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(Acts whose publication is obligatory)

COUNCIL REGULATION (EEC) No 1391/91

of 27 May 1991

imposing a definitive anti-dumping duty on imports of aspartame originating in Japan and the United States of America

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 with the Advisory Committee as provided for in the above Regulation,

Whereas :

A. PROVISIONAL MEASURES

(1) The Commission, by Regulation (EEC) No 3421/90 [2], imposed a provisional antidumping duty on imports of aspartame originating in Japan and in the United States of America (USA). That duty was extended for a maximum period of two months by Council Regulation (EEC) No 792/91 [3].

B. SUBSEQUENT PROCEDURE

(2) Following the imposition of the provisional antidumping duty, the Japanese and the American producers/exporters named in Regulation (EEC) No 3421/90 and the complainant each requested, and were granted, a hearing with regard to the findings set out in this Regulation. They also made written submissions making their views known on the findings.

(3) A number of consumers of aspartame made written submissions to the Commission. However, only one of them substantiated its views.

(4) Upon request, parties were also informed, both orally and subsequently in writing, 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 also were granted a period within which to make representations in accordance with to Article 7 (4) (c) (iii) of Regulation (EEC) No 2423/88.

(5) The oral and written submissions and comments of the parties were considered and, where appropriate, the Commission's findings were modified to take account of them.

(6) Due to the complexity of the proceeding, in particular to the detailed verification of the data and the numerous arguments put forward, the investigation could not be concluded within the time limit provided for in Article 7 (9) (a) of Regulation (EEC) No 2423/88.

(7) The Commission has disregarded all studies and submissions, for which no meaningful non-confidential summary was submitted, since this would have deprived the other parties of their rights of defence.

C. DUMPING

(a) THE UNITED STATES OF AMERICA

I. Normal value

(8) Normal value has been established on the basis of the weighted average domestic price, net of all discounts, in accordance with Article 2 (3) (a) of Regulation (EEC) No 2423/88. In the absence of new arguments the findings laid down in recitals 12 to 19 of Regulation (EEC) No 3421/90 are confirmed.

[1] OJ No L 209, 2. 8. 1988, p. 1.
[2] OJ No L 330, 29. 11. 1990, p. 16.
[3] OJ No L 82, 28. 3. 1991, p. 1.

The Council confirms the Commission's findings in this regard.

II. Export price

(9) As set out in recital 20 of Regulation (EEC) No 3421/90 export prices have been determined on the basis of the price actually paid or payable for the product sold for export to the Community in accordance with Article 2 (8) (a) of Regulation (EEC) No 2423/88. In the absence of new arguments the findings laid down in recitals 20 to 23 of Regulation (EEC) No 3421/90 are confirmed by the Council.

III. Comparison

(10) As set out in recital 28 of Regulation (EEC) No 3421/90 due allowance has been made in accordance with Article 2 (9) and (10) of Regulation (EEC) No 2423/88 with regard to both the export price and the normal value for the differences affecting price comparability. The allowances granted on this basis were set out in recital 29 of Regulation (EEC) No 3421/90 and are confirmed. All adjustments requested by the NutraSweet Co. have been granted, irrespective of their justification, since they had no influence on the outcome of the case.

(11) The Council confirms the Commission's findings on adjustments given for the purpose of a fair comparison between normal value and export price.

IV. Dumping margin

(12) Normal value was compared with the export prices on a transaction by transaction basis. The examination of the facts shows the existence of dumping in respect of aspartame originating in the USA, the margin of dumping being equal to the amount by which the normal value as established exceeds the price for export to the Community.

(13) The weighted average margin of dumping amounts to ECU 66 per kilogram.

The Council confirms the Commission's findings on the dumping margin.

(b) JAPAN

I. Normal value

(14) Following the imposition of provisional anti-dumping duties the Commission has reconsidered the dumping situation.

This case presents the particularity that the Japanese product was not imported into the Community directly from Japan, but was first exported to the USA. For such a situation Article 2 (6) of Regulation (EEC) No 2423/88 provides that normal value can be established on the basis of prices paid or payable in either the country of origin (Japan) or the country of export (USA) and that the price in the country of origin (Japan) might be appropriate in cases where the product is merely transhipped through the country of export (USA), where the product is not produced in the country of export (USA) or where no comparable price for it exists there.

(15) The investigation revealed that the product was not merely transhipped through the USA but was actually sold to and imported by the US producer/exporter in the USA before exportation to the Community. The investigation also showed that there was substantial production within the USA and that there was a comparable price for aspartame in the USA.

(16) In these circumstances the conditions under which, pursuant to Article 2 (6) of Regulation (EEC) No 2423/88, the country of origin might be considered appropriate as a basis for establishing normal value are not fulfilled.

(17) In addition, the investigation showed that the Japanese product was fully interchangeable with the US material, and that almost the entire production of the Japanese manufacturer was purchased and warehoused by the US exporter which subsequently sold the product both inthe USA and for export to the Community.

(18) The Commission therefore based normal value on US domestic prices.

(19) Consequently there is no need to consider the offer made by the Japanese producer/exporter to supply new information on normal value on the Japanese market. The Japanese producer/exporter offered to provide this new information after the imposition of provisional duties. In any event, it should be noted that the verification of these data would require a further on spot investigation in Japan. The Commission considers, however, that such an approach would not be justified, especially in cases like the present, where the exporter was able to provide the information in a timely fashion, but decided not to do so.

(20) The Council confirms the Commission's findings and conclusions in this regard.

II. **Export price**

(21) Since all exports by the Japanese exporter were made through a related company in Switzerland, which sold the products to unrelated customers in the Community, export prices should be determined on the basis of a constructed export price in accordance with Article 2 (8) (b) of Regulation (EEC) No 2423/88.

(22) However, the Commission was not allowed by the Swiss authorities to carry out an on-the-spot investigation at the premises of the Swiss company. Furthermore, it was noted that already on the basis of the resale price by the Swiss company, before deducting all costs between importation and resale and profit, the dumping margin largely exceeded the level of the duty necessary to eliminate the injury. The Commission consequently based its calculation on those prices.

The Council confirms the Commission's findings.

III. **Comparison**

(23) As set out in recital 28 of Regulation (EEC) No 3421/90, due allowance has been made in accordance with Article 2 (9) and (10) of Regulation (EEC) No 2423/88 with regard to both the export price and the normal value for the differences affecting price comparability. The allowances granted on this basis were set out in recital 29 of Regulation (EEC) No 3421/90 and are confirmed. All adjustments requested have been granted, irrespective of their justification, since they had no influence on the outcome of the case.

The Council confirms the Commission's findings on adjustments made for the purpose of a fair comparison between normal value and export price.

IV. **Dumping margin**

(24) Normal value was compared with the export prices on a transaction-by-transaction basis. The examination of the facts shows the existence of dumping in respect of aspartame originating in Japan, the margin of dumping being equal to the amount by which the normal value as established exceeds the price for export to the Community.

(25) The weighted average margin of dumping amounts to ECU 47 per kilogram for aspartame originating in Japan.

The Council confirms the Commission's findings on the dumping margin.

D. **INJURY**

(26) After the imposition of the provisional anti-dumping duties, the US and Japanese exporters repeated their allegations that the Community producer had not suffered any injury, since it had increased its market share and capacity utilization. However, no new arguments have been presented. Therefore the findings laid down in recitals 33 to 40 of Regulation (EEC) No 3421/90 with regard to injury are confirmed. In summary, to determine whether the Community industry concerned suffered material injury account has been taken of the following factors :

The Community producer began selling in 1988 and obtained a relatively small part of the Community market which is still largely held by the US and Japanese producers/exporters. This market penetration was countered by the American competitors by a dramatic price drop which resulted in considerable losses for the Community industry and prevented it form increasing its utilisation of production capacity which would have allowed it to benefit from economies of scale. At the end of the investigation period the losses had reached a dimension which was directly threatening the viability of the industry.

(27) On the basis of these factors it is determined that the Community industry suffered material injury within the meaning of Article 4 (1) of Regulation (EEC) No 2423/88. The considerations laid down in recitals 43 and 44 of Regulation (EEC) No 3421/90 are confirmed.

(28) The US producer/exporter repeated its arguemtns that the imports of US material were *de minimis* and could therefore not have caused injury to the Community producer. The US producer further argued that the Commission's method of cumulating the US and Japanese imports for the determination of injury was not justified, because it 'unduly embroiled' the US producer in an anti-dumping proceeding.

(29) The Council, however, considers that the cumulation is justified, because the US and the Japanese products are totally iterchangeable and because the majority of the imports into the Community are made throught their jointly owned company in Switzerland (NSAG). The cumulation is also appropriate in view of the close relationship between the US and the Japanese producers/exporters. The imposition of anti-dumping duties only on imports of the Japanese material would not necessarily eliminate the injurious dumping practices, given that they could easily be continued with American material being imported through NSAG on the basis of a joint decision by the two producers/exporters.

The Council confirms the Commission's findings and conclusions.

E. CAUSATION

(30) For the reasons set out in recitals 45 to 49 of Regulation (EEC) No 3421/90, it is considered that the dumped imports concerned caused the injury suffered by the Community industry. In fact, these sales took place at prices which did not cover costs and forced the Community producer to apply similarly low prices. No other factors were found which could have contributed to the injury.

(31) The exporters argued that the drop in prices on the Community market was due to fierce competition from ohter artificial sweeteners. However, that competition already existed before the Community producer came on the market. At any rate, even if the competition from ohter sweeteners has caused certain downward adjustments of the prices, the price drop observed at the time the Community producer decided to enter the market, was much more substantial.

Moreover competition between aspartame and other artificial sweeteners exists, admittedly to a lesser degree, also in the USA, where prices remained relatively stable at a very high level.

(32) In addition, it was argued that the difficulties of the Community industry were mainly due to a lack of efficiency of that industry. However, the Commission notes that efficiency largely depends on the scale of production. Had the Community producer been able to extend its production capacity as planned, it would have benefitted from economies of scale and would have become more competitive.

(33) The Council agrees with the above and confirms the Commission's findings and conclusions as set out in recitals 45 to 49 of Regulation (EEC) No 3421/90.

F. COMMUNITY INTEREST

1. General considerations

(34) The general considerations with regard to 'Community interest' (see recitals 51 to 54 of Regulation (EEC) No 3421/90) are confirmed.

II. Interest of the Community industry

(35) Recital 55 of Regulation (EEC) No 3421/90 is confirmed by the Council in particular as regards the necessity to safeguard the viability of the Community industry and to avoid the loss of several hundred jobs directly and indirectly related with the production of the Community industry.

III. Interest of other partiers

(36) With regard to interests of other parties it was indicated in recital 56 of Regulation (EEC) No 3421/90 that the Commission had received a number of submissions from end-users of aspartame in the Community which are mainly producers of low calorie soft drinks and other low calorie food products. The end-users claimed that a duty on the imports of aspartame would increase their costs, have the effect of removing competition and slow down the expected growth of the aspartame market.

In addition, it had been stated in recital 57 of Regulation (EEC) No 3421/90 that the Commission had not received any evidence substantiating the increase in costs for the end-users and the effect of possible increases on the prices of their products.

(37) Since the imposition of the provisional anti-dumping duty, the Commission recelved more submissions from the user industry alleging that the anti-dumping duty would substantially increase the price of their final product. However, despite the fact that it was mentioned in Regulation (EEC) No 3421/90 that no evidence substantiating these allegations had been submitted, these companies did not submit any evidence at a subsequent stage.

(38) In these circumstances the Commission's services had no other choice but to estimate, on the basis of the information available, what the impact of the definitive anti-dumping duty would be. It was found that the impact of the duty on the costs of the light soft drink producers, by far the largest consumers of aspartame in the Community, would be negligible. The same considerations apply to the consumers of light soft drinks.

(39) Therefore, the Council confirms the considerations laid down in recitals 58 to 60 of Regulation (EEC) No 3421/90.

IV. Development of demand for aspartame

(40) It has been argued that the imposition of an anti-dumping duty would lead to a considerable reduction in the demand for aspartame in the Community, i.e. substitution of aspartame by other artifical sweeteners. This argument is refuted for the following reasons :

— firstly, there is a growing health awareness in the Community with regard to the use of particular types of sweeteners,

— secondly, the Commission has proposed to the Council a Directive on sweeteners for use in foodstuffs, according to which aspartame is considered the sweetener with the highest maximum level allowed per kilogram or litre of foodstuff,

— thirdly, the imposition of anti-dumping duties will make aspartame in the Community more expensive but only to the extent required to eliminate the injury caused. This should only have a negligible effect on the prices paid by end consumers,

— fourthly, the demand for aspartame in the Community largely exceeds the existing production capacity in the Community. There will consequently be a continued demand for aspartame, both imported and produced in the Community.

(41) Furthermore it is considered that, even if the demand were in fact to decrease, this would not justify the continuation of injurious dumping.

The Council confirms the Commission's findings on Community interest.

G. CONCLUSIONS

(42) Having considered the various arguments of the exporters, the Commission concludes that it i in the Community's general interest to re-establish a fair competitive situation and to eliminate the injurious effects of the dumped imports. The benefits of such protection clearly outweigh any short-term effects, particularly on price.

The Council confirms the Commission's conclusions in this respect.

H. DUTY

(43) Provisional measures took the form of specific anti-dumping duties; these were imposed only at the level required to eliminate the injury although the dumping margins were much higher.

For definitive measures the Commission considers it appropriate to impose a duty in a similar specific form, the amounts being:

— ECU 27,21 per kilogram for aspartame originating in Japan,

— ECU 25,15 per kilogram for aspartame originating in the USA.

(44) On the basis of the above findings the Commission concludes that definitive anti-dumping duties should be imposed. In order to determine the level of the duty necessary to eliminate the injury, the Commission applied the same method as already set out in recitals 65 to 67 to Regulation (EWEC) No 3421/90. As regards the calculation of the cost of production of the Community industry, the Commission had to take account of the fact that some of the raw materials and services were purchased from a related company and that some costs did not relate to sales of aspartame in the Community. Actual research and development costs have now been included as well as direct selling costs. these adjustments lead to lower costs of prodution as a basis for the calculation of the reference price and thus the amount of the duty necessary to eliminate the injury.

(45) For the assessment of a reasonable profit margin the following elements have been taken into account:

— the fact that the Community producer is just getting beyond its start-up period,

— the uncertainty about the evolution of the future sales, which might be as favourable as in the United States of America, but could also develop negatively,

— the possibility of the development of substitute products, which could shorten the life-cycle of the product concerned;

Under those circumstances a return on turnover of 8 % is considered reasonable and appropriate.

(46) The producers/exporters argued that the Commission should not have established the reference price on the basis of the cost of production of the Community industry plus a reasonable profit margin, but on the basis of 'the price which would have been obtained in the Community in the absence of the dumped imports'. The Commission, however, notes that such a price would have been considerably higher than the price now established as the reference price, since dumping margins largely exceeded 100 %. Consequently, in the absence of the dumped imports, the Community industry would have been able to charge much higher prices than the actual reference price.

(47) The Council confirms the Commission's findings and conclusions with regard to the level of the duty.

(48) The Community producer requested the imposition of retroactive anti-dumping duties. However, it did not sufficiently substantiate its request. The Commission therefore dit not examine whether the conditions for the imposition of anti-dumping duties with retroactive effect as laid down in Article 13 (4) of Regulation (EEC) No 2423/88 are fulfilled. The Council confirms the Commission's position in this respect.

I. UNDERTAKINGS

(49) The producers/exporters offered price undertakings. After consultations these undertakings were not considered acceptable by the Commission. The Commission notified the producers/exporters of the reasons for this decision.

J. COLLECTION OF PROVISIONAL DUTIES

(50) In view of the dumping margins established and the seriousness of the injury caused to the Community industry, the Council considers it necessary that amounts collected by way of provisional anti-dumping duties should be definitively collected to the extent of the amount of the duties definitively imposed,

HAS ADOPTED THIS REGULATION :

Article 1

1. A definitive antidumping duty of ECU 25,15 per kilogram (net weight) is hereby imposed on imports of aspartame falling within CN code ex 2924 29 90 (Taric code : 2924 29 90*50) originating in the United States of America.

2. A definitive anti-dumping duty of ECU 27,21 per kilogram (net weight) is hereby imposed on imports of aspartame falling within CN code ex 2924 29 90 (Taric code : 2924 29 90*50) originating in Japan.

Article 2

The amounts secured by way of provisional anti-dumping duty pursuant to Regulation (EEC) No 3421/90 shall be definitively collected at the rates of duty definitively imposed. Amounts secured in excess of the rates of duty definitively imposed shall be released.

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, 27 May 1991.

For the Council

The President

G. WOHLFART