COUNCIL REGULATION (EC) No 3386/93

of 6 December 1993

imposing a definitive anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European 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 Community [1], and in particular Article 12 thereof,

Having regard to the proposal from the Commission, submitted after consultation within the Advisory Committee as provided under the above Regulation,

Whereas :

A. Provisional measures

(1) The Commission, by Regulation (EEC) No 2799/92 [2], imposed a provisional anti-dumping duty on imports of dead-burned (sintered) magnesia originating in the People's Republic of China and falling within CN code 2519 90 30, hereafter referred to as 'dead-burned magnesite'.

B. Subsequent procedure

(2) Following the imposition of the provisional anti-dumping duty, five Chinese exporters and some independent importers requested and were granted an opportunity to be heard by the Commission. They also made written submissions making known their views on the findings as did other independent importers, some end users and the Chinese authorities.

(3) Parties were also informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive duties. They were also granted a period within which they could make representations subsequent to these disclosures.

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

C. Product under consideration — Like product

(5) Certain Chinese exporters, independent importers and end users have repeated the argument that dead-burned magnesite originating in the Community and elsewhere is not a like product to that originating in the People's Republic of China. In this respect, the Chinese exporters proposed that an independent technical expert be appointed by the Commission to determine the question of whether or not Chinese dead-burned magnesite is a 'like product' to any other dead-burned magnesite, in terms of the quality of its mineral deposits, the extracting and processing methods, its chemical and physical characteristics and the application of the final product.

(6) The Commission accepts that an independent expert may provide factual information as to any such differences between Chinese dead-burned magnesite and that from other sources. The existence of these differences is, however, accepted by the Community institutions. It is also not contested that these differences do not alter the fact that the basic physical and chemical characteristics of all types of dead-burned magnesite are identical. Only if these basic physical and technical characteristics were to be different, could it be considered that the different types of dead-burned magnesite are not similar products. The fact that dead-burned magnesite from whatever source can be used interchangeably by end users confirms that it is a like product. It was thus not considered necessary to appoint such an expert for these reasons and for those given in recitals 10, 11 and 12 of Regulation (EEC) No 2799/92.

The Council confirms these findings and conclusions.

D. Dumping

(a) *Reference country*

(7) In Regulation (EEC) No 2799/92 the Commission found that Turkey was an appropriate reference country for the determination of normal value for the People's Republic of China. After the imposition of provisional duties some of the exporters objected to the use of Turkey as a reference country and proposed Czechoslovakia as being more appro-

[1] OJ No L 209, 2. 8. 1988, p. 1.
[2] OJ No L 282, 26. 9. 1992, p. 15.

priate because of the nature of its reserves, its processing techniques, and the range of the MgO (magnesium oxide) grades. They argued that the former Czechoslovakia, while being a market economy, has an economic structure closer to that of China.

The Commission recalls however that, in accordance with Regulation (EEC) No 1765/82 [1], the former Czechoslovakia cannot be regarded as a market economy during the investigation period of July 1990 to June 1991. According to the provisions of Article 2 (5) of Regulation (EEC) No 2423/88, prices and costs in such a non-market economy cannot be used as a basis for establishing normal value.

When selecting a market economy country in which normal value can be established, the Commission takes several factors into account. It considers the access to raw materials, the representativity of the market in relation to the quantities exported by the exporting country and whether costs and prices of the product in question in that country are formed by competitive market forces.

After a full examination of conditions in Turkey in the light of the above considerations, the Commission concluded, as in recital 15 of Regulation (EEC) No 2799/92 that Turkey is an appropriate reference country.

The Council confirms these findings and conclusions.

(b) *Normal value*

(8) With regard to the price situation in Turkey, the Commission found that the high proportion of sales between related companies made it inappropriate to base normal value on selling prices. However, it was found, as shown in recital 16 of Regulation (EEC) No 2799/92 that the costs of production of the Turkish producer are determined through a process of competitive tendering. Costs of production are thus established in the ordinary course of trade and form an appropriate basis for normal value.

(9) The Chinese exporters argued, after the imposition of provisional duties, that the normal value as constructed for each MgO grade and as adjusted to take account of differences in conditions between China and Turkey, did not fully reflect the natural advantages of China, where they claimed dead-burned magnesite can be extracted and processed more easily than in Turkey.

The Commission, to some extent, agrees with this argument. As far as the differences in the mining and processing methods are concerned, the Commission accepts that for Chinese produced dead-burned magnesite, due to the natural advantages, some cost factors do not exist in China. In Regulation (EEC) No 2799/92 normal value was adjusted to allow beneficiation and sorting processes found in Turkey but not found in China. The Commission now considers that an additional allowance should be made for the ease of access to raw materials in China in comparison with that of Turkey. Therefore, taking into account the actual ore/spoil ratio found in Turkey and the level of adjustment suggested by the Chinese exporters, the costs of extraction have been reduced by 20 %, as compared with those established in Turkey.

On this basis, the normal value, as established for the Turkish producer, is considered to reflect the natural advantages in China. The Chinese exporters argued that a further allowance should be made in the light of the claimed proximity of the open cast mines to the kilns in China. In this respect it must be stated that the decision to locate the kilns near to the mines, and to move them as the mines move, is one which is influenced by the non-market cost structure in China and that to make adjustments on this account would be incompatible with the aims of Article 2 (5) of Regulation (EEC) No 2423/88.

(10) The normal value thus established is confirmed by the Council.

(c) *Export price*

(11) The Council confirms the method used to establish export prices set out in recital 18 of Regulation (EEC) No 2799/92 as no substantiated comments in this respect were made by interested parties.

E. Comparison and dumping margin

(12) The Chinese exporters argued that Chinese producers use simple, low cost, coke-burning, shaft kilns and that an adjustment of 10 % should be made to reflect lower burning costs in China. The Commission established, however, that the Turkish producer also uses shaft kilns. By way of contrast the Commission accepted that an allowance should be made to reflect the higher cost of the fuel oil used by the Turkish producer and costs of production have thus been reduced by 3 %. A number of importers and end users both before and after the imposition of provisional measures alleged that when importing Chinese dead-burned magnesite they had to carry out themselves operations such as analysis of the product, monitoring of loading of the product and removal of foreign substances. It

[1] OJ No L 195, 5. 7. 1982.

was alleged that this requires often the use, by the importers, of personnel in China. These operations, in the case of the Turkish producers, are normally done by the producers themselves and do not require any intervention of the purchasers. It was requested by these importers and end users that an allowance under Article 2 (9) of Regulation (EEC) No 2423/88 should be granted to take account of differences in conditions and terms of sale affecting price comparability. The Commission considers on the basis of the information collected that the request for the allowance is justified. On the basis of the information available from the Turkish producer, these costs have been evaluated to be 6 % of the constructed sales price and, for purposes of the comparison, normal value has been adjusted accordingly.

No other observation having been raised by any other party, the findings and conclusions in recital 19 of Regulation (EEC) No 2799/92 are hereby confirmed by the Council.

The final examination of the facts showed the existence of dumping, the margin of dumping being equal to the amount by which the normal value exceeds the price for export to the Community. This margin is equal to ECU 47 per tonne.

(13) For the purpose of the provisional findings the Commission has established a single dumping margin for all Chinese exporters. The cooperating Chinese exporters contested the single dumping margin and argued that the Commission should calculate a dumping margin for each cooperating exporter.

The Commission recalls however that, with regard to exports from a non-market economy, individual treatment must remain a strict exception to be applied solely in cases where the producer concerned has provided evidence that it is free to establish export prices without the influence of the State authorities. The State, through its control, could modify the pattern of production and trade, so as to take advantage of the lowest dumping margin and thus undermine the effectiveness of any measures. In this respect, as explained in recital 21 of Regulation (EEC) No 2799/92, these exporters which are State controlled enterprises are not independent of any State influence and are not free in the fixing of their export prices. Therefore only one dumping margin for all Chinese exports has been established. The Council confirms the above findings and conclusions.

F. Injury

(14) The Commission concluded in Regulation (EEC) No 2799/92 (see recitals 22 to 32) that the Community industry had suffered material injury as a result of the dumped imports of dead-burned magnesite originating in the People's Republic of China. Imports of the product concerned from the People's Republic of China increased from 117 000 tonnes in 1988 to over 176 000 tonnes during the investigation period of 1 July 1990 to 30 June 1991, the market share of the Community producers decreased in a growing market and their prices were significantly depressed. All sales by Community producers were loss making or at a low profit level. In this respect no new arguments were put forward by interested parties. The Council, therefore, confirms the Commission findings and conclusions as set out in recital 32 of Regulation (EEC) No 2799/92.

(15) The Chinese exporters argued that there can be no injury for grades above 92 % MgO as the Community producers of these grades have, allegedly, continually increased sales, production volume and capacity utilization.

As established in recital 32 of Regulation (EEC) No 2799/92, the Commission did not find, during its investigation, that Community producers had increased sales, production volume and capacity utilization for these grades. In addition, this argument ignores the fact that according to Article 4 (4) of Regulation (EEC) No 2423/88 injury has to be established in relation to the Community production of the like product, which consists of all types and grades of dead-burned magnesite which are largely interchangeable. If sales in the Community by the Community producers of certain grades are not affected by dumped imports in an identical way to other grades, this has to be seen in the global context of the Community industry's performance on the Community market for the like product as a whole, which means all types and grades. This argument has, therefore, to be rejected. The Council confirms the above findings and conclusions.

G. Causation of injury

(16) As set out in recitals 33 and 34 of Regulation (EEC) No 2799/92, the Commission found that the Community industry had suffered material injury through the effect of dumped imports within the meaning of Article 4 (1) of Regulation (EEC) No 2423/88. However, after the imposition of provisional measures, the Chinese exporters and some importers argued that the rising costs of production incurred by Community producers indicated that injury was self-inflicted and not attributable to imports from China. They also argued that injury had been caused by imports from North Korea.

(17) With regard to the first argument, the Commission did not find that Community producers' costs had risen significantly between 1988 and the investigation period. The worsening financial position of the Community industry was the result of the downward pressure on prices from dumped imports from China while costs remained stable. The Commission, therefore, cannot accept that there was any self-inflicted injury on the part of the Community industry due to rising costs of production and this argument, therefore, has to be rejected.

(18) With regard to imports from North Korea the Commission notes that China is by far the largest source of imports of dead-burned magnesite into the Community. North Korea accounted for 15 % of imports of dead-burned magnesite into the Community during the reference period, whereas China accounted for 46 % of the imports. Accordingly, while it cannot be excluded that factors other than dumped imports from China also had negative effects on the Community industry, it must be concluded that the very substantial expansion in volume and the low prices of the dumped Chinese exports have been responsible for the fall in market share and deteriorating financial position of the Community producers. These exports, taken in isolation, must, therefore, be considered to have caused material injury to the Community industry.

(19) The refractory producers argued that imports from China used by them had not caused injury to the Community producers as the Community producers did not offer for sale dead-burned magnesite with the appropriate chemical profile.

In this respect, the Commission recalls that all the products imported and the dead-burned magnesite produced by the Community industry are like products having the same basic and identical physical and chemical characteristics and the same applications. The Commission found, in addition, that the Community industry is able to provide all types of magnesite, including those which meet the requirements of the abovementioned users. The fact that, in this specific case, the Community industry could not sell these types of magnesite to these users, while the Chinese exporters could, due to their low prices, is a further indication that the Community industry was injured by the dumped imports from China.

The Council confirms the above findings and conclusions.

H. Duty

(20) As far as the amount of the duty is concerned, the Commission established in recital 44 of Regulation (EEC) No 2799/92 that only a duty equal to the full dumping margin (as established in recital 12 of this Regulation), which would bring the Chinese prices up to the normal value, is sufficient to remove the injury, caused by dumping, experienced by the Community industry. No arguments concerning this duty amount were put forward ; subsequent to the imposition of the provisional duty, the Council, therefore, confirms the Commission's findings and conclusions in this respect.

As far as the form of the duty is concerned, the Commission considers that the structure of a State-controlled economy gives the Chinese exporters considerable room for manoeuvre to further decrease their export prices and such falls in price by Chinese exporters have indeed taken place since 1988. The dead-burned magnesite market is very sensitive to price instability thus the form of the duty should be such as to prevent further price decreases by the Chinese exporters. Therefore, neither a fixed amount of duty nor an *ad valorem* duty seem to be appropriate.

In these circumstances it is considered that a minimum price at which the Chinese magnesite should be sold on the Community market should be established. This minimum price has been calculated on the basis of the weighted average normal value of dead-burned magnesite as established in recital 9, taking into account the adjustments mentioned in recital 12. This minimum price adjusted to cif Community frontier value is ECU 120 per tonne for all grades. Consequently, the duty should be equal to the difference between this minimum price and the net, free at Community frontier price before customs clearance. This is confirmed by the Council.

I. Community interest

(21) In assessing the need for the measures, two basic elements were taken into account. The first is that to prevent distortions of competition arising from unfair commercial practices and thus to re-establish open and fair competition on the Community market is the purpose of anti-dumping measures and is fundamentally in the general Community interest. The second is that, in the particular

circumstances of the present proceeding, to refrain from re-establishing a fair market situation would endanger the future existence of the dead-burned magnesite industry since the Community industry is at present unable to generate the profits necessary to continue trading. The Community dead-burned magnesite industry would cease to be a source of technical expertise, employment and investment (see recital 40 of Regulation (EEC) No 2799/92).

(22) Certain importers and end users argued that any increase in costs for refractory producers would seriously affect their ability to compete with other producers outside the Community.

The Commission accepts that this industry is currently facing a difficult trading situation both within and outside the Community which could be exacerbated by increases in the price of dead-burned magnesite. The Commission considers, however, that the impact of the duty in the form of a minimum price per tonne, as established in recital 20, will be such as to enable users of the higher grades to buy dead-burned magnesite at prices which are not significantly higher than those of their competitors outside the Community and thus maintain their competitive position. In addition, in general, while there might be a short term price advantage to users if no duty is imposed, to refrain from establishing fair competition on the Community market would, in the longer term, lead to less competition and higher prices.

(23) Some importers argued that there was no need to protect the Community industry in respect of supplies of dead-burned magnesite which it cannot deliver.

While it is true that production in the Community is, at present, insufficient to meet demand for the product concerned, the Commission found that the Community industry is currently operating below a reasonable capacity utilization level and has large reserves available. It was only the low priced dumped imports from China which prevented the Community industry from utilizing existing capacity and expanding production facilities. In addition, this argument is based on a mistaken view of the effects of anti-dumping duties. Even with the application of duties, Community consumers will still be able to buy Chinese magnesite at competitive prices. Indeed, as in this proceeding, where the duty is equal to the dumping margin, but lower than the amount required to fully remove the injury, it is only the unfair element of the exporters' price advantage which will be eliminated. There are also many other non-Community suppliers of dead-burned magnesite on the Community market. The Commission sees no danger of any shortage of supply.

(24) The Chinese exporters repeated the argument that it was not in the Community interest to impose ineffective measures in that anti-dumping duties imposed on Chinese dead-burned magnesite would result in a large increase in low priced imports from North Korea. As indicated in recital 41 of Regulation (EEC) No 2799/92, the Commission would be made aware of Chinese imports being replaced to a large extent by allegedly dumped imports from North Korea and in such circumstances appropriate action would be considered.

(25) For the reasons given above and in recitals 40 to 43 of Regulation (EEC) No 2799/92 the Commission concludes that the Community interest calls for intervention in this case. The Council confirms the above findings and conclusions.

J. Collection of provisional duty

(26) The Council considers that it is not appropriate, in view of the change in the form of the duty, in this particular case, to definitively collect the provisional anti-dumping duty,

HAS ADOPTED THIS REGULATION:

Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of dead-burned (sintered) magnesia falling within CN code 2519 90 30 originating in the People's Republic of China.

2. The amount of the duty shall be the difference between ECU 120 per tonne and the net, free-at-Community-frontier price before customs clearance, if this price is lower.

3. The provisions in force concerning customs duties shall apply.

Article 2

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, 6 December 1993.

For the Council

The President

W. CLAES