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COMMISSION IMPLEMENTING REGULATION (EU) 2016/415

of 21 March 2016

withdrawing the acceptance of the undertaking for two exporting producers and repealing Decision 2008/577/EC accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Russia

(OJ L 75, 22.3.2016, p. 10)

Corrected by:

►**C1** Corrigendum, OJ L 98, 14.4.2016, p. 6 (2016/415)

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COMMISSION IMPLEMENTING REGULATION (EU) 2016/415

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withdrawing the acceptance of the undertaking for two exporting producers and repealing Decision 2008/577/EC accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Russia

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [1] (the 'basic Regulation'), and in particular Article 8 thereof,

Informing the Member States,

Whereas:

A. EXISTING MEASURES

(1) The Council, by Regulation (EC) No 2022/95 [2], imposed a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia. Following an expiry and interim review, the Council, by Regulation (EC) No 658/2002 [3], imposed a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia. Following another expiry and interim review, the Council, by Regulation (EC) No 661/2008 [4], imposed a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia. Following another expiry review the Commission, by Implementing Regulation (EU) No 999/2014 [5], imposed a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia.

(2) The Commission, by Decision 2008/577/EC [6] ('the Decision') accepted a price undertaking ('the undertaking'), inter alia, from the Russian producers JSC Acron and ►C1 PJSC Dorogobuzh ◄, members of Acron Holding Company (referred to jointly as Acron) concerning imports of ammonium nitrate produced by these companies and sold to the first independent customer in the Union.

(3) By the same Decision, the Commission also accepted an undertaking from Open Joint Stock Company (OJSC) Azot Cherkassy, Ukraine. Measures on imports of ammonium nitrate originating in Ukraine expired on 17 June 2012 [7], thus the related undertaking also expired on the same day.

[1] OJ L 343, 22.12.2009, p. 51.
[2] OJ L 198, 23.8.1995, p. 1.
[3] OJ L 102, 18.4.2002, p. 1.
[4] OJ L 185, 12.7.2008, p. 1.
[5] OJ L 280, 24.9.2014, p. 19.
[6] OJ L 185, 12.7.2008, p. 43.
[7] OJ C 171, 16.6.2012, p. 25.

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(4) By the same Decision, the Commission also accepted an undertaking from EuroChem group. By Decision 2012/629/EU ([1]), the Commission withdrew its acceptance of the undertaking offered by the EuroChem Group because of the impracticability of the undertaking.

(5) The undertaking accepted from Acron is based on three elements, namely (1) an indexation of the minimum prices in accordance with public international quotations, (2) a quantitative ceiling and (3) a commitment not to sell the products covered by the undertaking to the same customers in the European Union to which they sell other products, with the exception of certain other products for which Acron undertook to respect specific price regimes.

(6) As referred to in recital (14) of Decision 2008/577/EC, when accepting the undertaking, the sales structure of Acron was such that the Commission considered the risk of circumventing the undertaking as limited.

B. CHANGED CIRCUMSTANCES

Acron's business relationships

(7) In May 2012, Acron informed the Commission of its intention to acquire stake in a chemical company in the Union. In August 2012, Acron informed the Commission of a change in its corporate structure, namely that it acquired minority shares in this chemical company in the Union, indicating that this corporate change had no repercussions on the implementation of the undertaking. After assessing the evidence provided by Acron, the Commission did not initially consider that this change in Acron's corporate structure had an impact on the undertaking. However, new evidence currently available to the Commission shows that Acron had submitted incomplete information when originally informing the Commission of the change in its structure. In particular, the Commission had not been informed that this Union producer manufactures and sells not only chemical products, but also fertilizers including ammonium nitrate. Furthermore, the evidence currently available to the Commission also showed that Acron's shareholding further increased since it was notified to the Commission in August 2012.

Preliminary assessment

(8) The Commission analysed the implications of the evidence available to it, and considered that there is a high risk of cross-compensation. Indeed, if the fertilizer production and sales facility in the Union, in which Acron's acquired shares, sells any of its products to the same customers as Acron, the prices for such transactions could be set in a way to compensate for the Minimum Import Price subject to the undertaking. Such a compensation would however not be identifiable by monitoring activities since the price structure for the majority of products produced by the fertilizer production and sales facility in which Acron's acquired shares is not subject to any publicly available source. Thus it cannot be assessed whether the prices paid by the customers respond to the value of the products or take into account a potential rebate in order to compensate transactions

([1]) OJ L 277, 11.10.2012, p. 8.

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subject to the undertaking for which a Minimum Import Price has to be respected. Consequently, the monitoring of the undertaking would become impracticable and unworkable.

(9) The Commission informed Acron accordingly and announced that, in light of the circumstances described in recitals (7) and (8), it considered that the undertaking should be withdrawn. Acron was given an opportunity to comment.

C. **WRITTEN SUBMISSIONS AND HEARING**

(10) Acron submitted written submissions and was granted the opportunity to be heard. In response to the disclosure document, Acron reiterated the arguments already submitted when it was first informed of the incompliance of the undertaking with its shareholding in a Union producer of fertilizers. Those arguments have been addressed in the disclosure document and are also addressed in this Regulation.

(11) Several parties have sent written submissions to the Commission supporting Acron's position (they however were not the addressees of the Commission's disclosure and request for comments). These parties stated that they have not been involved in cross-compensation practices with Acron. However, such statements per se do not alleviate the risk of cross compensation. In any event, it is standing practice of the Commission not to accept price undertakings if the risk of cross-compensation is high, regardless of whether or not a cross-compensation actually took place.

(12) Acron claimed to have been acting in good faith when it informed the Commission, in accordance with the definition of related party and pursuant to clause 5.14 of the undertaking, of some changes in its corporate structure.

(13) In addition, Acron claimed that it should be considered as a financial investor in the Union company and that its shareholding conferred to Acron only limited statutory rights in decision making, therefore not giving Acron control over the Union company in the sense of Union competition law.

(14) Acron underlined that Union law and the national competition laws do not allow exchanging commercially sensitive information or coordinating sales with its competitors in the Union or elsewhere, which would be indispensable for any cross-compensation.

(15) The Commission considers that Acron's arguments should be rejected for the following reasons.

(16) Firstly, the Undertaking, offered by Acron, contains a definition of related party. As stipulated in Clause 1 of the undertaking, holding 5 % or more of shares in another company is sufficient to be considered as a related party; this is the benchmark that should be taken into account when assessing the monitorability and practicability of the undertaking.

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(17) Moreover, the Commission re-iterates the problems of cross-compensation referred to in recital (8). In addition, it cannot be excluded that some of the price quotations (being the basis for the price indexation mechanism of the undertaking) could be influenced by sales of the related producer in the Union.

(18) Acron itself admitted that shareholdings in the Union producer create a presumption of the existence of a risk of cross-compensation, although rebuttable. Considerations based on competition law, be it national or that of the Union, that such behaviour is theoretically not in Acron's interest, are not relevant for the assessment of the monitorability and practicability of the undertaking. Indeed, such considerations do not per se alleviate the risk of cross-compensation.

(19) Acron claimed that cross-compensation is neither in its own commercial interest nor in the commercial interest of the related Union producer. This statement per se does not alleviate the risk of cross-compensation, notably because the notion of commercial interest cannot be assessed in abstract terms. Further, according to the Commission's assessment, the incentives for cross-compensation cannot be excluded as both the related Union producer and Acron sell in the Union other products than ammonium nitrate potentially to the same customers. It would be impracticable, if not impossible, to trace such sales in the Union. In this respect, it is worth noting the complex structure of Acron's and the related Union producer's company groups. Thus, a high risk of cross-compensation exists with sales of ammonium nitrate or other products to the same customers.

(20) Secondly, the Union based producer cannot be subject to monitoring activities as it cannot be party to an undertaking since according to Article 8 of the basic Regulation undertakings can be offered only by exporters.

(21) Thirdly, even if the Union producer could be party to the undertaking, *quod non*, the monitoring of such an undertaking would be impracticable as stated in recitals (8) and (19) above.

(22) Therefore, based on the evidence available to it, it is concluded that following the change in the corporate structure of Acron, there is a high risk of cross-compensation and the undertaking accepted from Acron becomes impracticable and therefore should be withdrawn.

(23) Finally, Acron suggested the implementation of an additional monitoring mechanism in the context of the undertaking. Specifically, Acron offered to regularly provide to the Commission an audited report on the cash-flows between the two company groups. However, this new mechanism would make the monitoring of the undertaking even more complex and burdensome and it would not alleviate the identified risks and problems of cross-compensation.

(24) None of the arguments presented by Acron are such as to alter the Commission's assessment that the monitoring of the undertaking has become impracticable.

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D. **REPEAL OF DECISION 2008/577/EC**

(25) Therefore, in accordance with Article 8(9) of the basic Regulation and also in accordance with the relevant clauses of the undertaking authorising the Commission to unilaterally withdraw the undertaking, the Commission has concluded that the acceptance of the undertaking offered by Acron should be withdrawn and Commission Decision 2008/577/EC should be repealed. Accordingly, the definitive anti-dumping duty imposed by Commission Implementing Regulation (EU) No 999/2014 should apply to imports of the product concerned produced by Acron (Taric additional code A532),

HAS ADOPTED THIS REGULATION:

Article 1

Acceptance of the undertaking in relation to the companies JSC Acron, Veliky Novgorod, Russia and ►C1 PJSC Dorogobuzh ◄, Dorogobuzh, Russia, members of 'Acron' Holding Company concerning imports of ammonium nitrate produced by these companies and sold to the first independent customer in the Union (Taric additional code A532) is hereby withdrawn.

Article 2

Decision 2008/577/EC is hereby repealed.

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.