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(Acts whose publication is obligatory)

COUNCIL REGULATION (EEC) No 2808/89

of 18 September 1989

imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports

THE COUNCIL OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (1), and in particular Article 12 thereof,

Having regard to the proposal submitted by the Commission after consultation within the Advisory Committee as provided for under that Regulation,

Whereas :

A. Provisional measures

(1) The Commission, by Regulation (EEC) No 707/89 (2), imposed a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union. That duty was extended for a maximum period of two months by Regulation (EEC) No 2165/89 (3).

B. Subsequent procedure

(2) Following the imposition of the provisional anti-dumping duty, the Community producer and an independent importer (who also transforms the product) requested, and were granted, an opportunity to be heard by the Commission. They also made written submissions known their views on the findings.

(3) Upon request, the Community producer and the importer were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive duties and the definitive collection of amounts secured by way of a provisional duty. They were also granted a period within which they could make further representations to these disclosure meetings. The importer made comments which were considered prior to the Commission finalizing its conclusions.

The Chinese and Soviet exporters were also informed of the intention to recommend the imposition of definitive duties higher than the amount of the provisional anti-dumping duties. The Chinese exporter responded by repeating an allegation concerning injury, which was considered prior to the Commission finalizing its conclusions.

C. Description of the product

(4) In its provisional findings, recital 6 of Regulation (EEC) No 707/89, the Commission had concluded that calcium metal is used chiefly in the metallurgical and uranium industries. This conclusion was contested by one importer, who also transforms the product in question, on the gounds that calcium metal is no longer used in the production of uranium. The Commission has examined this claim and has found that, whilst calcium metal continues to be used in the uranium industry, this usage is indeed limited and that calcium metal is used essentially in the metallurgical industry.

(5) The same importer has also claimed that the imported calcium metal from the People's Republic of China and the Soviet Union is not a like product to calcium metal produced in the Community. The importer has alleged that Community-produced calcium metal is of a poorer quality and is more difficult to transform than Chinese or Soviet imported calcium metal and that only Chinese and Soviet imported calcium metal can be used for many of the uses of that product.

(1) OJ No L 209, 2. 8. 1988, p. 1.
(2) OJ No L 78, 21. 3. 1989, p. 10.
(3) OJ No L 208, 20. 7. 1989, p. 1.

With respect to physical and technical characteristics, although Community-produced calcium metal, without distillation, is of a slightly lower degree of purity than Chinese and Soviet imported calcium metal, both the Community-produced calcium metal and the imported products are commercial grade material and both need further distillation to produce the highest purity grade of calcium metal.

The majority of calcium metal end uses are for metallurgical applications, where, in many cases, Community-produced calcium metal is directly substitutable by Chinese and Soviet imported calcium metal. the importer has claimed that only calcium metal from the People's Republic of China and the Soviet Union can be used for certain technical applications in the iron and steel industry and for calcium thermic reactions, although this claim was denied by the Community producer. The importer has also requested that an expert be nominated to carry out a technical analysis of the products in question. This request has not been accepted since the importer, as a transformer, whilst claiming to experience difficulties in using the Community product, has itself acknowledged that it can technically use the Community-produced calcium metal instead of the Chinese or Soviet imported product. The importer has even complained that the Community producer has refused to supply Community produced calcium metal for its use. (See recital 15 below).

(6) The Soviet exporter had also claimed during the procedure that its product was not a like product to the Community producer, but on the grounds that Soviet-produced calcium metal was poorer in quality. No end user of calcium metal has either requested a hearing or made any written submission to contest the Commission's findings on this subject.

In these circumstances, the Commission has concluded that, although Community-produced calcium metal is of a slightly lower degree of purity than Chinese and Soviet imported calcium metal, Community produced calcium metal and, the imported product from the People's Republic of China and the Soviet Union have sufficiently close physical and technical characteristics, the same end uses and the same markets to be considered as like products.

(7) In the light of the findings presented in Regulation (EEC) No 707/89 (recitals 6 to 8), and of the considerations set out above, the Council concludes that the Chinese and Soviet imports are like products to calcium metal produced in the Community, within the meaning of Article 2 (12) of Regulation (EEC) No 2423/88.

D. Dumping

(8) In establishing the normal value, the Commission had to take account of the fact that neither the People's Republic of China nor the Soviet Union have a market economy and that, therefore, in accordance with Regulation (EEC) No 2423/88, normal value should be determined with reference to prices or costs of a producer or producers in a market economy country. In this connection the Commission based its calculation of normal value on the domestic market prices of the like product in the United States and set out its reasons for so doing in recital 11 of Regulation (EEC) No 707/89.

One importer contested the calculation of the normal value alleging that the prices used by the Commission were based on inter-company transactions by the United States producer and that, as a result, the United States producer had made excessive profits. To support this claim, the importer produced statistics for United States consumption for the year 1983 and suggested, therefore, that normal value should be determined on the basis of constructed value, as per Article 2 (5) (b) of Regulation (EEC) No 2423/88.

The Commission has only taken sales transactions to independent end users into account for the period of the investigation, namely the year of 1987, to determine prices and, as pointed out in recital 11 of Regulation (EEC) No 707/89, the prices charged by the United States producer during the reference period allowed a reasonable but not excessive profit. The Council therefore confirms the Commission's provisional findings concerning the basis for determining the normal value.

(9) As regards the calculation of normal value, the Commission has only considered the United States sales prices of calcium metal crowns and pieces requiring no distillation or major transformation of form by the producer, and determined a weighted average normal value.

(10) Export prices were determined on the basis of prices actually paid or payable for the Chinese or Soviet product sold for export to the Community.

(11) In comparing normal value with export prices, the Commission took account, where appropriate, of differences affecting price comparability, including transport, insurance, handling, loading and ancilliary costs, commissions paid in respect of the sales under consideration, and credit terms. All comparisons were made on an ex-works basis.

One importer has claimed that an adjustment for physical characteristics should be made as the quality of the United States produced calcium metal is slightly lower than that of the Chinese and Soviet product. This request has not been accepted as the normal value in the United States market was determined by; restricting the calculation to sales prices of calcium metal crowns and pieces, requiring no distillation or major transformation, i.e. those products directly comparable to, and which compete directly with, Chinese and Soviet products.

(12) The comparison showed that Chinese and Soviet exports to the Community were being dumped during the reference period. Weighted average dumping margins, calculated as a percentage of the net, free-at-Community-frontier price of the product, before duty, are 21,8 % for the Chinese product and 22,0 % for the Soviet product. The Council confirms these definitive dumping margins.

E. Injury

(13) As regards the injury caused by the dumped imports, one importer has advanced six arguments to contest the Commission's conclusions as set out in Regulation (EEC) No 707/89.

The first argument is that the year 1985 cannot serve as the reference year for examining injury as the Community production in the year 1985 is not in line with the trend for production recorded in the years 1981 to 1983.

The argument cannot be accepted since the period for the examination of injury, the years from 1985 to 1987, was chosen as these years corresponded to the most recent period for the examination of the trend of imports into the Community. As regards the production figures for this period, they have been verified by the Commission. References made by the importer to trends in the earlier years of 1981 to 1983 are not therefore considered relevant.

(14) The second argument is that the producer's decision to invest in new capacity was not justified and was responsible for the fall in capacity utilization.

This claim is considered to be unfounded. In recital 20 of Regulation (EEC) No 707/89, the Commission had referred to investments made by the Community producer in 1985 and 1986. The decision, however, to invest in new capacity, representing a 35 % increase, was taken in 1984 when capacity utilization was at a level of 92 % and with the market in a state of expansion. In any event, the announcement to double capacity, to which the importer is referring, was consequently suspended and has not taken place.

(15) The third argument concerns a claim that the Community producer has suffered self-inflicted injury in refusing to supply calcium metal to the importer, who has begun Court proceedings in one Member State against the Community producer alleging abuse of dominant position.

The Commission notes that the Community producer has denied these allegations and that no final judgement has yet been reached in the Court proceedings in the Member State concerned.

The Commission takes the view that the purpose of anti-dumping proceedings is not, and cannot be, to condone or encourage restrictive business practices, and that the initiation of such a proceeding does not therefore deprive an undertaking of its right to initiate proceedings under Articles 85 or 86 of the Treaty, the outcome of which cannot be prejudiced by an anti-dumping investigation. Moreover, if and when an infringement of Articles 85 and 86 is discovered and a decision has been made under Regulation No 17 [1], the Commission may review the present anti-dumping proceeding in accordance with Article 14 (1) of Regulation (EEC) No 2423/88.

(16) The fourth argument is that the fall in sales price of the Community producer was not only due to competition from imported products but also due to a lack of competition in the absence of any other producers, coupled with poor management practices and high fixed costs of the Community producer. The importer requested that the Commission should recalculate the selling prices of the Community producer by deducting the level of its fixed costs.

The request cannot be accepted since the Commission has established the actual selling prices in the marketplace based on the sales transactions to independent purchasers. In addition, it has been found that the fall in sales price has occurred during the period in which imports of Chinese and Soviet calcium metal have increased in terms of both volume and market share. In any event, fixed costs are not a factor to be deducted in

[1] OJ No 13, 21. 2. 1962, p. 204/62.

determining the actual sales prices found in the marketplace. Under these circumstances, there is no reason to recalculate the selling prices.

(17) The fifth argument claims that other third country imports have been responsible for any injury caused.

The Commission, in its preliminary determination, has already examined whether the injury sustained by the Community producer was caused by factors other than the dumped imports. With respect to the level of imports from other third countries, these have declined by over 46 % during the period 1985 to 1987 with a reduction in market share. Additionally the price of other imports during the reference period was found to be higher than those of the imported Chinese and Soviet product.

(18) The sixth argument alleges that, prior to 1985, it was the Community producer who practised price undercutting and forced the Chinese and Soviet exporters to follow its prices. This allegation was also made by the Chinese exporter.

The Commission, in its preliminary conclusions, had established price undercutting by the Chinese and Soviet exporters during the reference period. A recalculation of the undercutting figures, based on weighted average cif export prices, shows price undercutting of 6,5 % for the Chinese imported product and 9,8 % for the Soviet imported product, i.e. figures lower than provisionally established (10,7 % and 11,2 % respectively). The argument as to who started the price undercutting, prior to 1985, is now considered difficult, if not impossible, to determine and in any event, whether the exporters concerned initially intended only to align their prices on those of the Community producer is not considered relevant to the issue of price undercutting during the period in which injury had been examined. The recalculation of price undercutting has confirmed that there is evidence that dumped Chinese and Soviet exorts have undercut the prices of the Community producer.

(19) None of the above arguments put forward by the importer calls into question the conclusions as regards the injury to the Community industry which the Commission reached in its preliminary conclusions, recitals 16 to 22 of Regulation (EEC) No 707/89. Consequently, the Council confirms those conclusions.

F. Community interest

(20) One importer has also disputed the Commission's preliminary conclusions concerning Community interest. Firstly, it is claimed that calcium metal is no longer used in the production of uranium and therefore there is no strategic reason for maintaining calcium metal production in the Community.

This claim, referring to the use of calcium metal in the production of uranium, has already been examined in recital 4 above. Even without this particular use, the Commission, however, still considers that, in the absence of any protection against the injurious effects of the dumped Chinese and Soviet imports, the viability of the sole Community producer would be jeopardized and the Community would then be entirely dependent on outside sources of calcium metal for use in the metallurgical industry.

(21) Secondly, the importer, who also transforms the product, has alleged that the impact of a duty would significantly increase its costs and threaten its viability to continue in business.

The Commission is unable to accept this claim. An examination of the submission made by the importer shows that the importer has based its claim on a calculation incorporating, not only the expected duty increase but also, other increases in product costs and changes in currency rates in the period 1988 to 1989. The Commission, in examining the impact of theduty on imports of calcium metal, has necessarily to base its examination on the facts established in the investigation period. This shows that the proposed measures would have the effect of a limited increase in the total costs of a company which transforms the product and an insignificant increase for the Community end users of calcium metal.

(22) Finally, the importer has claimed that it is in the interest of the Community to pursue developments in the industrial sector of new types of magnets, to which the importer as a transformer of calcium metal is a leading contributor through the use of imported Chinese and Soviet calcium metal.

The claim has already been examined under two aspects — namely 'like product' and cost increase — and has had to be rejected for the following reasons. With regard to 'like product' it was shown in recital 5 that Chinese and Soviet imported products are considered as like products to the Community calcium metal. Secondly, with regard to cost increase as discussed in recital 21 above, the limited impact of definitive anti-dumping duties, on the total costs of a company which transforms calcium metal is not considered to be an economic deterrent to pursuing these developments.

(23) No Community end users have either requested a hearing or made any written submission after the imposition of provisional measures.

Taking into account the considerations set out above, the Council has come to the conclusion that it is in the Community's interest that action be taken and that protection of the Community's interest calls for the imposition of a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union.

(24) One independent importer has also requested a special exemption in the event that a decision should be taken to impose definitive duties. The Council is unable to grant such a request from an independent importer, when it is clear that it is in the Community's interest that action be taken to prevent the injurious effect of dumped Chinese and Soviet imports and since this objective would be rendered nugatory if such an exemption were to be made and which would also be difficult to defend on the grounds of equality of treatment of all imorters.

G. Definitive duty

(25) The Commission has re-examined the purchase prices of the Community importers with the selling price necessary to provide an adequate profit (5 % margin on the sales price) for the Community producer, the injury threshold. Taking into account the conclusions reached concerning injury, that there has been price undercutting and that the Community producer has suffered considerable financial losses in selling below its production cost, the Commission has concluded that definitive anti-dumping duties should be imposed upon imports of calcium metal originating in the People's Republic of China and the Soviet Union higher than the amount of the provisional anti-dumping duties and equivalent to the definitive dumping margins found, which are below the injury threshold. The Council confirms this conclusion.

(26) The Council considers that, to ensure the effectiveness of the protective measures and to facilitate customs clearance, the definitive duty should take the form of an *ad valorem* duty.

H. Collection of the provisional duty

(27) The amounts secured by way of provisional anti-dumping duty should therefore be collected in their entirety,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of calcium metal originating in the People's Republic of China and the Soviet Union and corresponding to CN code 2805 21 00, and the rate thereof is set as follows:

(a) The rate of duty for calcium metal originating in the People's Republic of China shall be 21,8 % of the net, free-at-Community-frontier price of the product, before duty;

(b) The rate of duty for calcium mtal originating in the Soviet Union shall be 22,0 % of the net, free-at-Community-frontier price of the product, before duty.

2. The provisions in force with regard to customs duties shall apply.

Article 2

The sums secured by way of provisional anti-dumping duty under Regulation (EEC) No 707/89 shall be definitively collected.

Article 3

This Regulation shall enter into force on the 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, 18 September 1989.

For the Council

The President

E. CRESSON