Commission Decision of 18 October 2004 terminating the accelerated review of Council Regulation (EC) No 2164/98 imposing a definitive countervailing duty on imports of certain broad spectrum antibiotics originating in India (2004/830/EC)

COMMISSION DECISION

of 18 October 2004

terminating the accelerated review of Council Regulation (EC) No 2164/98 imposing a definitive countervailing duty on imports of certain broad spectrum antibiotics originating in India

(2004/830/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 2026/97 of 6 October 1997 on protection against subsidised imports from countries not members of the European Community[(1)] (the basic Regulation), and in particular Article 20 thereof,

After consulting the Advisory Committee,

Whereas:

A. PREVIOUS PROCEDURE

(1) The Council, by Regulation (EC) No 2164/98[(2)], imposed a definitive countervailing duty on imports of certain broad spectrum antibiotics, namely amoxicillin trihydrate, ampicillin trihydrate and cefalexin not put up in measured doses or in forms or packings for retail sale (the product concerned) falling within CN codes ex 2941 10 10, ex 2941 10 20 and ex 2941 90 00 originating in India. The measures took the form of an *ad valorem* duty ranging between 0 % and 12 % on individual exporters, with a residual duty rate of 14,6 % for non-cooperating exporters.

B. CURRENT PROCEDURE

1. Request for review

(2) Following the imposition of definitive measures, the Commission received a request for the initiation of an accelerated review of Regulation (EC) No 2164/98 pursuant to Article 20 of the basic Regulation, from an Indian producer of the product concerned, Nestor Pharmaceuticals Limited (the applicant). The applicant claimed not to be related to any other exporters of the product concerned in India. Furthermore, it asserted that it had not exported the product concerned during the original investigation period (i.e. from 1 July 1996 to 30 June 1997), but had exported the product concerned to

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the Community subsequently. On the basis of the above, it requested that an individual duty rate be established for it, in case subsidisation was to be found.

2. Initiation of an accelerated review

(3) The Commission examined the evidence submitted by the applicant and considered it sufficient to justify the initiation of a review in accordance with the provisions of Article 20 of the basic Regulation. After consultation of the Advisory Committee and after the Community industry concerned had been given an opportunity to comment, the Commission initiated by a notice in the *Official Journal of the European Union*[(3)] an accelerated review of Regulation (EC) No 2164/98 with regard to the applicant.

3. Product concerned

(4) The product covered by this review is the same product as the one under consideration in Regulation (EC) No 2164/98.

4. Investigation period

(5) The investigation of subsidisation covered the period from 1 April 2002 to 31 March 2003 (the review investigation period).

5. Parties concerned

(6) The Commission officially advised the applicant and the Government of India (the GOI) of the initiation of the investigation. Furthermore, it gave other interested parties an opportunity to make their views known in writing and to request a hearing. However, no such views or any request for a hearing was received by the Commission.

(7) The Commission sent a questionnaire to the applicant and received a full reply within the set deadline. The Commission sought and verified all information it deemed necessary for the purpose of the investigation and carried out verification visits at the premises of the applicant in New Delhi and in Hyderabad.

C. SCOPE OF THE REVIEW

(8) As no request for a review of the findings on injury was made by the applicant, the review was limited to subsidisation.

(9) The Commission examined the same subsidy schemes which were analysed in the original investigation. It also examined whether the applicant had used any other subsidy schemes, or had received ad hoc subsidies in relation to the product concerned.

D. RESULTS OF THE INVESTIGATION

1. New exporter qualification

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(10) The applicant was able to satisfactorily demonstrate that it was not related, directly or indirectly, to any of the Indian exporting producers subject to the countervailing measures in force with regard to the product concerned.

(11) The investigation confirmed that the applicant had not exported the product concerned during the original period of investigation, i.e. from 1 July 1996 to 30 June 1997, and that it had begun exporting to the Community after this period.

Furthermore, the applicant was not individually investigated during the original investigation for reasons other than a refusal to cooperate with the Commission.

Consequently, it is confirmed that the applicant should be considered as a new exporter. Therefore, in accordance with Article 20 of the basic Regulation, the Commission examined whether an individual countervailing duty rate could be determined for the applicant.

2. Subsidisation

(12) On the basis of the information contained in the applicant's reply to the Commission's questionnaire and further collected in the course of the investigation, the following schemes were investigated:

— Duty Entitlement Passbook Scheme,

— Income Tax Exemption Scheme,

— Passbook Scheme,

— Export Promotion Capital Goods Scheme,

— Export Processing Zones/Export Oriented Units,

— Advance Licence Scheme physical export.

2.1. Schemes originally investigated and used by the company

2.1.1. Duty Entitlement Passbook Scheme (DEPBS)

General

(13) It was established that the applicant received benefits under the DEPBS on a post-export basis. The detailed description of the scheme is contained in paragraph 4.3 of the Export and Import Policy 2002-2007 (EXIM-policy 02-07) and in Chapter 4 of the complementing Handbook of Procedures Volume I 2002-2007 (HOP I 02-07)[(4)]. The EXIM-policy 02-07 is based on the Foreign Trade (Development and Regulation) Act 1992 (No 22 of 1992).

(14) Any manufacturer-exporter or merchant-exporter is eligible for this scheme. It can apply for DEPBS credits which are calculated as a percentage of the value of products exported under this scheme. Such DEPBS rates have been established by the Indian authorities for most products, including the product concerned. They are determined on the basis of Standard Input/Output Norms (SION), taking into account a presumed import content of inputs in the export

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product and the customs duty incidence on such presumed imports, regardless whether actually import duties have been paid or not.

(15) To be eligible for benefits under this scheme, a company must export. At the point in time of the export transaction, a declaration must be made by the exporter to the authorities in India indicating that the export is taking place under the DEPBS. In order for the goods to be exported, the Indian customs authorities issue during the dispatch procedure an export shipping bill. This document shows, *inter alia*, the amount of DEPBS credit which is to be granted for that export transaction. At this point in time, the exporter knows the benefit it will receive. Once the customs authorities issue an export shipping bill, the GOI has no discretion over the granting of a DEPBS credit. The relevant DEPBS rate to calculate the benefit is that which applied at the time the export declaration is made. Therefore, there is no possibility for a retroactive amendment to the level of the benefit.

(16) It was also found that in accordance with Indian accounting standards, DEPBS credits can be booked on an accrual basis as income in the commercial accounts, upon fulfilment of the export obligation.

(17) Such credits can be used for payment of customs duties on subsequent imports of any goods unrestrictedly importable, except capital goods. Goods imported against such credits can be sold on the domestic market (subject to sales tax) or used otherwise.

DEPBS credits are freely transferable and valid for a period of 12 months from the date of issue.

(18) An application for DEPBS credits can cover up to 25 export transactions and if electronically filed, an unlimited amount of export transactions. De facto no strict deadlines to apply exist, because the time periods mentioned in Chapter 4.47 of the HOP I 02-07 are always counted from the most recent export transaction included in a given DEPBS application.

(19) The main characteristics of the DEPBS have not changed since the original investigation. The scheme is a subsidy contingent in law upon export performance. Therefore, it was determined during the original investigation that it is deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

Calculation of the subsidy amount

(20) In the original investigation the DEPBS subsidy amount was calculated on the basis of best information available in accordance with Article 28(1) of the basic Regulation and *pro rata temporis* the DEPBS rate was regarded as the corresponding subsidy rate. Because of the cooperation of the applicant, which is considered as a change of circumstances within the meaning of Article 22(4) of the basic Regulation, this methodology should not be applied to its detriment.

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(21) In accordance with Articles 2(2) and 5 of the basic Regulation, the amount of countervailable subsidies was calculated in terms of the benefit conferred on the recipient, which is found to exist during the investigation period. In this regard, it was considered that the benefit is conferred on the recipient at the point in time when an export transaction is made under this scheme. At this moment, the GOI is liable to forego the customs duties, which constitutes a financial contribution within the meaning of Article 2(1)(a)(ii) of the basic Regulation. As stated in recital 15, once the customs authorities issue an export shipping bill which shows, *inter alia*, the amount of DEPBS credit which is to be granted for that export transaction, the GOI has no discretion as to whether or not to grant the subsidy and it has no discretion as to the amount of the subsidy. Also, as stated in the same recital, any change of the DEPBS rates between the actual export and the issuance of a DEPBS licence has no retroactive effect on the level of the benefit granted. Furthermore, as stated in recital 16, companies can, in line with Indian accounting standards, book the DEPBS credits on an accrual basis as income at the stage of export transaction. Finally, by virtue of the fact that a company is aware that it will receive a subsidy under the DEPBS, and indeed benefits under other schemes, the company is already in a competitively more advantageous position, because it can reflect the subsidies through offering lower prices.

(22) The rationale for imposing a countervailing duty, though, is to redress unfair trading practices based on illicit competitive advantage. In light of the above, it is considered appropriate to assess the benefit under the DEPBS as being the sum of the credits earned on all export transactions made under this scheme during the investigation period. In accordance with Article 7(1)(a) of the basic Regulation, fees necessarily incurred to obtain the subsidy were deducted.

(23) The applicant claimed that only DEPBS credits generated by export transactions of the product concerned are relevant when calculating the subsidy margin in the present investigation. However, under the DEPBS no obligation exists which limits the use of the DEPBS credits to import duty-free input material linked to a specific product. On the contrary, DEPBS credits are freely transferable, can even be sold and be used for imports of any unrestrictedly importable goods (the input materials of the product concerned belong to this category), except capital goods. Consequently, the product concerned can benefit from all DEPBS credits generated.

(24) It further claimed that the sales tax payable on the transfer of DEPBS credits should be deducted as an expense when establishing the amount of the subsidy. However, the sales tax is not a cost necessarily incurred in order to qualify for, or to obtain the subsidy within the meaning of Article 7(1)(a) of the basic Regulation. The sales tax is only the consequence of a purely commercial decision to dispose of an already obtained DEPBS credit by selling it, instead of using it free of sales tax to offset duties payable

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for subsequent imports. Application fees for obtaining the DEPBS credits, though, have been considered as necessary expenses and deducted.

(25) The amount of the total subsidy (nominator) has been allocated over total export sales during the review investigation period (denominator) in accordance with Article 7(2) of the basic Regulation, since this subsidy was not granted by reference to the quantities manufactured, produced, exported or transported. The subsidy margin for the applicant under this scheme was 3,3 %.

2.1.2. Income Tax Exemption Scheme (ITES)

(26) It was established that the applicant received the benefit of a partial income tax exemption on profits from export sales during the review investigation period. The legal basis for this exemption is set by Section 80HHC of the Income Tax Act 1961.

(27) Section 80HHC of the Income Tax Act 1961 was abolished for the assessment year 2005 to 2006 (i.e. for the financial year from 1 April 2004 to 31 March 2005) onwards. Consequently, this scheme will not confer any benefits on the applicant after 31 March 2004. In accordance with Article 15(1) of the basic Regulation, this scheme shall therefore not be countervailed.

2.2. Schemes originally investigated but not used by the company

2.2.1. Passbook Scheme (PBS)

(28) It was found that the applicant had not received benefits under the PBS, which on 1 April 1997 was abolished and replaced by its successor, the DEPBS.

2.2.2. Export Promotion Capital Goods Scheme (EPCGS)

(29) It was established that the applicant had not imported capital goods under the EPCGS and therefore, had not availed itself of this scheme.

2.2.3. Export Processing Zones (EPZ)/Export Oriented Units (EOU)

(30) It was established that the applicant was not located in an EPZ nor did it operate under the EOU scheme and as a result, had not availed itself of these schemes.

2.3. Other scheme used by the applicant in relation to the product concerned and found countervailable: Advance Licence Scheme for physical exports (ALS physical exports)

Legal basis

(31) It was established that the applicant received benefits under this scheme during the review investigation period. The detailed description of the scheme is contained in paragraphs 4.1.1 to 4.1.7 of the EXIM-policy 02-07 and Chapters 4.1 to 4.30 of the HOP I 02-07.

Eligibility

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(32) Manufacturer-exporters and merchant-exporters 'tied to' supporting manufacturers are eligible for this scheme.

Practical implementation

(33) The ALS physical exports allows for the duty-free import of input materials which have to be physically incorporated in the resultant export goods. For verification purposes by the Indian authorities, the exporter is legally obliged to maintain 'a true and proper account of licence-wise consumption and utilisation of imported goods' in a specified format (Chapter 4.30 and Appendix 18 of the HOP I 02-07), i.e. an actual consumption register. Both import allowance and export obligation are fixed in volume and value by the GOI and are documented on a licence. In addition, at the time of import and of export, the corresponding transactions are to be documented by government officials on the licence. The volume of imports allowed under this scheme is determined by the GOI on the basis of standard norms, i.e. on SIONs, allegedly reflecting the most efficient use possible to produce a reference quantity of the resultant export product. SIONs exist for most products including the product concerned and are published in the HOP II 02-07. Imported input materials are not transferable and have to be used to produce the resultant export product. The export obligation must be fulfilled within a prescribed time frame (18 months with two possible extensions of six months each).

(34) In the course of the review investigation it was established that the input materials, imported duty-free under this scheme by the applicant according to the SION import allowance, exceeded the material it needed to produce the reference quantity of the resultant export product. Thus, the SION for the product concerned was not sufficiently accurate. Furthermore, the applicant maintained the actual consumption register not in conformity with its real consumption. Instead it recorded in this register, incorrectly, its consumption according to GOI's more generous SIONs, although de facto it consumed less input material for the reference resultant export production. Neither the applicant nor the GOI were able to demonstrate that the import duty exemption did not lead to an excess remission.

Conclusion

(35) The exemption from import duties is a subsidy within the meaning of Article 2(1)(a)(ii) and Article 2(2) of the basic Regulation, i.e. a financial contribution of the GOI which conferred a benefit upon the applicant. In addition, the ALS physical exports is contingent in law upon export performance, and therefore deemed to be specific and countervailable under Article 3(4)(a) of the basic Regulation.

(36) This scheme can not be considered a permissible duty drawback system or substitution drawback system within the meaning of Article 2(1)(a)(ii) of the basic Regulation. It does not conform to the strict rules laid down in Annex I

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item (i), Annex II (definition and rules for drawback) and Annex III (definition and rules for substitution drawback) to the basic Regulation. The GOI did not effectively apply its verification system or procedure to confirm whether and in what amounts inputs were consumed in the production of the exported product (Annex II(II)(4) to the basic Regulation and in the case of substitution drawback schemes, Annex III(II)(2) to the basic Regulation). The SIONs for the product concerned were not sufficiently precise and cannot be considered a verification system of actual consumption. An effective control based on a correctly kept actual consumption register did not take place. Besides, the GOI did neither carry out a further examination based on actual inputs involved, although this would normally need to be carried out in the absence of an effectively applied verification system (Annex II(II)(5) and Annex III(II)(3) to the basic Regulation), nor did it prove, that no excess remission took place.

(37) Upon disclosure, the applicant claimed that the ALS physical exports operated as a permitted drawback or substitution drawback system. It argued, without providing new factual evidence or substantiating its claims, that the GOI installed an adequate verification in conformity with the basic Regulation. To this end, the applicant referred to the following verification elements available to the GOI: allegedly precise SIONs for the product concerned, quantity information on input material and resultant products on import and export documents (export shipping bill, import bill of entry), customs bond register of imports and exports under the ALS physical exports, the actual consumption register (see recital 33), a Duty Entitlement Export Certification book (DEECB) and additional verification mechanisms applied by the Indian authorities in the context of their excise duty administration (i.e. safeguarding that no excise duty credits on input materials (CENVAT-credits) are claimed unjustly for inputs imported duty-free under the ALS). Further, it argued that the Commission would have to quantify the imprecision of the SION. In addition, the applicant contended that a verification system does not need to ascertain on a shipment by shipment basis the link between import materials and resultant products in order to be in conformity with the basic Regulation. Finally, the applicant claimed that the Commission is bound by the results of past investigations not to countervail the ALS.

(38) The position of the applicant summarised in recital 37 does not change the Commission's conclusions on the ALS physical exports. The applicant has not refuted that in the present case de facto, not de jure, the verification system of actual consumption was not applied effectively by the GOI. It was established during the investigation on the basis of actual consumption data provided by the applicant, that the SION for the product concerned is not sufficiently precise (see recital 34). The applicant is aware of this fact and confirmed this during the investigation to the verification team. It is not the task of the Commission to establish the exact amount of imprecision of the SION, but only to refute, on the basis of sufficient evidence, the alleged precision of the standard norms. Further, the applicant did not provide any evidence

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that it kept records or other documentation for ALS verification purposes by the GOI which reflected its actual consumption, i.e. not just standard norm consumption. Thus, for verification purposes of quantities consumed in export production, the GOI depended on its imprecise standard norms. This is considered by the Commission insufficient to satisfy the requirements of an effective verification system in accordance with Annexes II and III to the basic Regulation.

(39) The applicant did not substantiate that excise controls of CENVAT-credits provide any information about the nexus between input materials and resultant export products. Consequently, such controls are not considered by the Commission as part of the verification system in accordance with Annexes II and III to the basic Regulation. Further, the DEECB was abolished by the EXIM-policy 02-07 and thus can no longer, contrary to the claim of the applicant, constitute a relevant verification element. In addition, it was not substantiated that actual consumption data were recorded in the DEECB by the applicant. No evidence was provided that in any other way a system was effectively applied by the GOI to establish the nexus between imported input materials and the resultant export products with the necessary precision, i.e. in another way than on the basis of overly generous standard norms. In this context, it should be noted that indeed a verification system should be based on a shipment per shipment basis in order to reflect the standard set by the EXIM-policy 02-07 as cited under recital 33. In addition, only such a standard allows the controlling authorities to verify that the strict rules for either a drawback system or a substitution drawback system, as appropriate, are met. It should be recalled that in accordance with Annex I item (i) to the basic Regulation a substitution drawback system is only permissible in particular cases and, *inter alia*, only during a two-year period between the import of substitute inputs and export.

(40) Finally, the Commission is not bound by any precedent concerning the ALS physical exports. The scheme was never analysed on a basis of facts comparable with those established during the present investigation, in particular in view of the imprecision of the SION for the product concerned.

(41) Consequently, in the absence of a permitted duty drawback system or substitution drawback system and in view of the fact that the verification system is not applied effectively for the purpose intended, the countervailable benefit is the remission of total import duties normally due upon importation.

Calculation of the subsidy amount

(42) The subsidy amount was calculated on the basis of import duties foregone (basic customs duty and special additional customs duty) on the material imported under the ALS physical exports for the product concerned during the review investigation period with fees necessarily incurred to obtain the subsidy deducted in accordance with Article 7(1)(a) of the basic Regulation (nominator). This amount has been allocated over the export turnover

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generated by the product concerned during the review investigation period in accordance with Article 7(2) of the basic Regulation (denominator), since this subsidy was not granted by reference to the quantities manufactured, produced, exported or transported. On this basis, the subsidy obtained was 22 %.

3. Total amount of countervailable subsidies

(43) Taking account of the findings relating to the schemes as set out above, the amount of countervailable subsidies for the applicant is as follows:

(%)

	DEPBS	**ALS**	**Total**
Nestor Pharmaceuticals Ltd	3,3	22	25,3

(44) In accordance with Article 15(1) of the basic Regulation, the amount of the countervailing duty should be less than the total amount of countervailable subsidies, if such lesser duty were to be adequate to remove the injury to the Community industry. In the original investigation an average injury elimination level of 14,6 % was established. The applicant did not request a review of the findings on injury. Therefore, the originally established injury elimination level limits in the present review the amount of the countervailing duty.

E. TERMINATION OF THE ACCELERATED REVIEW

(45) On the basis of the findings made during this review investigation, it is considered that imports of the product concerned into the Community produced and exported by the applicant should continue being subject to a countervailing duty rate corresponding to the injury elimination level as established during the original investigation.

(46) Given that this duty rate is the rate already applicable to all companies not individually mentioned in Article 1(2) of Regulation (EC) No 2164/98, this Regulation should not be amended. The accelerated review concerning the applicant should be therefore terminated.

F. DISCLOSURE

(47) The applicant and the GOI were informed of the essential facts and considerations upon which it was intended to propose the termination of the accelerated review. They were also given a reasonable time to comment. The GOI did not make any comments. The applicant’s remarks on the disclosure, which only concern the ALS physical exports, were taken into consideration as set out under recitals 37 to 40,

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DECIDES:

Sole Article

The accelerated review of Regulation (EC) No 2164/98 concerning Nestor Pharmaceuticals Limited is hereby terminated.

Done at Brussels, 18 October 2004.

For the Commission

Pascal LAMY

Member of the Commission

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(**1**) 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).

(**2**) OJ L 273, 9.10.1998, p. 1.

(**3**) OJ C 102, 29.4.2003, p. 6.

(**4**) Notification No 1/2002-07 of 31 March 2002 of the Ministry of Commerce and Industry of the GOI.

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