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(Acts whose publication is obligatory)

COUNCIL REGULATION (EEC) No 1681/79

of 1 August 1979

amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community, and in particular Article 113 thereof,

Having regard to the proposal from the Commission,

Whereas Council Regulation (EEC) No 459/68 [1], as last amended by Regulation (EEC) No 1411/77 [2], sets out common rules on protection against dumping or the granting of bounties or subsidies by countries which are not members of the Community, in conformity with existing international obligations and, in particular, with those resulting from Article VI of GATT and from the anti-dumping code ;

Whereas the application of certain of these rules demonstrates that it is expedient to clarify certain concepts which are contained in the said rules, taking account *inter alia* of the established practice of the Community's major trading partners ;

Whereas, in particular, the term 'normal value' should be incorporated in the rules on the determination of dumping ;

Whereas, in situations where the price of the like product on the domestic market does not permit a proper comparison, it is appropriate to introduce the term 'constructed value' and to confirm the Community's position with regard to the question of the profit to be added when calculating the constructed value ;

Whereas it is appropriate to give examples of situations in which sales may be considered as not having been made in the ordinary course of trade, in particular with regard to cases where a product is sold at prices which are less than the costs of production, and to list the possible methods of determining normal value ;

Whereas it is appropriate to codify the Community's established practice in the case of imports from non-market-economy countries ;

Whereas it is expedient to define the export price and to enumerate the necessary allowances to be made in those cases where reconstruction of such price from the first open-market price is required ;

Whereas, in so far as allowances applicable in making comparisons between export price and normal value are concerned, it is advisable to draw attention to the fact that the burden of proof falls on the person claiming the allowances and to list the circumstances which may justify adjustments ;

Whereas the term 'dumping margin' should be more clearly defined and the Community's established practice for methods of calculation where prices of margins vary should be codified ;

Whereas it is appropriate to clarify the rules regarding the determination of injury and, in particular, to ensure that injuries caused by other factors may not be attributed to dumping ;

Whereas it is appropriate to clarify the conditions under which interested parties may have access to information used in the course of investigations and may ask to be informed of the essential facts and considerations on the basis of which it is intended to recommend definitive measures ;

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[1] OJ No L 93, 17. 4. 1968, p. 1.
[2] OJ No L 160, 30. 6. 1977, p. 4.

Whereas, in order to discourage dumping, it is appropriate to provide, in cases where the facts as finally established show that there is dumping and injury, for the possibility of definitive collection of provisional duties even if the imposition of a definitive anti-dumping duty is not decided on, on particular grounds ;

Whereas it is appropriate to modify certain of the rules governing the extension of provisional anti-dumping measures which have proved impracticable in cases involving a number of importers or exporters ;

Whereas it is appropriate to establish a simplified procedure for examining applications for refunds of anti-dumping duties ;

Whereas the modifications contained in this Regulation do not prejudge any subsequent adaptation of the Community's anti-dumping Regulations which could result from the multilateral trade negotiations within the framework of GATT,

HAS ADOPTED THIS REGULATION :

Article 1

Article 3 of Regulation (EEC) No 459/68 is replaced by the following :

'Article 3

1. A product introduced into Community trade shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product.

2. (a) For the purposes of this Article, the normal value shall be :

(aa) the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin ; or

(bb) when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison :

(i) the comparable price of the like product when exported to any third country, which may be the highest such export price but should be a representative price, or

(ii) the constructed value, i.e. the cost of production — including overheads — in the country of origin, plus a reasonable profit margin ; as a general rule, and provided that a profit is normally realized on sales of products of the same general category on the domestic market of the country of origin, the addition for profit shall not exceed such normal profit. In other cases, the addition shall be determined on any reasonable basis, using available information.

(b) Whenever there are reasonable grounds for believing or suspecting that the price at which a product is actually sold for consumption in the country of origin is less than its cost of production, sales at such prices may be considered as not having been made in the ordinary course of trade if they :

(aa) have been made over an extended period of time and in substantial quantities ; and

(bb) are not at prices which permit recovery of all costs within a reasonable period of time in the normal course of trade.

In such circumstances, the normal value may be determined on the basis of the remaining sales on the domestic market made at a price which is not less than the cost of production or on the basis of export sales to third countries, on the basis of the constructed value or by adjusting the sub production-cost price referred to above in order to eliminate loss and provide for a reasonable profit. Such normal-value calculations shall be based on available information.

(c) In the case of imports from non-market economy countries and, in particular, those to which Regulations (EEC) No 2532/78 [1] and (EEC) No 925/79 [2] apply, normal value shall be determined in an appropriate and not unreasonable manner on the basis of one of the following criteria :

[1] OJ No L 306, 31. 10. 1978, p. 1.
[2] OJ No L 131, 29. 5. 1979, p. 1.

(aa) the price at which the like product of a market economy third country is actually sold :

(i) for consumption on the domestic market of that country, or

(ii) to other countries, including the Community ; or

(bb) the constructed value of the like product in a market economy third country ; or

(cc) if neither price nor constructed value as established under (aa) or (bb) above provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin.

(d) Where a product is not imported directly from the country of origin but is exported to the Community from an intermediate country, the normal value shall be the comparable price actually paid or payable for the like product on the domestic market of either the country of export or the country of origin. The latter basis might be appropriate *inter alia,* where the product is merely transshipped through the country of export, where such products are not produced in the country of export or where no comparable price for it exists in the country of export.

3. (a) The export price shall be the price actually paid or payable for the product sold for export to the Community.

(b) In cases where there is no export price or where it appears that there is an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer, or if the product is not resold to an independent buyer, or not resold in the condition imported, on any reasonable basis. In such cases, allowance shall be made for all costs incurred between importation and resale, including all duties and taxes, and for a reasonable profit margin.

Such allowances shall include, in particular, the following :

(aa) usual transport, insurance, handling, loading and ancillary costs ;

(bb) customs duties, any anti-dumping duties and other taxes payable in the importing country by reason of the importation or sale of the goods ;

(cc) a reasonable margin for overheads and profit and/or any commission usually paid or agreed.

4. (a) For the purposes of a fair comparison, the export price and the normal value shall be compared at the same level of trade, normally at the ex-factory level, and as nearly as possible at the same time.

(b) Due allowance shall be made in each case, on its merits, for differences in conditions and terms of sale, for differences in taxation and for other differences affecting price comparability, provided that interested parties claiming such allowances can satisfactorily prove that their claim is justified.

The following guidelines shall apply in determining these allowances :

(aa) differences in merchandise : allowance for such differences shall normally be based on the effect on the market value in the country of origin or export ; however, where domestic pricing data in that country are not available or do not permit a fair comparison, the calculation shall be based on those production costs accounting for such differences ;

(bb) differences in quantities : allowances shall be made when the amount of any price differential is wholly or partly due to either :

(i) price discounts for quantity sales which have been made freely available in the normal course of trade over a representative preceding period of time, usually not less than six months, and in respect of a substantial proportion, usually not less than 20 %, of the total sales of the product under consideration made on the domestic market or, where applicable, on a third-

country market; deferred discounts may be recognized if they are based on consistent practice in prior periods, or on an undertaking to comply with the conditions required to qualify for the deferred discount, or

(ii) to savings in the cost of producing different quantities.

However, when the export price is based on quantities which are less than the smallest quantity sold on the domestic market or, if applicable, to third countries, then the allowance shall be determined in such a manner as to reflect the higher price for which the smaller quantity would be sold on the domestic market or, if applicable, on a third-country market;

(cc) differences in conditions and terms of sale: allowances shall be limited, in general, to those differences which bear a direct relationship to the sales under consideration and include, for example, differences in credit terms, guarantees, warranties, technical assistance, servicing and commissions; the amount of these allowances shall normally be determined by the cost of such differences to the seller, though consideration may also be given to their effect on the value of the product;

(dd) allocation of costs: in general, all cost calculations shall be based on available accounting data, normally allocated, where necessary, in proportion to the turnover for each product and market under consideration.

(c) No product shall be considered to have been dumped by reason of the exemption of such product from duties or taxes borne by the like product when destined for consumption in the country of origin or export, or by reason of the refund of such duties or taxes.

5. "Dumping margin" means the amount by which the normal value exceeds the export price.

Where prices vary, the dumping margin may be established on a transaction-by-transaction basis or by reference to the most frequently occurring, representative or weighted average prices.

Where dumping margins vary, weighted averages may be established.'

Article 2

Article 4 (1), (2) and (3) of Regulation (EEC) No 459/68 is replaced by the following:

'1. The evaluation of the effect of the dumped imports on the industry in question shall be based on examination of all factors having a bearing on the state of the industry, such as developments and prospects with regard to turnover, market share, profits, prices (including the extent to which the delivered duty-paid price is lower or higher than the most representative comparable price of the like product prevailing in the ordinary course of trade within the Community), employment, volume of dumped and other imports, utilization of capacity of Community industry, productivity and restrictive trade practices. No one or several of these factors can necessarily give decisive guidance.

2. In order to establish whether dumped imports are causing injury, all other factors which, individually or in combination, are known to be adversely affecting the Community industry shall also be taken into consideration. The factors to be considered are, among others, the volume and prices of other imports of the product in question, competition between the Community producers themselves, contraction in demand due *inter alia* to substitution of other products or to changes in consumer tastes and export performance.

3. (a) No injury may be attributed to dumping unless the dumped imports are demonstrably the principal cause of such injury. For the purpose of such demonstration, the consequences of dumping positively found to be such shall be weighed against each of the other known factors which at the same time may be injuring the industry. The injuries caused by such other factors shall not be attributed to the dumped imports.

(b) Determination of injury shall in all cases be based on positive findings and not merely on allegation, conjecture or remote possibility. In the case of threatened injury, the change in circumstances which would create a situation in which dumping would cause injury shall be clearly foreseen and imminent.'

Article 3

Article 10 (4) of Regulation (EEC) No 459/68 is replaced by the following:

'4. (a) The complainant and the importers and exporters known to be concerned, as well as the representatives of the exporting country, may inspect all information made available to the Commission by any party to an investigation as distinct from internal documents prepared by the authorities of the Community or its Member States, provided that it is relevant to the defence of their interests and not confidential within the meaning of Article 11 and that it is used by the Commission in the anti-dumping investigation. To this end, they shall address a written request to the Commission, indicating the information required.

(b) Exporters and importers of the product subject to investigation may request to be informed of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive duties or the definitive collection of amounts secured by way of a provisional duty.

(c) (aa) Requests for information pursuant to (b) shall:

(i) be addressed to the Commission in writing,

(ii) specify the particular issues on which information is sought,

(iii) be received not later than one month after publication of the notice of initiation of the investigation or, in the cases where a provisional duty has been imposed, within two weeks of the date of publication of the imposition of such duties, whichever is the earlier.

(bb) The information may be given either orally or in writing, as considered appropriate by the Commission. It shall not prejudice any subsequent decision which may be taken by the Commission or the Council. Confidential information shall be treated in accordance with the provisions of Article 11.

(cc) Information shall be given no later than 15 days prior to the submission by the Commission of any proposal for final action pursuant to Article 17. Representations made after the information is given shall be taken into consideration only if received not later than 10 days following the giving of such information.'

Article 4

Article 14 (2) (a) of Regulation (EEC) No 459/68 is replaced by the following:

'2. (a) Anti-dumping procedures may be terminated without imposition of anti-dumping duties or provisional measures where, during examination of the matter, exporters give a voluntary undertaking to revise their prices so that the dumping margin is eliminated or to stop their exports of the product in question to the Community, provided that the Commission, after hearing the opinions expressed within the Committee, considers this acceptable. Such termination shall be decided in accordance with the procedure laid down in the foregoing paragraph. It shall not preclude the definitive collection of amounts secured by way of provisional duties pursuant to Article 17 (2).'

Article 5

Article 16 (2) of Regulation (EEC) No 459/68 is replaced by the following:

'2. Not less than one month before expiry of the period of validity of the provisional duty, the Commission shall submit a proposal to the Council, either for definitive Community action or, if exporters and importers representing a significant proportion of the trade involved so request or do not object and if examination of the matter has not yet been completed, for the extension of the provisional measures for a period not exceeding three months.

The Council shall act by a qualified majority.'

Article 6

Article 17 of Regulation (EEC) No 459/68 is replaced by the following:

'Article 17

1. Where the facts as finally established show that there is dumping and injury and the interests of the Community call for Community intervention, the Commission shall, after hearing the opinions expressed within the Committee, submit a proposal to the Council. The Council shall act by a qualified majority.

2. (a) Where a provisional duty has been applied, the Council shall decide, irrespective of whether a definitive anti-dumping duty is to be imposed, what proportion of the provisional duty is to be definitively collected. The Council shall act by a qualified majority on a proposal from the Commission.

(b) The definitive collection of such amount shall not be decided upon unless the facts as finally established show that there has been dumping and material injury (and not merely a threat of material injury or material retardation of the establishment of a Community industry) or that such injury would have been caused if provisional action had not been taken.'

Article 7

Article 19 (4) of Regulation (EEC) No 459/68 is replaced by the following:

'4. (a) Where an importer can show that the duty collected exceeds the actual dumping margin, consideration being given to any application to dumping margins of weighted averages, the amount in excess of the margin shall be returned to him; where provisional measures were taken, the same shall apply in respect of the release of securities.

(b) For this purpose, the importer may, within three months of the date on which the products were entered for consumption, submit an application to the Member State in the territory of which they were so entered. That Member State shall forward the application to the Commission as soon as possible, either with or without an opinion as to its merits. The Commission shall inform the other Member States forthwith and give its opinion on the matter. If the Member States agree with the opinion given by the Commission or do not object to it within one month of being informed, the Member State in question may decide in accordance with the said opinion. In all other cases, the Commission shall, after consultations within the Committee, decide whether and to what extent the Member State should grant the application.'

Article 8

The reference 'Article 3 (5)' in Article 22 of Regulation (EEC) No 459/68 is replaced by 'Article 3 (4) (c)'.

Article 9

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

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

Done at Brussels, 1 August 1979.

For the Council

The President

M. O'KENNEDY