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COMMISSION

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2013/0070 (NLE)

Proposal for a

COUNCIL IMPLEMENTING REGULATION

terminating the partial reopening of anti-dumping investigation concerning imports of ethanolamines originating in the United States of America and terminating the expiry review pursuant to Article 11(2) and the partial interim review pursuant to Article 11(3) of Regulation (EC) 1225/2009

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

Grounds for and objectives of the proposal

This proposal concerns the application of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ('the basic Regulation') in the anti-dumping proceeding concerning imports of ethanolamines originating in the United States of America ('USA').

General context

This proposal is made in the context of the implementation of the basic Regulation and is the result of an investigation which was carried out in line with the substantive and procedural requirements laid out in the basic Regulation.

Existing provisions in the area of the proposal

Definitive measures were imposed by Council Regulation (EU) No 54/2010 (OJ L 17, 22.10.2010, p. 1).

Consistency with other policies and objectives of the Union

Not applicable.

2. RESULTS OF CONSULTATIONS WITH THE INTERESTED PARTIES AND IMPACT ASSESSMENTS

Consultation of interested parties

Interested parties concerned by the proceeding have had the possibility to defend their interests during the investigation, in line with the provisions of the basic Regulation.

Collection and use of expertise

There was no need for external expertise.

Impact assessment

This proposal is the result of the implementation of the basic Regulation.

The basic Regulation does not contain provisions for a general impact assessment but contains an exhaustive list of conditions that have to be assessed.

3. LEGAL ELEMENTS OF THE PROPOSAL

Summary of the proposed action

On 19 January 2010 and following a third expiry review investigation, the anti-dumping duties on imports of ethanolamines originating in the USA were prolonged for two more years by Council Regulation (EU) 54/2010. The Commission initiated an expiry review on 21 January 2012. A partial interim review limited to dumping as regards The Dow Chemical Company was initiated on 11 April 2012. By its judgment of 8 May 2012 the General Court annulled the Council Regulation insofar as it concerns the The Dow Chemical Company. On 18 October 2012, the Commission published a notice concerning the partial reopening of the anti-dumping investigation concerning imports of ethanolamines originating in the United States of America limited in scope to the implementation of the General Court judgment.

The attached proposal for a Council Regulation is based on the findings which brought the Commission to conclude that, on the basis of the verified information of the third expiry review investigation, the institutions could not have come to the conclusion that dumping had continued during the RIP, nor that there was a likelihood of continuation of dumping. Moreover, the institutions should also have concluded that there was was no likelihood of recurrence of dumping.

It is therefore proposed that the Council adopt the attached proposal for a Regulation which terminates the existing anti-dumping measures on ethanolamines originating in the USA. This regulation should be published no later than 10 April 2013, i.e. 12 months after the initiation of the interim review.

Legal basis

Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community.

Subsidiarity principle

The proposal falls under the exclusive competence of the European Union. The subsidiarity principle therefore does not apply.

Proportionality principle

The proposal complies with the proportionality principle for the following reasons:

The form of action is described in the above-mentioned basic Regulation and leaves no scope for national decision.

Indication of how financial and administrative burden falling upon the Union, national governments, regional and local authorities, economic operators and citizens is minimized and proportionate to the objective of the proposal is not applicable.

Choice of instruments

Proposed instruments: regulation.

Other means would not be adequate for the following reason:

Other means would not be adequate because the basic Regulation does not provide for alternative options.

4. BUDGETARY IMPLICATION

The proposal has no implication for the Union budget.

2013/0070 (NLE)

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terminating the partial reopening of anti-dumping investigation concerning imports of ethanolamines originating in the United States of America and terminating the expiry review pursuant to Article 11(2) and the partial interim review pursuant to Article 11(3) of Regulation (EC) 1225/2009

THE COUNCIL OF THE EUROPEAN UNION,

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 Articles 9 (2), 11(2) and 11(3) thereof,

Having regard to the proposal submitted by the European Commission ('the Commission') after having consulted the Advisory Committee,

Whereas:

1. PROCEDURE

1.1. Existing measures

(1) On 2 February 1994, the Council imposed, by Regulation (EC) No 229/94[2] ("the original Regulation"), definitive anti-dumping duties on imports of ethanolamines (product concerned) originating in the United States of America ('USA'). On 20 July 2000 and following an expiry review investigation, these measures were extended for five years by Council Regulation (EC) 1603/2000[3] ("the first expiry review Regulation").

(2) On 23 October 2006, following the second expiry review investigation, the measures were extended for five more years by Council Regulation (EC) No 1583/2006[4] ("the second expiry review Regulation").

(3) On 19 January 2010 and following a third expiry review investigation, the anti-dumping duties on imports of ethanolamines originating in the USA were imposed for two more years by Council Regulation (EC) No 54/2010[5] ("the third expiry review Regulation").

(4) On 9 April 2010, The Dow Chemical Company ("Dow Chemical") filed an application for partial annulment of Council Implementing Regulation (EU) No 54/2010 of 19 January 2010.

1 OJ L 343, 22.12.2009, p. 51.
2 OJ L 28, 2.2.1994, p. 40.
3 OJ L 185, 25.7.2000, p.1.
4 OJ L 294, 25.10.2006, p. 2.
5 OJ L 17, 22.1.2010, p. 1.

(5) On 12 March 2011, the Commission published a Notice of impending expiry in the Official Journal[6].

(6) Following a request lodged by BASF AG, Ineos Europe AG, and Sasol Germany GmbH ("the Union industry"), the Commission initiated an expiry review on 21 January 2012 ("fourth expiry review")[7].

(7) A partial interim review limited to dumping as regards Dow Chemical was initiated on 11 April 2012[8].

(8) By its judgment of 8 May 2012 in case T-158/10[9] ('the judgment') the General Court annulled the third expiry review Regulation insofar as it concerns Dow Chemical following an application lodged[10] on 9 April 2010.

1.2. Partial reopening

(9) Following the General Court judgment of 8 May 2012, a notice[11] was published concerning the partial reopening of the third expiry review investigation concerning imports of ethanolamines originating in the USA. The reopening was limited in scope to the implementation of the General Court judgment as far as the determination of a likelihood of a continuation or recurrence of dumping during the RIP, including the spare production capacity of ethanolamines in the USA, is concerned.

(10) In that notice, parties were informed that, in view of the judgment of the General Court, imports into the European Union of ethanolamines manufactured by Dow Chemical are no longer subject to the anti-dumping duties imposed by the third expiry review Regulation and that definitive anti-dumping duties paid pursuant to this Regulation on imports of ethanolamines should be repaid or remitted in accordance with the applicable customs regulation.

(11) The Commission officially advised the exporting producers, the importers and users known to be concerned and the Union industry of the partial reopening of the investigation. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time limit set out in the notice.

(12) All parties who so requested within the above time limit, and who demonstrated that there were particular reasons why they should be heard, were granted the opportunity to be heard.

(13) Representations were received from two exporting producers, three Union producers and a user of the product concerned.

2. IMPLEMENTATION OF THE GENERAL COURT JUDGMENT

2.1. 1. Preliminary remark

(14) It is recalled that the reason for the annulment of the contested Regulation was the General Court finding that the third expiry review Regulation contained two errors of assessment: (i) a finding of continued dumping during the review investigation period ("RIP") and, therefore, on that basis, a finding of a likelihood of continuation of

6 OJ C 79, 12.03.2011, p. 20.
7 OJ C 18, 21.01.2012, p. 16.
8 OJ C 103, 11.04.2012, p. 8.
9 Case T-158/10 *The Dow Chemical Company v Council* [2012] ECR II.
10 OJ C 161, 9.4.2010, p. 44.
11 OJ C 314, 18.10.2012, p. 12.

dumping; and (ii) the determination that the spare production capacity of ethanolamines in the United States amounted to 60 000 tonnes.

2.2. Comments of interested parties

(15) The Union industry acknowledged that the General Court judgment questioned the methodologies employed by the Institutions to quantify the spare capacity production in the USA. However, the Union industry sustained that basing the actual production capacity on 90% of the nameplate capacity, as the institutions had done, is overly conservative as it is common and accepted for companies to exceed the nameplate capacity. Basing themselves on published market data allegedly sourced from PCI Xylenes & Polyesters ("PCI"), they concluded that there was indeed a spare capacity in 2008 and onwards.

(16) Moreover, the Union industry considered that market conditions had not changed materially since the publication of the third expiry review Regulation and found several reasons to conclude that there is a likelihood of a recurrence of dumping. In this respect, they invoked the continuation of the US production capacity over domestic demand since the RIP; the material capacity expansions in third countries after 2009 which would have made US export markets increasingly self-sufficient; the existence of anti-dumping measures imposed or likely to be imposed soon in third countries; the increase of MEG (monoethylene glycol) capacity production from 2009 onwards; and the proposal in the USA to include some of the ethanolamines in the list of products with potential harmful effects to health which could ultimately have an impact in domestic consumption.

(17) Dow Chemical expressed its doubts about the legality of the re-opening of the investigation arguing that there is no specific provision in the basic Regulation allowing for that. This exporting producer also alleged that the re-opening would be in conflict with the 15-month statutory deadline set out in article 11(5) of the basic Regulation for the completion of review investigations.

(18) Dow Chemical further claimed that the General Court judgment would not require any implementing measure and that the Commission could not legally remedy the aspects of the contested Regulation since each of the substantive grounds that led to the adoption of the Regulation was either annulled by the General Court or contested. Dow Chemical therefore considered that the only legal way to remedy these aspects of the third expiry review Regulation would be to repeal the existing measures.

(19) An EU user, Stepan Europe ("Stepan"), submitted that the legal consequence of the judgment could only be that the measures imposed by the third expiry review Regulation should be withdrawn as they had been imposed on the basis of an erroneous analysis. Similar views were expressed by the exporting producer Huntsman Petrochemical Corporation LLC ("Huntsman"). Indeed, Stepan and Huntsman argued that the Court held that, during the RIP, the country-wide dumping margin was negative and therefore no continuation of dumping could be established. Stepan considered that the institutions should hence have examined if there was a likehood of recurrence of dumping; yet the third expiry review Regulation had been silent on this.

(20) Moreover, Stepan stressed that, would the notion of continuation of dumping be interpreted on an individual company basis, the institutions should have concluded that there was no continuation of dumping for Dow Chemical as, according to the Court, the company represented more than 85% of all imports from the USA, and therefore they should have considered whether dumping by Dow Chemical was likely to recur.

For the other exporting companies, it was established that there had been dumping and therefore the institutions should have established whether dumping was likely to continue. The likelihood of continuation of dumping analysis was mainly based, according to Stepan, on a country–wide spare capacity in the USA of 60 000 tonnes. Given the Court's finding that the institutions erred in assessing the spare capacity in the USA and given that, according to Stepan, the spare capacity was closer to at the most 8 000 tonnes, it was no longer possible to sustain that the other exporting companies were likely to continue dumping. The institutions would have needed to also analyze and establish the likelihood of recurrence of dumping.

(21) Hunstman also based its analysis on the assumption that the General Court's judgment confirmed that there was no spare capacity in the USA during the RIP and that it was therefore unlikely that an increased amount of ethanolamines would be exported into the EU on that basis. They claimed that it was therefore also not necessary to analyse other factors such as the impact of trade defence masures in third countries, the possible development of demand in the USA and in other markets or the downward pressure of prices. Moreover, Huntsman argued that, in the light of the Court's finding of the lack of spare capacity in the USA during the RIP, it was no longer possible for the Commission to re-analize the likelihood of recurrence of dumping and of injury and to conclude in the framework of this partial re-opening that there was a likelihood of recurrence of injurious dumping. Yet, were the Commission able to revisit the likelihood of recurrence of dumping and of injury, Huntsman considered that there would be no evidence to demonstrate that the requirements of Article 11(2) of the basic Regulation would be met. As regards the likelihood of recurrence of dumping, Huntsman opined that, on the basis of the finding that during the RIP there was no dumping for Dow Chemical, the biggest exporter by far, there was no likelihood of recurrence of dumping on a country-wide basis after the RIP if the anti-dumping duties would be withdrawn.

(22) According to Huntsman, the recurrence of injury would be unlikely in view of the absence of unused production capacity which results in very little leeway for increasing exports to the EU after the RIP. Huntsman maintained that such conclusion is corroborated by the fact that, according to the SRI report[12], the expected growth of consumption in the USA does not differ significantly from that of the other markets.

(23) Huntsman raised that if the Union industry would have suffered from any injury, this were to be attributted to the effects of the economic crisis and not to imports from the USA. The mere exacerbation of the negative impact of the crisis through imports could not permit a finding of a likely recurrence of injury caused by the mentioned imports.

2.3. Analysis of comments

(24) In respect of the alleged illegality of the reopening (recitals (17)-(18)), it is recalled that in case C-458/98 P ("the IPS judgment"), the Court of Justice recognised that in cases where a proceeding consists of several administrative steps, the annulment of one of those steps does not annul the complete proceeding. The anti-dumping proceeding is an example of such a multi-step proceeding. Consequently, the annulment of the amending Regulation in relation to one party does not imply the annulment of the entire procedure prior to the adoption of that Regulation[13]. Moreover, according to Article 266 of the Treaty on the Functioning of the European Union

12 *Chemical Economics Handbook Product Review*, 'Ethanolamines', SRI Consulting.

13 Case C-458/98 P, *Industrie des Poudres Sphériques v Council* [2000] ECR I-8147.

(TFEU), the Union institutions are required to comply with the judgment. In the light of the above, the claim that there is no legal basis for the partial reopening of a review investigation was found to be unwarranted.

(25) The claim that the introduction of deadlines to conclude anti-dumping investigations prevents the Commission from extending the investigation beyond the 15-months statutory limit (recital (17) above) was also found to be unwarranted. It is considered that this deadline is not relevant for the implementation of a Court judgment. Indeed, such deadline only governs the completion of the initial review investigation from the date of initiation to the date of definitive action, and does not concern any subsequent action that might have to be taken for instance as a result of judicial review. The consequence of accepting such claim would make it impossible for the institutions to take account of the General Court's findings (as Article 266 TFEU requires). Indeed, the General Court's judgment will always be handed down at a point in time when the deadline for the investigation has expired. Furthermore, it is noted that any other interpretation would mean that, for example, a successful legal action brought by one party would be without any practical effect for that party if the expiry of the time limit to conclude the original investigation would not permit the implementation of a judgment of the General Court. This would be at odds with the principle that all parties should have the right to effective judicial review.

(26) Concerning the claim that the Commission would not be able to legally remedy the errors of assessment found to be contained in the contested Regulation and that the only mean to implement the judgement is to repeal the existing measures (recital (18) above), the following should be noted. The Court has already established that the annulment of a Regulation also implies the possibility of remedying the aspects of the amending Regulation which led to its annulment, while leaving unchanged the uncontested parts which are not affected by the judgment — as was held in the IPS judgement. The institutions are therefore required to have regard not only to the operative part of the judgment but also to the grounds which led to the judgment and constitute its essential basis, in so far as they are necessary to determine the exact meaning of what is stated in the operative part[14]. The procedure for replacing an illegal measure may thus be resumed.[15]. Hence, this is also considered to be unwarranted.

(27) The General Court, as also noted by Stepan and Hunstman (see recital (19)), found that, during the investigation that resulted in the adoption of the third expiry review Regulation, the institutions could not have come to the conclusion that dumping had continued during the RIP, nor that there was a likelihood of continuation of dumping. The vast majority of imports from the USA namely, as the Court noted, more than 85% from Dow Chemical, had entered the Union at non-dumped prices. Moreover, that situation should have resulted in a finding that the weighted average margin for imports of the product at issue originating in the USA was negative. The Court concluded that the institutions were thefore obliged to demonstrate that there was a likehood of a recurrence of dumping[16].

(28) The analysis of the likelihood of the recurrence of dumping is in this case, as all interested parties recognize explicitly or implicitly, linked to the calculation of the spare production capacity in the USA. Some interested parties contend that the General Court confirmed that there was no significant spare capacity in the USA

14 Case C-458/98 P, *Industrie des Poudres Sphériques v Council* , paragraph 81.

15 Case C-458/98 P, *Industrie des Poudres Sphériques v Council,* paragraph 82.

16 Case T-158/10 *The Dow Chemical Company v Council*, paragraph 45.

during the RIP. The Court found that the calculation methodology resulting in a spare production capacity of ethanolamines of 60 000 tonnes during the RIP was confusing and that the resulting number of 60 000 tonnes was in conflict with the evidence relied on in the case[17].

(29) As mentioned in recital (15), the Union industry has submitted that, based on PCI data, there would be a country-wide spare capacity in 2008 exceeding 60 000 tonnes. It is however noted that, in the calculation submitted by the Union industry, the total US production capacity had been used, i.e. no downwards adjustment to 90% thereof had been done.

(30) As regards the allegations regarding the calculation of the spare capacity during the RIP, it is noted that two exporting producers cooperated with the third expiry review investigation. During that investigation, it was established that INEOS Oxide LLC (hereafter: "INEOS") did not have any spare capacity during the RIP, whereas Dow Chemical had some. The verified information shows that Dow Chemical did not use its spare capacity to engage in low-prices exports during the RIP although it could have done so given the low level of the measures when expressed at an ad valorem equivalent.

(31) Moreover, the cooperating companies, Dow Chemical and INEOS, represented during the RIP together 91,6% of exports from the US into the EU. The total exports of Dow Chemical and INEOS amounted to 30 000 – 35 000 tonnes; exports from non-cooperating companies were not more than 3 000 – 4 000 tonnes. The country-wide dumping margin during the RIP was *de minimis* and imports from non-cooperating companies represented less than 1% of EU market. For confidentiality reasons the above figures have either been given in the form of ranges or are not exact figure.

(32) As mentioned in recital (16), the Union industry referred to different factors which would indicate that, according to them, there was still a likelihood of a recurrence of dumping after 2008. However, market conditions have not changed materially since the publication of the third expiry review Regulation. These circumstances are also acknowledged by the Union industry. However, it should be noted that as mentioned in recitals (30) and(31), given the low level of the measures and the lack of spare capacity from INEOS as well as the absence of dumping from Dow, there is no indication that the repeal of the measure would be likely to change the situation.

(33) An exporting producer commented that the third expiry review should not have concluded with Regulation 54/2010 imposing measures. The exporting producer requested that measures be repealed with retroactive effect so that all duties paid since the date of entry into force of Regulation No 54/2010 be reimbursed to all importers who duly paid them.

(34) This claim is rejected as exporting producers other than Dow Chemical could also have brought an action for annulment against the Regulation - which was annulled only insofar it concerned the applicant, i.e. Dow Chemical. Therefore, according to the principle of legal certainty and following the jurisprudence of the Court[18], the regulation became definitive as regards the other exporting producers.

2.4. Conclusion

[17] Case T-158/10 *The Dow Chemical Company v Council*, paragraph 54.

[18] Case C-239/99 *Nachi Europe GmHb v Hauptzollamt Krefeld*, ECR I-1220.

(35) Account taken of the comments made by parties and the analysis thereof, it was concluded that the implementation of the General Court judgement implies that during the investigation that resulted in the adoption of Regulation No 54/2010, the institutions could not have come to the conclusion that dumping had continued during the RIP, nor that there was a likelihood of continuation of dumping. Moreover, the institutions should also have concluded that there was no likelihood of recurrence of dumping.

(36) On the basis of the above, the anti-dumping duty on ethanolamines should not have been reintroduced. With respect to Dow Chemical, it should be recalled that Council Implementing Regulation 54/2010 has already been annulled in so far as Dow Chemical is concerned by the judgment of the General Court in case T-158/10. Therefore, for the sake of clarity, it should be pointed out that with regard to imports of ethanolamines from Dow Chemical, the anti-dumping duties are not in force anymore as of the date of entry into force of Council Implementing Regulation 54/2010 (i.e., 23 January 2010).

3. FOURTH EXPIRY REVIEW

(37) In light of the above and in particular recital (35), it is considered that the fourth expiry review should be terminated without reimposing a duty. With regard to Dow Chemical, the fourth expiry review was deprived of object by the judgment of the Court of 8 May 2012 and no legal basis exists for the collection of anti-dumping duties on imports from Dow Chemical as of 23 January 2010.

4. PARTIAL INTERIM REVIEW

(38) Account taken of the findings summarised in recital (35) above, it is considered that the review should be terminated, since the basis for the very existence of the measures, i.e., a finding of a likelihood of continuation or recurrence of injurious dumping, is missing.

5. COMMENTS RECEIVED

(39) All parties were informed of the essential facts and considerations on the basis of which it was intended to recommend that the existing measures be terminated. They were also granted a period within which they could make representations subsequent to this disclosure. These comments were duly considered but were not as such as to change the conclusions.

6. CONCLUSIONS

(40) It follows from the above that the partial reopening investigation should be terminated and that the anti-dumping measures on imports of ethanolamines originating in the United States of America should be repealed. With respect to imports of ethanolamines from Dow Chemical, since Council Implementing Regulation 54/2010 had already been annuled in so far as Dow Chemical is concerned, the measures are not in force as of the date of entry into force of Council Implementing Regulation 54/2010 (23 January 2010).

(41) The fourth expiry investigation concerning anti-dumping duties in force on imports of ethanolamines originating in the USA should also be terminated without reimposing a duty. With respect to imports from Dow Chemical, this expiry review has been deprived of its object.

(42) The partial interim review limited in scope to the examination of dumping should be terminated on the basis of the repeal of the existing measures.

HAS ADOPTED THIS REGULATION:

Article 1

1. The partial reopening of the anti-dumping investigation concerning imports of ethanolamines currently falling within CN codes ex 2922 11 00 (monoethanolamine) (TARIC code 2922 11 00 10), ex 2922 12 00 (diethanolamine) (TARIC code 2922 12 00 10) and 2922 13 10 (triethanolamine), originating in the United States of America is hereby terminated without reimposing the duties and measures are repealed.

2. With respect to imports from The Dow Chemical Company, no legal basis exists for the collection of anti-dumping duties on imports from The Dow Chemical Company as of 23 January 2010.

Article 2

The expiry review investigation of the anti-dumping investigation concerning imports of ethanolamines from all exporting producers, currently falling within CN codes ex 2922 11 00 (monoethanolamine) (TARIC code 2922 11 00 10), ex 2922 12 00 (diethanolamine) (TARIC code 2922 12 00 10) and 2922 13 10 (triethanolamine), originating in the United States of America, initiated on 21 January 2012, is hereby terminated without imposition of measures. With respect to imports from The Dow Chemical Company, this expiry review has been deprived of its object.

Article 3

The partial interim review limited in scope to the examination of dumping concerning imports of ethanolamines from The Dow Chemical Company currently falling within CN codes ex 2922 11 00 (monoethanolamine) (TARIC code 2922 11 00 10), ex 2922 12 00 (diethanolamine) (TARIC code 2922 12 00 10) and 2922 13 10 (triethanolamine), originating in the United States of America is hereby terminated.

Article 4

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

This Regulation shall be binding in its entirety and directly applicable in the Member States in accordance with the Treaties.

Done at Brussels,

For the Council
The President