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(Acts whose publication is obligatory)

COUNCIL REGULATION (EC) No 365/2006

of 27 February 2006

amending Regulation (EC) No 1676/2001 imposing a definitive anti-dumping duty on imports of polyethylene terephthalate film originating, *inter alia*, in India and terminating the partial interim review of the anti-subsidy measures applicable to imports of polyethylene terephthalate (PET) film originating, *inter alia*, in India

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] ('the basic anti-dumping Regulation'), in particular Article 11(3) thereof, and Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community [2] ('the basic anti-subsidy Regulation'), in particular Article 19 thereof,

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

Whereas:

A. PROCEDURE

1. Existing measures and terminated investigations concerning the same product

(1) The Council, by Regulation (EC) No 2597/1999 [3], imposed a definitive countervailing duty on imports of polyethylene terephthalate (PET) film falling within CN codes ex 3920 62 19 and ex 3920 62 90 and originating in India ('the definitive countervailing measures'). The measures took the form of an *ad valorem* duty ranging between 3,8 % and 19,1 % imposed on imports from individually named exporters, with a residual duty rate of 19,1 % imposed on imports from all other companies.

(2) The Council, by Regulation (EC) No 1676/2001 [4], imposed definitive anti-dumping duties on imports of PET film originating, *inter alia*, in India. The measures took the form of an *ad valorem* duty ranging between 0 % and 62,6 % on imports of PET film originating in India ('the definitive anti-dumping measures'), with the exception of imports from five Indian companies (Ester Industries Limited (Ester), Flex Industries Limited (Flex), Garware Polyester Limited (Garware), MTZ Polyfilms Limited (MTZ), and Polyplex Corporation Limited (Polyplex)) from whom undertakings had been accepted by Commission Decision 2001/645/EC [5] accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of polyethylene terephthalate film originating inter alia in India.

(3) The Council, by Regulations (EC) No 1975/2004 and (EC) No 1976/2004, extended the definitive countervailing and anti-dumping measures on imports of PET film originating in India, to imports of the same product consigned from Brazil and Israel, whether declared as originating in Brazil or Israel or not.

(4) On 4 January 2005 [6], the Commission initiated a partial interim review of Regulation (EC) No 1676/2001 limited to the level of the definitive anti-dumping measures. This investigation has been concluded by Council Regulation (EC) No 366/2006 [7] which amended the level of the definitive anti-dumping measures.

(5) On 10 December 2004 [8], the Commission initiated an expiry review of the definitive countervailing measures. This investigation has been concluded by Council Regulation (EC) No 367/2006 [9] which maintained the definitive countervailing measures.

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(1) OJ L 56, 6.3.1996, p. 1. Regulation as last amended by Regulation (EC) No 2117/2005 (OJ L 340, 23.12.2005, p. 17).

(2) OJ L 288, 21.10.1997, p. 1. Regulation as last amended by Regulation (EC) No 461/2004 (OJ L 77, 13.3.2004, p. 12).

(3) OJ L 316, 10.12.1999, p. 1. Regulation as amended by Regulation (EC) No 1976/2004 (OJ L 342, 18.11.2004, p. 8).

(4) OJ L 227, 23.8.2001, p. 1. Regulation as amended by Regulation (EC) No 1975/2004 (OJ L 342, 18.11.2004, p. 1).

(5) OJ L 227, 23.8.2001, p. 56.

(6) OJ C 1, 4.1.2005, p. 5.

(7) See page 6 of this Official Journal.

(8) OJ C 306, 10.12.2004, p. 2.

(9) See page 15 of this Official Journal.

2. **Requests for reviews**

Request for a review as regards countervailing measures

(6) In 2002, a request for a partial interim review, limited in scope to the form of the countervailing measures in respect of one company, was lodged by (Polyplex), an Indian exporting producer from whom an undertaking had already been accepted by Decision 2001/645/EC in connection with the anti-dumping measures in force. Polyplex provided information that an undertaking of the same nature would remove the injurious effects of subsidisation and could be monitored. Therefore, it was warranted to review the form of the countervailing measure.

Request for a review as regards countervailing measures

(7) In October 2003, a request for a partial interim review limited to the form of the anti-dumping measures was lodged by the following Community producers: Du Pont Teijin Films, Mitsubishi Polyester Film GmbH and Nuroll SpA (the applicants). The applicants represent a major proportion of the Community production of PET film. Toray Plastics Europe indicated its support for the request, although it was not a formal applicant.

(8) The applicants alleged that the form of the measures (i.e. the existing undertakings as accepted by Decision 2001/645/EC) was no longer effective in removing the injurious dumping. The applicants alleged that, since the acceptance of the existing undertakings, which are based on minimum import prices, the range of products sold by the exporters concerned had developed, notably to include more technically sophisticated film, so that the minimum prices under which some products may be categorised no longer reflected their true value, and thus the mechanism of the measures was no longer adequate in view of the new technological developments. Consequently, the undertakings were said to be no longer adequate to eliminate the injurious effects of dumping.

3. **Investigations**

Review regarding countervailing measures

(9) On 28 June 2002, the Commission announced by a notice of initiation published in the *Official Journal of the European Union* ([1]), the initiation of a partial interim review of the anti-subsidy measures limited in scope to the examination of the acceptability of an undertaking offered by the Indian exporting producer Polyplex, pursuant to Article 19 of the basic anti-subsidy Regulation.

(10) Given that a partial interim review of the form of the anti-dumping measures (i.e. the existing undertakings) was initiated in November 2003, as mentioned in recitals (12) and (13) below, the question of the acceptability of Polyplex's offer of an undertaking was kept open in order to complete both reviews at the same time. The Commission officially informed Polyplex of its intentions in this regard. No comments were made by the applicant in this respect.

Review of the form of the anti-dumping measures

(11) On 22 November 2003, the Commission announced by a notice of initiation published in the *Official Journal of the European Union* ([2]), the initiation of a partial interim review in accordance with Article 11(3) of the basic anti-dumping Regulation.

(12) The review was limited in scope to the form of the measures applicable to the five Indian exporting producers from whom undertakings had been accepted. The investigation period was from 1 October 2002 to 30 September 2003 (the current IP).

(13) The Commission officially informed the exporting producers, the representatives of the exporting country and the Community producers about the initiation of the review. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit indicated in the notice of initiation.

(14) In order to obtain the information deemed necessary for its investigation, the Commission sent questionnaires to the exporting producers concerned, which all cooperated by replying to the questionnaire. Verification visits were carried out at the premises of the following exporting producers in India:

— Ester Industries Limited, New Delhi,

— Flex Industries Limited, New Delhi,

— Garware Polyester Limited, Aurangabad,

— MTZ Polyfilms Limited, Mumbai,

— Polyplex Corporation Limited, New Delhi.

B. **PRODUCT CONCERNED**

(15) The product concerned is, as defined in the original investigation, polyethylene terephthalate (PET) film originating in India, normally declared under CN codes ex 3920 62 19 and ex 3920 62 90.

([1]) OJ C 154, 28.6.2002, p. 2.

([2]) OJ C 281, 22.11.2003, p. 4.

C. FINDINGS

Review of the form of the anti-dumping measures

(16) PET film has specific physical, chemical and technical characteristics, which include thickness, coating properties, surface treatment and mechanical properties among others, which determine various types of PET film through different treatments of base film during or after the production process, including corona treatment, metallisation or chemical coating. It therefore exists in many different forms or types. Given the existence of the large number of different product presentations (product types), and for the purpose of facilitating the monitoring of the undertakings, the products were grouped under different categories (groupings) based on technical characteristics. These groupings served as the basis for establishing the minimum import prices (MIPs) set out in the undertakings. In the original investigation, the number of MIPs established on the basis of those groupings ranged from 10 to 32 per exporter.

(17) In the framework of the current review, a comparison was made, within groupings, of the mix of model types and of price variations between the investigation period used in the original investigation (original IP) and the current IP.

(18) The analysis showed that the mix of model types sold under certain product groupings have changed since the acceptance of the undertakings. For several companies under investigation these changes have been very significant, to the extent that for some groupings most of the product presentations exported to the Community during the IP no longer correspond to the products exported during the original IP. Examples of changes which were noted within groupings were the dropping of lower value products, the addition of new apparently higher value products, and sometimes a combination of both of these.

(19) The analysis also showed that for certain product groupings the price variance (the range of product values) within the grouping has changed significantly since the acceptance of the undertakings. In this context it should also be noted that there has been a significant change in the pattern of sales between the different product groupings following the acceptance of undertakings. In particular, there appears to have been a tendency to concentrate sales on those groupings with a lower minimum price.

(20) Since the MIPs and the undertakings were established on the basis of the mix of product types and their corresponding values within the product groupings during the original IP, it is clear that the changes found in relation to the actual mix of products and values within those product groupings have rendered those specific MIPs, and therefore the undertakings, inappropriate to counteract the injurious effect of dumping.

Request regarding countervailing measures

(21) As regards the review limited in scope to the examination of the acceptability of an undertaking offered by Polyplex, the analysis showed that the corporate structure of that company would render monitoring of an undertaking complex, thus making an undertaking inappropriate as a form of effective countervailing measure. The complexity arises from the fact that the product concerned is also manufactured by a related company of Polyplex in a third country (Thailand), which creates a risk of cross-compensation of prices should the company in Thailand also export the product concerned to the Community. Monitoring and therefore enforcement would be too difficult to guarantee a proper functioning of the undertaking.

D. CONCLUSIONS

Review of the form of the anti-dumping measures

(22) The undertakings as they are, with MIPs based on groups of products, permit a large degree of flexibility for the exporters to change the technical characteristics of the products within the group. The product concerned comprises numerous and evolving differentiating features, which largely determine sales prices. Changes in those features consequently have a significant impact on prices. The only viable way to make the groupings more homogeneous in terms of physical characteristics and prices would be to subdivide the groupings. However, the consequence would be a multiplication of groupings that would render monitoring unworkable, in particular, by making it difficult for customs authorities to discern the difference between product types and the classification of products by grouping upon importation. Moreover, the number of groupings per company might increase by a factor of 5 to 11 compared to those in the undertakings if more characteristics of the different product types were considered in order to arrive at a more accurate classification. Currently, product types already fall into more than several hundred detailed groupings, thus rendering undertakings unworkable. This number might increase with further developments of the product characteristics.

(23) For certain companies subject to the review, the model types sold under a particular product grouping did not change significantly since the acceptance of the undertakings. However, the likely increase in the number of product groupings due to further developments in the product groupings, as mentioned in recital (22), could arise at any future stage and in the case of any exporting producer.

(24) It can therefore be concluded that, in order to enable effective monitoring of the undertakings, the groupings of products should be considerably more homogeneous in terms of physical characteristics and prices. These characteristics should be stable throughout the duration of the undertaking. The investigation has confirmed that this has not been the case as regards PET-film.

(25) On the basis of the above facts and considerations, it is considered that the undertakings are not appropriate to counteract the injurious effect of dumping, since they present both considerable monitoring and enforcement difficulties and unacceptable risks. In these circumstances, the undertakings accepted from the five Indian producers subject to the review of the form of the anti-dumping measures should be withdrawn.

(26) All parties concerned were informed of the essential facts and considerations on the basis of which the decision to withdraw the existing undertakings was made, and were given the opportunity to comment.

(27) Further to disclosure, some parties indicated that they considered that there were no monitoring or enforcement difficulties related to the undertakings and therefore there were no risks associated with the form of the measures. Furthermore many of the exporting producers indicated that they had not violated their undertaking agreements. One of the exporting producers concerned indicated that whereas the Notice of Initiation referred to the significance of the development of new product types, they had not introduced any new product types into the EU between the time of the offer of the existing undertaking and the current IP.

(28) As regards the technical aspects, the sheer number of variations of this product, coupled with product development possibilities, makes this product unsuited to undertakings as product developments would require a constant update of the MIPs which is not feasible (see recital 22). In this respect, it should be recalled that Article 8(3) of the basic Regulation indicates that undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual or potential exporters is too great, or for other reasons. In regard to the claim by exporters that they have not violated the terms of the undertakings, there is no suggestion that violation took place. The decision to withdraw the undertakings is based on evidence assembled during the investigation that changes in the mix of products make the undertaking inappropriate and that monitoring of sales of this product are unsuited to undertaking agreements (see recitals 18 to 20 and 22). Finally, the investigation showed that films different from the mix of products on which the MIPs were based were now widely sold in the Community under the undertaking agreements and that potentially that number and variety of products could grow. Thus, the market situation on which the undertakings had been established, as regards the products sold, is no longer representative in the current review and therefore the undertakings MIPs have become inappropriate.

(29) In this context, the fact that one exporting producer had not yet introduced any new product types, does not change the fact that the undertakings for the product concerned have been found to be inappropriate and their monitoring not feasible, as explained in recital 28 above.

(30) In addition, some exporting producers made reference to Article 15 of the Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade (GATT) 1994, hereinafter referred to as 'WTO Anti-dumping Agreement' and the requirement therein for developed countries to assist developing countries, indicating that the exporting producers should be given the opportunity to offer new undertaking agreements. It was suggested that the withdrawal of the undertakings was being made on speculative, non-material grounds which was devaluing the spirit of Article 15 of the WTO Anti-dumping Agreement and that withdrawal of the undertakings was a violation of the principle of proportionality.

(31) Article 15 of the WTO Anti-Dumping Agreement refers to the need to explore constructive remedies before applying anti-dumping duties. The existing undertakings were accepted in the spirit of seeking a constructive remedy to the injurious dumping. However, it should be recalled that Article 8.3 of the WTO Anti-dumping Agreement indicates that undertakings offered need not be accepted if the authorities consider their acceptance impractical, for example, if the number of actual of potential exporters is too great, or for other reasons. Far from withdrawing the undertakings on speculative grounds, the investigation has revealed that the products on which the Indian producers agreed to fix undertaking prices (i.e. the MIPs) are largely different from the products currently being sold into the Community. The withdrawal of the undertakings is therefore not disproportionate but a considered response to developments in the market place brought about by the exporting producers themselves.

Request for an undertaking as regards countervailing measures

(32) The conclusions of the review of the form of the anti-dumping measures that undertakings are not appropriate to counteract the injurious effect of dumping since they present both considerable monitoring and enforcement difficulties and unacceptable risks are equally valid as concerns countervailing measures. It was also found that the corporate structure of the Polyplex Group would lead to monitoring and enforcement difficulties vis-à-vis an undertaking. For this reason the acceptance of the undertaking is considered impractical within the meaning of Article 8(3) of the basic anti-subsidy Regulation.

(33) In the light of the above, it was concluded that the review investigation on the form of the anti-subsidy measures, limited to the acceptability of the undertaking offered by Polyplex, should be terminated and the undertaking in question not be accepted, since the conditions set out in Article 13(1) of the basic anti-subsidy Regulation regarding the acceptance of an undertaking are not met.

(34) The reasons why the undertaking offered could not be accepted were disclosed to the applicant concerned,

HAS ADOPTED THIS REGULATION:

Article 1

1. Article 1(3) of Regulation (EC) No 1676/2001 as in force on the day of publication of this Regulation shall be deleted.

2. Article 1(4) of Regulation (EC) No 1676/2001 as in force on the day of publication of this Regulation shall be renumbered Article 1(3).

3. Article 2 of Regulation (EC) No 1676/2001 as in force on the day of publication of this Regulation shall be deleted.

4. Articles 3 and 4 of Regulation (EC) No 1676/2001 as in force on the day of publication of this Regulation shall be renumbered Articles 2 and 3.

Article 2

The partial interim review of Regulation (EC) No 2597/1999 is hereby terminated with the non acceptance of the undertaking.

Article 3

This Regulation shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels, 27 February 2006.

For the Council
The President
U. PLASSNIK