EUROPEAN
COMMISSION

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COMMISSION IMPLEMENTING DECISION

of 18.12.2014

concerning applications for a refund of anti-dumping duties paid on imports of ferro-silicon originating in Russia
(only the English and the Spanish texts are authentic)

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THE EUROPEAN COMMISSION,

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 ('the basic Regulation')[1], and in particular Article 11(8) thereof,

After informing the Member States,

Whereas:

A. PROCEDURE

Measures in force

(1) Council Regulation (EC) No 172/2008[2] of 25 February 2008 imposed a definitive anti-dumping duty on imports of ferro-silicon originating in Russia ranging between 17,8% and 22,7% ('the original investigation').

(2) Council Implementing Regulation (EU) No 60/2012 terminated a partial interim review with regard to the measures and they remained at the same level ('the interim review')[3]. The interim review was requested by the related exporting producers of the applicant of the present refund request.

(3) Implementing Regulation (EU) No 360/2014 maintained these measures following an expiry review ('the expiry review')[4].

(4) In 2012, a partial refund of the duty paid was granted to *[omissis]*for requests concerning earlier periods of time ('the previous refund investigations')[5].

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1 Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community, OJ L 343, 22.12.2009, p. 51.

2 Council Regulation (EC) No 172/2008 of 25 February 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ferro-silicon originating in the People's Republic of China, Egypt, Kazakhstan, the former Yugoslav Republic of Macedonia and Russia, OJ L 55, 28.2.2008, p. 6.

3 Council Implementing Regulation (EU) No 60/2012 of 16 January 2012 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009 of the anti-dumping measures applicable to imports of ferro-silicon originating, inter alia in Russia, OJ L 22, 25.1.2012, p. 1.

4 Commission Implementing Regulation (EU) No 360/2014 of 9 April 2014 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in the People's Republic of China and Russia, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009, OJ L107, 10.4.2014, p. 13.

Refund application

(5) On 1 October 2012 a company registered in *[omissis]* ('the applicant') applied for a refund of anti-dumping duties via the authorities of Spain ('the application') under Article 11(8) of the basic Regulation. The application related to duties paid on imports of ferro-silicon originating in Russia subject to the duty rate of 22,7%.

(6) The total amount of anti-dumping duties for which a refund is requested is *[omissis]*. The anti-dumping duties were levied by the customs authorities on 3 May 2012. The corresponding transaction was invoiced by one Russian exporting producer, related to the applicant : *[omissis]*.

Investigation period

(7) The application was recurring. In accordance with point 3.6 of the Commission Notice concerning the reimbursement of anti-dumping duties[6] ('the Notice'), for reasons of efficiency, the European Commission ('the Commission') decided to establish two investigation periods, one that comprises imports made before the expiry review investigation period and another one that coincided with the expiry review investigation period.

(8) The following refund investigation periods were used:

- from 1 October 2010 to 31 December 2011('first investigation period') and
- from 1 January 2012 to 31 December 2012 which was also the investigation period of the expiry review investigation ('second investigation period').

(9) The two related exporting producers to the applicant are: *[omissis]* ('the exporting producers'). They are considered to be related to the applicant in accordance with Article 143 of Commission Regulation (EEC) No 2454/93[7]. For the purpose of this refund investigation, the applicant and the Russian exporting producers will be referred to as 'the group'.

B. ARGUMENTS OF THE APPLICANT

(10) The applicant claimed that the dumping margin of its related exporting producers in Russia, on the basis of which anti-dumping duties were paid, was reduced or eliminated, below the level of the duty in force and, therefore, requested the excess of anti-dumping duties paid to be reimbursed.

C. ADMISSIBILITY

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5 Commission Decisions of 10 August 2012 No C(2012) 5577, C(2012) 5585, C(2012) 5588, C(2012) 5595, C(2012) 5596, C(2012) 5598 and C(2012) 5611, concerning an application for a refund of anti-dumping duties paid on imports of ferro-silicon originating in Russia.

6 Commission Notice concerning the reimbursement of anti-dumping duties, OJ C 164, 29.5.2014, p. 9.

7 In accordance with Article 143 of Commission Regulation (EEC) No 2454/93 concerning the implementation of the Community Customs Code, persons shall be deemed to be related only if: (a) they are officers or directors of one another's businesses; (b) they are legally recognized partners in business; (c) they are employer and employee; (d) any person directly or indirectly owns, controls or holds 5% or more of the outstanding voting stock or shares of both of them; (e) one of them directly or indirectly controls the other; (f) both of them are directly or indirectly controlled by a third person; (g) together they directly or indirectly control a third person; or (h) they are members of the same family. Persons shall be deemed to be members of the same family only if they stand in any of the following relationships to one another: (i) husband and wife, (ii) parent and child, (iii) brother and sister (whether by whole or half blood), (iv) grandparent and grandchild, (v) uncle or aunt and nephew or niece, (vi) parent-in-law and son-in-law or daughter-in-law, (vii) brother-in-law and sister-in-law. (OJ L 253, 11.10.1993, p. 1). In this context 'person' means any natural or legal person.

(11) The applicant made an application, submitted within the time limits, which contained sufficient evidence and precise information on the amount of refund of anti-dumping duties claimed. Therefore, the application was admissible under Article 11(8) of the basic Regulation.

(12) The application is considered as duly supported by evidence as of 25 June 2013, the date on which the exporter submitted full evidence on export prices and normal values.

D. MERITS OF THE APPLICATION

1. General

(13) The Commission sought and verified all the necessary information for the determination of the relevant dumping margin. The Commission also carried out verification visits at the premises of the following companies:

- *[omissis]*
- *[omissis]*
- *[omissis]*

(14) The applicant, the exporting producers and *[omissis]* are considered to be related as they are ultimately owned, through sisters companies, by the same shareholders.

(15) *[omissis]* provides administrative services to the applicant such as processing of purchases and sales orders, including the logistic of deliveries, warehousing administration and invoicing.

(16) On 23 October 2014 the Commission informed the applicant of the findings on the basis of which it was intended to propose to adopt a Commission Decision rejecting the application for a refund.

(17) The applicant submitted comments on 18 November 2014 ('the comments') and made several claims and in particular that:

- the methodology used to establish the dumping margin in the current investigation is a new methodology and it is in breach with Article 11(9) of the basic Regulation;
- when constructing the export price in the context of the Article 2(9) of the basic Regulation, the Commission ignored that the group forms a single economic entity and wrongly established the selling, general and administrative ('SG&A') expenses and profit adjustments;
- the deduction of the anti-dumping duties in the context of the Article 11(10) and Article 2(9) of the basic Regulation was unlawful and it is in breach with Article 11(9) of the basic Regulation.

All comments made by the parties are addressed below.

2. Dumping

2.1. Preliminary remarks

(18) Following the disclosure of the findings, the applicant claimed that the Commission could not change the methodology used in the original investigation and in the previous refund investigations and by doing that breached Article 11(9) of the basic Regulation and Article 18.3.1 of the WTO Anti-dumping Agreement ('ADA') which stipulates that "… *with respect to the calculation of margins of dumping in refund*

procedures under a paragraph 3 of Article 9, the rules used in the most recent determination or review of dumping shall apply...".

(19) The investigation has shown that the factual situation in the current refund investigation differs significantly from that prevailing in the original investigation period, namely from 1 October 2005 to 30 September 2006. The applicant provided evidence that the global corporate structure in which the group operated and its organization changed after the conclusion of the original investigation. In particular:

- The domestic sales structure of the group was revised shortly after the original investigation was concluded. A related trader which was selling a part of the Russian exporting producer's production was not used anymore. Instead, the domestic sales were made directly by the two producing entities concerned, namely *[omissis]* and *[omissis]*. This was the case also during the current investigation.
- The export trade flows of the Russian exporting producers were modified. During the original investigation, all export sales were channelled through one of the exporting producers. After the original investigation, both Russian exporting producers sold and invoiced the product concerned to the applicant which subsequently exported them in particular to the Union market.
- During the original investigation, the said exporting producer was mainly exporting the product concerned on the basis of free on board ('FOB')[8] and delivery duty unpaid ('DDU')[9] conditions to related and unrelated traders located in the Union. After the original investigation, both Russian exporting producers were selling the product concerned exclusively to the applicant on an ex-works basis ('EXW')[10].
- During the original investigation, the traders subsequently resold the product concerned to the Union customers mainly on an EXW, free carrier ('FCA')[11] and delivery duty paid basis ('DDP)[12]. After the original investigation, the applicant resold the product concerned to Union customers mainly on a DDP basis.
- The applicant and *[omissis]* were established after the original investigation. The applicant became the sole purchaser of the product concerned from it related Russian exporting producers and exported it in particular to the Union. *[omissis]* replaced another related company in the corporate structure to provide administrative services as explained in recital (15) above.

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8 FOB means that the seller delivers when the goods pass the ship's rail at the named port of shipment. The buyer has to bear the costs and risks of loss and damage to the goods from that point. The FOB term requires the seller to clear the goods for export (International Chamber of Commerce).

9 DDU means that the seller delivers the goods to the buyer, not cleared for import, and not loaded from any arriving means of transport at the named place of destination. The seller has to bear the costs and risks involved in bringing the goods thereto, other than, where applicable, any duty which includes the responsibility for and the risks of the carrying out of customs formalities and the payments of the formalities, customs duties, taxes and other charges for import in the country of destination. Such duty has to be borne by the buyer.

10 EXW means that the seller delivers when he places the goods at the disposal of the buyer at the seller's premises or another named place not cleared for export and not loaded on any collecting vehicle (International Chamber of Commerce).

11 FCA means that the seller delivers the goods, cleared for export, to the carrier nominated by the buyer at the named place.

12 DDP means that the seller delivers the goods to the buyer, cleared for imports, and not unloaded from any arriving means of transport at the named place of destination. The seller has to bear all costs and risks involved in bringing the goods thereto including, where applicable, any duty including the responsibility for and the risks of carrying out of customs formalities, customs duties, taxes and other charges for import in the country of destination.

- The applicant contracted *[omissis]* in particular for the organization of the logistic and the administration tasks mentioned abovein the context of the export activity of the group.
- The costs of production of the two Russian exporting producers have increased significantly, namely by around 100%, compared to the original investigation.
- The market conditions that prevailed during the original investigation, namely in 2005, also changed significantly. As mentioned in recital (41) of the expiry review regulation, the export restrictions imposed by the Chinese Government led to a significant decreased in Chinese exports to the Union. The applicant explained that the world market was driven by Chinese prices and that ferro-silicon price fluctuations were due to the variation in the Chinese exports volume.

(20) The above factual changes are of particular importance for establishing the findings pertaining to the applicant in the current refund application and had to be taken into consideration in the calculation of the dumping margin.

(21) The methodology used in the current investigation is the same as that used in previous ones. It is however applied to a different set of data, namely data that have been currently submitted and verified data that have changed compared to the original investigation. The fact that the results are different cannot be considered as a change in methodology. Even if, as the applicant claims, this would constitute a change in methodology, *(quod non)* this change would be fully justified in view of the new factual evidence provided and the significant changes introduced within the group during the current investigation as compared to the original investigation.

(22) The Commission must examine the information and evidence available independently and objectively for each case on the basis of its own merits.

(23) With regards to Article 18.3.1 of the ADA, this was an exception to the principle laid out in Article 18.3 of the ADA. The Article 18.3.1 of the ADA deals with the specific issues which occurred during the transition period following the entry into force of the ADA. Therefore, the Commission considers that the Article 18.3.1 of the ADA is not relevant in the current situation.

2.2. Normal value

(24) As was the case in the original investigation, the normal value was established at an EXW level. The change in the domestic sales structure mentioned in recital (19) above was taken into account.

(25) The Commission first examined whether the total volume of domestic sales was representative, in accordance with Article 2(2) of the basic Regulation. The domestic sales are representative if the total domestic sales volume of the like product to independent customers on the domestic market represented at least 5 % of total export sales volume of the product concerned to the Union during the investigation period. On this basis, the total sales of the like product on the domestic market were representative.

(26) The Commission subsequently identified the product types sold domestically that were identical or comparable with the product types sold for export to the Union.

(27) The Commission then examined whether the domestic sales on the domestic market for each product type that is identical or comparable with a product type sold for export to the Union were representative, in accordance with Article 2(2) of the basic Regulation. The domestic sales of a product type are representative if the total volume

of domestic sales of that product type to independent customers during the investigation period represents at least 5 % of the total volume of export sales of the identical or comparable product type to the Union. Where sales of product types were found to be not representative, namely representing less than 5% of the total sales volume to the Union of that product type, normal value was constructed.

(28) The Commission next defined the proportion of profitable sales to independent customers on the domestic market for each product type during the investigation periods in order to decide whether to use actual domestic sales for the calculation of the normal value, in accordance with Article 2(4) of the basic Regulation.

(29) The normal value is based on the actual domestic price per product type, irrespective of whether those sales are profitable or not, if:

- the sales volume of the product type, sold at a net sales price equal to or above the calculated cost of production, represented more than 80 % of the total sales volume of this product type; and
- the weighted average sales price of that product type is equal to or higher than the unit cost of production.

(30) In this case, the normal value is the weighted average of the prices of all domestic sales of that product type during the investigation periods.

(31) The normal value is the actual domestic price per product type of only the profitable domestic sales of the product types during the investigation periods, if:

- the volume of profitable sales of the product type represents 80 % or less of the total sales volume of this type, or
- the weighted average price of this product type is below the unit cost of production.

(32) The analysis of domestic sales showed that more than 80% of all domestic sales were profitable and that the weighted average sales prices for those sales were higher than the cost of production. Accordingly, the normal value was calculated as a weighted average of the prices of all domestic sales during the investigation periods.

(33) Where a product type was not sold in representative quantities on the domestic market, the Commission constructed the normal value in accordance with Article 2(3) and (6) of the basic Regulation.

(34) The normal value for the non-representative types, namely those of which domestic sales constituted less than 5% of export sales to the Union, was calculated on the basis of the cost of manufacturing per product type plus an amount for selling, general and administrative costs and profits. Where necessary the cost of production was adjusted to take account of intragroup sales of raw material. The profit of transactions in the ordinary course of trade on the domestic market per product type for the product types concerned was used.

(35) The applicant claimed that this constitutes a change in methodology compared to the original investigation although it has not challenged its legality as such. However, it is appropriate to use the actual profit and SG&A of the transactions made in the ordinary course of trade on the domestic market per product type for the product types concerned as reflected in the current Commission's practise. This thus cannot be considered as a change in methodology.

(36) Normal value was constructed by adding the following to the average cost of production of the like product of each of the exporting producers during each of the investigation periods:

- the weighted average SG&A expenses incurred by the exporting producer on domestic sales of the like product, in the ordinary course of trade, during the investigation periods; and
- the weighted average profit realised by exporting producer on domestic sales of the like product, in the ordinary course of trade, during the investigation periods.

(37) Lastly, the Commission wishes to underline that even if the methodology advocated by the applicant would be accepted (*quod non)*, the impact would be a decrease in the dumping margin of 1% for the first refund investigation and 0,1% for the second refund investigation and would not entail any refund to the applicant.

2.3. Export price

Preliminary remarks

(38) As explained under point "**Comparison and adjustments**" below, the comparison between the normal value and the export price was made on an EXW basis as was done in the original investigation.

(39) The factual changes mentioned in recital (19) above, in particular the changes in the organisation of the exports and sales conditions for the export transactions, were taken into account to establish the export price relevant for the current investigation.

(40) It is recalled that in the current investigation, the applicant purchased the product concerned from its related exporting producers on an EXW basis, incurred all the costs to bring it to Union border and sold it mainly on a DDP basis to Union customers.

(41) Whilst the ex-works term (EXW) represents the minimum obligations for the seller, DDP represents the maximum obligation and costs for the seller.

(42) DDP means in particular that the seller delivers the goods to the buyer, cleared for imports, and not unloaded from any arriving means of transport at the named place of destination. The seller has to bear all costs and risks involved in bringing the goods thereto including, where applicable, any duty including the responsibility for and the risks of carrying out of customs formalities, customs duties and anti-dumping duties, taxes and other charges for import in Union.

(43) It is also recalled that in the current investigation, all the export sales of the group to the Union were channelled through the applicant, which is related to the exporting producers in Russia. Hence, the export price was not considered to be reliable and had first to be constructed on the basis of the price at which the imported product was first resold to independent customers in the Union in accordance with Article 2(9) of the basic Regulation.

(44) Article 2(9) of the basic Regulation states that where it appears that the export price is unreliable adjustments for all costs, including duties and taxes, incurred between importation and resale, and for profit accruing, shall be made so as to establish a reliable export price, at Union frontier level. This price level would normally correspond to the incoterm called "Cost, insurance and freight" ('CIF')[13].

[13] CIF means that the seller delivers when the goods pass the ship's rail in the port of shipment. The seller must pay for the costs and freight necessary to bring the goods to the named port of destination and the cost of the marine insurance to cover the risks of loss of or damage to the goods.

(45) However, with reference to recitals (24) and (38) above, it is noteworthy that as was the case in the previous investigations, the comparison between the export price and the normal value was made at the same sales condition, namely at EXW basis. In order to ensure a fair comparison, account was taken of differences which affect price comparability in accordance with Article 2(10) of the basic Regulation, namely of factors that occurred between DDP term in the Union and EXW term in Russia. This include in particular freight in the Union, Customs duty, anti-dumping duties, ocean freight, insurance, loading and unloading costs in Russian port, railway freight in Russia, handling costs.

Export price at Union frontier level based on Article 2(9) of the basic Regulation

(46) The investigation showed that the applicant is related to the Russian exporting producers and is performing, in particular, all import functions in relation to the goods entering into free circulation in the Union. The applicant resold the product concerned to Union customers mainly on a DDP basis. Respectively for the first refund investigation and the second refund investigation, DDP transactions represented 79% and 89% of the transactions.

(47) With regard to profit, the profit realised by the applicant was also considered to be unreliable because of the association with the exporting producers, as the price itself between them was not considered to be reliable. In the absence of information from independent importers in this investigation, the reasonable profit deducted from the resale price was the profit determined in the original investigation[14].

(48) With regard to the deduction of SG&A expenses, the Commission took the actual SG&A expenses amount submitted by the applicant in its questionnaire reply for its sales of the product concerned into the Union market. This amount was identified by the applicant for the resale of the product concerned to the Union. The Commission ensured that there was no double counting in the expenses deducted and that all costs related to the resale of the product concerned to Union customers were included in the deducted amount.

(49) In its comments to the disclosure, the applicant claimed that the Commission wrongly established the above SG&A adjustment and that any profit deducted from export price should be based on its own financial data. The applicant estimated that presumably 50% of the SG&A costs they incurred should be allocated to post-importation activities. These costs included in particular *[omissis]* fees, storage expenses and financial expenses. The applicant further proposed to provide details concerning the possible split of expenses and profit to attribute to their export sales, namely prior and post importation but conditioned it to the acceptance by the Commission of their claim of a single economic entity.

(50) The applicant cannot condition the submission of evidence which should support its case with any change of the Commission's position in the case. The issue of lack of relevance of the finding of the single economic entity in relation to Article 2(9) of the basic Regulation is currently, amongst others, an issue in pending Court cases and the

[14] Recital (41) of Council Regulation (EC) No 172/2008 of 25 February 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ferro-silicon originating in the People's Republic of China, Egypt, Kazakhstan, the former Yugoslav Republic of Macedonia and Russia (OJ L 55, 28.2.2008, p.9). The same was done in the interim review (Council Implementing Regulation (EU) No 60/2012 of 16 January 2012 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009 of the anti-dumping measures applicable to imports of ferro-silicon originating, inter alia, in Russia (OJ L 22, 25.1.2012, p.3), see recital (22)).

Commission position on the matter is well known to the applicant. Furthermore, the applicant cannot ignore that the current investigation is governed by statutory deadlines governed by the basic Regulation and it is not possible, in particular after final disclosure, to allow for further new submissions and additional time to provide new information. This information could have been provided in time during the investigation.

(51) Furthermore, the claim made by the applicant is very vague and is not substantiated by any piece of evidence or supported by any duly justified request. The Commission thus cannot take it into consideration.

(52) Given that no new information was provided by the applicant during the investigation and after disclosure concerning the breakdown of its SG&A costs. The Commission analysed the information available, namely the information collected during the on-spot visits, and deducted all the SG&A costs of the applicant under Article 2(9) of the basic Regulation.

(53) As mentioned in recitals (19) and (40) above, the applicant bore all the costs from the premises of its related exporting producers in Russia; as the goods were purchased on an EXW basis; to the delivery to the named destination in the Union; as the resales are mainly made on a DDP basis; thus also including post-importation costs such as customs formalities, taxes and duties, freight into the Union to bring the goods to the named destination.

(54) The Commission thus confirms that in view of the circumstances of the case, a breakdown between SG&A expenses incurred prior and post to importation, and a distinction between any adjustment to be made to the export price under Article 2(9) of the basic Regulation or adjustments to ensure a fair comparison under Article 2(10) of the basic Regulation would not change the dumping margin calculation made in the current refund investigation. The adjustments made by the Commission on the basis of the data provided by the applicant allowed to establish a reliable export price pursuant to Article 2(9) of the basic Regulation and to compare the normal value and the export price at the same level of trade and taking account of differences affecting comparability with normal value in accordance with Article 2(10) of the basic Regulation.

(55) This means, for the sake of the argument, that the acceptance of the applicant's claim in recital (49) above will not change the dumping margin established by the Commission in the current refund investigation.

(56) Concerning the deduction of a reasonable profit margin, the Commission reiterates that in the circumstances of the present case, namely where there is a related importer, its own profit is considered to be unreliable in the same way as the price between the exporting producers and the related importer. Therefore, as explained in recital (47) above, the profit of an unrelated importer established in the original investigation was used. On that basis, the claim of the applicant concerning profit should be rejected.

Concept of single economic entity in the context of the Article 2(9) of the basic Regulation

(57) The applicant claimed that it should be considered as the internal export sales department of the Russian exporting producers, and that the group acts as a single economic entity despite being separate legal entities. As a consequence, the applicant claimed that no deduction should have been made for its SG&A and profit.

(58) The investigation showed that the applicant was established after the original investigation and that it performs a large number of services within the export activities of the group to the Union and other third markets. With regard to the export sales to the Union, the applicant purchases the product concerned from the related exporting producers on an EXW basis and makes the resale to Union customers on a DDP basis. This implies the bearing of numerous costs which cannot be ignored for the purpose of establishing the dumping margin in the present investigation.

(59) Article 2(9) of the basic Regulation clearly prescribes adjustments for all costs incurred between importation and resale and for profits accruing. These costs include in particular the SG&A expenses. Where there is an association between the exporting producers and the related importer, the export price is considered to be unreliable. The rationale and the purpose of the adjustments under Article 2(9) of the basic Regulation is to render the export price at Union frontier reliable.

(60) There is no language in Article 2(9) of the basic Regulation that differentiates between various types of association, neither a prescription of the degree of control or integration for the application of the adjustments, nor the basic Regulation precludes the applicability of such adjustments where there is a single economic entity[15]. Therefore, it is clear that the form of association cannot have any impact on the applicability of the adjustments which aim at rendering the export price reliable. Just to the contrary, such adjustments are compulsory once the price has to be constructed.

(61) Therefore, whether the association between the companies took the form of a single economic entity is irrelevant in the context of an Article 2(9) of the basic Regulation adjustment for the purposes of constructing a reliable export price at Union frontier.

(62) The Commission verified that the applicant performed all the functions normally performed by an associated importer in the Union. Indeed, the applicant is acting as a purchaser of the two exporting producers. The applicant is in charge of actions like processing of purchases orders (including payments to vendor), organizing the logistics between plants and warehouses, carrying out the delivery to the end customer, managing the warehouses located into the Union, being responsible for the customs clearances and VAT declarations, invoicing and providing assistance to end-customers.

(63) The applicant did not dispute the fact that it acted as a related importer for the Russian exporting producers. Therefore, the Commission rightly established that there was association between the exporting producers and the applicant. On that basis, the Commission rightly applied the prescribed adjustments for all costs incurred between importation and resale and for reasonable profit to establish a reliable export price at Union frontier level.

(64) The applicant asserts that it follows from the ruling in Nikopolsky/Interpipe[16] that if the exporter and the related trader constitute a single economic entity, an adjustment to the export price pursuant to Article 2(9) of the basic Regulation is not permitted.

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[15] For instance, in the case of the adjustment for duties paid, expressly prescribed by Article 2(9) of the basic Regulation, there is an exception provided for in Article 11(10) of that Regulation. There is no other exception with relation to the applicability of the other adjustments under Article 2(9) of that Regulation.

[16] 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* [2009] ECR II-00383. The judgment was subsequently upheld by the Court of Justice on appeal in Joined Cases C-191/09 P and C-200/09 P.

(65) However, that judgment concerns an adjustment made pursuant to Article 2(10)(i) of the basic Regulation for nominal commissions received by a trader whose functions are similar to those of an agent working on a commission basis. In the current situation, the commercial relations between the exporting producers and the applicant are defined in a supply agreement where the nature of relationship between parties is defined as that of a purchaser and supplier only.

(66) The Commission considers that as long as the conditions stipulated in Article 2(9) of the basic Regulation are met, the degree of control or integration is irrelevant for the assessment of the legality of the adjustments under Article 2(9) of the basic Regulation.

(67) In case law C-260/84[17] Minebea, the Court confirmed that the two provisions are different and said that those adjustments should be made "automatically" pursuant to Article 2 (8) [18] of the Council Regulation No 3017/79[19].

(68) Indeed, Article 2(9) of the basic Regulation requires the Commission to construct a reliable export price, in certain situations, when the export price is unreliable e.g. because of an association, and to adjust this export price if it is constructed for a certain number of factual parameters, at the Union frontier level. The wording of Article 2(9) of the basic Regulation is clear that an "adjustment shall be made" in the situation where the parties "appear to be associated".

(69) Based on the above, it is considered that the adjustments made were required on the basis of Article 2(9) of the basic Regulation. The claim should be rejected as unfounded.

Deduction of the anti-dumping duty in accordance with the Article 11(10) of the basic Regulation

(70) The applicant requested, as was the case in previous interim review and refund investigations, that the anti-dumping duty should not be deducted when establishing the export price in accordance with Article 11(10) of the basic Regulation.

(71) It also alleged that the anti-dumping duty was duly reflected in the resale prices and the subsequent selling prices in the Union. The applicant provided a table showing the evolution of its weighted average prices at EXW and CIF level, from the original investigation up to the second investigation period of the current refund investigation, allegedly demonstrating that their resale prices increase was sufficient to reflect the duty.

(72) The applicant claims that the price analysis to assess whether or not the anti-dumping duty is reflected in the resale price should be made at EXW or CIF level, because there were no anti-dumping duties paid during the original investigation. For the applicant the fact that its CIF prices allegedly increased respectively for the first and second investigation periods by +77% and +102% compared to the original investigation is conclusive to demonstrate that the anti-dumping duty is reflected in the resale price.

(73) Following disclosure, the applicant also provided a table showing an increase of +193% in sales price when comparing a constructed export price at EXW level, with

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17 Case C-260/84, Judgment of the Court (Fifth Chamber) of 7 May 1987, Minebea Company Limited and others v. Council of the European Communities, para 43.

18 This article corresponds now to Article 2(9) of the basic Regulation.

19 Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidized imports from countries not members of the European Economic Community.

deduction of the anti-dumping duty but with SG&A and profit deducted, between the original investigation and the first refund investigation.

(74) With regard to the first part of the claim, the Commission wishes to point out that the fact that the anti-dumping duty was not deducted in previous investigations cannot guarantee that it will also not be deducted in subsequent investigations. The factual situation of each case is analysed independently on its own merits.

(75) As far as the previous investigations where the duty was not deducted are concerned, it is noteworthy that unlike in the current investigation, the Commission was able to draw its conclusion on the evidence collected during the investigation, including on the analysis of the evolution of resale prices.

(76) Article 11(10) of the basic Regulation states that in case the Commission decides to construct the export price pursuant to Article 2(9) of the basic Regulation, it shall calculate it with no deduction for the amount of the anti-dumping duties paid when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Union. It is for the party claiming the exemption to provide conclusive evidence. In the absence of such evidence the Commission has to apply a general rule and deduct the anti-dumping duty in accordance with Article 2(9) of the basic Regulation.

(77) As confirmed by the Court in case T-162/94[20], the Commission must use the facts before it objectively in order to reach its conclusions in line with the requirements of the basic Regulation.

(78) The Commission considers that the evidence provided by the applicant is not conclusive as it cannot demonstrate that the anti-dumping duty is reflected into the resale prices reported in the table. Indeed, those prices are EXW and CIF terms and per definition do not include the anti-dumping duty. Moreover, the resale prices charged by the applicant to its Union customers during the current refund investigation are mainly DDP and should cover for all costs and duties including the anti-dumping duty. Reference is made to recital (19) above for the detailed definition of the incoterms.

(79) Even if for the sake of argument the applicant demonstrated that the anti-dumping duty was reflected in the resale price, it did not demonstrate that all the other costs linked to the transactions for which a refund is requested are covered in the resale price. The applicant did not provide evidence showing that the resale prices covered for all the relevant costs associated to these prices, including the anti-dumping duty. Moreover, the table provided was made on an average and product type basis whereas the refund application is made for a series of transaction in a given period and not on an average basis.

(80) Concerning the table provided by the applicant after the disclosure, the Commission considers that the evidence is also not conclusive because the income statement reported by the applicant for that period was considered unreliable as described in recitals (81) to (83) below. However, the Commission notes that the applicant submitted new evidence for the first refund investigation and not for the second refund investigation where a similar analysis was done to demonstrate that the duty was not reflected into the resale price as mentioned in recital (84) below. Where no evidence is provided, the Commission considered that the applicant agreed with its findings.

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[20] Case T-162/94, *NMB France SARL, NMB-Minebea-GmbH, NMB UK ltd and NMB Italia Srl v Commission of the European Communities*, para 70 and 73.

(81) The information available to the Commission revealed that one exporting producer reported losses when selling the product concerned to the applicant for further resale into the Union market. Without any other explanation or evidence provided, it is justified to consider that all relevant costs incurred were not reflected in the transfer price to the applicant. Moreover, the transfer pricing between the applicant and its related exporting producers impacted on the costs of goods sold and by consequence the amount of the anti-dumping and customs duties paid in particular during the first investigation period. On that basis, it was considered that income statement provided by the applicant was not reliable and did not reflect the fair situation of the profit or losses it incurred for its export sales to the Union. The applicant did not comment on this finding.

(82) The Commission also analysed the gross and net profit margins made on the export sales to the Union and the cost of production incurred overall by the group to export its products to the Union market. The investigation also revealed additional inconsistencies, in particular in the breakdown per market of the income statement provided by the applicant. It was found that the proportion of major costs items, such as the costs of goods sold for the product concerned, was significantly different depending on the market of destination. The costs for the exports to the Union were lower than those incurred for sales in other markets.

(83) Without any other explanation or evidence provided, it is justified to consider that the income statement submitted by the applicant did not fairly represent the economic situation of the company, in particular for the sales to the Union market. Therefore, the income statement provided by the applicant for the first investigation period was not considered to constitute conclusive evidence in the context of the application of Article 11(10) of the basic Regulation.

(84) For the second investigation period, the income statement submitted by the applicant during the investigation showed that the resale prices did not cover all the costs and expenses, including the anti-dumping duty paid. This finding was confirmed by the analysis of the applicant sales transactions which showed that for 99% of the transactions the resale price was lower than the total amount of costs / expenses it incurred, including the anti-dumping duties paid. In other words, the export sales to the Union were made at a loss and could thus not reflect the anti-dumping duty paid. The applicant did not comment on these findings.

(85) The Commission also analysed the evolution of the cost of production of the exporting producers in Russia and it found that the unit cost of manufacturing per tonne was significantly higher for the first and second investigation periods compared with the original investigation. The comparison shows that the cost of manufacturing of the product concerned sold into the Union market has increased respectively by +100% for the first investigation period and by +109% for the second investigation period. The applicant did not comment on this finding.

(86) For each case the Commission has the duty to examine the evidence provided by the parties and make an assessment based on the merits of the evidence provided. Where it is considered that the evidence provided is not conclusive, the Commission shall deduct the anti-dumping duty from the export price. This was the case for example in

certain tungsten electrodes from the People's Republic of China published in May 2013[21].

(87) It is also Commission practice to examine whether or not the total costs, including the anti-dumping duty paid, are covered in the resale prices based on the evidence available. This is one of the core aspects of the investigation. It is confirmed that the implementation of Article 11(10) of the basic Regulation depends on the specificity of each case and the quality of the evidence available. In the cases where the evidence available is not conclusive the Commission is entitled to deduct the anti-dumping duty in accordance with Article 11(10) of the basic Regulation.

(88) The applicant also claimed that the above methodology which consists in analysing the costs associated to the sale transaction is not in accordance with the decisional practice. The applicant referred to two recitals of the Council Regulation amending a definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China published in July 2005. The applicant claimed that this regulation demonstrates that other factors, namely normal values are irrelevant for the determination of whether or not the current resale prices duly reflect the anti-dumping duty.

(89) In this respect, it should be noted that the regulation mentioned above refers to a very specific case, where the costs and the domestic sales of the Chinese exporting producer concerned were not taken into consideration because market economy treatment was not granted to the Chinese exporting producer. In order to assess Article 11(10) of the basic Regulation, the Chinese exporting producer proposed to use the normal value established on the basis of the information provided by a third party. This proposal was considered irrelevant by the Commission as the basis of comparison was not the actual costs of the Chinese exporting producers. Therefore, the Commission considers that there is nothing in this regulation which prevents assessing the evolution of the elements of the resale prices in order to determine whether there is a pass on of the anti-dumping duty.

2.4. Comparison and adjustments

(90) As was the case in previous investigations, the comparison between the normal value and the export price was made on an EXW basis. In order to ensure a fair comparison, account was taken of differences which affect price comparability in accordance with Article 2(10) of the basic Regulation.

(91) With reference in particular to recitals (53) to (55) above, it is recalled that in the present case, the applicant is mainly selling on a DDP basis. Based on the information provided by the applicant in its questionnaire reply, adjustments were made where applicable and justified, in accordance with Article 2(10) of the basic Regulation.

2.5. Dumping

(92) A single dumping margin was determined for the two exporting producers as they are considered related. The corporate structure and reporting system of the exporting producers allowed identifying the origin of the products sold to the Union market at the time of export. Therefore, the specific costs of production and overheads of each exporting producer were taken into consideration and compared with the respective

[21] Recital (36) of the Council Implementing Regulation (EU) No508/2013 of 29 May 2013 imposing a definitive anti-dumping duty on imports of certain tungsten electrodes originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009.

export prices. As in the last refund investigation[22], the interim review and expiry review concerning the same applicant and its exporting producers, the amount of dumping was calculated for each individual exporting producer then aggregated so that a single weighted average dumping margin was determined.

(93) Regarding the methodology described in recital (92), the applicant claims that this methodology is a change of methodology in comparison with the methodology used in the original investigation.

(94) This methodology described in recital (92) was applied in the following investigations: the interim review, the previous refund investigations and the expiry review. It should be noted that this methodology is different from the methodology applied in the original investigation where the dumping calculation was done by aggregating all production and sales data of the producing entities. The change of circumstances that warranted the change in methodology was the change in the corporate structure of the group, described in recital (19) allowing the identification of the individual producers within the group in respect to sales and production.

(95) Therefore, the Commission considered this claim unfounded and disregarded it.

(96) Regarding the first investigation period, it was found that the dumping margin for the exporting producers, expressed as a percentage of the net, free-at-Union-frontier price, duty unpaid, was 40,8%.

(97) For the second investigation period, coinciding with expiry review investigation period, the corresponding dumping margin was 42,8%.

(98) The applicable anti-dumping duty in force was 22,7%.

E. REFUND CALCULATION

(99) For the transactions invoiced during the two refund investigation periods, the dumping margin was higher than the level of the duty in force applied for the same periods. Accordingly, the applicant could not establish that the dumping margin of its exporting producers was eliminated, or reduced below the level of the duty in force. The application for a refund of anti-dumping duties related to imports invoiced by the exporting producers during the two refund investigation periods is therefore rejected.

F. CONCLUSION

(100) On the basis of the findings of this investigation, a comparison between the dumping margins established during the two refund investigation periods and the anti-dumping duty paid show that the application for a refund of *[omissis]* of anti-dumping duties paid submitted by the applicant should be rejected.

HAS ADOPTED THIS DECISION:

Article 1

The refund application submitted by *[omissis]* in respect of anti-dumping duties paid on imports of ferro-silicon originating in Russia for an amount of *[omissis]* is rejected.

Article 2

This Decision is addressed to *[omissis]* and to the Kingdom of Spain.

[22] Recital (31) of the Commission Decision of 10.8.2012 concerning an application for a refund of anti-dumping duties paid on imports of ferro-silicon originating in Russia.

Done at Brussels, 18.12.2014

For the Commission
Cecilia MALMSTRÖM
Member of the Commission

CERTIFIED COPY
For the Secretary-General,

Jordi AYET PUIGARNAU
Director of the Registry
EUROPEAN COMMISSION