

Commission Decision of 19 August 2009 repealing Decision 2007/424/EC accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of certain prepared or preserved sweet corn in kernels originating in Thailand (2009/708/EC)

## COMMISSION DECISION

of 19 August 2009

repealing Decision 2007/424/EC accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of certain prepared or preserved sweet corn in kernels originating in Thailand

(2009/708/EC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Community,

Having regard to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community<sup>(1)</sup> (the ‘basic Regulation’), and in particular Articles 8 and 9 thereof,

After consulting the Advisory Committee,

Whereas:

### A. EXISTING MEASURES

- (1) In June 2007, the Council, by Regulation (EC) No 682/2007<sup>(2)</sup>, imposed a definitive anti-dumping duty on imports of certain prepared or preserved sweet corn in kernels originating in Thailand (‘the product concerned’). Council Regulation (EC) No 954/2008<sup>(3)</sup> amended Regulation (EC) No 682/2007 with regard to the duty imposed on one company and on ‘all other companies’.
- (2) The Commission, by Decision 2007/424/EC<sup>(4)</sup>, accepted price undertakings offered by two exporting producers, namely Sun Sweet Co., Ltd (‘Sun Sweet’) and Malee Sampran Public Co., Ltd (‘Malee’).

### B. BREACHES OF THE UNDERTAKING

1. **Obligations stipulated in the undertaking**
- (3) With regard to Sun Sweet, it is noted that in the framework of the undertaking, the company agreed to respect a number of obligations, such as, inter alia, not to issue undertaking invoices within 1 calendar year to customers in the Community to which they sell other products, in order to reduce the risk of cross-compensation.

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- (4) Moreover, and without prejudice to the abovementioned clause, the company agreed that it will not have the option of making some sales under the terms of the undertaking and others with payment of the anti-dumping duties as long as the quantitative ceiling is not reached.
- (5) The company also agreed not to circumvent the undertaking by, inter alia, taking part in a trading system leading to a risk of circumvention.
- (6) The terms of the undertaking also oblige the company to provide the Commission with regular and detailed information in the form of a quarterly report of its sales of the product concerned to the European Community.
- (7) For the purpose of ensuring compliance with the undertaking, the company also undertook to allow on-spot verification visits at its premises in order to verify the accuracy and veracity of data submitted in the said quarterly reports and to provide all information considered necessary by the Commission.
- (8) In addition, the acceptance of the undertaking by the European Commission is based on trust and any action which would harm the relationship of trust established with the European Commission shall justify the immediate withdrawal of the undertaking.
- (9) Furthermore, any changes in circumstances occurring during the period of implementation of the undertaking from those circumstances prevailing at the time of acceptance of the undertaking which were relevant to the decision to accept the undertaking may give rise to the withdrawal of the undertaking by the European Commission.

## 2. **Verification visit**

- (10) In this regard and in parallel to the visit carried out in the framework of the partial interim review limited to the form of the measure initiated on 16 September 2008<sup>(6)</sup>, a verification visit was carried out at the premises of Sun Sweet.
- (11) The verification visit established a number of breaches of the undertaking.
  - (a) *Change in the pattern of trade*
- (12) The verification visit revealed that the company changed the pattern of trade to the European Community after imposition of anti-dumping measures, at least with regard to one customer, representing a substantial part of the company's turnover of the product concerned. During the original investigation period (original IP), the company delivered the product concerned to that customer to Germany only. In 2008, the company delivered more than one third of its sales of the product concerned to this customer to Russia.
- (13) Such a change in the pattern of trade does affect the undertaking in so far as it constitutes a serious risk of cross-compensation, i.e. shipments to Russia

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may be sold at artificially low prices in order to compensate for the minimum prices to be respected for sales to the Community.

(14) Furthermore, and of equal importance is that it had to be concluded that due to the change in the pattern of trade during the application of the undertaking, the current circumstances are different from those prevailing at the time of acceptance of the undertaking which were relevant to the decision to accept the undertaking. It is standing practice of the Commission not to accept undertakings if the risk of cross-compensation is too high.

(b) *Sales of the product concerned together with other products*

(15) The verification established that the company also violated the cross-compensation clause of the undertaking by issuing undertaking invoices for sales of the product covered to one customer in the Community to which other products were sold in the same calendar year.

(c) *Sales outside the undertaking before reaching the quantitative ceiling*

(16) Moreover, it has been found that the company chose to sell the product covered by the undertaking to at least three customers outside the terms of the undertaking before the quantitative ceiling was reached. On some of those normal commercial invoices the phrase ‘goods subject to undertaking as detailed in the *Official Journal of the European Union*’ appeared. This phrase is misleading and may have caused customs authorities not to collect anti-dumping duties for those imports.

(17) In addition, some of those sales were not reported in the quarterly reports.

(d) *Numerous errors in the undertaking reports*

(18) Despite the fact that the company has been advised in February 2008 that the undertaking reports were not correct, in particular with regard to quantities, exchange rates and invoice values reported, it was found that the reports still contain numerous errors, which impeded a proper monitoring of the undertaking.

### 3. **Reasons to withdraw acceptance of the undertaking**

(19) In view of the above, the following is concluded:

(20) A change in the pattern of trade since the imposition of measures has led to a significant risk of cross-compensation which no longer allows the Commission to effectively monitor the undertaking. This change in the pattern of trade is considered as a relevant change in circumstances compared to those prevailing at the time of acceptance of the undertaking.

(21) A breach of the cross-compensation clauses of the undertaking occurred since the company sold both, the product covered by the undertaking and other

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products to the same client in the same calendar year but continued to issue undertaking invoices for the product covered.

- (22) The sales made to certain customers outside the undertaking before the quantitative ceiling was reached constitute another breach of the undertaking.
- (23) In addition, the company failed to submit quarterly reports which are complete, exhaustive and correct in all particulars.
- (24) Although the verification did not reveal that sales were made below the minimum import price, the numerous other breaches of the undertaking mentioned above do not allow the Commission to effectively monitor the undertaking and have undermined the relationship of trust which formed the basis for the acceptance of the undertaking.

#### 4. **Written submissions**

- (25) With regard to the change in the pattern of trade and the increasing risk of circumvention resulting from such a change, the company submitted that it had no intention to violate the undertaking and that it did not change the pattern of trade in order to circumvent the terms of the undertaking. It was further added that no cross-compensation had taken place.
- (26) In response to this argument, it should be mentioned that there was indeed no evidence for an intentional violation of the price undertaking. However, the change in the pattern of trade as such constitutes a serious risk of cross-compensation, regardless of the underlying reason. It is long-standing practice of the Commission not to accept price undertakings if the risk of cross-compensation is too high. Consequently, if such a change in the pattern of trade occurs during the period of application of an undertaking, the change in itself is sufficient for the Commission to withdraw the undertaking, because it renders proper monitoring of the undertaking impractical, regardless of whether or not cross-compensation actually took place.
- (27) Accordingly, the arguments presented by the company in this respect do not alter the Commission's view that the change in the pattern of trade had led to a significant risk of cross-compensation.
- (28) The company further submitted that it misunderstood the terms of the undertaking when selling the product concerned together with other products and when selling outside the undertaking before reaching the quantitative ceiling. It also underlined that it concerned only a small quantity and that those practices were immediately ceased.
- (29) Additionally, the company argued that the errors in the undertaking reports were of limited importance and mainly due to typing errors which the company tried to correct as much as possible during the verification visit. A withdrawal of the undertaking would not give the company a chance to improve the reporting practice and to correct the shortcomings identified

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during the verification. The company also brought forward the argument that the Commission has sent each quarter an e-mail confirming that no error was found in the electronically submitted version of the report and underlined that the main clause of the undertaking, the respect of the minimum price, has never been violated.

- (30) In response to those submissions, it has to be stressed that already in 2007, the Commission exceptionally provided all companies that offered an undertaking with detailed information and training regarding the functioning of undertakings and the obligations of the companies.
- (31) Furthermore, it should be emphasised that the respect of the minimum price is indeed a core element of a price undertaking, but not the only one. It is equally important to respect the other obligations as well, including the obligation to provide regular sales reports that are complete, exhaustive and correct in all particulars in order to allow proper monitoring by the Commission. The confirmation e-mail the company referred to is an automatically generated message which confirms that the structure of the report is in accordance with the technical specifications outlined in the Annex to the undertaking text. As also explicitly mentioned in the same Annex, it does not confirm correctness in substance.
- (32) Therefore, the arguments presented by the company in this respect do not alter the Commission's view that the numerous breaches of the undertaking render the undertaking unworkable and are sufficient to withdraw acceptance of the undertaking.

#### C. PRACTICABILITY

- (33) With regard to both undertaking offers accepted, it has also to be noted that the partial interim review limited to the form of the measures revealed that the undertakings in their current form, i.e. with a fixed minimum price are no longer appropriate to counteract the injurious effect of dumping, and that there is no possibility of indexing the minimum import prices in order to address the problem<sup>(6)</sup>.

#### D. WITHDRAWAL OF ACCEPTANCE OF THE UNDERTAKINGS

- (34) In view of the above, and in accordance with the relevant clauses of the undertakings in question, which authorise the Commission to unilaterally withdraw acceptance of the undertakings, the Commission has decided to withdraw the acceptance of both undertakings.

#### E. REPEAL OF DECISION 2007/424/EC

- (35) In view of the above, Decision 2007/424/EC accepting undertakings from Sun Sweet Co., Ltd. and Malee Sampran Public Co., Ltd should be repealed. Accordingly, the definitive anti-dumping duty imposed by Article 1(2) of

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Regulation (EC) No 682/2007 on imports of the product concerned from those companies should apply,

HAS DECIDED AS FOLLOWS:

*Article 1*

Decision 2007/424/EC is hereby repealed.

*Article 2*

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

Done at Brussels, 19 August 2009.

*For the Commission*

Catherine ASHTON

*Member of the Commission*

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- (1) OJ L 56, 6.3.1996, p. 1.
- (2) OJ L 159, 20.6.2007, p. 14.
- (3) OJ L 260, 30.9.2008, p. 1.
- (4) OJ L 159, 20.6.2007, p. 42.
- (5) OJ C 237, 16.9.2008, p. 18.
- (6) Council Regulation (EC) No 847/2009 (see page 1 of this Official Journal).

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