**COUNCIL OF THE EUROPEAN UNION**

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**ANTIDUMPING 97**
**COMER 244**

**LEGISLATIVE ACTS AND OTHER INSTRUMENTS**

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| Subject: | COUNCIL IMPLEMENTING REGULATION amending Implementing Regulation (EU) No 1138/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia |

**COUNCIL IMPLEMENTING REGULATION (EU) No /2012**

**of**

**amending Implementing Regulation (EU) No 1138/2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia**

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 Article 9(4) thereof,

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

[1] OJ L 343, 22.12.2009, p. 51.

Whereas:

(1) In August 2010, the Commission, by Notice of Initiation (NOI) published on 13 August 2010[1], initiated a proceeding with regard to imports of certain fatty alcohols and their blends ('FOH') originating in India, Indonesia and Malaysia ('the countries concerned').

(2) In May 2011, by Regulation (EU) No 446/2011[2] ('the provisional Regulation'), the Commission imposed a provisional anti-dumping duty on imports of FOH originating in India, Indonesia and Malaysia, and in November 2011 a definitive anti-dumping duty was imposed on the same imports by Council Implementing Regulation (EU) No 1138/2011[3] ('the definitive Regulation').

(3) On 21 January 2012, PT Ecogreen Oleochemicals, an Indonesian exporting producer of FOH, Ecogreen Oleochemicals (Singapore) Pte. Ltd and Ecogreen Oleochemicals GmbH (herein jointly referred to as 'Ecogreen') lodged an application (Case T-28/12) before the General Court for the annulment of the definitive Regulation as far as the anti-dumping duty with regard to Ecogreen was concerned. Ecogreen contested the adjustment made on the basis of Article 2(10)(i) of the basic Regulation to its export price for the purpose of comparing that export price with the company's normal value.

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1 OJ C 219, 13.8.2010, p. 12.
2 OJ L 122, 11.5.2011, p. 47.
3 OJ L 293, 11.11.2011, p. 1.

(4) On 16 February 2012, the Court of Justice rendered its judgment in joined Cases C-191/09 P and C-200/09 P Council of the European Union and European Commission v Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT). The Court of Justice rejected the appeals and cross-appeals of the General Court's judgment in Case T-249/06 Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube Rolling Plant VAT (Interpipe NTRP VAT) v. Council of the European Union. The General Court had annulled Article 1 of Council Regulation (EC) No 954/2006 [1]with regard to Interpipe NTRP VAT, inter alia on the grounds of a manifest error of assessment in making the adjustment based on Article 2(10)(i) ,and on other grounds with regard to Interpipe Niko Tube ZAT.

(5) Given that the factual circumstances for Ecogreen are similar to those of Interpipe NTRP VAT in respect of the adjustment made pursuant to Article 2(10)(i) of the basic Regulation, in particular the following factors in combination: volume of direct sales to third countries of less than 8 % (1-5 %) of all export sales; existence of common ownership/control of the trader and the exporting producer; the nature of functions of the trader and the exporting producer, it is considered appropriate to re-calculate the dumping margin of Ecogreen without making an adjustment pursuant to Article 2(10)(i) and to amend the definitive Regulation accordingly.

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[1] Council Regulation (EC) No 954/2006 of 27 June 2006 imposing definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, repealing Council Regulations (EC) No 2320/97 and (EC) No 348/2000, terminating the interim and expiry reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, *inter alia* , in Russia and Romania and terminating the interim reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating*, inter alia* , in Russia and Romania and in Croatia and Ukraine *(OJ L 175, 29.6.2006, p. 4)*

## A. NEW ASSESSMENT OF THE FINDINGS BASED ON THE JUDGEMENT OF THE GENERAL COURT

(6) On the basis of eliminating the adjustment pursuant to Article 2(10)(i), the dumping margin established for Ecogreen, expressed as a percentage of the CIF import price at the Union frontier, duty unpaid, is less than 2% and is therefore considered *de mimimis* in accordance with Article 9(3) of the basic Regulation. In the light of this, the investigation should be terminated in respect of Ecogreen without the imposition of measures.

(7) The dumping margin for all companies in Indonesia, other than for the other exporting producer with an individual margin, which was based on that of the cooperating Indonesian exporting producer with the highest dumping margin, should be revised to take account of the re-calculated dumping margin of Ecogreen.

## B. DISCLOSURES

(8) The interested parties concerned were informed of the proposal to revise the rates of anti-dumping duty in two disclosures, one sent on 13 June 2012 and a second disclosure sent on 25 September 2012. All parties were granted a period within which they could make representations subsequent to each disclosure in accordance with the provisions of the basic Regulation.

(9) Comments on the disclosure sent on 13 June 2012were received from P.T. Musim Mas (PTMM), the second exporting producer in Indonesia, from one producer in the Union, and from one exporting producer in Malaysia. PTMM also asked for an opportunity to be heard by the Commission services and was granted such a hearing.

(10) PTMM, for which an adjustment under Article 2(10)(i) had also been made, argued that the Court judgment in joined Cases C-191/09 P and C-200/09 P should result in a recalculation of its dumping margin, similar to that made for Ecogreen, without an adjustment being made pursuant to Article 2(10)(i), as once a single economic entity made up of the exporting producer and the trader is established, no adjustments under Article 2(10)(i) can be made. The company also claimed that the burden of proving that an adjustment should be made rests with the Institutions, and that they have not proved it in the case of PTMM. It further alleged that its circumstances were identical to those of Ecogreen, and any difference in treatment would therefore amount to discrimination.

(11) As regards the comments made by PTMM, it should be noted that it does not follow from the Court judgment in joined Cases C-191/09 P and C-200/09 P that as soon as the existence of a single economic entity is established no adjustment under Article 2(10)(i) of the basic Regulation can be made. The adjustment under Article 2(10)(i) is considered to be justified in the case of PTMM as has been explained in the definitive regulation, in communication with the company and below.

(12) There are a number of differences in the circumstances of the two Indonesian exporting producers, in particular the following in combination: the level of direct export sales made by the producer; the significance of the trader's activities and functions concerning products sourced from non-related companies; the existence of a contract between the trader and producer, which provided that the trader was to receive a commission for the export sales. Given the difference in the circumstances of the two companies the claim of discrimination has to be rejected.

(13) It is noted that PTMM also lodged an application (Case T-26/12) before the General Court for the annulment of the definitive Regulation as far as the anti-dumping duty with regard to PTMM was concerned.

(14) One exporting producer in Malaysia argued that the recalculation of the margin for Ecogreen, without making an adjustment pursuant to Article 2(10)(i), was not supported by the judgment in joined Cases C-191/09 P and C-200/09 P or the facts therein. It pointed out that the General Court, in Case T-249/06, had found a manifest error of assessment in applying Article 2(10)(i) of the basic Regulation in so far as the Council made an adjustment on the export price charged by Sepco in the context of transactions concerning pipes manufactured by Interpipe NTRP VAT, but not those manufactured by Interpipe Niko Tube ZAT. Ecogreen's factual circumstances thus could not simultaneously be similar to those of Interpipe NTRP VAT and of Interpipe Niko Tube ZAT due to a difference in the situation of those two companies.

(15) This argument is accepted. Indeed, Ecogreen's situation is similar to that of Interpipe NTRP VAT. This finding justifies the need for taking the appropriate steps to re-calculate the dumping margin for Ecogreen without the Article 2(10)(i) adjustment.

(16) The exporting producer in Malaysia further argued that the situation of Ecogreen as described in the definitive Regulation is not even similar to that of Interpipe NTRP VAT. Upon reassessing the precise factual circumstances of Ecogreen, it is however considered that these are sufficiently similar to those of Interpipe NTRP VAT as such control as found by the General Court for Interpipe NTRP VAT when assessing whether the company carrying out the sales activities is under the control of the exporting producer or whether there is common control has been found for Ecogreen and together with several other factors, as indicated in recital (4), leads to the conclusion that the adjustment under Article 2(10)(i) of the basic Regulation should not have been made.

(17) The same exporting producer in Malaysia, as an alternative to its argument regarding the similarities between the situation of Ecogreen and the circumstances of Case T-249/06, argued that the disclosure sent on 13 June 2012 was insufficient and that additional disclosure should be made of the essential facts and considerations on the basis of which the recalculation for Ecogreen is justified. One producer in the Union also commented that both disclosures referred to in recital (8) were insufficient, and argued that it was deprived of its rights of defence.

(18) In this regard, it is recalled that certain details relating to specific companies which are confidential in nature cannot be disclosed to third parties. However, the nature of the factual circumstances of Ecogreen which are similar to those of Interpipe NTRP VAT, as indicated at recital (5), was disclosed to interested parties on 13 June 2012 and on 25 September 2012, who were granted a period within which they could make representations subsequent to each disclosure in accordance with the provisions of the basic Regulation.

(19) In response to the second disclosure sent on 25 September 2012, the parties mainly reiterated their claims in their responses to the first disclosure of 13 June 2012.

(20) PTMM has developed its comments based on its main claim that the existence of a Single Economic Entity (SEE) of PTMM and its trader excludes an adjustment under Article 2(10)(i) of the basic Regulation claiming that the Institutions shift the SEE doctrine laid down by the Courts to a functional approach where an analysis of the functions of the related trader would be required.

(21) It is noted that this issue turns on a point of law that is a subject matter of a pending case.

(22) Furthermore, PTMM claimed that the arguments in recital (12) above are not convincing and do not suffice to differentiate between the circumstances of Ecogreen and PTMM respectively.

(23) In that regard it is sufficient to note that it is settled case law that different treatment of companies that are not in an identical situation does not amount to discrimination[1]. Against this background each individual case was assessed on its individual merits against the findings in the judgments of Case T-249/09 and joined Cases C-191/09 P and C-200/09 P.

(24) First argument: *Level of direct export sales made by the producer.* PTMM submitted that it has no marketing and sales division and claimed that all the sales carried out directly by the producer in Indonesia (and not by the related trader) were only done so as to comply with legal requirements. The functions of marketing and sales were carried out by its trader in Singapore. For this reason, PTMM claimed that this argument does not justify the adjustment under Article 2(10)(i) of the basic Regulation nor the distinction drawn between PTMM on the one hand and Interpipe NTRP VAT on the other.

(25) Article 2(10) of the basic Regulation stipulates that a fair comparison shall be made between the export price and the normal value at the same level of trade with due account taken of differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability.

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[1] Case C-248/04, Koninklijke Cooperatie Cosun [2006] ECR I-10211, paragraph 72, and Case C-303/05 Advocaten voor de Wereld [2007] ECR I-3633, paragraph 56. Case C-372/06 Asda Stores Ltd v Commissioners of Her Majesty's Revenue and Customs, [2007] ECR I-11223, point 62.

(26) On this basis, and as explained in recital (38) of the provisional Regulation, adjustments for *inter alia* differences in commissions between export sales prices and domestic sales prices during the original investigations were considered warranted due to the differences in the sales channels between export sales to the European Union and domestic sales.

(27) The arguments put forward by PTMM do not contradict the first argument, namely that the level of direct export sales made by PTMM is higher than that of Interpipe NTRP VAT and that this fact distinguishes PTMM from Ecogreen. Indeed, given the level of direct export sales, it can only be concluded that PTMM's export sales are performed not only from its related trader in Singapore, but also from Indonesia.

(28) Second argument: *Significance of the trader's activities and functions concerning products sourced from non-related companies*. PTMM claimed that, whereas it did not deny that its related trader was involved in a range of different palm oil-based products, PTMM claimed that this argument was flawed, since it was based on activities beyond the scope of original investigation.

(29) In order to assess whether the functions of a trader are not those of an internal sales department but comparable to those of an agent working on a commission basis within the meaning of the judgement of the General Court in Case T-249/06, the trader's activities have to be assessed against the economic reality. There are similarities as regards the functions of the trader with regard to the product concerned and the other products traded. This is confirmed by the fact that, as discussed below in recitals (30) and (31), the relationship between PTMM and its related trader, including the functions of the latter, for most if not all products – including the product concerned - is governed by one single contract without distinguishing among products. It should be noted that the trader's overall activities were based to a significant extent on supplies originating from unrelated companies. The trader's functions are therefore similar to those of an agent working on a commission basis.

(30) Third argument: *The existence of a contract between the trader and producer, which provided that the trader was to receive a commission for the export sales*. PTMM claimed that this contract was a master agreement to regulate transfer prices between related parties to comply with applicable Indonesian/Singapore tax guidelines and internationally accepted guidelines on transfer pricing.

(31) The fact that this agreement can also be used for calculating arm's length prices in accordance with applicable tax guidelines does not contradict the finding that pursuant to the agreement the trader received a commission in the form of a fixed mark-up only for its international and marketing sales activities. Indeed, the very name and the modalities of the agreement justify the finding that the contract was intended to govern the relationship between PTMM and the trader and was not limited to the transfer pricing or tax issues. The contract thus represents circumstancial evidence that the trader's functions are similar to those of an agent working on a commission basis.

(32) In the light of the arguments presented above the Institutions have met the standard of proof required by the settled case law[1]: they based their findings on direct or at least circumstancial evidence. As regards PTMM, and for reasons explained above, the adjustment made to the export prices pursuant to Article 2(10)(i) of the basic Regulation is warranted and the present level of anti-dumping duty should therefore be kept.

[1] T-249/06, paragraphs 180 and 181.

## C. CONCLUSION

(33) On the basis of the above the duty rates applicable to Ecogreen and to all other companies in Indonesia (except P.T. Musim Mas) should be amended. The amended rates should apply retroactively from the date of the entry into force of Implementing Regulation (EU) No 1138/2011 including to any imports subject to provisional duties between 12 May 2011 and 11 November 2011. Consequently, the definitive anti-dumping duty paid or entered into the accounts pursuant to Article 1 of Implementing Regulation (EU) No 1138/2011 in its initial version and the provisional antidumping duties definitively collected pursuant to Article 2 of the same Regulation in its initial version in excess of the duty rate specified in Article 1(2) of Implementing Regulation (EU) No 1138/2011 as amended by this Regulation should be repaid or remitted. Repayment or remission should be requested from national customs authorities in accordance with applicable customs legislation,

HAS ADOPTED THIS REGULATION:

*Article 1*

The entry for Indonesia in the table in Article 1(2) of Council Implementing Regulation (EU) No 1138/2011 is replaced by the following:

| "Country | Company | Definitive anti-dumping duty (EUR per tonne net) | TARIC Additional Code |
|---|---|---|---|
| Indonesia | P.T. Ecogreen Oleochemicals Batam, Kabil, Batam | 0,00 | B111 |
| | P.T. Musim Mas, Tanjung Mulia, Medan, Sumatera Utara | 45,63 | B112 |
| | All other companies | 45,63 | B999" |

*Article 2*

The amounts of duties paid or entered into the accounts, pursuant to Article 1 of Council Implementing Regulation (EU) No 1138/2011 in its initial version and the amounts of provisional duties definitively collected pursuant to Article 2 of the same Regulation in its initial version, which exceed those established by Article 1 of this Regulation, shall be repaid or remitted. Repayment or remission must be requested from national customs authorities in accordance with applicable customs legislation.

*Article 3*

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

It shall apply from 12 November 2011.

This Regulation shall be binding in its entirety and directly applicable in all Member States.

Done at Brussels,

*For the Council*
*The President*
*[...]*