COMMISSION IMPLEMENTING DECISION

of 17 September 2013

refusing to grant a derogation from Council Decision 2001/822/EC, as regards the rules of origin for sugar from Curaçao

(notified under document C(2013) 5826)

(2013/460/EU)

THE EUROPEAN COMMISSION,

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

Having regard to Council Decision 2001/822/EC of 27 November 2001 on the association of the overseas countries and territories with the European Community ('Overseas Association Decision') [1], and in particular Article 37 of Annex III thereto,

Whereas:

THE RULES OF ORIGIN SET OUT IN ANNEX III TO DECISION 2001/822/EC

(1) Annex III to Decision 2001/822/EC concerns the definition of the concept of 'originating products' and methods of administrative cooperation. Article 37 thereto provides that derogations from those rules of origin may be adopted where justified by the development of existing industries or the creation of new industries in a country or territory.

(2) Points (g), (j), (k) and (o) of paragraph 1 of Article 5 of Annex III to Decision 2001/822/EC provide that partial or total milling of sugar, sifting and placing in bags are considered to be operations that are insufficient to confer the status of originating products.

(3) Paragraph 4 of Article 6 of Annex III to Decision 2001/822/EC provides that ACP/EC-OCTs cumulation for all sugar products classified within HS Chapter 17 is phased out over time and reduces the quantities for which such cumulation is allowed progressively. By setting the quantity at zero tonnes, the phasing out finally led to the prohibition of such cumulation as of 1 January 2011.

PREVIOUS DEROGATIONS GRANTED TO THE NETHERLANDS ANTILLES FOR SUGAR PRODUCTS

(4) In 2002 the Netherlands requested a derogation from the rule of origin in respect of sugar products falling within CN codes 1701 11 90, 1701 99 10 and 1701 91 00 processed in the Netherlands Antilles for an annual quantity of 3 000 tonnes. That request was granted and the derogation ended on 31 December 2007.

(5) In 2009 the Netherlands submitted a request for extension of the derogation granted in 2002, which request was rejected by Commission Decision 2009/699/EC [2]. That Decision however granted a new request for derogation included in the request for extension, within the limits of the quantities for which import licences for sugar were allocated to the Netherlands Antilles in 2009 and in 2010.

(6) In 2010, the Netherlands requested a new derogation in respect of sugar products processed in the Netherlands Antilles for the period from 2011 to 2013. By Commission Decision 2011/47/EU [3] the derogation was granted in accordance with paragraphs 1, 3 and 7 of Article 37 of Annex III to Decision 2001/822/EC and under certain conditions which aimed to balance the legitimate interests of the Overseas Countries and Territories (OCTs) operators with the objectives of the Union's common market organisation for sugar. The products for which derogation was granted were subject to actual processing activities in the Netherlands Antilles and the value added to the raw sugar in the Netherlands Antilles was considered to be at least 45 % of the value of the finished product.

(7) Decision 2011/47/EU explained that the phasing out of the ACP/EC-OCTs cumulation of origin with regard to sugar, as provided for in paragraph 4 of Article 6 of Annex III to Decision 2001/822/EC, showed that it was the Union's intention to focus trade preferences on economic activity that contributes sustainably to OCTs development while taking due account of the Union's sugar sector. That principle was applied for the purpose of determining the quantities for which the derogation was granted by Decision 2011/47/EU. The request submitted in 2010 also indicated that the company in Curaçao benefiting from the previous derogations aimed to diversify away from sugar production requiring further derogation. Therefore the amounts for derogation were phased out over time (5 000 tonnes for 2011, 3 000 tonnes for 2012 and 1 500 tonnes for 2013).

(8) In the request submitted in 2010, the Netherlands highlighted that the company in Curaçao, benefiting from the previous derogations, aimed to diversify into producing mixtures and 'bio-sugar' which both address distinctly different markets than the sugar products covered by the request submitted in 2010. The derogation requested in 2010 was needed to earn the necessary

[1] OJ L 314, 30.11.2001, p. 1.

[2] OJ L 239, 10.9.2009, p. 55.

[3] OJ L 21, 25.1.2011, p. 3.

capital for the investments required for such diversification. Consequently, when granting the derogation by Decision 2011/47/EU, it was expected that the derogation would generate the required turnover to finance the said investments in diversification of products and activities, so that the company benefiting from the derogation would no longer be required to request derogations.

THE FIRST REQUEST SUBMITTED IN 2013 FOR DEROGATION FOR SUGAR PRODUCTS

(9) On 11 February 2013 the Netherlands requested on behalf of the government of Curaçao a new derogation from the rules of origin set out in Annex III to Decision 2001/822/EC for the period from 1 January to 31 December 2013, the date of expiry of Decision 2001/822/EC. The request covered a total annual quantity of 5 500 tonnes of sugar products of CN code 1701 14 90, described as 'bio-sugar', originating in third countries and processed in Curaçao for export to the Union.

(10) This request was officially withdrawn by the Netherlands on 17 April 2013 because the processing activities described in the request were no longer carried out in the Netherlands Antilles. The company in Curaçao had moved part of its sugar processing activities, in particular the production of sugar lumps manufactured from raw cane sugar, packed for retail sale, to Belgium from where it currently supplies supermarkets in the Netherlands. It has reoriented its remaining production line towards sifting, cleaning, milling and simple mixing of organic sugar and packing it into 1 000 kg bags for transport.

THE SECOND REQUEST SUBMITTED 2013 FOR DEROGATION FOR SUGAR PRODUCTS

(11) On 17 April 2013, the Netherlands submitted a second request for derogation for 5 000 tonnes of sugar products, described as organic raw cane sugar of CN code 1701 14 90, for the period from 1 January to 31 December 2013. The Netherlands explained that it had appeared from discussions with the authorities of Curaçao that the quantities for which derogation was granted for 2013 by Decision 2011/47/EU would be insufficient to continue the activities of the company carrying out the sugar processing in Curaçao.

(12) The second request was mainly motivated by a change of circumstances in the company involved, because the company had changed its business activity towards the processing of organic cane sugar, a change on the world sugar market, since the EU has become a net importer of sugar, the fact that the value added to the third country raw materials was more than 45 % of the ex-works price of the final product, and the creation of direct and indirect employment in Curaçao. On 14 and 28 June 2013 the Netherlands provided additional information to support its request of 17 April 2013.

(13) By letter of 16 July 2013, the Commission requested that the Dutch authorities take note of the Commission's assessment of the request and its intention to recommend the refusal of the request. The Commission also requested that the Dutch authorities transmit this assessment to the company potentially concerned by the derogation to allow both the Netherlands and the company concerned to raise any issues of fact or law which might concern the request before the Commission reached its final decision. The deadline for reply was set at 25 July 2013. A reply was received from the Dutch authorities on 24 July 2013.

THE VALUE ADDED TO THE NON-ORIGINATING PRODUCTS USED

(14) Paragraph 7 of Article 37 of Annex III to Decision 2001/822/EC provides that derogations shall be granted where the value added to the non-originating products used in the OCTs concerned is at least 45 % of the value of the finished product, provided that the derogation is not such as to cause serious injury to an economic sector of the Union or of one or more Member States.

(15) The information received from the company in Curaçao, as transmitted by the Netherlands, regarding the calculation of the value generated in Curaçao for the production of 'bio cane sugar' in 2013 indicates the value added by the processing of 5 000 tonnes of 'bio-sugar'. The company also indicated the purchase price for 1 tonne of raw 'bio-sugar' originating in third countries and the ex-works price at which 1 tonne of 'bio-sugar' is sold. According to the company, these figures generate a value added in relation to the ex-works price of 52 %. According to the same information the production of 1 500 tonnes of 'bio-sugar' would generate a value added in relation to the ex-works price of 88 %.

(16) The information received from the company, as transmitted by the Netherlands, with regard to the calculation of the value generated in Curaçao for 'brown crystal sugar' on 1 January 2013, indicates the value added by the working and processing of 5 500 tonnes of 'brown crystal sugar'. Where the highest available value added per tonne for 'brown crystal sugar' is considered as realistic, the value added in relation to the ex-works price amounts to approximately 52,4 %. However, the processing operations carried out on 'bio-sugar' involve less processing than for 'crystal sugar' packed for retail sale. The added value inherent in those operations and

the actual processing costs can therefore only be lower for 'bio-sugar' packed in 1 000 kg bags for transport than for 'brown crystal sugar' packed for retail sale.

(17) According to the 'Global Sugar Outlook — 2013 Report' ([1]) the production cost of cane sugar in Brazil, which is the most competitive region for sugar production in the world, amounts to USD 224,7 per tonne to produce cane and USD 95 per tonne to process the cane into raw sugar. The total costs, including the administrative costs, are USD 367,8 per tonne or, at an exchange rate of EUR 1 = USD 1,3, EUR 283 per tonne raw cane sugar. Taking into account the farming and processing operations involved in the production of raw sugar from cane, it appears unlikely that the costs for merely cleaning, milling and packing of organic cane sugar, which constitutes only a fraction of the production process, would be higher. Considering EUR 283 per tonne as a realistic production costs for the calculation of the value added for cleaning, milling and packing of organic raw cane sugar in the company in Curaçao, the ex-works price amounts to EUR 1 020,19 per tonne and the value added in relation to the ex-works price amounts to merely 32,2 %.

(18) In the simulation of comparable costs in recital 17, the value added would not reach 45 %. It is therefore unrealistic that such a value added could be obtained by the company in Curaçao performing simple processing. Instead, the figures transmitted to the Commission have to be considered to contain other overhead components and gains which do not constitute amounts that contribute to the benefit of the population in Curaçao.

INVESTMENT IN THE EXISTING INDUSTRY IN THE NETHERLANDS ANTILLES TO ENABLE THE RULES OF ORIGIN FOR SUGAR TO BE SATISFIED

(19) According to paragraph 3 point (c) of Article 37 of Annex III to Decision 2001/822/EC, the examination of requests for derogations should take into account the cases where it can be clearly demonstrated that significant investment in an industry would be deterred by the rules of origin and where a derogation favouring the realisation of the investment programme would enable these rules to be satisfied by stages.

(20) The phasing out of the ACP/OCTs-EC cumulation of origin for sugar on 1 January 2011 was known in advance by the company in Curaçao and it had sufficient time to prepare itself and diversify towards the production of products not requiring derogation.

(21) During the period from 2009 to 2013 the company in Curaçao benefitted from derogations helping to generate the necessary turnover to invest in diversification towards the production of products not requiring derogation from the rules of origin. According to the information received from the company, investments were very low in 2009, and no investments at all were made between 2010 and 2012. The derogations therefore only have helped to maintain the current activities of the company in Curaçao without contributing sustainably to the development of an existing industry or the creation of a new one. It is therefore doubtful that a new derogation would encourage the company to make new investments.

(22) In order for sugar mixtures of HS 2106, containing pectin or casein, to be considered as originating from Curaçao to thus benefit from preferential access to the Union, the value of the non-originating sugar used in the manufacture of the final product may not exceed 30 % of the ex-works price of the product. By diversifying towards production of such mixtures, as proposed in the current request, the company would still need to apply for derogation in order to be able to comply with the rules of origin.

ABILITY OF THE EXISTING INDUSTRY IN THE NETHERLANDS ANTILLES TO CONTINUE ITS SUGAR EXPORTS TO THE UNION

(23) According to paragraph 3 point (b) of Article 37 of Annex III to Decision 2001/822/EC, the examination of requests for derogations should take into account the cases where the application of the existing rules of origin would significantly affect the ability of an existing industry in an OCTs to continue its exports to the Union, with particular reference to cases where this could lead to cessation of its activities.

(24) The Commission maintains a balance sheet in order to analyse the sugar market and to see whether sugar stocks are sufficient, whether additional sugar is necessary or whether sugar has to be taken out of the market in order to maintain a price level close to the reference price. That balance sheet continuously shows a quantity of 50 000 to 60 000 tonnes of sugar that is imported at full duty.

(25) For sugar products of CN code 1701 14 90, a customs tariff of EUR 419 per tonne applies in the Union. Considering that the world market price for white sugar, which includes the costs for refining, traded at London Futures Exchange is around EUR 380 per tonne and a customs duty of EUR 419 per tonne applies, the price of this sugar would be at least EUR 800 per tonne when delivered in the Union duties paid. The average price of such sugar products manufactured in the Union as communicated by Member States in accordance with Article 9 of Council Regulation (EC)

([1]) Published in the 'Sugar and HFCS production costs — global benchmarking' review, issued by LMC international.

No 1234/2007 ([1]) is around EUR 725 per tonne. Under such conditions these sugar products are not likely to be imported profitably into the Union unless it is premium sugar such as organic or fair trade sugar, which is sold at a much higher price than other sugar products.

(26) It is therefore likely that a substantial part of imports into the Union at the full customs duty is organic or fair trade sugar, as such sugar can be sold for up to EUR 3 000 per tonne in the retail sector. The volume of imports of organic cane sugar at full duty into the Union show that sugar exporters worldwide are surviving in the current market.

(27) Adding to the purchase price of the raw sugar as communicated by the company, EUR 283 per tonne as a realistic production cost for the calculation of the value added for milling and packing of organic raw cane sugar in the company in Curaçao, the profit margin and shipping costs as communicated by the company and the import duties to be paid in the Union, the company in Curaçao should still be in a position to export 'bio-sugar' to the Union cost-effectively without having to rely on a derogation which will exempt the importer in the Union from payment of the applicable import duties. Moreover, the level of the sales price per tonne of 'bio-sugar' to the buyer in the Netherlands as indicated by the Netherlands' request can be considered to be sufficient to offset the impact of the full customs duty being applied.

(28) As an OCTs operator, the company in Curaçao performing the processing activities on the sugar products is placing itself on the world market and is free to export its products to any part of the world, including the Union. That company may therefore be compared to other operators all over the world undertaking the same activity. In particular, the level of the transport costs from the OCTs to the Union, which according to the information received from the company amounts to EUR 42,59 per tonne, does not put the company in Curaçao in a disadvantageous position when competing with other players on the market because the company is free to sell its products to markets that are closer to its place of operation than the Union.

(29) Exports of sugar, molasses and honey represent only 6 % of the total export of goods from Curaçao, except oil products. Container handling activities related to the import and export of sugar products represent only 2 % of the total container handling activities related to import and export. The contribution of these exports to the development of the territory can only be small at best.

(30) In terms of employment, it is expected that the derogation would create 10 additional jobs which is disproportionally low compared to the requested increase in production volume. In particular, the 10 additional jobs expected to be created is less than the 20 jobs lost since the request in 2010, where the Netherlands indicated that 35 persons worked in the company in Curaçao, and the second request of 2013 stating that 15 persons worked in the company.

CONCLUSION

(31) The impact of a refusal of the new derogation requested on 17 April 2013 would be minimal. A refusal would neither hinder the company in continuing its exports of sugar products to the Union nor would it deter investment in the sugar industry in Curaçao because the profit margin would still be sufficient to facilitate investments, even where the full duty rate is paid in the Union.

(32) As a result, the requested derogation is not justified with regard to paragraph 1, points (b) and (c) of paragraph 3, and paragraph 7 of Article 37 of Annex III to Decision 2001/822/EC.

(33) The measures provided for in this Decision are in accordance with the opinion of the Customs Code Committee,

HAS ADOPTED THIS DECISION:

Article 1

The request submitted on 17 April 2013 by the Netherlands, and completed on 14 and 28 June 2013, for derogation from Decision 2001/822/EC, as regards the rules of origin for sugar from Curaçao, is hereby rejected.

Article 2

This Decision is addressed to the Member States.

Done at Brussels, 17 September 2013.

For the Commission

Algirdas ŠEMETA

Member of the Commission

([1]) OJ L 299, 16.11.2007, p. 1.