COUNCIL REGULATION (EEC) No 2834/91

of 23 September 1991

collecting definitively the provisional countervailing duty on imports of polyester fibres and polyester yarns originating in Turkey

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 Additional Protocol [2] to the Agreement establishing an Association between the European Economic Community and Turkey, and in particular Article 46 thereof,

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

Whereas :

A. Provisional measures and subsequent procedure

(1) The Commission, by Regulation (EEC) No 1432/91 [3] (hereinafter referred to as the Commission Regulation) imposed a provisional countervailing duty on imports of polyester fibres and polyester yarns originating in Turkey.

(2) Following the imposition of the provisional countervailing duty, the Turkish Government, three exporters and one importer made written submissions making known their views on the findings. The Turkish Government and one exporter who so requested were granted an opportunity to be heard by the Commission.

(3) 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.

B. Length of proceeding

(4) The initiation of this proceeding was announced in a notice published in the *Official Journal of the European Communities* [4]. The investigation of subsidies covered the period 1 July 1987 to 31 December 1988. The investigation exceeded the normal time period because of the volume and complexity of the data initially gathered and examined.

The Turkish Government and one Turkish exporter argued that the Commission had exceeded a reasonable period to finalize this proceeding and that some data was therefore out of date.

In this regard the Council has noted that for a considerable period of time before the imposition of countervailing duties, the Commission had, in vain, discussed with the Turkish authorities the possibility of an undertaking.

The Council confirmed the explanation of the Commission as outlined in recital 6 of the Commission Regulation.

C. Subsidization

General

(5) The Council considered in this specific case whether it would be appropriate to countervail subsidy schemes which were abolished after the investigation period.

The Council, taking into account evidence supplied by the Turkish Government and being convinced that no further benefits will accrue after the abolition of these subsidy schemes and in the understanding of the non re-introduction of these subsidies, considered it unnecessary to impose countervailing duties gainst such schemes.

Specific schemes

(6) The Commission identified 11 subsidy schemes, of which a number were considered countervailable.

Specific arguments were made on the following schemes by the Turkish Government and the Turkisch exporters.

Corporate tax exemption

(7) The Turkish Government and one Turkish exporter did not challenge the fact that this subsidy is contingent upon export performance, but contested the basis on which the Commission had calculated the level of countervailability of this

[1] OJ No L 209, 2. 8. 1988, p. 1.
[2] OJ No L 293, 29. 12. 1972, p. 4.
[3] OJ No L 137, 31. 5. 1991, p. 8.
[4] OJ No C 33, 9. 2. 1989, p. 7.

scheme. The Turkish Government proposed to use as a basis the exemption rate (14 %) which will apply to export earnings in 1992, but will not come into effect until 1993.

The corporate tax exemption scheme exempted from corporate taxation 20 % of the export earnings of manufacturing companies in 1989 and 18 % of export earnings in 1990. This percentage has been lowered to 16 % in 1991, but it will not come into effect until 1992. The Turkish Government has further reduced the exemption rate to 14 % of export earnings in 1992, which will come into effect in 1993. The Commission considered that, as the present cost to the Turkish Government and the benefit to the companies concerned was based on the companies' 1990 export earnings, the 18 % exemption rate which is applicable in 1991, should form the basis for calculating the level of countervailability of this scheme. It would not be justified at this stage to anticipate a further reduction in the cost and benefit of this scheme in future years. The Council confirmed this finding.

Low interest credit for investment purposes

(8) The Turkish Government and one Turkish exporter have stated that this scheme was abolished in January 1990. As adequate proof was given and considered acceptable by the Council, this scheme was considered to be no longer countervailable.

Incentive premium

(9) The Turkish Government and one exporter have stated that this scheme was abolished in November 1989. Leaving aside the fact that the Commission had not been informed of this fact when imposing provisional countervailing duties, the actual benefit accruing to the companies which benefited under this scheme was negligible and therefore did not and will not have any effect on the duties. The Council did not take into account the benefits of this scheme.

Investment incentive allowance

(10) The Turkish Government and one Turkish exporter alleged that the Commission used for this scheme, as well as for the customs exemption, a depreciation period which was not representative of the normal depreciation period in Turkey. They claimed that the normal depreciation period in Turkey is from eight to ten years, with companies free to choose their own period.

(11) In this respect the Commission based its findings on information obtained during the verification visits which showed the normal depreciation period in the industry concerned to be four years.

(12) In addition, one Turkish exporter noted that if the benefit from this scheme was calculated on the basis of polyester fibre and yarn investments only, rather than on all investments, a lower subsidy amount would accrue to them. The exporter was unable to quantify satisfactorily the amount of subsidy relating solely to investments in polyester fibre and yarns and therefore the Commission's calculations have been based on the only reliable evidence provided by the company concerned, i.e. on all its investments benefiting from this scheme.

In these circumstances, the Council confirmed all methods of the Commission's basis of calculating the countervailable amount of subsidy for this scheme.

Customs exemption

(13) The Turkish Government and one Turkish exporter have stated that the customs duty rate on which exemption is claimed was reduced from 30 % to 5 % in November 1989. Satisfactory evidence has been provided to that effect. The Council has taken account of this fact in calculating the countervailable amount of this subsidy.

Other schemes

(14) The Council confirmed the Commission's findings not to take measures against the Resource Utilization Support Fund (recital 9 of Commission Regulation), the Rebate of Indirect Taxes (recitals 10 and 11), because these two schemes ended before the end of the investigation period, nor against the Support and Price Stabilization Fund (recital 17) because the products involved are not eligible for payments from this Fund nor against the Low Interest Credit for Operational Phase (recital 29), because its benefits were negligible.

D. Specificity

(15) The Turkish Government and one Turkish exporter have further advanced the argument that domestic subsidies can only be countervailable if they hae been provided in a specific manner to the benefiting industry. The Turkish Government

claimed the domestic subsidies which the Commission has found countervailable are, however all granted under generally available incentive schemes.

(16) The Council noted the way domestic subsidies are granted in Turkey. A company must obtain an incentive certificate from the State Planning Organization (SPO). To assist this decision, the SPO has established a list of non-eligible industries for domestic incentive schemes. In addition the SPO carries out on a case-by-case basis, an analysis of each investment application which is normally accompanied by a so-called feasibility study, and decides subsequently whether and if a company obtains one or any of the subsidies under the domestic schemes described.

Under these circumstances, there is every reason to believe that the allocation of the subsidies in question was not carried out in accordance with neutral and objective criteria.

The Commission requested the Turkish authorities to submit conclusive evidence as to the general availability of the subsidies in question, which however was not supplied.

Under these circumstances, the Council shares the Commission's conviction that the Turkish system does not entitle the applying companies to obtain automatically the subsidies they claim once the criteria are met.

(17) The consequence of these arguments is that the Council cannot accept the allegations that these schemes are generally available. Consequently the Council considered these schemes to be specifically granted.

(18) In addition, even those domestic subsidies which were allocated according to the state of development of the region in which the benefiting company was located, were found to have been granted specifically and in all cases, in the most developed regions of Turkey.

(19) Therefore it was clear that there was no effective general availability of these subsidies between companies, nor between regions where differing eligible percentages have been established according to the state of development of the region. The Council considered them countervailable.

E. Total amount of subsidies

(20) The total amounts of countervailable subsidies determined by the Council are as follows :

SASA	9,99 %,
Sonmez Filament	9,13 %,
Sonmez ASF	9,35 %,
Sifas	9,39 %,
Polylen	8,79 %,
Polyteks	10,16 %.

The individual amounts of countervailable subsidies found by scheme have been notified to each of the companies concerned. For reasons of confidentiality they are not published here.

F. Injury

(21) In the Commission Regulation it was found that four products were concerned by these proceedings and that the Community industry was manufacturing like products. As far as the assessment of the effect of the subsidized imports was concerned, it was however argued that the polyester fibres and yarns exported by the Turkish companies and those of the Community producers were not similar products since they were of different qualities. These imports could, therefore, not have caused material injury to the Community production of like products. These arguments were not accepted in the Commission Regulation since these differences in quality between Turkish and Community products, if any, were so minor, that no clear product distinction between them could be made. This conclusion was further supported by the similarity of the end uses of these products.

(22) The Council confirmed that in this case the basic physical characteristics of the exported and Community-produced products and their uses were identical. In addition, the end-users are the same and the only decisive element of distinction between the imported and the Community-produced products is price. Price is, however, largely influenced by the subsidization by the Turkish Government. In these circumstances, there is no clear and decisive element of distinction between these products.

(23) The Council confirms therefore the Commission findings that the Community production has to be considered as like products to the imported subsidized products.

(24) In its provisional findings, the Commission concluded that the Community fibres and yarn industry had experienced material injury owing to the subsidized imports from Turkey.

(25) These injury findings were based mainly on the following facts :

As far as the volume of the subsidized imports was concened, the Commission established in its Regulation that imports of yarn increased from 233 tonnes in 1984 to 13 315 tonnes in 1988; an increase in market share from 0 % to 5 %, and that that of fibres fluctuated around 4 % and was 3,3 % in 1988. In this respect, it has to be recalled that in June 1988 provisional anti-dumping duties were imposed (1) on the imports of most of the products concerned, which probably had an effect on the import volumes. No comments were submitted in this respect.

(26) The market share of the Community industry decreased for fibres from 79 % in 1984 to 75 % in 1988 and for yarns from 81 % in 1984 to 69,8 % in 1988. As far as prices were concerned between 1985 and the investigation period, considerable price depressions from 5 % for textured yarn, 12 % for polyester filament yarn, 20 % for fibre and 26 % for POY were established.

In addition, it was found that the majority of the Community industry suffered heavy losses in 1988, in some instances up to 26 % for fibres and 15 % for yarns.

(27) The Council confirms therefore the findings of the Commission as given in recitals 50 to 53 of its Regulation.

(28) The Commission has further established that during the investigation period the prices in the Community of Turkish imported products were on average lower than the corresponding prices of the Community manufactured like products by the following percentages: for fibres: 18 to 22 %; for Turkish polyster filament yarn: 65 %; for Turkish POY: 30 %, and for Turkish textured yarn between 25 to 43 %.

(29) In this respect, the Turkish Government and one Turkish exporter argued that the price undercutting margins were not correct, since no adjustments of the Turkish prices had been made in order to take account of the alleged differences in physical characteristics between the Turkish and the Community products. However, no effect on prices of these alleged differences was proved to the satisfaction of the Commission, either by the Turkish Government or by the exporter concerned. Accordingly, this claim was rejected.

(30) In addition, it has to be recalled that, even if the alleged differences were to have a certain effect on the prices and thus on the price comparability of the products, this effect would never be such as to compensate for the huge undercutting margins established and verified by the Commission. The Council therefore confirmed the price-undercutting analysis of the Commission.

Conclusion

(31) In the light of the Commission's finding as shown in recital 53 of its Regulation and the abovementioned considerations, the Council confirmed that the Turkish exporters had considerably increased their market presence, reverted to price undercutting and that Community industry is suffering material injury.

G. Causality

(32) As already shown in recital 54 of the Commission Regulation, the markets concerned were highly price-sensitive and transparent. The large price undercutting of the Turkish exports, which to a large extent was covered by the substantial subsidy margin, had thus clearly an effect on the prices of Community industry.

In this respect, the Turkish government alleged that with a small market share, the Turkish exports could not have an injurious effect on the prices of Community industry. However, in this particular market, where only a relatively limited number of suppliers exist and the price situation is transparent, low prices charged by exporters which have only a relatively small market share can nevertheless have a considerably detrimental effect on the general price level, and force the Community producers to align their prices on these low-priced imports at the expense of their profitability.

(33) It was further argued that the price depression, which as such is not contested, was mainly caused by falling raw material costs. The Council was however of the opinion, that while falling raw material prices may have had a decreasing effect on prices, this does not explain the fact that the Community industry was prevented from selling at profitable prices. Thus, the price undercutting by the subsidized imports increased the price depressing effect, and forced the prices down beyond the normal price development due to cost reductions.

(34) The Turkish Government and one Turkish exporter argued that the material injury to Community industry had been caused by other factors, either by the dumped imports from several countries against which anti-dumping duties are in force, or by low prices of fairly priced imports.

In this respect, the Council was aware that it had imposed anti-dumping duties on imports of three of the investigated products from several countries. these measures were supposed to eliminate the injury caused by the dumping of these exports.

(1) Provisional duty: OJ No L 151, 17. 6. 1988, p. 39 and 47.

However, apart from the fact that the findings in the anti-dumping cases related to a different reference period, the anti-dumping duties were for most Turkish companies and most products based on the dumping margins found for Turkey and did not completely eliminate injury. Consequently, the subsidization of imports had an additional injurious impact on Community industry, which has not been eliminated by these anti-dumping measures.

Indeed, Article 4 of Regulation (EEC) No 2423/88 does not provide that injury can only be established if subsidization is the only, or the principal cause of the overall injury suffered by an industry. Therefore, injury caused by subsidization may justify protective measures, even if it is only a part of a larger injury due also to other factors. In this particular case, the investigation has indeed shown that in spite of the anti-dumping measures taken the situation of the Community industry is still precarious and that, thus, the measures against dumped imports have not fully remedied the injury caused by unfair pricing.

(35) It was further claimed by the Turkish authorities that the difficulties encountered by the Community industry were predominantly caused by fundamental structural problems.

(36) Council acknowiedged that the Community industry had suffered major economic problems in the past. To overcome these problems, the Community producers had taken a number of restructuring measures, which had improved their performance. This restructuring of the Community industry has however now been jeopardized by unfair and injurious pricing of various imports by a number of countries, as evidenced by the profitability figures set out in recital 52 of the Commission Regulation. The Council considered it therefore incorrect to blame structural problems for the injury actually caused by unfair pricing.

(37) The Turkish Government further argued, that as the effect of dumped imports from Turkey was considered together with that of dumped imports from five other countries in assessing injury in these anti-dumping cases, the Council would — *a contrario* — not have the possibility in this anti-subsidies case to determine whether the subsidized imports from Turkey have caused injury.

(38) However, for the reasons given in recitals 56 to 58 of the Commission Regulation and in view of the above considerations the Council confirms that the subsidized Turkish imports have caused material injury to Community industry.

H. Community interest

(39) The Commission has stated in recitals 59 to 63 of its Regulation the reasons why the interest of the Community called for intervention to prevent injury during the proceeding. The Council considered these reasons to be valid.

One Turkish exporter and the Turkish Government argued, however, that duties would prevent price competition on the Community market, which would not be in the Community interest.

(40) In this respect, the Council recalls that countervailing duties are intended to re-establish a fair competitive situation and that it is therefore necessary to eliminate the effect of the subsidy on the imports, resulting in the Community industry being further exposed to fair competition, also from exports by the Turkish companies, on the Community market. Therefore, the Council confirmed the Commission findings concerning the Community interest.

I. The Additional Protocol to the EEC — Turkey Association Agreement

(41) The Turkish Government contended that the Commission did not use the appropriate instrument against the Turkish subsidy shemes by imposing duties under Regulation (EEC) No 2423/88, since special rules exist under the Additional Protocol to the EEC-Turkey Association Agreement of 23 November 1970.

(42) Article 43 (2) of this Additional Protocol, which allows Turkey to be considered as being in a situation specified in Article 92 (3) (a) of the EEC Treaty, considers such aid compatible with the proper functioning of the Association only if it does not alter the conditions of trade to an extent inconsistent with the mutual interest of the Contracting Parties.

The Turkish Government was of the opinion that hence it was entitled under Article 43 (2) to grant these subsidies.

(43) The Council considered however that the Commission has correctly assessed its findings on injury and causality and it further confirmed that by the subsidization of the Turkish imports, the conditions of trade have been altered in a manner which is inconsistent with the mutual interest of the Contracting Parties.

(44) The Community has, in accordance with Article 45 of the Additional Protocol, further submitted to the Association Council for its approval, the countervailing duties which the Community intends to collect definitively on imports of fibres and yarns from Turkey. In the absence however of any decision, under Article 45 by the Association Council, the Community is further allowed under Article 46 of the Additional Protocol to take safeguard measures which it feels appropriate in order to overcome difficulties due to this absence of a decision of the Association Council.

J. GATT — Subsidies code — Developing countries

(45) The Turkish Government alleged further that, contrary to recitals 36 and 37 of the Commission Regulation, the requirements of Article 14 of the Agreement on interpretation and Application of Articles VI, XVI and XXIII of the General Agreement on Tariffs and Trade (subsidies code) had been violated.

(46) With regard to domestic subsidies, the special provisions for developing countries (Article 14 subsidies code) however do not restrict the possibility for another signatory to apply its countervalling-duty laws, in case subsidized exports from a developing country cause material injury to its domestic industry (Article 14 (7) GATT subsidies code).

In addition, in so far, as export subsidies are concerned, the Council has noted in this respect that Turkey has entered into a commitment *vis-à-vis* the signatories of the GATT subsidies code (Article 14 (5) and (6)) to phase out its export subsidies at the end of 1989. Turkey has not respected this commitment.

(47) The Council considered that the Community is entitled under the subsidies code to apply countervailing duties.

K. Injury threshold

(48) The Commission has calculated the amount of the duty necessary to remove the injury by comparing, for each of the four products, the prices of the Turkish products in the Community during the investigation period with a target price of the Community industry calculated on the average production costs for each product of representative Community producers plus a reasonable profit margin (6 % for fibre and 7 % for yarns). The differences between these two prices were considered to constitute the amount by which the prices of the Turkish products should be increased at the Community frontier in order to remove the injury caused by the subsidized imports.

The Turkish Government and one Turkish exporter considered that, in calculating the injury threshold, a profit margin of 3 % is a more realistic margin to apply to Community producers. No basis has been provided, however, to justify applying a 3 % profit margin. The Council noted that the Commission established the profit margin on the basis of the average profit margin of Community producers in 1985 and 1986 since for most of that period the injurious impact on Community producers of unfairly priced third country imports was still moderate.

In these circumstances, the Council confirmed the basis of selecting the level of profit margin used in this instance and thus the findings set out in recitals 64 and 65 of the Commission Regulation.

L. Undertaking

(49) Following the Parties being 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, the Government of Turkey offered an undertaking which is considered to be acceptable.

The effect of this undertaking will be to phase out the most important export subsidy (the Corporate Tax Exemption), which will remedy the material injury caused by the Turkish subsidies.

After consultation with the Advisory Committee, this undertaking was accepted by Commission Decision 91/511/EEC [1]. The Council has further noted that the investigation in this case has been terminated.

(50) Since part of these rates of definitive countervailing duties would have been suspended in view of the anti-dumping duties imposed by Regulations (EEC) No 3905/88 [2] and 3946/99 [3], only net definitive countervailing duties would have been imposed as listed in Article 1 of this Regulation.

M. Cumulation of anti-dumping duties and countervailing duties

(51) The Commission has set out in recitals 67 to 70 of the Commission Regulation, the question as to

[1] See page 92 of this Official Journal.
[2] OJ No L 347, 16. 12. 1988, p. 10.
[3] OJ No L 348, 17. 12. 1988, p. 49.

whether anti-dumping duties and countervailing duties can be cumulated in accordance with Article 13 (9) Regulation (EEC) No 2423/88 and Article VI (5) of the GATT.

(52) The Council accepted the reasoning as set out in recitals 67 to 70 of the Commission Regulation and it confirmed that Article 13 (9) does not preclude the imposition of countervailing duties in addition to anti-dumping duties against the domestic subsidies found, as well as against export subsidies which cannot have influenced the anti-dumping duty since the companies concerned benefited from them after the anti-dumping duties were imposed.

(53) While the anti-dumping duties are in force, that part of the countervailing duty which corresponds to the export subsidies which will have influenced the dumping margin, should only be imposed to the extent that it exceeds the anti-dumping duty.

N. Collection of provisional duties

(54) In view of the subsidy level definitively established as mentioned above and the seriousness of the injury caused to the Community industry, the Council considered it necessary that amounts collected by way of provisional countervailing duties should be definitively collected at the level of the net countervailing duty established (Article 1 of this Regulation).

HAS ADOPTED THIS REGULATION:

Article 1

The amounts collected or secured by way of provisional countervailing duty pursuant to Regulation (EEC) No 1432/91 shall be collected at the following rates of duty:

(i) polyester staple fibres = 3,19 %
(Taric additional code: 8527).

For the company mentioned hereunder, the following rate shall apply:

— Sonmez Filament = 0,58 %
(Taric additional code: 8526);

(ii) polyester textured filament yarn = 1,98 %
(Taric additional code: 8532).

For the companies mentioned hereunder, the following rates shall apply:

— Sasa = 1,31 %
(Taric additional code: 8531),

— Sonmez Filament = 0,58 %
(Taric additional code: 8530),

— Sonmez ASF = 0,58 %
(Taric additional code: 8529),

— Polyteks = 1,48 %
(Taric additional code: 8528);

(iii) polyester filament yarn = 9,99 %
(Taric additional code: 8534).

The following company shall be exempted from this rate:

— Sonmez Filament
(Taric additional code: 8533);

(iv) partially oriented polyester yarn (POY) = 7,29 %
(Taric additional code: 8536).

The following company shall be exempted from this rate:

— Sonmez ASF
(Taric additional code: 8535).

Amounts provisionally collected or secured which are not covered by the above rates shall be released.

Article 2

This Regulation shall enter into force on the day following that of 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, 23 September 1991.

For the Council

The President

P. BUKMAN