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COUNCIL REGULATION (EC) No 368/98

of 16 February 1998

imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China and collecting definitively the provisional duty imposed

(OJ L 47, 18.2.1998, p. 1)

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COUNCIL REGULATION (EC) No 368/98

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imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China and collecting definitively the provisional duty imposed

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community [1], and in particular Article 9(4) thereof,

Having regard to the proposal submitted by the Commission after consulting the Advisory Committee,

Whereas:

A. PROVISIONAL MEASURES

(1) By Commission Regulation (EC) No 1731/97 [2] (hereinafter referred to as the 'Provisional Duty Regulation') provisional anti-dumping duties were imposed on imports of glyphosate falling within CN codes ex 2931 00 80 and ex 3808 30 27 originating in the People's Republic of China.

B. SUBSEQUENT PROCEDURE

(2) Following the imposition of the provisional anti-dumping measures, a number of interested parties submitted comments in writing.

(3) Importers in the Community, Chinese exporters, and both complainant Community producers requested and were granted a hearing.

(4) The Commission continued to seek and verify all information deemed necessary for its definitive findings.

(5) Parties were informed of the essential facts and considerations on the basis of which it was intended to recommend the imposition of definitive anti-dumping duties and the definitive collection of amounts secured by way of provisional duties. They were also granted a period within which to make representations subsequent to this disclosure.

(6) The oral and written comments submitted by the interested parties were considered, and, where deemed appropriate, taken into account in the Commission's definitive findings.

C. PRODUCT UNDER CONSIDERATION AND LIKE PRODUCT

1. Product under consideration

(7) As stated in recital 10 of the Provisional Duty Regulation, the product under consideration is glyphosate. This product can be produced in different grades or forms of concentration of which the main ones are the following: formulated (generally with 36 % glyphosate content), salt (with 62 %), cake (with 84 %) and acid (95 %).

In order to reduce the costs of transportation, distributors normally purchase glyphosate in a concentrated form (usually acid, but also salt) and further process it to obtain the formulated glyphosate, the only form that can be used as an end-product, i.e. as a non-selective herbicide.

(8) The Chinese exporters and a number of importers in the Community claimed that the various forms of glyphosate referred to above could not be considered as one product because they presented substantial differences in cost terms, customer structure, price and end-use. One importer argued, in particular, that the transformation of acid into formulated glyphosate required further chemical processing and that the resulting formulated product was of a different chemical

[1] OJ L 56, 6. 3. 1996, p. 1. Regulation as amended by Regulation (EC) No 2331/96 (OJ L 317, 6. 12. 1996, p. 1).
[2] OJ L 243, 5. 9. 1997, p. 7.

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composition than the acid form. The importers considered that, as a consequence, the acid form, which accounted for the majority of all glyphosate imported from the People's Republic of China during the investigation period and the formulated form, which accounted for the majority of sales of the Community industry in the same period, could not be considered as a single product.

(9) However, these claims were not considered justified for the following main reasons:

— it was found in the course of the investigation that there were no basic differences in the chemical characteristics and properties of all abovementioned forms of glyphosate. Indeed, although the acid constitutes an intermediate stage in the production of the formulated form, the acid already contains the essential chemical properties of the formulated product,

— furthermore, although the abovementioned forms of glyphosate have different grades of concentration, thus justifying differences in cost or price, the transformation costs from one to the other are not substantial,

— finally, it should be noted that all forms are dedicated to the same end-use, i.e. as a herbicide, albeit in the case of acid, salt and cake, following further processing into formulated, and cannot be used for any other purpose.

(10) It was therefore concluded that all forms should be considered as one product for the purpose of the investigation, irrespective of the glyphosate concentration.

2. **Like product**

(11) One importer claimed that the glyphosate production process used in the Community and in Brazil (the analogue country) is different from that used in the People's Republic of China and that, as a consequence, the products resulting from these different processes are not alike.

(12) The investigation has confirmed that the production process used in the Community and Brazil, on the one hand, and that used in the People's Republic of China, on the other, were different. However, the glyphosate produced by both processes was found to be identical in all respects.

(13) In the absence of other arguments, it was confirmed that the glyphosate exported to the Community by the People's Republic of China and that produced and sold by the Community industry were alike in all respects. The same applied to glyphosate produced in Brazil, when compared to glyphosate exported from the People's Republic of China and to that produced in the Community. All these products are therefore like products within the meaning of Article 1(4) of Regulation (EC) No 384/96 (hereinafter referred to as the 'Basic Regulation').

D. **DUMPING**

1. **Analogue country**

(14) Some exporters and importers reiterated their opposition to the choice of Brazil as analogue country and made a number of counter-proposals. The exporters and importers in particular argued that the Commission did not do enough to verify whether the alternative countries proposed were more appropriate than Brazil.

(15) In that respect, the Commission made a close examination of the counter-proposals. It should be noted that in Indonesia all producers refused to cooperate with the Commission's investigation. Whereas in Brazil there are two producers and significant imports of the product concerned, in Argentina, Australia, India and Malaysia the markets are largely denominated by companies related to the main complaining producer located in the Community, i.e. Monsanto. In those circumstances, it was concluded that none of the countries proposed were more appropriate than Brazil.

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2. **Normal value**

(16) Exporters requested the Commission to give justification for the determination of a constructed normal value for acid while domestic prices were used for the formulated product.

(17) In this respect it should be noted that as clarified to the exporters in the course of the investigation, normal value for acid was constructed pursuant to Article 2(3) of the Basic Regulation because the domestic sales to unrelated customers, although they were sold in representative quantities, were not sold in the ordinary course of trade. In the absence of further arguments concerning the establishment of normal value, the provisional determintion is hereby confirmed.

3. **Export price**

(18) In the absence of further arguments concerning the establishment of export price, the provisional determination is hereby confirmed.

4. **Comparison**

(19) Exporters claimed that the Commission in determining the dumping margin had compared export prices of acid with the weighted average normal value of both acid and the formulated product. In this respect it is noted that export prices for acid were only compared with the normal value for acid. The same method was used for formulated. On that basis a weighted average dumping margin was then calculated.

5. **Dumping margins**

(20) The methodology used to determine the definitive dumping margin is the same as that used for the calculation of the provisional dumping margin. In the absence of any amendments to the establishment of the normal value and the export price, the provisional determination is hereby confirmed.

(21) The dumping margin established for definitive determinations expressed as a percentage of the cif price at Community frontier, remains at 38,2 %.

E. **INJURY**

1. **Consumption in the Community market**

(22) In determining total apparent consumption on the Community market, the Commission added the sales of Community producers to the imports into the Community.

(23) A further examination of the imports volumes originating in both the People's Republic of China and other third countries resulted in minor changes in the total volume of imports and, consequently, of consumption figures for the period examined. On this basis, Community consumption increased by 130 % between 1991 and the investigation period.

2. **Volume and market share of imports**

(24) A number of importers contested the determination of market share held by imports originating in the People's Republic of China, as established in the provisional duty Regulation. They alleged that this market share was overestimated because it did not take into account the relative importance of imports from other third countries, such as the USA, India, Switzerland and Japan, which, according to these importers, were substantial under Eurostat statistics.

(25) In this context, it is recalled that, at the provisional stage, the determination of imports originating in third countries other than the People's Republic of China, was based on information provided by cooperating importers in the Community. As regards these imports, it was not considered appropriate to use Eurostat, because no precise figures for these imports could be established under Eurostat statistics. Indeed, Eurostat is available per CN code only. As the CN codes applicable to glyphosate are also applied to products other than the product concerned this course of action was deemed appropriate. In addition, it has been confirmed that as regards imports originating in the USA (by far the largest single import quantities declared under Eurostat), products other than glyphosate were imported under the same CN code as glyphosate, during the period examined. This would also appear to be the case as regards imports from other origins, since

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for some of these origins the import volumes reported by Eurostat largely exceeded the import volumes of glyphosate reported by importers.

For the reasons stated above, and in the absence of information which would justify a different approach, the volume of imports originating in third countries other than the People's Republic of China was definitively determined on the basis of information supplied by the importers.

(26) As regards imports originating in the People's Republic of China, at provisional stage, these imports were based on Eurostat statistics, since the Commission was not aware of products other than glyphosate being imported from the People's Republic of China under the same CN codes as glyphosate. However, at the definitive stage it was considered appropriate to also base the findings concerning the development of Chinese imports on information supplied by the importers, since this information was considered reliable.

(27) The above analysis resulted in small changes in the assessment of consumption (recital 23 above) and consequently of the market shares of both imports and sales of the Community producers.

(28) Following the above, the total volume of dumped imports of glyphosate originating in the People's Republic of China increased continually and substantially, from a very low level in 1991 to 1 487 tonnes in the investigation period. Glyphosate of Chinese origin was sold in its three main forms (acid, salt and formulated) and was sold in larger quantities in some Member States than in others.

(29) The market share of these imports followed a similar progressive trend, from very low levels between 1991 and 1993, to 9 % in 1994 and 11 % in the investigation period, i.e. showing a very rapid rate of increase after 1993.

3. **Prices of the dumped imports and price undercutting**

(30) A number of arguments were put forward by both the Community industry and importers regarding the price undercutting assessment made at the provisional stage.

(31) In this context, it is recalled that prices were compared at the formulated stage. In order to ensure a fair comparison of prices, and given the existence of a variety of types of formulated glyphosate on the market, the prices of which can vary considerably both according to the concentration of the product and the type of surfactant used, the Commission services selected the most common formulation, called '3A', which has 360 g of glyphosate content per litre. Consequently, for this comparison, one type of '3A' produced by the Community industry, containing a special type of surfactant (alkylpolyoalkylammoniumquat), designed to increase its efficiency, was excluded from the calculation.

(32) One Community producer argued, however, that all types of formulations having identical concentrations are interchangeable from the consumer viewpoint irrespective of the surfactant used. According to this producer, all such types, including the one with the special surfactant, should therefore be used for a correct assessment of price undercutting by Chinese formulations.

However, the information available indicated that the product with special surfactant was of better quality regarding efficiency and environmental impact than other types of identical concentration and, indeed, was sold at a price significantly higher than that of more common '3A' formulations of the Community industry. In order to ensure the comparability of prices, the approach followed at provisional stage was therefore maintained.

(33) Importers contested the prices used for the Chinese imports, which they argued were not representative because Chinese imports of formulated product accounted for a small percentage of all glyphosate imported from the People's Republic of China during the investigation period.

(34) As mentioned above it should be noted that the price undercutting assessment was made for formulated product combining both the prices of direct imports of formulated product provided by one

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exporter, and the prices of formulated product processed in the Community from Chinese acid, provided by cooperating importers in the Community. On this basis, the prices used accounted for a representative volume of all imports of glyphosate originating in the People's Republic of China.

(35) On the basis of the abovementioned approach, the price undercutting margins during the investigation period were found to range from 2 % to 13 % of the Community industry's corresponding weighted average sales unit price.

4. **Situation of the Community industry**

4.1. *Market share*

(36) The market share of the Community industry decreased continuously from 98 % in 1991, to 95 % in 1992, to 93 % in 1993, to 86 % in 1994 and to 85 % in the investigation period.

4.2. *Profitability*

(37) The profitability of the Community industry was re-assessed to take account of factors such as financing costs which, in the case of one producer, had been incorrectly determined at the provisional stage. It was confirmed that one producer was incurring heavy financial losses in the investigation period. The profitability of the other producer decreased substantially reaching very low levels in the investigation period.

In addition, a calculation of the profitability of this producer for the product types more exposed to competition from the People's Republic of China and used in the undercutting assessment revealed significant financial losses in sales of such product types.

4.3. *Employment*

(38) One importer argued that the employment figure for the Community industry provisionally determined seemed overestimated because glyphosate production does not normally require as many people. The Commission confirms that, on the basis of verified information, in the investigation period the Community industry employed some 814 people in connection with the glyphosate activity.

(39) In the absence of other arguments, the other findings concerning the situation of the Community industry, as stated in recitals 46 to 53 of the Provisional Duty Regulation, are confirmed.

4.4. *Conclusion on injury*

(40) Importers argued that in the light of the increase in capacity, production, sales volume and employment of the Community industry, it could not be considered that this industry had suffered material injury in the period examined.

However, it is recalled that, in accordance with Article 3(5) of the Basic Regulation, any one or more of the injury factors set out in this provision cannot necessarily give decisive guidance as to the impact of the dumped imports on the situation of the Community industry.

In this context, it is noted that, in spite of the positive development of the above factors, which took place in the context of a significant expansion of the market, during the period examined, the Community industry's market share decreased significantly, as did its prices and profits. Furthermore, it is recalled that, in the investigation period, and as underlined by the analysis of imports prices made in recitals 41 to 44 of the Provisional Duty Regulation, the Chinese dumped prices of acid were found to be below the manufacturing costs of acid of the Community industry. This shows the magnitude of the impact of such imports on the situation of this industry.

The conclusion whereby the Community industry suffered material injury during the period examined, as set out in recitals 54 and 55 of the Provisional Duty Regulation, is therefore confirmed.

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F. CAUSATION

1. Patent expiry

(41) Importers claimed that the situation of the Community industry and, in particular, the decrease in prices and profits of this industry, was mainly a consequence of the expiry of the patent held by one Community producer up to 1991. The importers argued, in particular, that the decrease in glyphosate prices on the Community market was in line with other cases of patent expiry and that, as a consequence, the decrease in profitability of the former patent holder was to be expected.

As regards any losses suffered by the other producer, these were claimed by the importers to be due to lack of anticipation of the price evolution that the market would follow after the expiry of the patent. The importers further claimed that the prices of glyphosate on the Community market during the investigation period were comparable to prices of the product on other world markets, e.g. Argentina, which showed that following the expiry of the patent the prices in the Community market had reached a normal level.

(42) It should be noted, in the first instance, that no new evidence was submitted on this subject following provisional findings, which would justify a change in the conclusions regarding causality. In particular, it is noted that as regards the comparison of prices of glyphosate in the Community and Argentina, insufficient evidence was provided on the prices in the latter market or, indeed, on whether the conditions of competition in Argentina would be comparable to those in the Community following the expiry of the patent. It should further be noted that given the different situations for different markets as regards patents, no world price could be established for this product.

(43) Concerning the profitability of the Community industry, it is recalled that in spite of considerable reductions in costs of this industry, its prices decreased further than costs. In addition, the investigation revealed that this decrease in prices was considerably accelerated between 1993 and the investigation period, when the Chinese imports appeared on the Community market in significant volumes. This shows that, irrespective of the patent expiry, the Chinese imports had a negative impact on the level of Community market prices.

(44) It is further noted with regard to the other Community producer which entered the market after the expiry of the patent, that it had made detailed forecasts of the decrease in prices that would follow the expiry of the patent. However, it is clear that prices dropped to much lower levels than anticipated.

(45) Finally, it is stressed that in the investigation period, the Chinese imports of acid were found to be below the manufacturing costs of the Community industry, i.e. at a level excluding any general, sales or administrative expenses, thus exerting a continuous downward pressure on the prices of the formulated product.

(46) In view of all the above elements, the conclusion in the Provisional Duty Regulation is maintained that the dumped prices largely influenced the level of prices and profits of the Community industry in the period examined. Furthermore, it is recalled that the impact of the dumped Chinese imports resulted in an increase of market share of these imports, to the detriment of the market share of the Community industry.

2. Other imports

(47) As regards the effects of imports other than those originating in the People's Republic of China, one importer claimed that the Commission had underestimated the volume of these imports, in particular of those originating in Hungary.

For the reasons explained in recital 25, it is recalled that the volume of imports was based on information provided by importers. In this context, it is noted that other imports were found to have taken place from Hungary, Korea, Taiwan, Slovenia, India and Malaysia. The total market share of these imports was, in the investigation period, 3,2 %, with individual market shares of less than 1 % in all cases with the

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exception of Hungary. As regards Hungary, its market share was 2 % in the investigation period. However, there was no evidence that the Hungarian prices were dumped.

(48) In the light of the above, it is unlikely that other imports had any significant impact on the situation of the Community industry.

3. **Conclusion on causation**

(49) Although it is not contested that the patent expiry had an impact on the Community industry's situation, it was concluded that the imports concerned have, in isolation, caused material injury to the Community industry. The findings set out in recitals 56 to 60 of the Provisional Duty Regulation, concerning causation, are confirmed.

G. COMMUNITY INTEREST

1. **Impact on importers/formulators**

(50) Importers in the Community claimed that the imposition of anti-dumping duties would force them to cut down an important part of their activities. However, since this claim was not substantiated and for the reasons set out in recitals 66 and 67 of the Provisional Duty Regulation, it could not be considered justified.

2. **Competition in the Community**

(51) One importer alleged that the imposition of duties would strengthen the position of the former patent holder in the Community market, thus preventing competition from developing in this market.

(52) In this respect, it is considered that, on the contrary, measures would ensure the viability of new producers in the Community, as well as of those already producing, thus enlarging the number of competitors on the market.

(53) As explained in recitals 70 and 71 of the Provisional Duty Regulation, it is noted that, following the expiry of the patent, two new producers have entered the Community market. However, the investments made by these new producers are being jeopardised by the continued presence of the dumped imports, the prices of which have apparently continued to decrease after the investigation period.

It is therefore considered essential that fair conditions of competition are established on the Community market in order to ensure the viability of these producers, while encouraging the emergence of new ones.

(54) Furthermore, given the difficulties encountered by the new producers due to the Chinese dumped prices there is a likelihood that, without the imposition of measures, competition in the Community would be limited to the former patent holder and the Chinese, to the extent that the former patent holder would economically be in a position to compete with the very low dumped prices of the Chinese exporters. It is considered that new entrants would ensure a more effective competition on the Community market as there would be a greater number of players involved on that market. In doing so, a greater variety of reliable sources of supply for Community consumers would be maintained than would be the case if Chinese imports were the only alternative to the former patent holder products.

3. **Conclusion on Community interest**

(55) In the absence of any other arguments, the conclusions on Community interest as stated in recitals 61 to 74 to the Provisional Duty Regulation are maintained.

H. DEFINITIVE DUTY

(56) The product type used as a reference to determine the duty rate was the acid form of the product concerned, because the acid form represented 67 % of the volume of glyphosate imported from the People's Republic of China during the investigation period. Moreover, acid is the common base of all forms of glyphosate exported from the People's Republic of China and produced in the Community.

(57) For the purpose of calculating the injury elimination level, the Commission considered that the prices of the dumped imports should be compared with the production costs of acid of the Community

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industry plus a reasonable level of profit. In this context, the Community industry contested both the determination of its cost of production at provisional stage, insofar as it did not include certain R & D costs claimed by this industry, and the profit level used by the Commission, which the industry considered to be underestimated for a product in the agrochemical sector.

(58) Specifically, the Community industry argued that the Commission, at provisional stage, had improperly classified glyphosate acid as a commodity product and that this had resulted in an underestimation of both the R & D costs and the profit margin attributed to this product. The Community industry claimed that glyphosate acid is a highly technical product that requires continued research and development for compliance with environmental requirements.

(59) In this context, the producer concerned provided sufficient additional evidence showing the link of certain R & D costs with the product type concerned.

(60) Therefore, the cost of production of the Community industry, for the purpose of establishing the non-injurious price level, was adjusted, where appropriate, to take account of these R & D costs.

(61) No further evidence was provided on R & D costs relating to glyphosate which should be taken into account at definitive stage. Furthermore, as far as the former patent holder is concerned, and given the effective duration of the patent protection for this company, it can be considered that any other significant research costs in relations to this product were already recovered.

(62) As regards profit, the Community industry argued that profit level higher than that used at provisional stage would be adequate for the glyphosate business. In this respect, it should be noted that during much of the period examined, the prices on the Community market were influenced by the former existence of a patent, and latterly, by the presence of dumped Chinese prices. Therefore, it was not possible to obtain reliable information on the profit level this industry would be able to obtain in normal conditions of competition.

(63) In any event, it should be borne in mind that, irrespective of whether acid should be qualified as a commodity, glyphosate has benefited during an extended time period from patent protection. Therefore, the level of profit of 5 % on turnover was considered reasonable. It should be noted that the same level of profit was considered appropriate for producers in the analogue country (see recital 26 of the Provisional Duty Regulation).

(64) Further, a small downward correction was found to be required in the amount of post-importation adjustment added to the Chinese cif export price of acid, in order that the comparison be made at the same level of trade.

(65) On the basis of the revised figures, the weighted average export price of acid, for the investigation period, on a cif Community frontier level, adjusted to take account of customs duty and post-importation costs, was compared with the weighted average cost of production of the Community industry, increased by a profit margin of 5 %.

(66) This comparison resulted in an injury margin of 24,0 %, on the basis of the net, free-at-Community frontier average price before duty.

(67) Since the injury margin is lower than the dumping margin found, the definitive anti-dumping duties should be based on this lower level, in accordance with the provisions of Article 9(4) of the Basic Regulation.

I. COLLECTION OF THE PROVISIONAL DUTY

(68) Considering the conclusions on dumping and injury definitively established, and that the rate of definitive duty is higher than that provisionally determined, the amounts secured by way of the provisional anti-dumping duty should be definitively collected at the rate established in the Provisional Duty Regulation,

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HAS ADOPTED THIS REGULATION:

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Article 1

1. A definitive anti-dumping duty is hereby imposed on imports of glyphosate falling within CN codes ex 2931 00 95 (TARIC code 2931 00 95 80) and ex 3808 30 27 (TARIC code 3808 30 27 10) originating in the People's Republic of China.

2. The rate of duty applicable to the net, free-at-Community-frontier price before duty shall be 48 %.

3. Unless otherwise specified, the provisions in force concerning customs duties shall apply.

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Article 2

The amount secured by way of provisional anti-dumping duty pursuant to Regulation (EC) No 1731/97 shall be definitively collected at the duty rate provisionally imposed.

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.