products (Single CMO Regulation) [1],

Having regard to Commission Regulation (EC) No 1301/2006 of 31 August 2006 laying down common rules for the administration of import tariff quotas for agricultural products managed by a system of import licences [2], and in particular Article 7(2) thereof,

Whereas:

(1) Commission Regulation (EC) No 341/2007 [3] opens and provides for the administration of tariff quotas and introduces a system of import licences and certificates of origin for garlic and other agricultural products imported from third countries.

(2) The quantities for which 'A' licence applications have been lodged by traditional importers and by new importers during the first seven working days of October 2011, pursuant to Article 10(1) of Regulation (EC) No 341/2007 exceed the quantities available for products originating in China, and all third countries other than China and Argentina.

(3) Therefore, in accordance with Article 7(2) of Regulation (EC) No 1301/2006, it is now necessary to establish the extent to which the 'A' licence applications sent to the Commission by 14 October 2011 can be met in accordance with Article 12 of Regulation (EC) No 341/2007.

(4) In order to ensure sound management of the procedure of issuing import licences, the present Regulation should enter into force immediately after its publication,

HAS ADOPTED THIS REGULATION:

*Article 1*

Applications for 'A' import licences lodged pursuant to Article 10(1) of Regulation (EC) No 341/2007 during the first seven working days of October 2011 and sent to the Commission by 14 October 2011 shall be met at a percentage rate of the quantities applied for as set out in the Annex to this Regulation.

*Article 2*

This Regulation shall enter into force on the day of 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, 19 October 2011.

*For the Commission,*
*On behalf of the President,*
José Manuel SILVA RODRÍGUEZ
*Director-General for Agriculture and Rural Development*

[1] OJ L 299, 16.11.2007, p. 1.
[2] OJ L 238, 1.9.2006, p. 13.
[3] OJ L 90, 30.3.2007, p. 12.

*ANNEX*

| Origin | Order number | Allocation coefficient |
|---|---|---|
| Argentina | | |
| — Traditional importers | 09.4104 | 84,959795 % |
| — New importers | 09.4099 | 1,064155 % |
| China | | |
| — Traditional importers | 09.4105 | 43,180341 % |
| — New importers | 09.4100 | 0,381865 % |
| Other third countries | | |
| — Traditional importers | 09.4106 | 100 % |
| — New importers | 09.4102 | 1,910605 % |

# DECISIONS

## DECISION OF THE PRESIDENT OF THE EUROPEAN COMMISSION

**of 13 October 2011**

**on the function and terms of reference of the hearing officer in certain competition proceedings**

**(Text with EEA relevance)**

(2011/695/EU)

THE PRESIDENT OF THE EUROPEAN COMMISSION,

Having regard to the Treaty on European Union,

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

Having regard to the Agreement on the European Economic Area,

Having regard to the Rules of Procedure of the Commission [1], and in particular Article 22 thereof,

Whereas:

(1) Under the system for competition law enforcement established under the Treaty on the Functioning of the European Union (hereinafter 'the Treaty'), the Commission investigates and decides on cases by administrative decision, subject to judicial review by the Court of Justice of the European Union (hereinafter 'the Court of Justice').

(2) The Commission has to conduct its competition proceedings fairly, impartially and objectively and must ensure respect of the procedural rights of the parties concerned as set out in Council Regulation (EC) No 1/2003 of 16 December 2002 on the implementation of the rules on competition laid down in Articles 81 and 82 of the Treaty [2], Council Regulation (EC) No 139/2004 of 20 January 2004 on the control of concentrations between undertakings (the EC Merger Regulation) [3], Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles 81 and 82 of the EC Treaty [4], and Commission Regulation (EC) No 802/2004 of 7 April 2004 implementing Council Regulation (EC) No 139/2004 on the control of concentrations between undertakings [5], as well as in the relevant case-law of the Court of Justice. In particular, the right of the parties concerned to be heard before the adoption of any individual decision adversely affecting them is a fundamental right of European Union law recognised by the Charter of Fundamental Rights, and in particular Article 41 thereof [6].

(3) In order to ensure the effective exercise of the procedural rights of the parties concerned, other involved parties within the meaning of Article 11(b) of Regulation (EC) No 802/2004 (hereinafter 'other involved parties'), complainants within the meaning of Article 7(2) of Regulation (EC) No 1/2003 (hereinafter 'complainants') and persons other than those referred to in Articles 5 and 11 of Regulation (EC) No 773/2004 and third persons within the meaning of Article 11 of Regulation (EC) No 802/2004 (hereinafter 'third persons') involved in competition proceedings, responsibility for safeguarding the observance of such rights should be entrusted to an independent person experienced in competition matters who has the integrity necessary to contribute to the objectivity, transparency and efficiency of those proceedings.

(4) The Commission created the function of hearing officer for these purposes in 1982, revised it in Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission [7] and in Commission Decision 2001/462/EC, ECSC of 23 May 2001 on the terms of reference of hearing officers in certain competition proceedings [8]. It is now necessary to clarify and further strengthen the role of the hearing officer and to adapt the terms of reference of the hearing officer in the light of developments in Union competition law.

(5) The function of the hearing officer has been generally perceived as an important contribution to the competition proceedings before the Commission due to the independence and expertise that hearing officers have brought to these proceedings. In order to ensure the

[1] OJ L 308, 8.12.2000, p. 26.
[2] OJ L 1, 4.1.2003, p. 1.
[3] OJ L 24, 29.1.2004, p. 1.
[4] OJ L 123, 27.4.2004, p. 18.
[5] OJ L 133, 30.4.2004, p. 1.
[6] OJ C 303, 14.12.2007, p. 1.
[7] OJ L 330, 21.12.1994, p. 67.
[8] OJ L 162, 19.6.2001, p. 21.

continued independence of the hearing officer from the Directorate-General for Competition, he or she should be attached, for administrative purposes, to the member of the Commission with special responsibility for competition.

(6) The hearing officer should be appointed in accordance with the rules laid down in the Staff Regulations of Officials and the Conditions of Employment of Other Servants of the European Union. In accordance with those rules, consideration may also be given to candidates who are not officials of the Commission. Transparency as regards the appointment, termination of appointment and transfer of hearing officers should be ensured.

(7) The Commission may appoint one or more hearing officers and should provide for their supporting staff. Where the hearing officer perceives a conflict of interests in the performance of his or her functions, the hearing officer should cease from acting on a case. If the hearing officer is unable to act, his or her role should be carried out by another hearing officer.

(8) The hearing officer should operate as an independent arbiter who seeks to resolve issues affecting the effective exercise of the procedural rights of the parties concerned, other involved parties, complainants or interested third persons where such issues could not be resolved through prior contacts with the Commission services responsible for the conduct of competition proceedings, which must respect these procedural rights.

(9) The terms of reference of the hearing officer in competition proceedings should be framed in such a way as to safeguard the effective exercise of procedural rights throughout proceedings before the Commission pursuant to Articles 101 and 102 of the Treaty and Regulation (EC) No 139/2004, in particular the right to be heard.

(10) In order to strengthen this role, the hearing officer should be attributed with the function of safeguarding the effective exercise of procedural rights of undertakings and associations of undertakings in the context of the Commission's powers of investigation under Chapter V of Regulation (EC) No 1/2003, as well as pursuant to Article 14 of Regulation (EC) No 139/2004 which empowers the Commission to impose fines on undertakings and associations of undertakings. The hearing officer should also be attributed with specific functions during this investigative phase in relation to claims for legal professional privilege, the privilege against self-incrimination, deadlines for replying to decisions requesting information pursuant to Article 18(3) of Regulation (EC) No 1/2003, as well as with regard to the right of undertakings and associations of undertakings subject to an investigative measure by the Commission under Chapter V of Regulation (EC) No 1/2003 to be informed of their procedural status, namely whether they are subject to an investigation and, if so, the subject matter and purpose of that investigation. In assessing claims made in relation to privilege against self-incrimination, the hearing officer may consider whether undertakings make clearly unfounded claims for protection merely as a delaying tactic.

(11) The hearing officer should be able to facilitate the resolution of claims that a document is covered by legal professional privilege. To this end, if the undertaking or association of undertakings making the claim agrees, the hearing officer will be allowed to examine the document concerned and make an appropriate recommendation, referring to the applicable case-law of the Court of Justice.

(12) The hearing officer should be responsible for deciding whether a third person shows a sufficient interest to be heard. Consumer associations that apply to be heard should be generally regarded as having a sufficient interest, where the proceedings concern products or services used by end-consumers or products or services that constitute a direct input into such products or services.

(13) The hearing officer should decide whether to admit complainants and interested third persons to the oral hearing, taking into account the contribution they can make to the clarification of the relevant facts of the case.

(14) The right of the parties concerned to be heard before a final decision adversely affecting their interests is taken is guaranteed through their right to reply in writing to the preliminary position of the Commission, as set out in the statement of objections and their right to develop their arguments, if they so request, at the oral hearing. In order to exercise these rights effectively, parties to whom a statement of objections has been addressed have the right of access to the Commission's investigation file.

(15) In order to safeguard the effective exercise of the rights of defence of parties to whom a statement of objections has been addressed, the hearing officer should be responsible for ensuring that disputes about access to the file or about the protection of business secrets and other confidential information between those parties and the Commission's Directorate-General for Competition are resolved. In exceptional circumstances, the hearing officer may suspend the running of the time period in which an addressee of a statement of objections should reply to that statement until a dispute about access to file has been resolved, if the addressee would not be in a position to reply within the deadline granted and an extension would not be an adequate solution at that point in time.

(16) In order to safeguard the effective exercise of procedural rights while respecting the legitimate interests of confidentiality, the hearing officer should, where appropriate, be able to order specific measures for access to the Commission's file. In particular, the hearing officer should have the power to decide that parts of the file are made accessible to the party requesting access in a restricted manner, for example by limiting the number or category of persons having access, and the use of the information being accessed.

(17) The hearing officer should be responsible for deciding on requests for the extension of time limits set for the reply to a statement of objections, a supplementary statement of objections or a letter of facts or time limits within which other involved parties, complainants or interested third persons may make comments, in case of disagreement between any such person and the Directorate-General for Competition.

(18) The hearing officer should promote the effectiveness of the oral hearing, by, inter alia, taking all appropriate preparatory measures, including the circulation, in due time before the hearing, of a provisional list of participants and a provisional agenda.

(19) The oral hearing allows the parties to whom the Commission has addressed a statement of objections and other involved parties to further exercise their right to be heard by developing their arguments orally before the Commission, which should be represented by the Directorate-General for Competition as well as other services that contribute to the further preparation of a decision to be taken by the Commission. It should provide an additional opportunity to ensure that all relevant facts – whether favourable or unfavourable to the parties concerned, including the factual elements relating to the gravity and duration of the alleged infringement – are clarified as much as possible. The oral hearing should also allow the parties to present their arguments as to the matters that may be of importance for the possible imposition of fines.

(20) To ensure the effectiveness of oral hearings, the hearing officer may allow the parties to whom a statement of objections has been addressed, other involved parties, complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing. The oral hearing should not be public so as to guarantee that all participants can express themselves freely. Therefore, information disclosed during the oral hearing should not be used for a purpose other than judicial and/or administrative proceedings for the application of Articles 101 and 102 of the Treaty. Where justified to protect business secrets and other confidential information, the hearing officer should be able to hear persons in a closed session.

(21) Parties to the proceedings which offer commitments pursuant to Article 9 of Regulation (EC) No 1/2003, as well as parties which engage in settlement procedures in cartel cases pursuant to Article 10a of Regulation (EC) No 773/2004, should be able to call upon the hearing officer in relation to the effective exercise of their procedural rights.

(22) The hearing officer should report on the respect for the effective exercise of procedural rights throughout competition proceedings. Moreover, and separately from his or her reporting function, the hearing officer should also be able to make observations on the further progress and objectivity of the proceedings and thereby contribute to ensuring that competition proceedings are concluded on the basis of a sound assessment of all relevant facts.

(23) When disclosing information about natural persons, the hearing officer should have regard, in particular, to Regulation (EC) No 45/2001 of the European Parliament and of the Council of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data [1].

(24) Decision 2001/462/EC, ECSC should be repealed,

HAS DECIDED AS FOLLOWS:

CHAPTER 1

## ROLE, APPOINTMENT AND DUTIES OF THE HEARING OFFICER

*Article 1*

### The Hearing Officer

1. There shall be one or more hearing officers for competition proceedings, whose powers and functions are laid down in the present decision.

2. The hearing officer shall safeguard the effective exercise of procedural rights throughout competition proceedings before the Commission for the implementation of Articles 101 and 102 of the Treaty, and under Regulation (EC) No 139/2004 (hereinafter 'competition proceedings').

*Article 2*

### Appointment, Termination of Appointment and Deputising

1. The Commission shall appoint the hearing officer. The appointment shall be published in the *Official Journal of the European Union*. Any interruption, termination or transfer of the hearing officer shall be the subject of a reasoned decision of the Commission. That decision shall be published in the *Official Journal of the European Union*.

[1] OJ L 8, 12.1.2001, p. 1.

2. The hearing officer shall be attached, for administrative purposes, to the member of the Commission with special responsibility for competition (hereinafter 'the competent member of the Commission').

3. Where the hearing officer is unable to act, his or her role shall be carried out by another hearing officer. If no hearing officer is able to act, the competent member of the Commission, where appropriate after consultation of the hearing officer, shall designate another competent Commission official, who is not involved in the case in question, to carry out the hearing officer's duties.

4. In case of an actual or potential conflict of interests, the hearing officer shall refrain from acting on a case. Paragraph 3 shall apply.

*Article 3*

**Method of Operation**

1. In exercising his or her functions, the hearing officer shall act independently.

2. In exercising his or her functions, the hearing officer shall take account of the need for effective application of the competition rules in accordance with Union legislation in force and the principles laid down by the Court of Justice.

3. In exercising his or her functions, the hearing officer shall have access to any files relating to competition proceedings.

4. The hearing officer shall be kept informed by the director responsible for investigating the case in the Directorate-General for Competition (hereinafter 'the director responsible') about the development of the procedure.

5. The hearing officer may present observations on any matter arising out of any Commission competition proceeding to the competent member of the Commission.

6. If the hearing officer makes reasoned recommendations to the competent member of the Commission or takes decisions as foreseen in this decision, the hearing officer shall provide a copy of these documents to the director responsible and the Legal Service of the Commission.

7. Any issue regarding the effective exercise of the procedural rights of the parties concerned, other involved parties within the meaning of Article 11(b) of Regulation (EC) No 802/2004 (hereinafter 'the other involved parties'), complainants within the meaning of Article 7(2) of Regulation (EC) No 1/2003 (hereinafter 'complainants') and interested third persons within the meaning of Article 5 of this Decision involved in such proceedings shall first be raised by those persons with the Directorate-General for Competition. If the issue is not resolved, it may be referred to the hearing officer for independent review. Requests related to a measure for which a time limit applies must be made in due time, within the original time limit.

CHAPTER 2

**INVESTIGATION**

*Article 4*

**Procedural rights in the investigation phase**

1. The hearing officer shall safeguard the effective exercise of procedural rights which arise in the context of the exercise of the Commission's powers of investigation under Chapter V of Regulation (EC) No 1/2003 and in proceedings that can result in the imposition of fines pursuant to Article 14 of Regulation (EC) No 139/2004.

2. In particular, the hearing officer shall have the following functions, subject to Article 3(7):

(a) The hearing officer may be asked by undertakings or associations of undertakings to examine claims that a document required by the Commission in the exercise of powers conferred on it pursuant to Article 18, 20 or 21 of Regulation (EC) No 1/2003, in inspections pursuant to Article 13 of Regulation (EC) No 139/2004 or in the context of investigatory measures in proceedings that can result in the imposition of fines pursuant to Article 14 of Regulation (EC) No 139/2004 and which was withheld from the Commission is covered by legal professional privilege, within the meaning of the case-law of the Court of Justice. The hearing officer may only review the matter if the undertaking or association of undertakings making the claim consent to the hearing officer viewing the information claimed to be covered by legal professional privilege as well as related documents that the hearing officer considers necessary for his or her review. Without revealing the potentially privileged content of the information, the hearing officer shall communicate to the director responsible and the undertaking or association of undertakings concerned his or her preliminary view, and may take appropriate steps to promote a mutually acceptable resolution. Where no resolution is reached, the hearing officer may formulate a reasoned recommendation to the competent member of the Commission, without revealing the potentially privileged content of the document. The party making the claim shall receive a copy of this recommendation.

(b) Where the addressee of a request for information pursuant to Article 18(2) of Regulation (EC) No 1/2003 refuses to reply to a question in such a request invoking the privilege against self-incrimination, as determined by the case-law of the Court of Justice, it may refer the matter, in due time following the receipt of the request, to the hearing officer. In appropriate cases, and having regard to the need to avoid undue delay in proceedings, the hearing officer may make a reasoned recommendation as to whether the privilege against self-incrimination applies and inform the director

responsible of the conclusions drawn, to be taken into account in case of any decision taken subsequently pursuant to Article 18(3) of Regulation (EC) No 1/2003. The addressee of the request shall receive a copy of the reasoned recommendation.

(c) Where the addressee of a decision requesting information pursuant to Article 18(3) of Regulation (EC) No 1/2003 considers that the time limit imposed for its reply is too short, it may refer the matter to the hearing officer, in due time before the expiry of the original time limit set. The hearing officer shall decide on whether an extension of the time limit should be granted, taking account of the length and complexity of the request for information and the requirements of the investigation.

(d) Undertakings or associations of undertakings subject to an investigative measure by the Commission under Chapter V of Regulation (EC) No 1/2003 shall have the right to be informed of their procedural status, namely whether they are subject to an investigation and, if so, the subject matter and purpose of that investigation. If such an undertaking or association of undertakings considers that it has not been properly informed by the Directorate-General for Competition of its procedural status, it may refer the matter to the hearing officer for resolution. The hearing officer shall take a decision that the Directorate-General for Competition will inform the undertaking or association of undertakings that made the request of their procedural status. This decision shall be communicated to the undertaking or association of undertakings that made the request.

CHAPTER 3

## APPLICATIONS TO BE HEARD

*Article 5*

### Interested third persons

1. Applications to be heard from persons other than those referred to in Articles 5 and 11 of Regulation (EC) No 773/2004 and third persons within the meaning of Article 11 of Regulation (EC) No 802/2004 (hereinafter 'third persons') shall be made in accordance with Article 13(1) of Regulation (EC) No 773/2004 and Article 16 of Regulation (EC) No 802/2004. Applications shall be submitted in writing and explain the applicant's interest in the outcome of the procedure.

2. The hearing officer shall decide as to whether third persons are to be heard after consulting the director responsible. In assessing whether a third person shows a sufficient interest, the hearing officer shall take into account whether and to what extent the applicant is sufficiently affected by the conduct which is the subject of the competition proceedings or whether the applicant fulfils the requirements of Article 18(4) of Regulation (EC) No 139/2004.

3. Where the hearing officer considers that an applicant has not shown a sufficient interest to be heard, he or she shall inform the applicant in writing of the reasons thereof. A time limit shall be fixed within which the applicant may make known its views in writing. If the applicant makes known its views in writing within the time limit set by the hearing officer and the written submission does not lead to a different assessment, that finding shall be stated in a reasoned decision which shall be notified to the applicant.

4. The hearing officer shall inform parties to competition proceedings as from the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 or Article 6(1)(c) of Regulation (EC) No 139/2004 of the identities of interested third persons to be heard, unless such disclosure would significantly harm a person or undertaking.

*Article 6*

### Right to an oral hearing; participation of complainants and third persons in the oral hearing

1. At the request of parties to whom the Commission has addressed a statement of objections or other involved parties, the hearing officer shall conduct an oral hearing so that such parties can further develop their written submissions.

2. The hearing officer may, where appropriate and after consulting the director responsible, decide to afford complainants and interested third persons within the meaning of Article 5 the opportunity to express their views at the oral hearing of the parties to which a statement of objections has been issued, provided they so request in their written comments. The hearing officer may also invite representatives from competition authorities from third countries to attend the oral hearing as observers in accordance with agreements concluded between the Union and third countries.

CHAPTER 4

## ACCESS TO FILE, CONFIDENTIALITY AND BUSINESS SECRETS

*Article 7*

### Access to File and Access to Documents and Information

1. Where a party which has exercised its right of access to the file has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of the right to be heard, it may make a reasoned request for access to these documents to the hearing officer, subject to Article 3(7).

2. Subject to Article 3(7), other involved parties, complainants and interested third persons within the meaning of Article 5 may make a reasoned request to the hearing officer in the circumstances listed hereafter:

(a) Other involved parties who have reason to believe that they have not been informed of the objections addressed to the notifying parties in accordance with Article 13(2) of Regulation (EC) No 802/2004.

(b) A complainant who has been informed by the Commission of its intention to reject a complaint pursuant to Article 7(1) of Regulation (EC) No 773/2004 and has reason to believe that the Commission has in its possession documents which have not been disclosed to it and that those documents are necessary for the proper exercise of its rights in accordance with Article 8(1) of Regulation (EC) No 773/2004.

(c) A complainant who considers that it has not received a copy of the non-confidential version of the statement of objections in accordance with Article 6(1) of Regulation (EC) No 773/2004 or that the non-confidential version of the statement of objections has not been established in a manner which enables it to exercise its rights effectively, with the exception of cases where the settlement procedure applies.

(d) An interested third person within the meaning of Article 5 of this Decision who has reason to believe that it has not been informed of the nature and subject matter of a procedure in accordance with Article 13(1) of Regulation (EC) No 773/2004 and Article 16(1) of Regulation (EC) No 802/2004. The same applies to a complainant in a case to which the settlement procedure applies who has reason to believe that it has not been informed of the nature and subject matter of the procedure in accordance with Article 6(1) of Regulation (EC) No 773/2004.

3. The hearing officer shall take a reasoned decision on a request addressed to him or her under paragraph 1 or 2 and communicate such decision to the person that made the request and to any other person concerned by the procedure.

*Article 8*

**Business secrets and other confidential information**

1. Where the Commission intends to disclose information which may constitute a business secret or other confidential information of any undertaking or person, the latter shall be informed in writing of this intention and the reasons thereof by the Directorate-General for Competition. A time limit shall be fixed within which the undertaking or person concerned may submit any written comments.

2. Where the undertaking or person concerned objects to the disclosure of the information it may refer the matter to the hearing officer. If the hearing officer finds that the information may be disclosed because it does not constitute a business secret or other confidential information or because there is an overriding interest in its disclosure that finding shall be stated in a reasoned decision which shall be notified to the undertaking or person concerned. The decision shall specify the date after which the information will be disclosed. This date shall not be less than 1 week from the date of notification.

3. Paragraphs 1 and 2 shall apply *mutatis mutandis* to the disclosure of information by publication in the *Official Journal of the European Union*.

4. Where appropriate in order to balance the effective exercise of a party's rights of defence with legitimate interests of confidentiality, the hearing officer may decide that parts of the file which are indispensable for the exercise of the party's rights of defence will be made accessible to the party requesting access in a restricted manner, the details of which shall be determined by the hearing officer.

CHAPTER 5

**EXTENSION OF TIME LIMITS**

*Article 9*

**Requests for extension of time limits**

1. If an addressee of a statement of objections considers that the time limit imposed for its reply to the statement of objections is too short, it may seek an extension of that time limit by means of a reasoned request addressed to the director responsible. Such a request must be made in due time before the expiry of the original time limit in proceedings pursuant to Articles 101 and 102 of the Treaty and at least 5 working days before the expiry of the original time limit in proceedings under Regulation (EC) No 139/2004. If such a request is not granted or the addressee of the statement of objections making the request disagrees with the length of the extension granted, it may refer the matter to the hearing officer for review before the expiry of the original time limit. After hearing the director responsible, the hearing officer shall decide on whether an extension of the time limit is necessary to allow the addressee of a statement of objections to exercise its right to be heard effectively, while also having regard to the need to avoid undue delay in proceedings. In proceedings pursuant to Articles 101 and 102 of the Treaty, the hearing officer shall take into account, among others, the following elements:

(a) the size and complexity of the file;

(b) whether the addressee of the statement of objections making the request has had prior access to information;

(c) any other objective obstacles which may be faced by the addressee of the statement of objections making the request in providing its observations.

For the purposes of assessing point (a) of the first subparagraph, the number of infringements, the alleged duration of the infringement(s), the size and number of documents and the size and complexity of expert studies may be taken into consideration.

2. If other involved parties, a complainant or an interested third person within the meaning of Article 5 considers that the time limit to make its views known is too short, it may seek an extension of that time limit by means of a reasoned request addressed to the director responsible in due time before the expiry of the original time limit. If such a request is not granted or the other involved party, complainant or interested third person disagrees with this decision, it may refer the matter to the hearing officer for review. After hearing the director responsible, the hearing officer shall decide on whether an extension of the time limit should be granted.

CHAPTER 6

## THE ORAL HEARING

*Article 10*

### Organisation and function

1. The hearing officer shall organise and conduct the hearings provided for in the provisions implementing Articles 101 and 102 of the Treaty and Regulation (EC) No 139/2004.

2. The oral hearing shall be conducted by the hearing officer in full independence.

3. The hearing officer shall ensure that the hearing is properly conducted and shall contribute to the objectivity of the hearing itself and of any decision taken subsequently.

4. The hearing officer shall ensure that the oral hearing provides addressees of the statement of objections, other involved parties, as well as complainants and interested third persons within the meaning of Article 5 which have been admitted to the oral hearing, with sufficient opportunity to develop their views as to the preliminary findings of the Commission.

*Article 11*

### Preparation of the oral hearing

1. The hearing officer shall be responsible for the preparation of the oral hearing and shall take all appropriate measures in that regard. In order to ensure the proper preparation of the oral hearing, the hearing officer may, after consulting the director responsible, supply in advance to the persons invited to the hearing a list of questions on which they are invited to make known their views. The hearing officer may also indicate to the persons invited to the hearing the focal areas for debate, having regard, in particular, to the facts and issues that the addressees of a statement of objections who have requested an oral hearing want to raise.

2. For this purpose, after consulting the director responsible, the hearing officer may hold a meeting with the persons invited to the hearing and, where appropriate, the Commission services, in order to prepare for the hearing itself.

3. The hearing officer may also ask for prior written notification of the essential contents of the intended statements of persons invited to the hearing.

4. The hearing officer may set a time limit for all persons invited to the oral hearing to provide a list of participants who will attend on their behalf. The hearing officer shall make this list available to all persons invited to the oral hearing in due time before the date of the hearing.

*Article 12*

### Timing and conduct

1. After consulting the director responsible, the hearing officer shall determine the date, the duration and the place of the hearing. Where a postponement is requested, the hearing officer shall decide whether or not to allow it.

2. The hearing officer shall decide whether new documents should be admitted during the hearing and which persons should be heard on behalf of a party.

3. The hearing officer may allow the parties to whom a statement of objections has been addressed, other involved parties, complainants, other persons invited to the hearing, the Commission services and the authorities of the Member States to ask questions during the hearing. To the extent that, exceptionally, a question cannot be answered in whole or in part at the oral hearing, the hearing officer may allow the reply to be given in writing within a set time limit. Such written reply shall be distributed to all participants in the oral hearing, unless the hearing officer decides otherwise in order to protect the rights of defence of an addressee of a statement of objections or the business secrets or other confidential information of any person.

4. Where required by the need to ensure the right to be heard, the hearing officer may, after consulting the director responsible, afford the parties concerned, other involved parties, complainants or interested third persons within the meaning of Article 5 the opportunity to submit further written comments after the oral hearing. The hearing officer shall fix a date by which such submissions may be made. The Commission shall not be obliged to take into account written comments received after that date.

*Article 13*

### Protection of business secrets and confidentiality at the oral hearing

Each person shall normally be heard in the presence of all other persons invited to attend the oral hearing. The hearing officer may also decide to hear persons separately in a closed session, having regard to their legitimate interest in the protection of their business secrets and other confidential information.

CHAPTER 7

**INTERIM REPORT AND RIGHT TO MAKE OBSERVATIONS**

*Article 14*

**Interim report and observations**

1. The hearing officer shall submit an interim report to the competent member of the Commission on the hearing and the conclusions he or she draws with regard to the respect for the effective exercise of procedural rights. The observations in this report shall concern procedural issues including the following:

(a) disclosure of documents and access to the file;

(b) time limits for replying to the statement of objections;

(c) the observance of the right to be heard;

(d) the proper conduct of the oral hearing.

A copy of the report shall be given to the Director-General for Competition, to the director responsible and to the other competent services of the Commission.

2. In addition to, and separately from, the report referred to in paragraph 1, the hearing officer may make observations on the further progress and impartiality of the proceedings. In so doing, the hearing officer shall seek to ensure in particular that, in the preparation of draft Commission decisions, due account is taken of all the relevant facts, whether favourable or unfavourable to the parties concerned, including the factual elements relevant to the gravity and duration of any infringement. Such observations may relate to, inter alia, the need for further information, the withdrawal of certain objections, the formulation of further objections or suggestions for further investigative measures pursuant to Chapter V of Regulation (EC) No 1/2003.

The Director-General for Competition, the director responsible and the Legal Service shall be informed of such observations.

CHAPTER 8

**COMMITMENTS AND SETTLEMENTS**

*Article 15*

**Commitments and settlements**

1. Parties to the proceedings which offer commitments to meet the concerns expressed to them by the Commission in its preliminary assessment pursuant to Article 9 of Regulation (EC) No 1/2003 may call upon the hearing officer at any stage in the procedure pursuant to Article 9, in order to ensure the effective exercise of their procedural rights.

2. Parties to proceedings in cartel cases which engage in settlement discussions pursuant to Article 10a of Regulation (EC) No 773/2004 may call upon the hearing officer at any stage during the settlement procedure in order to ensure the effective exercise of their procedural rights.

CHAPTER 9

**FINAL REPORT**

*Article 16*

**Content and transmission prior to the adoption of a decision**

1. The hearing officer shall, on the basis of the draft decision to be submitted to the Advisory Committee in the case in question, prepare a final report in writing on the respect for the effective exercise of procedural rights, as referred to in Article 14(1), at any stage of the proceedings. That report will also consider whether the draft decision deals only with objections in respect of which the parties have been afforded the opportunity of making known their views.

2. The final report shall be submitted to the competent member of the Commission, the Director-General for Competition, the director responsible and the other competent services of the Commission. It shall be communicated to the competent authorities of the Member States and, in accordance with the provisions on cooperation laid down in Protocols 23 and 24 of the EEA Agreement, to the EFTA Surveillance Authority.

*Article 17*

**Submission to the Commission and publication**

1. The hearing officer's final report shall be presented to the Commission together with the draft decision submitted to it, in order to ensure that, when it reaches a decision on an individual case, the Commission is fully apprised of all relevant information as to the course of the procedure and that the effective exercise of procedural rights has been respected throughout the proceedings.

2. The final report may be modified by the hearing officer in the light of any amendments to the draft decision prior to its adoption by the Commission.

3. The Commission shall communicate the hearing officer's final report, together with the decision, to the addressees of the decision. It shall publish the hearing officer's final report in the *Official Journal of the European Union*, together with the decision, having regard to the legitimate interest of undertakings in the protection of their business secrets.

CHAPTER 10

**FINAL PROVISIONS**

*Article 18*

**Repeal and transitional provision**

1. Decision 2001/462/EC, ECSC is repealed.

2. Procedural steps already taken under Decision 2001/462/EC, ECSC shall continue to have effect. In relation to investigatory measures that were taken before the entry into force of this Decision, the hearing officer may decline to exercise his or her powers pursuant to Article 4.

In cases where the initiation of proceedings pursuant to Article 11(6) of Regulation (EC) No 1/2003 or the initiation of proceedings pursuant to Article 6(1)(c) of Regulation (EC) No 139/2004 took place before the entry into force of the present Decision, the interim report pursuant to Article 14 of the present Decision and the final report pursuant to Article 16 shall not cover the investigation phase, unless the hearing officer decides otherwise.

*Article 19*

**Entry into force**

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

Done at Brussels, 13 October 2011.

*For the Commission*
*The President*
José Manuel BARROSO

# RECOMMENDATIONS

## COMMISSION RECOMMENDATION

**of 18 October 2011**

**on the definition of nanomaterial**

**(Text with EEA relevance)**

(2011/696/EU)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 292 thereof,

Whereas:

(1) The Commission Communication of 7 June 2005 'Nanosciences and nanotechnologies: An action plan for Europe 2005-2009' [1] defines a series of articulated and interconnected actions for the immediate implementation of a safe, integrated and responsible approach for nanosciences and nanotechnologies.

(2) The Commission, in line with the commitments made in the Action Plan, carefully reviewed relevant Union legislation with a view to determine the applicability of the existing regulations to the potential risks of nanomaterials. The result of the review was contained in the Commission Communication of 17 June 2008 'Regulatory aspects of nanomaterials' [2]. The Communication concluded that the term 'nanomaterials' is not mentioned specifically in Union legislation but that existing legislation in principle covers the potential health, safety and environmental risks in relation to nanomaterials.

(3) The European Parliament in its resolution of 24 April 2009 on regulatory aspects of nanomaterials [3] called, inter alia, for the introduction of a comprehensive science-based definition of nanomaterials in Union legislation.

(4) The definition in this Recommendation should be used as a reference for determining whether a material should be considered as a 'nanomaterial' for legislative and policy purposes in the Union. The definition of the term 'nanomaterial' in Union legislation should be based solely on the size of the constituent particles of a material, without regard to hazard or risk. This definition, based only on the size of a material, covers natural, incidental or manufactured materials.

(5) The definition of the term 'nanomaterial' should be based on available scientific knowledge.

(6) Measuring size and size distributions in nanomaterials is challenging in many cases and different measurement methods may not provide comparable results. Harmonised measurement methods must be developed with a view to ensuring that the application of the definition leads to consistent results across materials and over time. Until harmonised measurement methods are available, best available alternative methods should be applied.

(7) The European Commission Joint Research Centre Reference Report 'Considerations on a Definition of Nanomaterial for Regulatory purposes' [4] suggests that a definition of nanomaterials should address particulate nanomaterials, be broadly applicable in Union legislation and be in line with other approaches worldwide. Size should be the only defining property which necessitates a clear definition of the nanoscale limits.

(8) The Commission mandated the Scientific Committee on Emerging and Newly Identified Health Risks (SCENIHR) to provide scientific input on elements to consider when developing a definition of the term 'nanomaterial' for regulatory purposes. The opinion 'Scientific basis for the definition of the term "Nanomaterial" ' was subject to a public consultation in 2010. In its opinion of 8 December 2010 [5], SCENIHR concluded that size is universally applicable to nanomaterials and the most suitable measurand. A defined size range would facilitate a uniform interpretation. The lower limit was proposed at 1 nm. An upper limit of 100 nm is commonly used by general consensus, but there is no scientific evidence to support the appropriateness of this value. The use of a

[1] COM(2005) 243 final.
[2] COM(2008) 366 final.
[3] P6_TA(2009) 0328.
[4] EUR 24403 EN, June 2010.
[5] http://ec.europa.eu/health/scientific_committees/emerging/docs/scenihr_o_032.pdf

single upper limit value might be too limiting for the classification of nanomaterials and a differentiated approach might be more appropriate. For regulatory purposes, the number size distribution should also be considered using the mean size and the standard deviation of the size to refine the definition. The size distribution of a material should be presented as size distribution based on the number concentration (i.e. the number of objects within a given size range divided by the number of objects in total) and not on the mass fraction of nanoscale particles in the nanomaterial as a small mass fraction may contain the largest number of particles. SCENIHR identified certain specific cases where the application of the definition can be facilitated by using the volume specific surface area as proxy to determine if a material falls within the defined nano size range.

(9) The International Organisation for Standardisation defines the term 'nanomaterial' as 'material with any external dimensions in the nanoscale or having internal structure or surface structure in the nanoscale'. The term 'nanoscale' is defined as size range from approximately 1 nm to 100 nm ([1]).

(10) The number size distribution should cover for the fact that nanomaterials most typically consist of many particles present in different sizes in a particular distribution. Without specifying the number size distribution, it would be difficult to determine if a specific material complies with the definition where some particles are below 100 nm while others are not. This approach is in line with the opinion of SCENIHR that the particle distribution of a material should be presented as the distribution based on the number concentration (i.e. the particle number).

(11) There is no unequivocal scientific basis to suggest a specific value for the size distribution below which materials containing particles in the size range 1 nm-100 nm are not expected to exhibit properties specific to nanomaterials. The scientific advice was to use a statistical approach based on standard deviation with a threshold value of 0,15 %. Given the widespread occurrence of materials that would be covered by such a threshold and the need to tailor the scope of the definition for use in a regulatory context, the threshold should be higher. A nanomaterial as defined in this recommendation should consist for 50 % or more of particles having a size between 1 nm-100 nm. In accordance with SCENIHR's advice, even a small number of particles in the range between 1 nm-100 nm may in certain cases justify a targeted assessment. However, it would be misleading to categorise such materials as nanomaterials. Nevertheless there may be specific legislative cases where concerns for the environment, health, safety or competitiveness warrant the application of a threshold below 50 %.

([1]) http://cdb.iso.org

(12) Agglomerated or aggregated particles may exhibit the same properties as the unbound particles. Moreover, there can be cases during the life-cycle of a nanomaterial where the particles are released from the agglomerates or aggregates. The definition in this Recommendation should therefore also include particles in agglomerates or aggregates whenever the constituent particles are in the size range 1 nm-100 nm.

(13) At present it is possible to measure the specific surface area by volume for dry solid materials or powders with the nitrogen adsorption method ('BET-method'). In those cases the specific surface area can be used as a proxy to identify a potential nanomaterial. New scientific knowledge may expand the possibility to use this and other methods to other types of materials in the future. There can be a discrepancy between the measurement of the specific surface area and the number size distribution from one material to another. Therefore it should be specified that results for number size distribution should prevail and it should not be possible to use the specific surface area to demonstrate that a material is not a nanomaterial.

(14) Technological development and scientific progress continue with great speed. The definition including descriptors should therefore be subject to a review by December 2014 to ensure that it corresponds to the needs. In particular, the review should assess whether the number size distribution threshold of 50 % should be increased or decreased and whether to include materials with internal structure or surface structure in the nanoscale such as complex nano-component nanomaterials including nano-porous and nano-composite materials that are used in some sectors.

(15) Guidance and standardised measurement methods as well as knowledge about typical concentrations of nanoparticles in representative sets of materials should be developed where feasible and reliable to facilitate the application of the definition in a specific legislative context.

(16) The definition set out in this Recommendation should not prejudge nor reflect the scope of application of any piece of Union legislation or of any provisions potentially establishing additional requirements for those materials, including those relating to risk management. It may in some cases be necessary to exclude certain materials from the scope of application of specific legislation or legislative provisions even if they fall within the definition. It may likewise be necessary to include additional materials, such as some materials with a size smaller than 1 nm or greater than 100 nm in the scope of application of specific legislation or legislative provisions suited for a nanomaterial.

(17) Given the special circumstances prevailing in the pharmaceutical sector and the specialised nano-structured systems already in use, the definition in this Recommendation should not prejudice the use of the term 'nano' when defining certain pharmaceuticals and medical devices,

HAS ADOPTED THIS RECOMMENDATION

1. Member States, the Union agencies and economic operators are invited to use the following definition of the term 'nanomaterial' in the adoption and implementation of legislation and policy and research programmes concerning products of nanotechnologies.

2. 'Nanomaterial' means a natural, incidental or manufactured material containing particles, in an unbound state or as an aggregate or as an agglomerate and where, for 50 % or more of the particles in the number size distribution, one or more external dimensions is in the size range 1 nm-100 nm.

   In specific cases and where warranted by concerns for the environment, health, safety or competitiveness the number size distribution threshold of 50 % may be replaced by a threshold between 1 and 50 %.

3. By derogation from point 2, fullerenes, graphene flakes and single wall carbon nanotubes with one or more external dimensions below 1 nm should be considered as nanomaterials.

4. For the purposes of point 2, 'particle', 'agglomerate' and 'aggregate' are defined as follows:

   (a) 'particle' means a minute piece of matter with defined physical boundaries;

   (b) 'agglomerate' means a collection of weakly bound particles or aggregates where the resulting external surface area is similar to the sum of the surface areas of the individual components;

   (c) 'aggregate' means a particle comprising of strongly bound or fused particles.

5. Where technically feasible and requested in specific legislation, compliance with the definition in point 2 may be determined on the basis of the specific surface area by volume. A material should be considered as falling under the definition in point 2 where the specific surface area by volume of the material is greater than 60 $m^2/cm^3$. However, a material which, based on its number size distribution, is a nanomaterial should be considered as complying with the definition in point 2 even if the material has a specific surface area lower than 60 $m^2/cm^3$.

6. By December 2014, the definition set out in points 1 to 5 will be reviewed in the light of experience and of scientific and technological developments. The review should particularly focus on whether the number size distribution threshold of 50 % should be increased or decreased.

7. This Recommendation is addressed to the Member States, Union agencies and economic operators.

Done at Brussels, 18 October 2011.

*For the Commission*

Janez POTOČNIK

*Member of the Commission*

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