



EUROPEAN COMMISSION

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Proposal for a

COUNCIL REGULATION

terminating the partial reopening of the anti-dumping interim review investigation concerning imports of polyethylene terephthalate (PET) film originating in India

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 proceeding concerning imports of polyethylene terephthalate (PET) film originating in India.

On 20 May 2010 an interim review in the context of this anti-dumping proceeding was re-opened. The re-opening was limited to the implementation of a judgement of the General Court as far as the company MTZ Polyfilms Limited is concerned.

The objective of this proposal is to terminate this partial reopening.

- **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 are in force and were imposed by Council Regulation (EC) No 1292/2007 of 30 October 2007. By Council Implementing Regulation (EU) No 469/2011 of 13 May 2011 the measures were lastly amended in view of the expiry of the countervailing measures which had run in parallel before. The Notice partially reopening an interim review in the context of this proceeding was published on 20 May 2010 (2010/C 131/03).

- **Consistency with other policies and objectives of the Union**

Not applicable.

2. CONSULTATION OF INTERESTED PARTIES AND IMPACT ASSESSMENT

- **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 20 May 2010 the Commission partially reopened anti-dumping interim review investigation concerning imports of PET film originating, inter alia, in India which had resulted in an amendment of the anti-dumping measures through Council Regulation (EC) No 366/2006. The reason for this partial reopening was the judgment of the General Court of 17 November 2009 in Case T-143/06 in which the General Court annulled the amending Regulation to the extent that it imposes an anti-dumping duty on MTZ Polyfilms ('the judgment'). The partial reopening, limited to MTZ Polyfilms, was in order to implement the above judgment of the General Court as far as MTZ Polyfilms is concerned. Through the attached proposal for a Regulation, this partial reopening will be terminated without reimposing an anti-dumping duty on imports of PET film manufactured by MTZ Polyfilms.

It is proposed that the Council adopts the attached proposal for a Regulation.

- **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.

Proposal for a

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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 Community¹ ('the basic anti-dumping Regulation') and in particular Article 9 and Article 11(3) and (6) 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) By Regulation (EC) No 1676/2001² ('the original regulation'), the Council, imposed a definitive anti-dumping duty on imports of polyethylene terephthalate (PET) film originating, *inter alia*, in India. On 8 March 2006, by Council Regulation (EC) No 366/2006³ ('the amending regulation') and following a partial interim review investigation, the anti-dumping duty on imports of PET film originating in India was amended.
- (2) On 6 November 2007, by Council Regulation (EC) No 1292/2007⁴ ('the expiry review regulation') and following an expiry review, the definitive anti-dumping duty on imports of PET film originating in India was confirmed.
- (3) MTZ Polyfilms Ltd ('MTZ Polyfilms'), an Indian exporting producer which cooperated with the above investigations, obtained an individual duty rate by the original regulation. This duty rate was revised by the amending Regulation.

¹ OJ L 343, 22.12.2009, p. 51.

² OJ L 227, 23.8.2001, p. 1.

³ OJ L 68, 8.3.2006, p. 6.

⁴ OJ L 288, 6.11.2007, p. 1

- (4) On 27 February 2006, MTZ Polyfilms lodged an application at the General Court ('the Court of First Instance' before the entry into force of the Lisbon Treaty) seeking the annulment of the amending Regulation in so far as it applies to MTZ Polyfilms⁵.
- (5) By its judgment of 17 November 2009 in Case T-143/06⁶, the General Court annulled the amending Regulation to the extent that it imposes an anti-dumping duty on MTZ Polyfilms ('the judgment'). The General Court found that the amending regulation was adopted on an incorrect legal basis. It considered, in particular, that Article 11(3) of the basic Regulation cannot serve as a legal basis allowing the Institutions, when determining the export price, not to apply the methodology prescribed by Article 2(8) and (9) of the basic Regulation.
- (6) On 13 May 2011, by Regulation (EU) No 469/2011⁷, the definitive anti-dumping duty on imports of PET film originating in India was amended in view of the expiry of the so far parallel countervailing duty on 9 March 2011.

1.2. Partial reopening

- (7) On 20 May 2010, a notice⁸ was published in the *Official Journal of the European Union*. In the notice, parties were informed that, in view of the judgment of the General Court mentioned in recital (5) above, imports into the European Union of PET film manufactured by MTZ Polyfilms are no longer subject to the anti-dumping measures imposed by the amending regulation and the expiry review regulation and that definitive anti-dumping duties paid pursuant to these regulations for the product concerned manufactured by MTZ Polyfilms should be repaid or remitted.
- (8) The notice also partially reopened the relevant anti-dumping interim review investigation concerning imports of PET film originating, *inter alia*, in India in order to implement the above judgment of the General Court as far as MTZ Polyfilms is concerned.
- (9) Moreover, by the same notice, MTZ Polyfilms was invited, should it consider that aspects of the findings which led to the adoption of the amending Regulation other than the one mentioned in recital (5) above were no longer valid, to present a duly substantiated request for review in accordance with the provisions of Article 11(3) of the basic Regulation.
- (10) The Commission officially advised MTZ Polyfilms, the representatives of the exporting country, the other Indian exporting producers which cooperated in the investigation which led to the adoption of the amending regulation 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 be heard within the time-limit set out in the notice.
- (11) Representations were received from two exporting producers in India (one being the party directly concerned, i.e. MTZ Polyfilms) and the Union industry.

⁵ Case T-143/06 MTZ Polyfilms v Council, ECR 2009, page II-04133.

⁶ European Court reports 2009, page II-04133.

⁷ OJ L 129, 17.5.2011, p. 1.

⁸ OJ C 131, 20.5.2010, p. 3.

2. IMPLEMENTATION OF THE JUDGMENT

2.1. Preliminary remark

- (12) As a preliminary remark it is important to note that MTZ Polyfilms did not reply to the invitation referred to in recital (9) above.

2.2. Comments of interested parties

- (13) MTZ Polyfilms argued that a partial reopening of a review investigation is illegal because there is no specific provision in the basic Regulation allowing for a possibility to reopen an investigation. The same company also submitted that the Commission's reference in the notice referred to in recital (7) above to the judgement in the IPS case ('IPS judgement')⁹ was erroneous as that judgement concerned an anti-dumping proceeding which had been initiated in a different legal framework as under the basic Regulation in force at that time, an anti-dumping proceeding consisted of several stages which included the initial investigation and all subsequent review investigations. The IPS judgement would therefore deal with the possibility to open a new investigation within the framework of an ongoing proceeding. The distinction between a proceeding and an investigation would have been written out of the basic Regulation in 1995 and, in the present case, the Commission has not initiated a new investigation in the framework of a proceeding but reopened an investigation which, according to MTZ Polyfilms, would already have been concluded by the imposition of definitive measures. MTZ Polyfilms submitted that the IPS case could not serve as a precedent because it was based on Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community¹⁰ ('the old basic Regulation'), under which mandatory deadlines in particular the maximum time for concluding a review investigation of 15 months from the date of initiation did not apply yet. It argued that in this case, the 15 months deadline had lapsed soon after the reopening on 20 May 2010 since the amended measures were imposed more than 14 months after the initiation of the partial interim review investigation. Finally, according to MTZ Polyfilms, the judgment required no implementing measures since the judgement is clear in all material aspects, simple and without any specific reservation and/or qualification annulling the amending Regulation as far as it concerned imports into the Union of PET film manufactured by MTZ Polyfilms.
- (14) Another Indian exporting producer of PET film, which had cooperated with the interim review, argued that, as in calculating its dumping margin the Institutions have applied the same approach as the one which had been condemned by the General Court in its judgement, the Institutions should now also revise the methodology for calculating dumping of this company, resulting in the absence of a dumping margin.
- (15) The Union industry claimed that, now that the General Court had annulled the amending Regulation insofar as it imposes an anti-dumping duty on MTZ Polyfilms, the individual duty rate calculated and imposed in 2001 should be re-imposed as, in the interim review, MTZ Polyfilms was still found to be dumping by a considerable

⁹ Case T-2/95 *Industrie des poudres sphériques (IPS) v Council* [1998], ECR, page II-3939.
¹⁰ OJ L 209, 2.8.1988, p. 1.

margin. In this respect, it also pointed at a longstanding pattern of circumvention and origin fraud allegedly practiced by the Indian exporters. Moreover, it alleged that there is a huge existing overcapacity in India and that in several other major world markets trade defence measures are in place against Indian PET film, which would inevitably lead to greater import volumes on the Union market of PET film manufactured by MTZ Polyfilms.

- (16) The Union industry also called on the Commission to ensure the registration of imports as it considered that the two conditions for such registration laid down in Article 10(4) of the basic Regulation, would have been met.

2.3. Analysis of comments

- (17) In respect of the alleged illegality of the re-opening, it is recalled that in its IPS judgement the General Court has 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. Moreover, according to Article 266 of the Treaty on the Functioning of the European Union, the Union institutions are obliged to comply with the judgment. This also implies the possibility to remedy the aspects of the amending Regulation which led to its annulment, while leaving unchanged the uncontested parts which are not affected by the Court of Justice judgment – as was held in case C-458/98 P¹¹ ('the IPS appeal case'). 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.
- (18) The claim that the introduction of deadlines to conclude anti-dumping investigations prevents the Commission from following the approach underlying the IPS case was also found to be unwarranted. It is considered that this deadline is not relevant for the implementation of a judgment of the Court of Justice of the European Union. 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. It should be noted that the General Court has not handed down any judgments which apply this reasoning, as that would make it impossible to finalise any anti-dumping investigation which was annulled by the General Court in order 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.
- (19) Concerning the claim of the other Indian exporting producer of PET film, it is reminded that the Court annulled the amending Regulation only to the extent that it imposes an anti-dumping duty on MTZ Polyfilms. As a consequence, the judgement is no basis for revisiting the approach and/or calculations with regard to other exporting producers. Therefore, this claim has to be rejected.

¹¹ Case C-458/98 P *Industrie des poudres sphériques (IPS) v Council* [2000] ECR, page I-08147.

- (20) As concerns the Union industry's claim mentioned in recital (15) above, the reasoning in recital (17) above is equally valid, i.e. case law has established that, if the Court judges that an illegality has taken place, the Commission can resume an investigation procedure at the point just before the illegality occurred. Therefore, there is no immediate need to resort to previously established data, as argued by the Union industry.
- (21) As concerns the Union industry's request for registration of imports, based on the information in the request and according to the statistical data available to the Commission it was concluded that the condition mentioned in Article 10(4)(b) of the basic Regulation, i.e. a substantial rise in the imports concerned, was not met (see also recital (24) below). The request for registration was therefore rejected.

2.4. Investigation

- (22) As mentioned in recital (5) above, the General Court annulled the amending Regulation as far as MTZ Polyfilms is concerned as it considered that Article 11(3) of the basic Regulation cannot serve as a legal basis allowing the Institutions, when determining the export price, to depart from the methodology prescribed by Article 2(8) and (9) of the basic Regulation. It is also noted that all findings in the review regulation, other than the ones which the General Court found to be erroneous, remain formally valid. This applies, in particular, to the finding that there were significant changes in circumstances justifying an amendment to the anti-dumping duty applicable to MTZ Polyfilms. Therefore, this aspect of the review was not re-investigated in the context of the current procedure. During the review investigation period ('RIP'), MTZ Polyfilms exported the product concerned to the Union under a price undertaking and these sales respected the terms of the undertaking, i.e. were at prices which were above the agreed minimum prices. For the reasons explained in the review regulation, it is confirmed that the export prices to the Union during the RIP cannot be used to calculate the dumping margin of MTZ Polyfilms.
- (23) In view of the above considerations, the current investigation was limited to an analysis of the facts available to the Institutions regarding the export activities of MTZ Polyfilms. In this respect, as the Court of Justice has held in the IPS judgment (already referred to above), the Institutions, when resuming an anti-dumping investigation following a judgment annulling a regulation imposing anti-dumping duties, are entitled to take account of recent information, including information dating from after the original investigation period. It also follows from that judgment that this possibility to take recent information into account applies also to reviews, which is the case at hand here.
- (24) It is noted that after the coming into effect of the amending regulation, and according to the available statistical information, import volumes of PET film manufactured by MTZ Polyfilms decreased strongly and even ceased as from 2008. Furthermore, the Council notes that the judgment annulling the review regulation as far as MTZ Polyfilms is concerned was delivered on 17 November 2009. The notice referred to in recital (7), which indicated that following the Court judgement the imports of PET film manufactured by MTZ Polyfilms were no longer subject to the anti-dumping measures, was published on 20 May 2010. This means that for more than one year those imports have only been subject to countervailing and customs duties, and not to an anti-dumping duty. In that context, the data gathered on the basis of Article 14(6) of

the basic Regulation indicate that during recent years no such imports have taken place.

2.5. Conclusion

- (25) In the light of all the above-mentioned circumstances, in particular the limited scope of the investigation at hand, which, in the light of the General Court judgement, did not re-examine the findings on the existence of changed circumstances and the unavailability of a reliable export price, the Council concludes that the recalculation of a dumping margin for MTZ Polyfilms and the re-imposition of an anti-dumping duty on exports of PET film manufactured by MTZ Polyfilms would be inappropriate. As a consequence, it is concluded that the review investigation which was opened with a view to implementing the Court findings should be terminated without reimposing a duty.
- (26) All parties concerned were informed of the essential facts and considerations on the basis of which it was intended to terminate the partial reopening of the anti-dumping interim review investigation concerning imports of PET film originating in India. Comments were received from the Union industry which reiterated, as already presented in recital (15) above, that the individual duty rate calculated and imposed in 2001 should be re-imposed on MTZ Polyfilms, and expressed the view that the decrease in exports to the Union by MTZ Polyfilms does not mean that in the future the company is not likely to engage in injurious dumping. The Union industry also pointed out that the overall volume of imports of PET film from India had recently increased. The comments in recital (15) have already been addressed in recital (20). As regards the likely future behaviour of MTZ Polyfilms, it is considered that the absence of any imports from the company for a significant period of time, during which period they were subject to low duty rates, as explained in recital (24) above, sufficiently demonstrates that the company is not likely to engage in injurious dumping. Despite the fact that recently imports from India have increased, the imports from MTZ Polyfilms have remained at zero,

HAS ADOPTED THIS REGULATION:

Article 1

1. The partial reopening of the anti-dumping interim review investigation concerning imports of polyethylene terephthalate (PET) film originating in India and manufactured by MTZ Polyfilms is hereby terminated.
2. Imports of PET film originating in India and manufactured by MTZ Polyfilms shall not be subject to an anti-dumping duty pursuant to this proceeding.

Article 2

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,

*For the Council
The President*