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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 985/2003

of 5 June 2003

amending the anti-dumping measures imposed by Council Regulation (EC) No 1334/1999 on imports of magnesium oxide originating in the People's Republic of China

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [1] (basic Regulation), and in particular Article 11(3) thereof,

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

Whereas:

A. PROCEDURE

1. Measures in force

(1) In June 1999, the Council, by Regulation (EC) No 1334/1999 [2], imposed definitive anti-dumping duties on imports of magnesium oxide originating in the People's Republic of China (the PRC). The duties took the form of a minimum import price (MIP).

2. Initiation

(2) On 13 June 2002, the Commission announced by a notice (Notice of Initiation) published in the *Official Journal of the European Communities* [3], the initiation of a partial interim review of the anti-dumping measures applicable to imports into the Community of magnesium oxide originating in the PRC pursuant to Article 11(3) of the basic Regulation.

(3) The review was initiated on the initiative of the Commission in order to examine the appropriateness of the form of the measures in force. The current measures in the form of an MIP do not differentiate between sales made to related parties and sales made to unrelated parties, or between direct sales to the Community and indirect sales, i.e. sales not made directly from an exporter in the country concerned to an importer in the Community. This lack of differentiation between different types of sales possibly leads to circumvention problems. Indeed, parties could set the import price at an artificially high level when entering the Community, in order to avoid the payment of anti-dumping duties. This artificially high level may be attained through an agreement between related parties or because the price was inflated due to successive sales before customs clearance.

(4) Consequently, the existing measures do not appear sufficient to counteract the dumping which is causing injury.

(5) Furthermore, the current measures do not cater for situations in which imported goods have been damaged before entry into free circulation into the Community. In this respect it should be noted that, since the measures should not go beyond what is necessary for the removal of injury, due account should be taken of the possible value reduction in cases of damage before the goods enter into free circulation into the Community.

3. Investigation

(6) The Commission officially advised exporting producers, the importers, the users known to be concerned and their associations, the representatives of the exporting country concerned and the Community producers about the initiation of the proceeding.

(7) Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the Notice of Initiation.

(8) One chamber of commerce in the country concerned, as well as an association of Community producers and Community importers/traders, made their views known in writing. All parties who so requested within the set time limit and who demonstrated that there were particular reasons why they should be heard were granted the opportunity to be heard.

[1] OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 1972/2002 (OJ L 305, 7.11.2002, p. 1).
[2] OJ L 159, 25.6.1999, p. 1.
[3] OJ C 140, 13.6.2002, p. 6.

(9) The Commission sought and verified all the information it deemed necessary for the purpose of a determination of the appropriateness of the measures in force.

B. **SALES MADE TO RELATED AND UNRELATED PARTIES**

(10) When they export to related companies in the Community, exporters subject to measures are in a position to invoice at a price above the MIP, and to subsequently compensate such a price after customs declaration. This may render the MIP ineffective, as it may mean that the product concerned is effectively still exported below the MIP to the Community. Accordingly, this could lead to subsequent resale prices in the Community which prevent that the intended effects of the measure, i.e. to remove the injurious effects of dumping, are achieved.

(11) If, however, sales made by exporters located in the PRC to related importers in the Community were subject to an *ad valorem* duty, the serious risk of such a duty evasion between related parties would be considerably reduced and any possible price manipulation would be more easily detected. Indeed, an *ad valorem* duty would be assessed in relation to the value in view of the existing rules on the determination of the customs value of goods imported into the Community as set out in the Community Customs Code [1]. For transactions made between unrelated parties, the Community Customs Code assumes that the value of imported goods for customs purposes is normally the transaction value. In order for a transaction value between related parties to be accepted by customs, the exporter must demonstrate that this value closely approximates to one of the transaction values as defined in Article 30 of the Community Customs Code. It is part of the daily activity of customs authorities to detect possible underestimates of the transaction values so determined. Indeed, if the customs authorities detect an artificially low transfer price between related parties, they will calculate a new customs value that would then be higher. The Community customs legislation [2] provides an exhaustive definition of 'related parties' for customs purposes. It is therefore part of the routine activity of the customs authorities to determine if a transaction is made between related parties, and hence the customs authorities are well equipped to identify the status of parties dealing with the product concerned. As a result, should an *ad valorem* duty be applied, customs authorities would be in a position to detect any irregular value declaration between related parties, thus making circumvention more difficult.

(12) A duty will have to be paid based on the amount of the transaction value. Should parties reduce the transaction value, this will have consequences in subsequent reviews, including anti-absorption investigations, since these low transaction values will be taken as a basis for the determination of the new export price with the potential of an increase of the dumping margin. In this context, in the case of an *ad valorem* duty, the (low) transaction values are evidenced in the relevant shipping documents.

(13) Finally, it should also be considered that the incentive for related parties to manipulate prices is higher in case of an MIP. Indeed with an MIP, price manipulations could lead to avoiding the anti-dumping duty completely. In the case of an *ad valorem* duty, on the other hand, possible price manipulations will only lead to a lower duty, as the duty is a percentage of whatever price is being charged. The risk of manipulation is therefore higher when an MIP applies than when an *ad valorem* duty applies.

(14) Community producers requested that no change in the form of the measures should be applied for transactions between related importers. They argued that there is a risk that national customs authorities will not properly identify the status of related importers. As a consequence, it is claimed that unrelated importers might hold themselves out to be related importers, thus benefiting from the *ad valorem* duty as opposed to the MIP in an unjustified manner. In this respect, as mentioned above, customs authorities are in a position to identify the status of the parties involved. Moreover, whatever its form, i.e. whether a minimum import price or an *ad valorem* duty, the effect of the duty is the same, namely to remove the effects of injurious dumping. For these reasons, even in the unlikely event that importers wrongly hold themselves out to be related, the duty will still have the same effect, whilst the overall risk of circumvention is considered to be lessened.

(15) Given the above, it is also concluded that if sales made by exporters located in the PRC to related parties in the Community were subject to an *ad valorem* duty, the risks of circumvention of the duty would be much reduced. The request by Community producers not to change the form of the measures for related importers is therefore rejected.

(16) Community producers also argued that the definition of price in the operative part of Regulation (EC) No 1334/1999 'net, free-at-Community-frontier' still allows the importer to clear the goods at the end-customer's warehouse, including all logistics costs incurred from 'cif free out' to 'franco end-customer' and that thereby the import price may be artificially high. It was therefore requested to change the wording to 'free-at-Community-port'.

[1] OJ L 302, 19.10.1992, p. 1.
[2] Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ L 253, 11.10.1993, p. 1). Regulation as last amended by Regulation (EC) No 444/2002 (OJ L 68, 12.3.2002, p. 11).

(17) However, the customs value arrived at by the definition 'net, free-at-Community-frontier' includes only the cost of transport and insurance of the imported goods, and loading and handling charges associated with the transport of the imported goods to the place of import into the Community customs territory. Consequently, costs incurred after import from the frontier to the end-customer are not included and the request is therefore rejected as unfounded.

(18) The Community industry also argued that in order to avoid any absorption of measures, the form of the measure should be a double duty, i.e. an MIP or an *ad valorem* duty, whichever is the higher in order to avoid a possible manipulation of prices. The argument was not substantiated and is therefore rejected.

(19) One chamber of commerce finally argued that any transaction at a price which is at or above the MIP level should be enough to remove the injury, regardless if such transaction is destined to a related or unrelated party. If an *ad valorem* duty were applied to a price which is at or above the MIP level, the protection would go beyond the level necessary to remove injury.

(20) In this respect, it is stressed that whatever its form, i.e. whether a minimum import price or an *ad valorem* duty, the effect of the duty is the same, namely to remove the effects of injurious dumping. On the other hand, it is not proposed that the *ad valorem* duty should be applied in addition to the MIP, but instead of the MIP. In addition, as pointed out above, exporters of products for which anti-dumping measures are in place could easily invoice at an artificially high price (i.e. above the MIP) when they export to related companies in the Community, and subsequently compensate such a price after customs declaration. This may render the MIP meaningless and subsequent resale prices in the Community may not achieve the intended effects of the measure. For these reasons, and considering the serious risk of price manipulation in sales between related parties, the argument made by the chamber of commerce is rejected.

C. **DIRECT/INDIRECT SALES BETWEEN UNRELATED PARTIES**

(21) As regards sales between unrelated parties, a further distinction should be made between direct sales (i.e. between an importer in the Community and an exporter in the country concerned) and indirect sales (i.e. not made directly from an exporter in the country concerned to an importer in the Community), since in the latter case the same risk of price manipulation exists.

(22) One importer argued that there should be no differentiation between direct and indirect sales to the Community as this would lead to an unequal treatment of different importers. For instance, importers buying the products via traders in third countries would be disadvantaged compared to importers buying the product directly from an exporter in the country concerned, even if all companies involved were unrelated.

(23) First it should be borne in mind that the two types of duty have the effect of removing the effects of injurious dumping, and thus represent the same level of duty. Furthermore, the distinction between direct and indirect sales is motivated by the necessity to limit the risk of price manipulation. It is considered that this risk is prevalent in all cases where sales are not made directly from an exporter located in the PRC to an unrelated importer in the Community, as a consequence of the higher number of parties involved and the difficulty for the customs authorities to verify the full chain of events when sales are made via traders in third countries. The seriousness of these risks is underscored by the findings of the European Court of Auditors in its 2000 Annual Report [1]. Due to the serious risk of price manipulation in indirect sales, which is considered to outweigh the potential disadvantage to importers sourcing from third countries, the importer's argument is rejected.

(24) It is therefore concluded that sales made by exporters located in the PRC directly to an unrelated party in the Community shall remain subject to the MIP, which was found to be the appropriate measure in the original investigation. However, in order to avoid the risk of price manipulation, in all other cases an *ad valorem* duty rate of 27,1 % as previously established [2] shall apply.

D. **DAMAGED GOODS**

(25) Article 145 of Commission Regulation (EEC) No 2454/93 foresees that, for the determination of the customs value, an apportioning of the price actually paid or payable in situations where goods have been damaged before entry into free circulation takes place. Consequently *ad valorem* duties on damaged goods follow the decrease in prices paid or payable when a good has been damaged, and the duty payable is automatically reduced.

(26) In the case of damaged goods for which an MIP is in place, the duty payable, i.e. the difference between the MIP and the net, free-at-Community-frontier price, before customs clearance, is not automatically adjusted downwards. As a consequence, if the same MIP applicable to non-damaged goods would also apply to damaged goods, the measures could go beyond what is necessary for the removal of injury.

[1] OJ C 359, 15.12.2001, p. 1, recitals 1.31 and 1.35.
[2] Council Regulation (EEC) No 1473/93 (OJ L 145, 17.6.1993, p. 1).

(27) In order to avoid the situation described the MIP should, in case of damaged goods, be reduced by a percentage which corresponds to the apportioning of the price actually paid or payable. The duty payable will then be equal to the difference between the reduced MIP and the reduced net, free-at-Community-frontier price, before customs clearance.

(28) Community producers argued that, in order to avoid fraud, the determination of the customs value for damaged goods should be assessed by an independent expert.

(29) The valuation of goods, damaged or not, is carried out by the customs authorities according to the well-established rules set out in the Community Customs Code. In view of these rules, which ensure a sufficient degree of impartiality, it is considered that there is no need for further specific provisions. The request is therefore rejected.

(30) In the absence of any substantiated argument from interested parties, it is concluded that in cases where goods have been damaged before entry into free circulation, the duty payable should be equal to the difference between the reduced minimum import price and the reduced net, free-at-Community-frontier price, before customs clearance,

HAS ADOPTED THIS REGULATION:

Article 1

Article 1(2) of Regulation (EC) No 1334/1999 shall be replaced by the following paragraphs:

'2. The amount of the anti-dumping duty shall be:

(a) the difference between the minimum import price of EUR 112 per tonne and the net, free-at-Community-frontier price, before duty, in all cases where the latter is:
— less than the minimum import price, and
— established on the basis of an invoice issued by an exporter located in the People's Republic of China directly to an unrelated party in the Community (TARIC additional code A420);

(b) zero, if the net, free-at-Community-frontier price, before duty, is established on the basis of an invoice issued by an exporter located in the People's Republic of China directly to an unrelated party in the Community and equal to or higher than the minimum import price of EUR 112 per tonne (TARIC additional code A420);

(c) equal to an *ad valorem* duty of 27,1 % in all other cases not falling under subparagraph (a) and (b) (TARIC additional code A999).

In cases where the anti-dumping duty is established according to subparagraph 2(a) of Article 1 and where goods have been damaged before entry into free circulation and, therefore, the price actually paid or payable is apportioned for the determination of the customs value pursuant to Article 145 of Commission Regulation (EEC) No 2454/93, the minimum import price set out above shall be reduced by a percentage which corresponds to the apportioning of the price actually paid or payable. The duty payable will then be equal to the difference between the reduced minimum import price and the reduced net, free-at-Community-frontier price, before customs clearance.'

Article 2

This Regulation shall enter into force on the day following that 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 Luxembourg, 5 June 2003.

For the Council
The President
M. STRATAKIS