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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 643/94

of 21 March 1994

amending Regulation (EEC) No 3068/92 in respect of definitive anti-dumping duties on imports of potassium chloride originating in Belarus, Russia and Ukraine

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 Economic Community [1] (hereafter referred to as the Basic Regulation), and in particular Article 14 thereof,

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

Whereas :

I. PREVIOUS PROCEDURE

(1) By Regulation (EEC) No 3068/92 [2], the Council imposed a definitive anti-dumping duty on imports of potassium chloride originating in Belarus, Russia or Ukraine, falling within CN codes 3104 20 10, 3104 20 50 and 3104 20 90 and consisting of the difference between a set minimum price and the net, free-at-Community-frontier price before customs clearance of the product concerned.

II. REVIEW

(2) By a notice published on 26 June 1993 [3], the Commission, after consultation with the Advisory Committee and in accordance with Article 14 of the Basic Regulation, initiated a review of Regulation (EEC) No 3068/92 (hereafter referred to as the Regulation subject to review). Information made available to the Commission indicated that, since the imposition of definitive measures in this case, important developments have taken place in Belarus, the Russian Federation and Ukraine, following decentralization from the former Soviet Union. These developments have apparently led, *inter alia*, to the introduction of autonomous marketing arrangements for potash, and the establishment of new export channels.

At the same time, the Commission had in its possession, conflicting data on the appropriateness of anti-dumping measures in the form of a variable duty.

(3) The Commission officially advised the producers, exporters and importers known to be concerned, the representatives of the exporting countries and the complainants, and gave the parties directly concerned the opportunity to make their views known in writing and to request a hearing. The representatives of the exporting countries, the Community industry and two importers in the Community made their views known. All parties who so requested were granted a hearing.

The representative of Ukraine submitted that there was no production of potash in Ukraine and that the anti-dumping duty imposed should be repealed in respect of imports of potash originating in Ukraine. However, the official customs statistics based on the customs declarations at the Community frontier, showed that, in the period of investigation, a substantial quantity of potash originating in Ukraine was imported in the Community. In these circumstances and in order to avoid any potential discrimination of circumvention, imports of potash originating in Ukraine should not be excluded from the scope of the present review.

[1] OJ No L 209, 2. 8. 1988, p. 1. Regulation as last amended by Regulation (EC) No 522/94 (OJ No L 66, 10. 3. 1994, p. 10).
[2] OJ No L 308, 24. 10. 1992, p. 41.
[3] OJ No C 175, 26. 6. 1993, p. 10.

(4) The Commission sent questionnaires to parties known to be concerned and received detailed information only from the Community industry and a number of importers in the Community. It should be noted that none of the producers or exporters in the countries concerned cooperated in the Commission's investigation and that a related importer, Ferchimex, and an exporter and several producers in Russia and Belarus, informed the Commission that they would not participate in the Commission's investigation.

(5) The Commission sought and verified all information it considered necessary for the determination of dumping and injury. It inspected the information submitted in the premises of the following companies :

(i) **Community producers**

— Société Commerciale des Potasses et de l'Azote (SCPA), France,

— Mines des Potasses d'Alsace (MDPA), France,

— Kali und Salz (1), Germany,

— Mitteldeutsche Kali (1), Germany,

— Comercial de Potasas (Coposal, Spain),

— Potasas del Llobregat, Spain,

— Suria K, Spain,

— Potasas de Subiza, Spain,

— Cleveland Potash Limited, United-Kingdom.

(ii) **Importers and traders**

Unrelated importers

FESA, Spain ;

Related importers

Soquimes, Spain ;

Traders

Potash Limited, United Kingdom,

Potash Continental, United Kingdom,

Ameropa, France.

(6) Upon request, parties were informed 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 provisional duty. They were also granted a reasonable period within which to make representations subsequent to the disclosure.

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

(7) The investigation of dumping covered the period 1 June 1992 to 31 May 1993 (investigation period).

III. PRODUCT UNDER CONSIDERATION, LIKE PRODUCT AND COMMUNITY INDUSTRY

(a) Product description

(8) The product under consideration is the same as that described in the Regulation subject to review.

The product is potassium chloride or potash muriate (hereafter termed potash) and is usually used as an agricultural fertiliser. The potassium content is variable and is expressed as the percentage of the weight of the dry anhydrous product represented by K_2O. There are three basic specifications :

— potash with a K_2O content of 40 % or less, falling within CN code 3104 20 10,

— potash with a K_2O of over 40 % K_2O but less than or equal to 62 %, falling within CN code 3104 20 50,

— potash with a K_2O content of over 62 % falling within CN code 3104 20 90.

The above specifications cover three grades of a single product which is available either as a powder or in a granulated form, with no significant difference in basic physical characteristics, application or use.

(b) Like product

(9) The Commission found that the conclusions of the Regulation subject to review are still valid and that potash produced in the Community and Canada is a like product to that export from Belarus, Russia and Ukraine to the Community.

IV. DUMPING

(a) Normal value

1. *Analogous country*

(10) Since Belarus, Russia and Ukraine are non market economy countries, normal value had to be determined on the basis of information obtained in a market economy third country, i. e. an analogous country, in accordance with Article 2 (5) of the Basic Regulation. For this purpose, the complainant Community industry suggested establishing normal value on the basis of information obtained in Canada.

(11) After examination of the suggestion made by the complainant, the Commission concluded that Canada was an appropriate and reasonable choice for the following reasons :

(1) The Commission notes that these companies merged after the investigation period and now trade as Kali und Salz GmbH, Germany.

— Canada is known to be the largest producer world-wide of this product and there is, to a large extent, similarity to the manufacturing process and access to raw materials between Canada and the non-market economy countries considered,

— domestic prices in Canada are governed by normal market forces given the level of demand in the market and the number of producers in competition,

— a comparison between the volumes exported to by Canada and the volume on which normal value was based showed that potash was sold in sufficient quantities on the domestic market to allow an adequate calculation of normal value.

2. *Normal value*

(12) Only one producer finally agreed to cooperate, the Toronto-based Potash Company of Canada Limited. The carried out checks on the data supplied by this producer and its mining subsidiary.

(13) In order to determine whether normal value could be based, in accordance with Article 2 (5) (a) (i) of the Basic Regulation, on the prices at which potash was actually sold for consumption on the domestic market in Canada, the Commission compared them with production costs to ensure that these prices generated a reasonable profit in normal trading. When examining the costs of production of the producer concerend, the found that they were increased by notional amounts corresponding to exceptional depreciation resulting from its recent change of ownership and financial expenses which should habe been borne by this producer. However, since these additional costs were not incurred in the ordinary course of trade, it was concluded that it would not be appropriate to make the Belarus, Russian and Ukraine producers bear the burden of such exceptional costs without any adjustment being made and that they should be deducted to establish the actual costs of production of Canadian potash sold on the domestic market. After such deduction it was found that prices practised by this producer for sales on the domestic market in the ordinary course of trade permitted the recovery of all costs reasonably allocated in the ordinary course of trade and the generation of a normal profit margin.

(14) In these circumstances, normal value was established on the basis of the net weighted average price for the like product sold for consumption in Canada since, for the types considered, domestic sales were made in sufficient quantities as compared with export sales to be considered representative.

(b) **Export price**

(15) In spite of the Commission's attempts to obtain information, the exporters thought to be concerned in Belarus, Russia and Ukraine refused to cooperate in the investigation. Further, the information received from importers was inadequate to establish a reliable export price since, either the quantities invoiced were too small to be regarded as representative, or the product was purchased through traders who failed to cooperate, or the importer was related to a non-cooperating producer in the countries concerned.

In addition, when seeking the information necessary to establish the export price, the Commission received strong indications from several sources that discrepancies existed between the prices practised on the Community market and the minimum price imposed by the Regulation subject to review. The possibility of circumvention of the miniumum prices could not be overlooked. For these reasons, the Commission could not rely on the statistical information available on either the values or the quantities of imports of the product concerned.

(16) However, in view of the nature of this review, which is, *inter alia*, to examine the appropriateness of the level and type of anti-dumping duty for the purpose of preventing dumped imports from causing injury, and the fact that the duty which applies at present is a minimum price duty, it was not necessary to establish the current level of export prices. It was merely necessary to estimate what the level of export prices would be if there were no protective duties. For this purpose, it was considered in the absence of cooperation on the part of producers in the exporting countries concerned, that export prices would bear the same relationship to other prices on the Community market as found during the original investigation. Since prices on the Community market would not be lower in the absence of the measures now in force, this method cannot lead to an underestimate of the export prices which would prevail in the absence of duties. It has to be noted that, since the information on available did not allow a differentiation of the export price according to the countries concerend, the export price has been established on the same basis, at the ex-national frontier level for Belarus, Russia and Ukaine.

(c) **Comparison**

(17) Normal value was compared with export prices at the ex-national frontier stage, transaction by transaction. For the purpose of ensuring a fair comparison, due allowances in the form of adjustments

were made for the differences affecting price comparability, such as differences in selling expenses, in particular in respect of credit terms, transport, insurance and handling costs and packing.

(d) **Dumping margin**

(18) The comparison showed the existence of dumping, the dumping margins being equal to the amount by which the normal value, as established above, exceeded the price for export to the Community. For the reasons stated in recitals 10 and 16, the information available to the Commission to establish the export price did not allow a differentiation to be made according to the countries concerned. Therefore, a single dumping margin was established for each of the free countries in question.

The weighted average dumping margin for the countries concerned expressed as a percentage of the net, free-at-Community-frontier price, before customs clearance is 46 %. The Council confirms this conclusion and the findings of the Commission underlying the establishment of this dumping margin.

V. INJURY

(19) In accordance with Article 14 of the Basic Regulation, the investigation sought to determine the exent of any changes in the curcumstances established by the Regulation subject to review (1986 to 1990) with regard to the behaviour of the exporters on the Community market or the situation of the Community industry during the subsequent period, independently of the anti-dumping measures in force.

(a) **Community industry**

(20) In examining whether the complainant Community producers contituted a major proportion of the total Community production of the like product, the Commission noted that a German producer located in the eastern part of Germany has become a party to the complaint following the unification of Germany. As a result, the complainant Community producers represent the totality of the Community production of the like product.

(21) It was also that two of the Community producers had, through affiliated companies, imported the dumped product. The Commission had, therefore, to decide whether these producers should be excluded from the term Community industry, as provided for in Article 4 (5) of the Basic Regulation.

(22) In this respect, the consistent practice of the Community Institutions has been that the exclusion of such producers must be decided on a case-by-case basis, on reasonable and equitable grounds and by taking into consideration all the legal and economic aspects involved. The Institutions have, on several occasions, concluded that an exclusion is justified where the producers in the Community either participated in the dumping practices, are shielded from their effects, or where they benefit unduly from them.

(23) In the present case, the Commission considered that, since these importing producers were independent of the exporters concerned, they did not participate in the dumping practices. Moreover, the level of imports in the investigation period by these producers did not, on an individual basis, represent a significant part of their total sales in the Community in the same period. Such a low level of imports cannot, therefore, have shielded the producers concerned from the effects of dumping nor have substantially benefited them. Indeed, the small advantages which these produces may habe obtained from these importers are by far offset by the disadvantages from the dumping.

(24) In the light of the above circumstances, it is considered that there are no reasons for the exclusion of any of the complainant producers from the definition of the Community industry.

(b) **Cumulation**

(25) To measure the impact of dumped imports on the Community industry, it must first be ascertained whether the approach adopted in determining the measures under review, namely cumulation of all imports originating in the countries covered by the investigation should be continued.

In analysing whether cumulation of the imports from the three countries concerned is appropriate, it was found that potash imported from each of them was alike in all respects, and interchangeable. These imports complete with each other and with the like product manufactured by the Community industry. In addition, the pricing in the Community of the products from each of the countries concerned could not be distinguished and the volume of the dumped imports from each of them could not be considered negligible.

It is thus considered that there are sufficient grounds to cumulate the dumped imports from the countries concerned.

(c) **Injury**

(26) The Commission's findings, based on an examination of the facts between 1990, which is the latest year taken into account in the Regulation subject to review and may 1993 are as follows :

1. *Community consumption, volume and price of the dumped imports*

(27) Community consumption declined from 4,5 million tonnes to 3,9 million tonnes, i. e. by 14 %, and the dumped imports showed a similar decrease, thus maintaining their market share at almost the same level, i. e. approximately 12 %.

(28) In the absence of any cooperation on the part of the exporters and, given the inadequate and non-representative information provided by importers, the Commission was unable to make an appropriate price undercutting determination. However, it received strong indications from several reliable sources that the selling prices of the dumped imports in the Community were significantly below the prices of potash sold by the Community industry, and actually far below the minimum price set by the Regulation subject to review.

2. *Situation of the Community industry*

(a) Production, capacity, utilization rate

(29) Community production fell from 5,5 million tonnes to 4,5 million tonnes, i. e. a decrease of 18 %. Production capacity remained almost trade at approximately 6,5 million tonnes, the utilization rate therefore decreased from 84 % to 70 %.

(b) Sales and market share

(30) The quantity of potash sold in the Community industry fell from 3,4 million tonnes to 2,8 million tonnes, i. e. a decrease of 18 %, while its market share declined from 74,9 % to 73,5 %.

(c) Prices

(31) The Community industry has been unable to raise its prices, even after the imposition of protective measures by the Regulation subject to review, and has suffered, on the contrary, a further decline of its selling prices.

(d) Profitability

(32) The Community industry could not recover from the losses it incurred previously. These losses, which are clearly related to the above decline of its selling price and the negative impact of the decreasing utilization rate on the allocation of fixed costs, remained at a high level and attained 26 % at the end of the period examined.

(e) Employment

(33) It should be noted that the potash industry involves underground mining and is thus labour intensive. A sharp and steady curtailment of the workforce has been observed over the period examined.

3. *Conclusion*

(34) In the light of the above, it is apparent that, while material injury has been established by the Regulation subject to review for the period 1986 to 1990, the examination of the facts demonstrates that material injury has persisted in the subsequent period from 1990 to May 1993. In fact, the situation of the Community industry has further deteriorated in spite of the imposition of the protective measures in 1992. This is indicated in particular by the further decrease of its prices and recent aggravation of its losses.

The Council confirms these views and concludes that the level of injury established by the Regulation subject to review has not been removed but merely been aggravated.

(f) Causality

(35) When determining whether any changes had occurred in the causal link established by the Regulation subject to review between the dumped imports from Belarus, Russia and Ukraine and the material injury, the Commission has examined the developments since the prior period of investigation which ended in 1990. Since the latter year, the situation has remained the same as that described in the Regulation subject to review, in so far as the poor performance of the Community industry has continued to coincide with the dumped imports maintaining the same level of market share and the persistence of price undercutting behaviour on their part.

(g) Effect of other factors

(36) It has also been examined whether the existence and subsequent aggravation of the material injury could be attributed to the effect of other factors, such as the effect of other imports, contraction in demand or internal management problems in the Community industry.

As to the effect of other imports, it was found that their market share remained relatively stable over the period examined, while no conclusion could be drawn from the information available to the Commission about the level of their prices. Concerning contraction in demand, and the management of the Community industry, the Commission found no evidence to suggest that the material injury suffered by the Community industry could be attributed to any of these factors.

The Commission therefore concludes that, although it cannot be ruled out that some of the above factors might have had an adverse effect on the situation of the Community industry, the dumped imports from Belarus, Russia and Ukraine have, taken in isolation, caused material injury to the Community industry.

(37) The Council confirms this conclusion.

VI. COMMUNITY INTEREST

(38) The Commission found that the conclusion on Community interest set out in the Regulation subject to review should remain unchanged, since the development of the facts underlying these conclusions in the subsequent period have only strengthened the case of the imposition of protective measures.

(39) Indeed, not only is it in the fundamental interests of the Community to put an end to distortions of commercial practices, but, in this specific case, the endangering of thousands of jobs in all ailing sector and the precariousness of the financial situation of the Community industry have recently become even more acute.

(40) In these curcumstances, it is in the Community interest that protective measures are maintained and adapted to the findings made in the present review. Since these findings show increased dumping and a further aggravation of injury, the Community interest calls for an amendment of the measures in force.

VII. DUTY

(41) In order to adopt the existing measures to the changed circumstances and to prevent the recurrence of further injury, the Commission took account of the fact that injury consisted, in particular, of price depression and suppression, lack of profitability and losses. The removal of such injury requires therefore that the industry should be put in the position where prices can be increased to profitable levels without loss of sales volume. In order to calculate the necessary price increse, the Commission considered that the export prices of the dumped imports, as determined in recital 16, should be compared to the selling prices that reflect the costs of production of the Community industry plus a reasonable amount of profit.

To this end, the Commission has used the actual average cost of production of the Community industry and a profit margin of 9 % necessary to ensure the viability of this industry.

The difference between these two prices expressed on a weighted average basis and as a percentage of the net, free-at-Communiy-frontier price, before customs clearance represents the injury threshold, which was found to exceed the margin of dumping established. In these circumstances, the duty to be imposed should be limited to the dumping margin.

(42) In view of the strong indications that circumvention of the previous minimum price duty occurred and the potential which exists for consequently arrangements in this sector, it is necessary to impose a duty in the form of a fixed amount per tonne of imported potash corresponding to the dumping margin calculated as described above. Further, it is considered that in view, on the one hand, of high overcapacity for the production of potash in the exporting countries concerned, the lack of domestic purchasers and the corresponding availability of large quantities for export and, on the other hand, the relative attractiveness of the Community market compared with other export markets due to the high level of prices and spending power of users, its proximity and the availability of a high developed transport infrastructure, there is a possibility that the exporters will respond to the imposition of this duty by further lowering their export prices. This danger is further exacerbated by the fact that exports could be made available at very low prices due to currency problems in the exporting countries concerned and the fact of that the prevalence of long term supply contracts in the Community can make the offering of potash to users in the Community at very low prices attractive to exporters. To guard against such an increase in dumping, it is considered necessary to provide also that if the price of the imported product should fall below a minimum price established on the basis of the normal value, the duty to be imposed should be the difference between the import price and the minimum price. Such a system is justified in view of the clear risk of an increase in the dumping margin,

HAS ADOPTED THIS REGULATION:

Article 1

Article 1 of Regulation (EEC) No 3068/92 is hereby replaced by the following:

'Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of potassium chloride (KCl) falling within CN codes 3104 20 10, 3104 20 50, 3104 20 90, originating in Belarus, Russia and Ukraine.

2. The amount of duty shall be equal to the fixed amount per tonne of KCl shown below per type and grade, or the difference between the prices shown below and the net, free-at-Community-frontier price per tonne KCl, before customs clearance for the corresponding type and grade, whichever is the higher :

Potassium chloride with a K_2O content	Fixed amount of duty per tonne KCl	Price CIF cif Community frontier per tonne KCl	Taric code
40 % or less :			
— standard grade (powder)	ECU 24,19	ECU 76,79	3104 20 10*10
— granulated grade (granules)	ECU 27,37	ECU 86,91	3104 20 10*20
Over 40 % but less than or equal to 62 % :			
— standard grade (powder)	ECU 36,28	ECU 115,19	3104 20 50*10
— granulated grade (granules)	ECU 41,06	ECU 130,36	3104 20 50*20
over 62 % :			
— standard grade (powder)	ECU 44,13	ECU 137,28	

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

Article 2

This Regulation shall enter into force on the day 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, 21 March 1994.

For the Council

The President

Y. PAPANTONIOU