

COUNCIL REGULATION (EC) No 3287/94

of 22 December 1994

on pre-shipment inspections for exports from the Community

THE COUNCIL OF THE EUROPEAN UNION;

Having regard to the Treaty establishing the European Community, and in particular Article 113 thereof,

Having regard to the proposal from the Commission,

Having regard to the opinion of the European Parliament ⁽¹⁾,

Whereas a number of developing countries have recourse to so-called pre-shipment inspection programmes in order to ensure a proper distribution of limited foreign currency resources to importers and in order to combat such practices as over- and under-invoicing and fraud; whereas these developing countries have charged private companies with this task, which includes a check on quality, as well as price of the goods intended for export to the territory of these countries;

Whereas the Community recognizes the right of the developing countries to have recourse to pre-shipment inspection; whereas, however, pre-shipment inspection can give rise to abusive interference in the price freely agreed between parties to a contract and to other practices which form unnecessary obstacles to trade; whereas, therefore, efforts should be made through cooperation and technical assistance to reduce the need for pre-shipment inspection;

Whereas the Uruguay Round Final Act, signed on 15 April 1994 in Marakesh (Morocco), establishes an Agreement on pre-shipment inspection between members of the World Trade Organization ('WTO Agreement'); whereas this Agreement has been approved and needs to be put into effect for the Community;

Whereas Community legislation provides exporters with additional assurance that pre-shipment inspection activities are indeed carried out according to the provisions of the WTO Agreement and thus do not constitute a barrier to trade;

Whereas, to this end, pre-shipment inspection activities carried out in the Community should be made subject to certain conditions;

Whereas, in view of the maintenance of uniform principles of export policy of the Community it is necessary that the activities of pre-shipment inspection entities be regulated along uniform lines;

Whereas there is good reason to simplify procedures as much as possible, in particular with respect to the review of prices; whereas exemptions, however, are not provided by the WTO Agreement and such exemption can thus be applied only with the agreement of the pre-shipment inspection entities;

Whereas a quick and effective procedure for the settlement of disputes between exporters and pre-shipment inspection entities should be instituted; whereas such a procedure is provided by the WTO Agreement;

Whereas disputes concerning non-compliance with conditions or non-observance of procedures by pre-shipment inspection entities should be settled with the third countries making use of such entities in accordance with the relevant Community and WTO procedures;

Whereas Article 3 (3) of the WTO Agreement provides for technical assistance to third countries,

HAS ADOPTED THIS REGULATION:

Article 1

This Regulation applies to activities carried out on the customs territory of the European Community by pre-shipment inspection entities which, for the account of governments of public entities, of third countries, carry out controls on the quality, quantity or price, including exchange rate and financial terms, of goods destined for export to the territory of these third countries ('pre-shipment inspection programmes').

Article 2

1. The activities of pre-shipment inspection entities as defined in Article 1 are subject to a procedure for prior notification on a generic basis under the conditions set out in this Regulation.

⁽¹⁾ Opinion delivered on 14 December 1994 (not yet published in the Official Journal).

2. In their notification, the pre-shipment entities shall communicate to the Commission the provisions, with the exception of remuneration, of contracts agreed with governments or public entities of third countries for the account of which the pre-shipment inspection programmes have been put in place. They shall subsequently notify all modifications regarding conditions for control to the Commission. They shall also indicate which measures they have taken to comply with the conditions set out in this Regulation.

3. The Commission shall copy all the notifications received to the Member States.

Article 3

The notification of activities mentioned in Article 2 shall cover the following activities:

- (a) physical inspection of merchandise before it is exported in order to verify the conformity of the dispatch (quality, quantity) with the specifications of the contract and the respect of rules and standards of the importing country or recognized at international level;
- (b) verification of the price and where applicable, the currency exchange rate, on the basis of the contract between the exporter and the importer, the pro forma invoice and, where applicable, the application for import authorization.

Article 4

Pre-shipment inspection entities, when carrying out their activities, shall meet the following conditions:

- (a) Prior to any control, the pre-shipment inspection entity shall inform the exporter of the details of the inspection and the criteria that will be applied.

The pre-shipment inspection entity shall carry out the appropriate controls in a time span that avoids unreasonable delays. It shall also, following receipt of the final documents and completion of the inspection, within five working days, either issue a Clean Report of Findings or provide a detailed written explanation specifying the reasons for non-issuance. In the latter case exporters shall be given the opportunity to present their views in writing and, if exporters so request, arrange for reinspection at the earliest mutually convenient date.

Pre-shipment inspection entities shall also undertake, whenever so requested by the exporter, prior to the date of physical inspection, a preliminary verification of price and, where applicable, of currency exchange rate, on the basis of the contract between exporter

and importer, the pro forma invoice and, where applicable, the application for import authorization. They shall, after a preliminary verification has taken place, immediately inform exporters in writing either of their acceptance or of their detailed reasons for non-acceptance of the price and/or currency exchange rate.

In order to avoid delays in payment, pre-shipment inspection entities shall send to exporters or to designated representatives or the exporters a Clean Report of Findings as expeditiously as possible. They shall also, in the event of a clerical error in the Clean Report of Findings, correct the error and forward the corrected information to the appropriate parties as expeditiously as possible.

- (b) The pre-shipment inspections shall be carried out in a non-discriminatory manner, and the procedures and criteria employed in the conduct of these activities shall be objective and applied on an equal basis to all exporters affected by such activities.
- (c) Pre-shipment inspection entities shall not request exporters to provide information regarding:
 - (i) manufacturing data related to patented, licensed or undisclosed processes, or to processes for which a patent is pending;
 - (ii) unpublished technical data other than data necessary to demonstrate compliance with technical regulations or standards;
 - (iii) internal pricing, including manufacturing costs;
 - (iv) profit levels;
 - (v) the terms of contracts between exporters and their suppliers unless it is not otherwise possible for the entity to conduct the inspection in question. (In such cases, the entity shall only request the information necessary for this purpose).

Pre-shipment inspection entities shall treat all information provided by exporters as business confidential, to the extent that such information is not already published, generally available to third parties, or otherwise in the public domain. Such business confidential information shall be shared with the governments contracting or mandating the entity only to the extent that such information is customarily required for letters of credit or other forms of payment or for customs, import licensing or exchange control purposes.

- (d) Pre-shipment inspection entities shall establish procedures to receive, consider and render decisions concerning grievances raised by the exporters. These procedures shall be developed and maintained in accordance with the following guidelines:

- (i) pre-shipment inspection entities shall designate one or more officials who shall be available during normal business hours in each city or port in which they maintain a pre-shipment inspection administrative office to receive, consider and render decisions on exporters' appeals or grievances;
- (ii) exporters shall provide in writing to the designated official(s) the facts concerning the specific transaction in question, the nature of the grievance and a suggested solution;
- (iii) the designated official(s) shall afford sympathetic consideration to exporters' grievances and shall render a decision as soon as possible after receipt of the documentation referred to in subparagraph (ii).

Article 5

Pre-shipment inspection entities, when carrying out their activity with respect to price verification, shall meet the following conditions:

- (a) pre-shipment inspection entities shall only reject a contract price agreed between an exporter and an importer if they can demonstrate that their findings of an unsatisfactory price are based on a verification process which is in conformity with the criteria set out in subparagraphs (b) to (e) inclusive;
- (b) the pre-shipment inspection entity shall base its price comparison for the verification of the export price on the price(s) of identical or similar goods offered for export from the same country of exportation at or about the same time, under competitive and comparable conditions of sale, in conformity with customary commercial practices and net of any applicable standard discounts. Such comparison shall be based on the following:
 - (i) only prices providing a valid basis of comparison shall be used, taking into account the relevant economic factors pertaining to the country of importation and a country or countries used for price comparison;
 - (ii) the pre-shipment inspection entity shall not rely upon the price of goods offered for export to different countries of importation to arbitrarily impose the lowest price upon the shipment;
 - (iii) the pre-shipment inspection entity shall take into account the specific elements listed in subparagraph (c);
 - (iv) at any stage in the process described above, the pre-shipment inspection entity shall provide the exporter with an opportunity to explain the price;

- (c) when conducting price verification, pre-shipment inspection entities shall make appropriate allowances for the terms of the sales contract and generally applicable adjusting factors pertaining to the transaction; these factors shall include but not be limited to the commercial level and quantity of the sale, delivery periods and conditions, price escalation clauses, quality specifications, special design features, special shipping or packing specifications, order size, spot sales, seasonal influences, license or other intellectual property fees, and services rendered as part of the contract if these are not customarily invoiced separately; they shall also include certain elements relating to the exporter's price, such as the contractual relationship between the exporter and importer;
- (d) the verification of transportation charges shall relate only to the agreed price of the mode of transport in the country of exportation as indicated in the sales contract;
- (e) the following shall not be used for price verification purposes:
 - (i) the selling price in the country of importation of goods produced in such country;
 - (ii) the price of goods for export from a country other than the country of exportation;
 - (iii) the cost of production;
 - (iv) arbitrary or fictitious prices or values.

Article 6

If, as a result of its obligations towards the government or a public entity of a third country, the pre-shipment inspection entity does not observe the conditions set out in Articles 4 and 5 of this Regulation, if the entity does not comply with the procedures set out in Article 7, or if there is any other reason to believe that the WTO Agreement is not respected, recourse may be had to any appropriate procedure, including the procedure laid down by Regulation (EEC) No 2641/84 under the conditions set out therein ⁽¹⁾.

Article 7

If pre-shipment inspection entities and exporters cannot resolve their disputes otherwise and at the earliest two working days after submission of the grievances in accordance with the provisions of paragraph (d) of Article 4, the following procedure shall normally be applied:

⁽¹⁾ OJ No L 252, 20. 9. 1984, p. 1.

- (a) an exporter or pre-shipment inspection entity wishing to raise a dispute shall contact the independent entity referred to in Article 4 of the WTO Agreement on pre-shipment inspection and request the formation of a panel. The independent entity shall be responsible for establishing a panel. This panel shall consist of three members. The members of the panel shall be chosen so as to avoid unnecessary costs and delays. The first member shall be chosen from section (i) of the list provided for in the WTO Agreement by the pre-shipment inspection entity concerned, provided that this member is not affiliated to that entity. The second member shall be chosen from section (ii) of the list provided for in the WTO Agreement by the exporter concerned, provided that this member is not affiliated to that exporter. The third member shall be chosen from section (iii) of the list provided for in the WTO Agreement by the independent entity referred to above. No objections shall be made to any independent trade expert drawn from section (iii) of the list provided for in the WTO Agreement;
- (b) the independent trade expert drawn from section (iii) of the list provided for in the WTO Agreement shall serve as the chairman of the panel. The independent trade expert shall take the necessary decisions to ensure an expeditious settlement of the dispute by the panel, for instance, whether the facts of the case require the panellists to meet and, if so, where such a meeting shall take place, taking into account the site of the inspection in question;
- (c) if the parties of the dispute so agree, one independent trade expert could be selected from section (iii) of the list provided for in the WTO Agreement on pre-shipment inspection by the independent entity referred to in subparagraph (a) to review the dispute in question. This expert shall take the necessary decisions to ensure an expeditious settlement of the dispute, for instance taking into account the site of the inspection in question;
- (d) the object of the review shall be to establish whether, in the course of the inspection in dispute, the parties to the dispute have complied with the provisions of

the WTO Agreement, and thus with the provisions of this Regulation. The procedures shall be expeditious and provide the opportunity for both parties to present their views in person or in writing;

- (e) decisions by a three-member panel shall be taken by majority vote. The decision on the dispute shall be rendered within eight working days of the request for independent review and be communicated to the parties of the dispute. This time limit may be extended upon agreement by the parties to the dispute. The panel or independent trade expert shall apportion the costs, based on the merits of the case;
- (f) the decision of the panel shall be binding upon the pre-shipment inspection entity and the exporter which are parties to the dispute.

Article 8

Each Member State shall:

- take appropriate measures at the national level for the implementation of the present Regulation, in particular to facilitate the proper operation of the independent review procedure set out in Article 7,
- appoint an official responsible for pre-shipment inspection questions, whose name and functions will be communicated to the Commission.

The Community and the Member States, if requested, may provide user countries with technical assistance related to pre-shipment inspection; normally such assistance should be aimed at removing the circumstances which have led these countries to resort to pre-shipment inspection.

Article 9

The Commission will inform the Secretariat of the WTO of this Regulation and any modification thereof.

Article 10

This Regulation shall enter into force on 1 January 1995.

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

Done at Brussels, 22 December 1994.

For the Council

The President

H. SEEHOFER