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(Acts adopted under the EC Treaty/Euratom Treaty whose publication is obligatory)

REGULATIONS

COUNCIL REGULATION (EC) No 319/2009

of 16 April 2009

clarifying the scope of the definitive anti-dumping duties imposed by Regulation (EC) No 85/2006 on imports of farmed salmon originating in Norway

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 Regulation), and in particular Article 11(3) thereof,

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

Whereas:

A. PROCEDURE

1. Former investigations and anti-dumping measures

(1) Following the initiation of an anti-dumping proceeding in October 2004 [2], the Commission, by Regulation (EC) No 628/2005 [3], imposed provisional anti-dumping duties on imports of farmed salmon originating in Norway in the form of an *ad valorem* duty.

(2) On 1 July 2005, by Regulation (EC) No 1010/2005 [4], the Commission changed the form of the provisional duties to a minimum import price (MIP).

(3) The Council, by Regulation (EC) No 85/2006 [5], imposed a definitive anti-dumping duty on imports of farmed salmon originating in Norway (the original investigation and definitive Regulation). The definitive duty was imposed in the form of a MIP.

(4) By Regulation (EC) No 685/2008 [6], following an interim review limited in scope to the aspects of dumping with the objective of assessing the need for the continuation, removal or amendment of the existing measures, the Council repealed the anti-dumping measures imposed by the definitive Regulation.

2. Initiation of the review investigation

(5) A partial interim review was initiated on the Commission's own initiative after the Tallinn Administrative Court applied to the European Court of Justice for a preliminary ruling on the question whether frozen backbones (bones with fish meat) of salmon (salmon backbones) fall within one of the Taric codes mentioned in Article 1 of the definitive Regulation. Article 1 of the definitive Regulation imposes measures at different levels depending on the presentations of the product concerned. One of these presentations is 'Other (including gutted, head off), fresh, chilled or frozen'.

(6) Therefore, it was considered appropriate to examine whether frozen backbones of salmon fall within the definition of the product concerned, and in particular within the presentation 'Other (including gutted, head off), fresh, chilled or frozen', with the conclusion thereon possibly having retroactive effect as of the date of the imposition of the relevant anti-dumping measures.

(7) After consulting the Advisory Committee, the Commission announced by a notice (the notice of initiation) published in the *Official Journal of the European Union* [7] the initiation of a partial interim review of the anti-dumping measures applicable to farmed salmon originating in Norway in accordance with Article 11(3) of the basic Regulation, limited in scope to the examination of the product scope.

[1] OJ L 56, 6.3.1996, p. 1.
[2] OJ C 261, 23.10.2004, p. 8.
[3] OJ L 104, 23.4.2005, p. 5.
[4] OJ L 170, 1.7.2005, p. 32.
[5] OJ L 15, 20.1.2006, p. 1.
[6] OJ L 192, 19.7.2008, p. 5.
[7] OJ C 181, 18.7.2008, p. 25.

B. **PRESENT INVESTIGATION**

(8) The Commission officially informed the authorities of Norway, the Norwegian producer association, known importers in the Community, known users in the Community, the associations of producers in the Community and other known producers in the Community of the initiation of the investigation. Interested parties were given the opportunity to make their views known in writing and request a hearing within the time limit set in the notice of initiation.

(9) The Commission sent questionnaires to all parties known to be concerned and to all other companies which made themselves known within the deadlines set out in the notice of initiation.

(10) In view of the scope of the partial review, no investigation period was set for the purpose of this partial review. The information received in the questionnaire replies covered the period from 2005 to 2007 (period considered). For the period considered, information concerning purchase volumes, sales volumes and value was requested. In addition, the parties concerned were asked to comment on any differences or similarities between salmon backbones and farmed salmon with respect to their physical, chemical and/or biological characteristics, end-uses, interchangeability and competition with one another.

(11) Two importers in the Community and the Norwegian producer association cooperated in the present investigation and submitted the basic information requested.

The Commission sought and verified all information deemed necessary for the purpose of the clarification of the scope of the existing anti-dumping measures and carried out investigations at the premises of the following importers:

— Nereus AS, Pärnu, Estonia,

— Pärlitigu OÜ, Tallinn, Estonia,

The following salmon backbone processor was also visited:

— Korvekula Kalatoostuse, Tartu, Estonia,

(12) All interested parties were informed of the essential facts and considerations on the basis of which the present conclusions were reached. In accordance with Article 20(5) of the basic Regulation, parties were granted a period within which they can make representations subsequent to the disclosure. The oral and written comments submitted by the parties were considered and, where appropriate, the findings have been modified accordingly.

C. **PRODUCT CONCERNED**

(13) The product under review is the same as in the original investigation, i.e. farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen, originating in Norway (the product concerned). The definition excludes other similar farmed fish products such as large (salmon) trout, biomass (live salmon) as well as wild salmon and further processed types such as smoked salmon.

(14) The product is currently classifiable within CN codes ex 0302 12 00, ex 0303 11 00, ex 0303 19 00, ex 0303 22 00, ex 0304 19 13 and ex 0304 29 13 corresponding to different presentations of the product (fresh or chilled fish, fresh or chilled fillets, frozen fish and frozen fillets).

D. **RESULTS OF THE INVESTIGATION**

1. **Methodology**

(15) In order to assess whether salmon backbones should fall within the product scope of Article 1 of the definitive Regulation, it was examined whether salmon backbones and farmed salmon shared the same basic physical and/or biological characteristics and end-uses. In this regard, the interchangeability and the competition between salmon backbones and other farmed salmon in the Community were also assessed.

2. **Basic physical characteristics**

(16) Salmon backbone, which usually weighs about 10 % of a whole fish, is a by-product which results from the salmon filleting process. After gutting and heading off operations, fillets are obtained by parting the salmon in at least three separate pieces: two fillets and a backbone to which some flesh is still attached. A higher level of trimming can be achieved by performing additional tasks such as the removal of back fins, collar bone, pin bone, belly flaps and skin.

(17) Article 1 of the definitive Regulation refers to various farmed salmon presentation types, including whole fish, whole fish gutted head-on and fillets in different presentations (weight, skin on/off).

(18) It is undisputed that salmon backbones do not fall within presentation types referring to the whole fish, gutted head on, gutted head-off, or any of the presentation types referring to fillets listed in Article 1 of the definitive Regulation. Indeed, as far as these presentation types are concerned, salmon backbones are clearly and easily distinguishable because they have, as outlined below, clear different physical characteristics.

(19) The question arises whether salmon backbones would fall within the category 'Other' in Article 1 of the definitive Regulation, which includes gutted head-off salmon (fresh, chilled or frozen) but is not exclusively reserved for this kind of presentation.

(20) In this regard, it was considered that the definitive Regulation only distinguished between two types of products; i.e. filleted and non-filleted salmon, and that the latter referred to the whole salmon. This is apparent from the original investigation where information was only collected concerning the whole fish and the fillets, but not for other parts of the fish. Consequently, the applicable MIPs were calculated on the basis of that information only. Thus, it seems that although salmon backbones were not explicitly excluded, the investigation at that time did not mean to target backbones.

(21) As mentioned above, some flesh is still attached to the backbone and this flesh is also partly destined for human consumption. However, backbones, as suggested by the name, are mainly characterised by the bone whereas farmed salmon whether filleted or not is mainly characterised by the flesh. Indeed, salmon backbone represents about 10 % of a whole salmon weight, and the flesh on the backbone represents between 25 % and 40 % of the backbone weight. The flesh attached to the backbone thus accounts for only 2,5 to 4 % of a whole fish weight while salmon flesh of a whole fish accounts for more than 65 % of the whole fish weight.

(22) Therefore, it was concluded that salmon backbones and farmed salmon as defined by the definitive Regulation do not share the same basic physical characteristics.

3. **Basic end-uses and interchangeability**

(23) The investigation further revealed that farmed salmon as defined in the definitive Regulation has several high-end uses. Indeed such product will be marketed in a gutted head-on/off presentation, as a fillet, a steak or will be filleted before being smoked or marinated. Such products are usually sold in supermarkets or are further processed and offered in restaurants or specialised shops. Given their price level, they will be advertised as high-end products and can be regarded as sub-luxury products.

(24) Very often salmon backbones are considered as waste and disposed of during the filleting process. When salmon backbones are not disposed of at the packing station where the filleting takes place, they will mostly be sold as low-end products and used mainly in animal feed but also as ingredients in soups, hamburger patties and pâtés. Only in some limited cases will salmon backbones also be smoked and sold as such (i.e. without scraping off the flesh beforehand) for human consumption. The smoked flesh on the backbone will, however, be even more limited in weight.

(25) The information gathered showed that salmon backbones are priced at a significantly lower level than farmed salmon. While farmed salmon was never imported below EUR 2,88/kg over the period January 2006 to July 2008, salmon backbones were imported at an average of EUR 0,50/kg over the same period. Also it should be noted that whereas the price of farmed salmon varied significantly in the period mentioned above, the price evolution for salmon backbones was flat.

(26) Given the above, it is concluded that both products do not share the same basic end uses and are targeted at distinct markets. While farmed salmon is a high-end product, salmon backbone is a salmon by-product destined for the low-end market and used mainly as an ingredient in the animal feed or food processing industry.

(27) It follows from the above that farmed salmon and salmon backbones do not have the same basic end-uses and are not interchangeable.

E. **CONCLUSIONS ON THE PRODUCT SCOPE**

(28) The above findings show that salmon backbones and farmed salmon as defined in the definitive Regulation do not share the same basic physical characteristics and do not have the same basic end-uses. They are not interchangeable and do not compete with each other on the Community market. On this basis, it is concluded that salmon backbones and farmed salmon as defined in Article 1 of the definitive Regulation are two different products. Since salmon backbones did not fall within the scope of the original investigation the anti-dumping duty should not have been applied to imports of salmon backbones.

(29) Based on the above, the scope of application of the measures should be clarified retroactively by an amendment to the definitive Regulation.

F. **RETROACTIVE APPLICATION**

(30) Since the present review investigation is limited to the clarification of the product scope and since salmon backbones were not covered by the original investigation and the consequent anti-dumping measure, it is considered appropriate that the findings be applied from the date of the entry into force of the definitive Regulation, including any imports subject to provisional duties.

(31) Consequently, the provisional duties definitively collected and the definitive anti-dumping duties paid pursuant to Regulation (EC) No 85/2006 on imports of salmon backbones in the Community should be repaid or remitted. The repayment or remission must be requested from national customs authorities in accordance with applicable national customs legislation,

HAS ADOPTED THIS REGULATION:

Article 1

Article 1(1) of Regulation (EC) No 85/2006 shall be replaced by the following:

'1. A definitive anti-dumping duty is hereby imposed on imports of farmed (other than wild) salmon, whether or not filleted, fresh, chilled or frozen, falling within CN codes ex 0302 12 00, ex 0303 11 00, ex 0303 19 00, ex 0303 22 00, ex 0304 10 13 and ex 0304 20 13 (hereinafter farmed salmon) originating in Norway. Salmon backbones, composed of a fishbone partly covered with flesh, being an edible by-product of the fishing industry, and falling within CN codes ex 0302 12 00, ex 0303 11 00, ex 0303 19 00, ex 0303 22 00, shall not be covered by the definitive anti-dumping duty provided that the flesh attached to the backbone represents not more than 40 % of the salmon backbone weight.'.

Article 2

For goods not covered by Article 1(1) of Regulation (EC) No 85/2006 as amended by this Regulation, the definitive anti-dumping duties paid or entered into the accounts pursuant to Article 1(1) of Regulation (EC) No 85/2006 in its initial version and the provisional anti-dumping duties definitively collected pursuant to Article 2 of that Regulation shall be repaid or remitted.

Repayment and remission shall be requested from national customs authorities in accordance with applicable customs legislation. In duly justified cases, the time limit of three years provided in Article 236(2) of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code [1] shall be extended for a period of two years.

Article 3

This Regulation shall enter into force on the day following its publication in the *Official Journal of the European Union* and shall apply retroactively from 21 January 2006.

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

Done at Brussels, 16 April 2009.

For the Council
The President
K. SCHWARZENBERG

[1] OJ L 302, 19.10.1992, p. 1.