EUROPEAN COMMISSION

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2010/0236 (NLE)

Proposal for a

COUNCIL REGULATION

terminating the partial interim review of Council Regulation (EC) No 661/2008 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia

EXPLANATORY MEMORANDUM

Context of the proposal

Grounds for and objectives of the proposal

This proposal concerns the application of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ('the basic Regulation') in the partial interim review concerning imports of ammonium nitrate originating in Russia.

General context

This proposal is made in the context of the implementation of the basic Regulation and is the result of an investigation which was carried out in line with the substantive and procedural requirements laid out in the basic Regulation.

Existing provisions in the area of the proposal

The measures currently in force were imposed by Council Regulation (EC) No 661/2008 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia.

Consistency with the other policies and objectives of the Union

Not applicable.

Consultation of interested parties and impact assessment

Consultation of interested parties

Interested parties concerned by the proceeding have had the possibility to defend their interests during the investigation, in line with the provisions of the basic Regulation.

Collection and use of expertise

There was no need for external expertise.

Impact assessment

This proposal is the result of the implementation of the basic Regulation.

The basic Regulation does not foresee a general impact assessment but contains an exhaustive list of conditions that have to be assessed.

Legal elements of the proposal

Summary of the proposed action

On 4 July 2009, the Commission initiated a partial interim review of the measures in force in respect of imports of ammonium nitrate ('AN') originating in Russia further to a request made by an exporting producer in Russia, Joint Stock Company "Acron" (‘the applicant') .

The attached proposal for a Council Regulation is based on the findings of the investigation carried out which is limited in scope to the form of the measures and in

particular to the inclusion of a related trader into the price undertaking of the applicant.

The investigation concluded that the inclusion of the related trader in the price undertaking of the applicant would seriously increase the risk of cross-compensation and affect the workability and the effective monitoring of the undertaking.

It was also found that the changed circumstances were not of a lasting nature.

It is therefore proposed to terminate the review.

Legal basis

Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community.

Subsidiarity principle

The proposal falls under the exclusive competence of the Union. The subsidiarity principle therefore does not apply.

Proportionality principle

The proposal complies with the proportionality principle for the following reasons:

The form of action is described in the above-mentioned basic Regulation and leaves no scope for national decision.

Indication of how financial and administrative burden falling upon the Union, national governments, regional and local authorities, economic operators and citizens is minimized and proportionate to the objective of the proposal is not applicable.

Choice of instruments

Proposed instruments: Regulation.

Other means would not be adequate for the following reason: The above-mentioned basic Regulation does not foresee alternative options.

Budgetary implication

The proposal has no implication for the Union budget.

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THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community[1] (the 'basic Regulation'), and in particular Articles 8 and 9 and 11(3) thereof,

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

Whereas:

A. PREVIOUS PROCEDURE

(1) By Regulation (EC) No 2022/1995[2], the Council imposed a definitive anti-dumping duty on imports of ammonium nitrate ('AN') originating in Russia falling within CN codes 3102 30 90 and 3102 40 90. Pursuant to a further investigation in accordance with Article 12 of the basic Regulation, which established that the duty was being absorbed, the measures were amended by Regulation (EC) No 663/1998[3]. Following a request for an expiry and an interim review pursuant to Articles 11(2) and 11(3) of the basic Regulation, the Council, by Regulation (EC) No 658/2002[4], imposed a definitive anti-dumping duty of EUR 47,07 per tonne on imports of ammonium nitrate falling within CN codes 3102 30 90 and 3102 40 90 and originating in Russia. Finally, a product scope interim review pursuant to Article 11(3) of the basic Regulation was carried out and, by Council Regulation (EC) No 945/2005[5], a definitive anti-dumping duty ranging between EUR 41,42 per tonne and EUR 47,07 per tonne was imposed on imports of solid fertilisers originating in Russia with an ammonium nitrate content exceeding 80 % by weight ('AN'), falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 91.

(2) Following a request for an expiry and an interim review ('the last expiry review') pursuant to Articles 11(2) and 11(3) of the basic Regulation, the Council, by Regulation (EC) No 661/2008[6], imposed a definitive anti-dumping duty ranging between EUR 28,88 per tonne and EUR 47,07 per tonne for a further five years.

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1 OJ L 343, 22.12.2009, p. 51.
2 OJ L 198, 23.8.1995, p. 1.
3 OJ L 93, 26.3.1998, p.1.
4 OJ L 102, 18.4.2002, p.1.
5 OJ L 160, 23.6.2005, p.1.
6 OJ L 185, 12.7.2008, p.1.

(3) Following the decision of the Court of First Instance of the European Communities to partially annul Council Regulation (EC) No 945/2005, the Council, by Regulation (EC) No 989/2009[7] amended the definitive anti-dumping duty in so far as it concerned JSC Kirovo-Chepetsky Khimichesky Kombinat.

(4) By Commission Decision 2008/577/EC of 4 July 2008[8], the Commission accepted undertaking offers submitted by several exporting producers, including the related Russian exporting producers Joint Stock Company Acron and Joint Stock Company Dorogobuzh ('Acron' Holding Company), in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Russia and Ukraine.

B. PRESENT PROCEDURE

1. REQUEST FOR A REVIEW

(5) A request for a partial interim review ('the present review') pursuant to Article 11(3) of the basic Regulation was lodged by JSC Acron, JSC Dorogobuzh and their related trading company Agronova International Inc., members of 'Acron' Holding Company ('the applicant'). The request was limited in scope to the examination of the form of the measure and in particular to the inclusion of Agronova International Inc. into the price undertaking of the JSC Acron and JSC Dorogobuzh.

(6) The applicant alleged that the circumstances under which the price undertaking was granted changed, in particular that Agronova International Inc., a newly established trader in the USA was incorporated into the 'Acron' Holding Company. The applicant further alleged that these changes were of a lasting nature.

2. INITIATION OF A REVIEW

(7) The Commission examined the prima facie evidence submitted by the applicant and considered it sufficient to justify the initiation of a partial interim review pursuant to Article 11(3) of the basic Regulation. After consulting the Advisory Committee, the Commission initiated[9] a review of the anti-dumping measures imposed by Regulation (EC) No 661/2008 ('measures in force') limited in scope to the examination of the form of the measure, in particular the potential effect of the inclusion of Agronova International Inc. into the price undertaking of JSC Acron and JSC Dorogobuzh.

3. PRODUCT CONCERNED

(8) The product concerned by the present review is the same as in the last expiry review, i.e. solid fertilisers with an ammonium nitrate content exceeding 80% by weight, originating in Russia ('the product concerned'), currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 91.

4. PARTIES CONCERNED

(9) The Commission officially informed the applicant, the representatives of the exporting country and the association of Union producers about the initiation of the review. Interested parties were given the opportunity to make their views known in writing

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7 OJ L 278, 23.10.2009, p.1.
8 OJ L 185, 12.7.2008, p.43.
9 OJ C 152, 4.7.2009, p. 40.

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.

(10) The Commission sent questionnaires to the applicant and received replies within the deadlines set for that purpose. The Commission sought and verified all information deemed necessary. The Commission carried out a verification visit at the premises of Agronova International Inc., Hallandale, USA ('Agronova').

5. REVIEW INVESTIGATION PERIOD

(11) The review investigation period covered the period from 1 July 2008 to 30 June 2009 ('RIP').

C. RESULTS OF THE INVESTIGATION

(12) The investigation confirmed that Agronova was a newly established trading company belonging to 'Acron' Holding company.

1. Workability of the undertaking

(13) The main considerations as to the inclusion of a trading company in the current undertaking were the practicability of the undertaking, i.e. the effectiveness of its monitoring and in particular assessing the risks of cross-compensation and circumvention through different sales channels and/or through the pricing of different products sold to potentially the same customers.

1.1. High risk of cross-compensation through an undisclosed trading company

(14) The investigation revealed that Agronova had strong interpersonal and operational links to at least one other undisclosed company active in the trading and marketing of fertilizer products. It was found that the same and only persons operating Agronova were in fact also involved in the activities of the said trading company. In particular, the evidence available showed that both companies shared a common manager and a common officer during most of the RIP, while a third person (who was at the same time found to be the President of the trading company in question), although not formally employed by Agronova, was in fact carrying out its daily trading business including the conduct during the verification visit on behalf of Agronova where he was presented as an advisor of Agronova. In addition to the strong interpersonal links, it was found that both companies were operating from the same office, employing the same secretary and using the same computers and office equipment during almost the entirety of the RIP. Agronova did not reveal the existence and operations of this other trading company neither in its response to the questionnaire nor at the time of the verification visit. The Commission's request for additional information in order to clarify the situation was only partly satisfied by the applicant since it did not, *inter alia*, disclose the precise ownership of said trading company nor its detailed activities. The information provided was therefore considered insufficient.

(15) On the basis of the above, the Commission considered that the above mentioned trading company was related to Agronova within the meaning of Article 143 of the IPCCC[10] and should have been reported in the applicant's reply to the questionnaire. The Commission notified the applicant in accordance with Article 18(1) of the basic

[10] Regulation (EEC) No 2454/93 laying down provisions for the implementation of the Community Customs Code ("IPCCC"), OJ L 253, 11.10.1993, p. 1–766.

Regulation of its intention to base these findings on facts available and invited the applicant to comment thereon in accordance with Article 18(4) of the basic Regulation.

(16) The applicant contested that Agronova is related to the above trading company or any other company. Furthermore, on the Commission's further enquiry request, it did not provide any detailed and verifiable information on the ownership and activities of the trading company in question within the deadline set.

(17) Upon disclosure of the Commission's proposal to base findings on Article 18 of the basic Regulation, the applicant further denied any relationship between Agronova and the trading company in the sense of Article 143 of the IPCCC. As far as the precise roles of the persons involved in both companies, the applicant contested that both companies shared directors or officers. The applicant even withdrew information given before, claiming that it was wrong or imprecise. The new information given was, however, not sufficiently supported by evidence. Overall, the information and evidence provided in this regard was unclear and in some instances contradictory and therefore in general cast doubts on the reliability of the information provided.

(18) By way of example, while the applicant originally stated that the president of Agronova was also the manager of the trading company in question, this statement was later qualified by explaining that the tasks carried out in the trading company by the president of Agronova did not include any control and decision making function. Likewise, while the evidence provided (annual accounts) showed that another person was an "officer" in both companies, it was later claimed that the real functions of this person were those of a legal secretary.

(19) In conclusion, the applicant did not submit any sufficiently reliable information or evidence which could show that the roles and responsibilities of each actor were defined and exercised in a way which would have excluded the existence of a relationship.

(20) The applicant also contested that the trading company in question should be considered as a trading company since it was mainly involved in marketing rather than sales of fertiliser products. However, besides the fact that this statement was not supported by any evidence, the company also stated at several instances to be indeed involved in fertiliser sales as a trader, but only for small quantities destined to other markets than Europe. The company had therefore to be considered as a trader and this argument had to be rejected.

(21) The Commission considered that the applicant impeded the investigation in the sense of Article 18(1) of the Regulation by having provided relevant information only gradually upon request, and the information provided in most cases was afterwards corrected, modified or contradicted. In this regard, given Agronova's unsatisfactory cooperation, a relationship of trust between the Commission and the company, which, as a general policy, is a necessary precondition for the acceptance of an undertaking, could not be established.

(22) It is reminded that in the analysis of the risk of cross-compensation, the knowledge of different sales channels and the flow of products through these channels are indispensable information. Given the very close interpersonal and operational links between Agronova and the other trading company, it was concluded that the risk of cross-compensation and circumvention through different sales channels was too high and that therefore Agronova should not be included in the current undertaking.

(23) Subsequent to disclosure, the applicant claimed that there would be a risk of cross compensation only in case companies are related by shares. First it should be noted that the risk of cross compensation is not limited to situations where companies are related by shares since there are various different ways of cross compensation. Thus, in this particular case and for reasons explained in the above recital, it was considered that there is a high risk of cross compensation even if the applicant and Agronova are not related by shares. Also, the applicant did not outline any legal or factual basis or present evidence to support its claim. This argument had therefore to be rejected.

1.2. Considerable risk of cross-compensation through the pricing of different products

(24) The current undertaking not only covers ammonium nitrate but it also imposes a price regime for other products traded by the group in order to avoid the risk of cross-compensation. The applicant stated in its questionnaire reply that it intended to sell through Agronova, *inter alia*, products that are not included in this price regime and even fertiliser products produced by other producers, located in Russia as well as in other countries. Therefore a risk of cross-compensation through exports of different products to the same customers was considered as high.

(25) Some of the products that Agronova intended to sell do not have a quoted market price that could serve as a benchmark for monitoring purposes. For this reason the monitoring of the undertaking would also be impracticable.

(26) Following disclosure, the applicant claimed that the Commission disregarded the applicant's offer to drop its business plans related to blending and other products in case the Commission found it necessary. In this respect it is noted that the Commission received those amended offers only later during the proceeding. The Commission considered that the applicant's continuous changing of its business plan to fit whatever it considered as the Commission's expectations casts doubts on the credibility of the applicant's offer. In this regard, the Commission also considered the insufficient level of cooperation by Agronova in this investigation as an impediment to establishing a relationship of trust between the Commission and Agronova. Therefore, the Commission was not satisfied that such commitment would indeed be respected.

(27) It was therefore concluded that the inclusion of Agronova in the sales channels of Acron would seriously increase the risks of cross-compensation and circumvention and affect the workability and the effective monitoring of the undertaking.

2. Lasting nature of the changed circumstances

(28) During the investigation, the 'Acron' Holding Company established another trading company, namely Agronova Europe AG ('Agronova Europe') which it claimed would take over most of the trading with European clients and thereby gradually replace Agronova. At a certain stage of the proceeding, the applicant requested that this new trader also be included in the current review with a view to having the two traders included in the existing price undertaking or alternatively that a new review be initiated to include this new trader also in the sales channel of the undertaking. This shows that the changed circumstances on the basis of which the present review was requested are not of a lasting nature.

(29) Following disclosure, the applicant claimed that an analysis whether the changed circumstances on the basis of which the present review was initiated were of a lasting nature, would not be relevant in the context of the present interim review limited in scope to the form of measures. The applicant claimed that such analysis would only be required in case dumping and/or injury would be assessed.

(30) The applicant also claimed that it would not intend anymore to channel sales of ammonium nitrate through Agronova Europe.

(31) With regard to the argument that an analysis as to whether the changed circumstances would be irrelevant in the present review, the applicant did not provide any legal reasoning that would have supported this view. In the present review it was considered that the stability of the sales channel(s) was an important factor in deciding to accept the inclusion of a newly established trader in an undertaking given that with every new trader included in a price undertaking the risk of cross-compensation and circumvention increases. This also needs to be addressed through adequate monitoring activities. Therefore, it was concluded that the lasting nature of the changed circumstances was indeed a relevant factor and the argument of the applicant had to be rejected.

(32) As regards the applicant's claim that Agronova Europe would finally not be used for sales of ammonium nitrate to the European Union market, this was provided at a very late stage of the investigation (after final disclosure) and contradicted the information submitted before. The applicant could furthermore not give sufficient assurances as to the respect of this commitment. The Commission again considered that the continuous changing in business plans of the applicant to fit whatever it considered as the Commission's expectations casts doubts on the credibility of the applicant's offer. As outlined above in recital (26), the Commission also considered Agronova's behaviour of having impeded the investigation as an impediment to establishing a relationship of trust between the parties to the undertaking. The applicant's argument had therefore to be rejected.

D.TERMINATION OF THE REVIEW

(33) In view of the conclusions reached with regards to the workability of the undertaking and the lasting nature of the changed circumstances, the investigation should be terminated without changing the existing undertaking of the applicant.

E. DISCLOSURE

(34) The applicant and interested parties were informed of the essential facts and considerations on the basis of which it was intended to terminate the investigation. All parties were given an opportunity to comment.

(35) The applicant stated that its rights of defense and to a fair hearing have been impaired in the proceeding. The applicant was given and has indeed used numerous occasions to introduce submissions and was given sufficient time to provide information and evidence during the proceeding. The applicant was also given the possibility to request hearing at several occasions. Therefore its claims in this respect are unwarranted.

HAS ADOPTED THIS REGULATION:

Article 1

The partial interim review concerning imports of solid fertilisers with an ammonium nitrate content exceeding 80% by weight, currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 91 and originating in Russia produced by Joint Stock Company Acron and Joint Stock Company Dorogobuzh is hereby terminated without changing the form of the measure.

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 Brussels,

For the Council
The President