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October 24, 2016

**MEMORANDUM TO:** Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance

**FROM:** Christian Marsh  
Deputy Assistant Secretary  
for Antidumping and Countervailing Duty Operations

**SUBJECT:** Issues and Decision Memorandum for Final Results of  
Antidumping Duty Administrative Review: Polyethylene Retail  
Carrier Bags from Malaysia

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## I. Summary

We analyzed the comments of interested parties in this administrative review of the antidumping duty (AD) order on polyethylene retail carrier bags (PRCBs) from Malaysia. As a result of our analysis, we have made one change to correct a programming error in the preliminary margin calculation for Euro SME Sdn Bhd (Euro SME), the sole respondent. We recommend that you approve the positions we developed in the “Discussion of the Issues” section of this memorandum.

Below is the complete list of the issues in this administrative review for which we received comments and rebuttal comments from interested parties:

Comment 1: Whether the U.S. Sale is *Bona Fide*

Comment 2: Home Market Window Period

## II. Background

The review covers one producer/exporter of the subject merchandise, Euro SME, for the period of review (POR) August 1, 2014, through July 31, 2015. On June 24, 2016, the Department of Commerce (the Department) published the *Preliminary Results* in the *Federal Register*, and invited parties to comment.<sup>1</sup> On July 21, 2016, the Department published a correction to the

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<sup>1</sup> See *Polyethylene Retail Carrier Bags From Malaysia: Preliminary Results of Antidumping Duty Administrative Review; 2014-2015*, 81 FR 41294 (June 24, 2016) (*Preliminary Results*).



*Preliminary Results.*<sup>2</sup> On July 25, 2016, Euro SME and the petitioners<sup>3</sup> filed case briefs. On August 1, 2016, Euro SME and the petitioners filed rebuttal briefs. Based on our analysis of the comments received, we are changing the weighted-average dumping margin calculated for Euro SME in the *Preliminary Results*. The petitioners requested a hearing but the request was withdrawn.<sup>4</sup>

### **III. Scope of the Order**

The merchandise subject to the AD order is PRCBs which may be referred to as t-shirt sacks, merchandise bags, grocery bags, or checkout bags. The subject merchandise is defined as non-sealable sacks and bags with handles (including drawstrings), without zippers or integral extruded closures, with or without gussets, with or without printing, of polyethylene film having a thickness no greater than 0.035 inch (0.889 mm) and no less than 0.00035 inch (0.00889 mm), and with no length or width shorter than 6 inches (15.24 cm) or longer than 40 inches (101.6 cm). The depth of the bag may be shorter than 6 inches (15.24 cm) but not longer than 40 inches (101.6 cm).

PRCBs are typically provided without any consumer packaging and free of charge by retail establishments, *e.g.*, grocery, drug, convenience, department, specialty retail, discount stores, and restaurants, to their customers to package and carry their purchased products. The scope of the order excludes (1) polyethylene bags that are not printed with logos or store names and that are closeable with drawstrings made of polyethylene film and (2) polyethylene bags that are packed in consumer packaging with printing that refers to specific end-uses other than packaging and carrying merchandise from retail establishments, *e.g.*, garbage bags, lawn bags, trash-can liners.

Imports of the subject merchandise are currently classifiable under statistical category 3923.21.0085 of the Harmonized Tariff Schedule of the United States (HTSUS). This subheading also covers products that are outside the scope of the order. Furthermore, although the HTSUS subheading is provided for convenience and customs purposes, the written description of the scope of the order is dispositive.

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<sup>2</sup> See *Polyethylene Retail Carrier Bags From Malaysia: Notice of Correction to Preliminary Results of Antidumping Duty Administrative Review; 2014-2015* (July 21, 2016).

<sup>3</sup> The Polyethylene Retail Carrier Bag Committee and its individual members, Hilex Poly Co., LLC, and Superbag Corporation.

<sup>4</sup> See Letter to the Secretary of Commerce regarding “Polyethylene Retail Carrier Bags From Malaysia: Petitioners’ Hearing Request And Request For A Closed Session Of The Hearing,” dated July 25, 2016, and Letter to the Secretary of Commerce regarding “Polyethylene Retail Carrier Bags From Malaysia: Withdrawal of Petitioners’ Hearing Request,” dated August 8, 2016, respectively.

#### IV. Margin Calculation

We calculated export price and normal value using the same methodology stated in the *Preliminary Results*.

#### V. Discussion of the Issues

##### Issue 1: Whether the U.S. Sale is *Bona Fide*

The petitioners assert that Euro SME's single U.S. sale is not *bona fide* and, accordingly, the Department should rescind the review. The petitioners argue that, in addition to the factors cited in the "Legal Framework" section of the *Bona Fides* Analysis Memo<sup>5</sup> and in section 752 of the Tariff Act of 1930, as amended (the Act), the Department must consider "any other factor" that is relevant.<sup>6</sup> The petitioners also argue that a transaction will not be indicative of future commercial behavior where "the facts surrounding ... {the company's} transaction would be unlikely to be repeated in the future."<sup>7</sup> Accordingly, because the U.S. customer reportedly misunderstood material terms of the sale (*i.e.*, the sales terms did not identify the specific types of duties to which the merchandise would be subject),<sup>8</sup> the petitioners maintain that Euro SME's sale is not indicative of future commercial behavior. Further, the petitioners maintain, the terms of Euro SME's sale to its customer are an aberration that do not meet the buyer's expectations.<sup>9</sup> As a result, the petitioners assert, regardless of whether: (1) Euro SME disclosed the existence of the AD duties; (2) Euro SME engaged in sound business practices; or (3) the U.S. customer had "constructive notice" of the AD duties, the Department's analysis does not address a key issue. The petitioners argue that any of these changes would have dramatically affected the net export price used to determine a dumping margin in this case.<sup>10</sup> Thus, the petitioners reiterate that there was no "meeting of the minds" (*i.e.*, with regard to specific details surrounding the types of applicable duties and taxes). Consequently, the petitioners claim, the price associated with Euro SME's U.S. sale is not typical of those the exporter or producer will make after completion of this administrative review.<sup>11</sup>

With respect to the price of Euro SME's U.S. sale and the Department's preliminary finding that the price for Euro SME's U.S. sales transaction falls within the range of average unit import values (AUV), the petitioners contend that the fact that an individual transaction price falls within the broad range of sales of plastic bags of all types does not show that the sale is typical for sales specific to the types of bags at issue here. Therefore, the petitioners argue that the Department's finding regarding the price of Euro SME's U.S. sale does not necessarily demonstrate that the price the U.S. customer paid for the subject merchandise is indicative of

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<sup>5</sup> See Memorandum to the File entitled, "Administrative Review of Polyethylene Retail Carrier Bags from Malaysia – *Bona Fides* Sales Analysis of Euro SME Sdn Bhd," dated June 20, 2016 (*Bona Fides* Analysis Memo).

<sup>6</sup> See the petitioners' Case Brief at page 2.

<sup>7</sup> See the petitioners' Case Brief at page 1; see also *CIT Zhengzhou Huachao Indus. Co., LTD. v. United States*, Slip. Op. 2013-61, 2013.

<sup>8</sup> *Id.* at page 3.

<sup>9</sup> *Id.* at page 4.

<sup>10</sup> *Id.* at page 5.

<sup>11</sup> *Id.* at page 6.

what would be paid for the same product in the future.<sup>12</sup> The petitioners conclude that the Department should find Euro SME's sale to be *non-bona fide* and rescind this administrative review.<sup>13</sup>

In rebuttal, Euro SME asserts that the petitioners present no new arguments or information in support of their position.<sup>14</sup> Euro SME further asserts that the petitioners' claim that the U.S. sales price might not be indicative of future behavior is inapposite, because the future is uncertain for all parties involved.<sup>15</sup> In support of its assertion, Euro SME maintains that if the sale is commercially reasonable at the time of sale, then, in the absence of additional information, it should be indicative of future behavior.<sup>16</sup> With respect to the petitioners' claim that, at the time of sale, there was no "meeting of the minds," Euro SME maintains that the delivery terms were requested by the U.S. customer.<sup>17</sup> Euro SME further argues that the Department correctly found that record evidence demonstrated that both parties agreed to the terms of sale.<sup>18</sup>

Citing the Department's preliminary determination in the *Bona Fides* Analysis Memo, Euro SME contends that the price of its U.S. sale is consistent with the U.S. market trends during the POR, and that the quantity was comparable to the average quantities during the POR and the month of importation.<sup>19</sup> In response to the petitioners' claims that the import data reflect plastic bags of all types, and do not reflect only the subject merchandise at issue, Euro SME argues that the import data accurately reflect the wide scope of subject merchandise covered by the AD order, and as such, a container could contain any number of bags differing in density, length, thickness, and width.<sup>20</sup> Additionally, Euro SME asserts, the petitioners acknowledge the fact that the scope of the AD order covers multiple types of bags.<sup>21</sup> Finally, Euro SME states, the petitioners did not raise any arguments pertaining to the other factors cited in the "Legal Framework" presented in the *Bona Fides* Analysis Memo. Consequently, Euro SME concludes, the Department's analysis and conclusion in the *Preliminary Results* regarding the *bona fide* nature of its sale is correct, and Euro SME requests that the Department continue to find Euro SME's sale to be *bona fide* and to calculate Euro SME's margin in the final results of this POR.

Department Position: In determining whether a respondent's sales are *bona fide* transactions, we examine a number of factors, all of which speak to the commercial realities surrounding the sales of subject merchandise. All such determinations are made on a case-by-case basis after

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<sup>12</sup> *Id.* at page 6; footnote 22.

<sup>13</sup> *Id.* at page 7.

<sup>14</sup> See Euro SME's Rebuttal Brief at pages 1-2.

<sup>15</sup> *Id.* at page 3; footnote 6.

<sup>16</sup> *Id.*

<sup>17</sup> See Letter to the Department from Euro SME entitled, "PRCBs from Malaysia: Response to Questionnaire on Entry Documentation," dated October 15, 2015 at pages 1-3 of Exhibit 1 (which contain the purchase order from the U.S. customer to Euro SME); see also Letter to the Department from Euro SME entitled, "PRCBs from Malaysia; Supplemental Section A Response," dated January 15, 2016 at page 4 of Exhibit 7 (Euro SME's January 15, 2016 response) (which contain an e-mail demonstrating that the U.S. customer requested the price of merchandise to be quoted according to certain delivery terms).

<sup>18</sup> *Id.* at page 7.

<sup>19</sup> *Id.* at page 3.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; footnote 7.

considering the totality of circumstances surrounding the transactions, as the *bona fides* issues are company-specific and may vary with the facts surrounding each sale.<sup>22</sup>

Where an administrative review is based on a single sale, exclusion of that sale as non-*bona fide* necessarily would end the review.<sup>23</sup> To determine whether a sale is “unrepresentative or extremely distortive” and, therefore, not reviewable due to its non-*bona fide* status, if properly alleged by the petitioners, we will examine the totality of the circumstances.<sup>24</sup> In examining the totality of the circumstances, we examine whether the transaction is “commercially reasonable” or “atypical.”<sup>25</sup> Atypical or non-typical in this context means unrepresentative of a normal business practice.<sup>26</sup>

In evaluating whether a sale is *bona fide*, we consider, *inter alia*, factors such as the timing of the sale, the price and quantity of the sale, the expenses arising from the transaction, whether the goods were resold at a profit, and whether the transaction was made on an arm’s-length basis.<sup>27</sup> Therefore, we consider a number of factors in our *bona fides* analysis, “all of which may speak to the commercial realities surrounding an alleged sale of subject merchandise.”<sup>28</sup>

In the *Preliminary Results*, we conducted a *bona fides* analysis through a “totality of circumstances” evaluation based on information collected in the context of this segment of the proceeding, including supplemental information obtained in response to comments from the petitioners. In addition, we examined whether the sale under consideration was atypical, distortive, or otherwise unrepresentative of normal business practices and, as such, whether the sale was structured in such a way that it can be replicated.<sup>29</sup>

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<sup>22</sup> See *Tianjin Tiancheng Pharm. Co., Ltd. v. United States*, 366 F. Supp. 2d 1246, 1260 (CIT 2005) (*Tianjin Tiancheng*) (quoting *Certain Preserved Mushrooms From the People's Republic of China: Final Results and Partial Rescission of the New Shipper Review and Final Results and Partial Rescission of the Third Antidumping Duty Administrative Review*, 68 FR 41304 (July 11, 2003) and accompanying Issues and Decision Memorandum at Comment 2).

<sup>23</sup> See *Tianjin Tiancheng*, 366 F. Supp. 2d at 1249.

<sup>24</sup> See *Solid Urea from the Russian Federation: Final Results of Antidumping Duty New-Shipper Review and Rescission of Antidumping Duty Administrative Review*, 73 FR 29736 (May 22, 2008), and accompanying Issues and Decision Memorandum at Comment 2.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*; see also *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250 (“{B}ecause the ultimate goal of the new shipper review is to ensure that the U.S. price side of the antidumping calculation is based on a realistic figure, any factor which indicates that the sale under consideration is not likely to be typical of those which the producer will make in the future is relevant”).

<sup>27</sup> See *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250 (citing *Am. Silicon Techs. v. United States*, 110 F. Supp. 2d 992, 995 (CIT 2000)); see also *Hebei New Donghua Amino Acid Co., Ltd. v. United States*, 374 F. Supp. 2d 1333, 1342 (CIT 2005) (“Commerce’s practice makes clear that it is highly likely to examine objective, verifiable factors to ensure that a sale is not being made to circumvent an antidumping duty order. Thus, a prospective new shipper is on notice that it is unlikely to establish the *bona fides* of a sale merely by claiming to have sold in a manner representative of its future commercial practices.”) (*New Donghua*).

<sup>28</sup> See *Fresh Garlic from the People’s Republic of China; Notice of Amended Final Results of Antidumping Duty Administrative Review*, 68 FR 11368 (March 10, 2003) (*Garlic From the PRC*) and accompanying Issues and Decision Memorandum at pages 5-11.

<sup>29</sup> See, e.g., *Shandong Chenhe Int’l Trading Co. v. United States*, No. 08–00373, slip op. at 19 (CIT 2010); see also *Tianjin Tiancheng*, 366 F. Supp. 2d at 1250 (CIT 2005); *New Donghua*, 374 F. Supp. 2d at 1342.

With respect to the petitioners' claims that Euro SME's U.S. sale is not indicative of future behavior (*i.e.*, the terms of Euro SME's sale to its customer are an aberration that affected the net export price used to determine a dumping margin in this POR, and would, therefore, not likely be used after completion of this administrative review), the sales documents from Euro SME are sufficient to show how a typical future domestic sale might be priced. There is no reason for us to ascertain whether all of Euro SME's future sales would be to the same U.S. customer, or that the U.S. customer in this administrative review represents a typical customer.

The petitioners allege that the import data (*i.e.*, obtained from the Global Trade Atlas (GTA))<sup>30</sup> do not demonstrate whether the U.S. sales price is indicative of what would be paid for the same product in the future, or if the data are specific to the bags at issue. However, we placed on the record, in accordance with 19 CFR 351.301(c)(4), price data of imports of subject or comparable merchandise into the United States during the POR as a benchmark measure of the commercial reasonableness of Euro SME's sale.<sup>31</sup> Our comparison of the U.S. price for this sale with the benchmark data indicates that it is reasonable. U.S. import price data on the record indicate that the price of Euro SME's sale was within the range of AUVs for comparable goods entering the United States during the month of importation and the POR. Likewise, the quantity is not reflective of a commercially unreasonable quantity, which is typically seen where parties attempt to "test the waters" or manipulate the dumping margin. The Court of International Trade (CIT) affirmed that AUV import data provide reliable benchmarks, as "larger sample sizes are generally preferable when the goal is, as here, to generalize from a sample to a population, because the larger the sample, the less risk run that the sample chosen is extreme or unusual simply by chance."<sup>32</sup>

With respect to the petitioners' arguments that Euro SME and its U.S. customer did not reach a "meeting of the minds" regarding the payment of applicable duties and taxes, or that the lack of a "meeting of the minds" with regard to the specifics of the amount of duties indicates that the terms of the sale are atypical of what Euro SME will make after the completion of this administrative review, we do not agree that the record information supports such a determination, as we explained in the *Bona Fides* Analysis Memo.<sup>33</sup> Specifically, the record evidence (*e.g.*, purchase order, sales invoice, receipt of payment) demonstrates that both parties agreed to the terms of sale, including the buyer's responsibility with respect to payment of applicable duties and/or taxes. For example, Euro SME's sales correspondence includes a footnote, as well as a "Terms and Conditions" section, stating it is the buyer's responsibility to pay any applicable duties/taxes appearing on the sales documentation.<sup>34</sup>

Furthermore, section 751(a)(2)(B)(iv) of the Act states that in conducting a *bona fide* analysis in new shipper reviews under section 751(a)(2)(B)(i) of the Act, the Department "shall consider, depending on the circumstances of the sale: (I) the prices of such sales; (II) whether such sales were made in commercial quantities; (III) the timing of such sales; (IV) the expenses arising

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<sup>30</sup> See *GTA Excel spreadsheets uploaded as data files in ACCESS, dated concurrently with the Bona Fides Analysis Memo.*

<sup>31</sup> *Id.*

<sup>32</sup> See *Tianjin Tiancheng*, 366 F. Supp. 2d at 1256.

<sup>33</sup> See *Bona Fides Analysis Memo* at pages 5-9.

<sup>34</sup> See Euro SME's January 15, 2016, response at Exhibit 7.

from such sales; (V) whether the subject merchandise involved in such sales was resold in the United States at a profit; (VI) whether such sales were made on an arms-length basis; and (VII) any other factor the administering authority determines to be relevant as to whether such sales are, or are not, likely to be typical of those the exporter or producer will make after completion of the review.” Looking to this language for guidance in this administrative review, we see no statutory requirement that, in addition to those factors, the Department must also consider the actual knowledge of all material terms of an agreement by the parties at the time the agreement is entered into. Indeed, it generally would be extremely difficult for the Department to ascertain such actual knowledge in our proceedings.

Instead, in determining if a transaction is *bona fide*, the Department need only look to the record as a whole to determine if the parties had constructive knowledge of the terms of a contract at the time they entered into that transaction. The AD orders on PRCBs have been in force since 2004. Furthermore, it is clear from the information on the record as to Euro SME and its customer that both of these were commercial entities in the business of producing and selling or buying Malaysian PRCBs at the time they entered into the transaction at issue. A purchaser of PRCBs would have constructive notice of the existence of the AD orders, thus prompting the purchaser to research the current applicable AD duties.

Therefore, contrary to the petitioners’ arguments, we find that Euro SME’s sale is not atypical and there is no record evidence to suggest that the sale was unrepresentative of Euro.SME’s normal business practices. We also find that, throughout the sales documentation, Euro SME clearly identified which party was responsible for the payment of duties.

Based on our analysis of: (1) the record evidence, particularly regarding the correspondence between Euro SME and its U.S. customer; (2) the factors described above; and (3) the comments received from parties after the *Preliminary Results*, the Department’s “totality of circumstances” review of Euro SME’s U.S. sale, we continue to conclude that Euro SME’s U.S. sale is *bona fide*. Moreover, the petitioners have not provided any new information or arguments that led us to re-evaluate our conclusion in the *Preliminary Results*. Accordingly, we continue to find that Euro SME’s sale during the POR is *bona fide* and we have, therefore, continued to calculate a dumping margin for the final results of this administrative review.

## Issue 2: Home Market Window Period

Euro SME’s comments in its case brief are limited to a single issue related to the incorrect designation of the home market (HM) window period.<sup>35</sup> Citing the Department’s practice, stated in the *Preliminary Results*,<sup>36</sup> Euro SME contends that the Department inadvertently assigned the POR dates to the HM window period, instead of using the three months before, and two months after, the defined U.S. month.<sup>37</sup> Finally, Euro SME concludes, correction of the error will result

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<sup>35</sup> See Letter from Euro SME, entitled, “Polyethylene Retail Carrier Bags from Malaysia; Case Brief,” dated July 25, 2016 (Euro SME’s Case Brief).

<sup>36</sup> Citing 19 CFR 351.414(e)(2), “In applying the average-to-transaction method in a review, when normal value is based on the weighted average of sales of the foreign like product, the Secretary will limit the averaging of such prices to sales incurred during the contemporaneous month.”

<sup>37</sup> See Euro SME’s Case Brief at page 3.

in the use of the appropriate HM window period, and a comparison to the correct month of HM sales of identical or similar merchandise.<sup>38</sup> In rebuttal, the petitioners contend that, although Euro SME alleges a calculation error in the preliminary margin program, Euro SME's argument is moot because Euro SME's sole U.S. sale is not a *bona fide* sale.<sup>39</sup>

Department Position: In the *Preliminary Results*, we stated our intention to, in accordance with 19 CFR 351.414(e)(2), compare the U.S. sale to weighted-average HM prices that were based on all sales of the identical product in the most contemporaneous month within the limits of our 90/60-day practice. However, as Euro SME argues, our comparison window period as executed did not match our stated intention. We agree that the correct HM window period should be used to ensure Euro SME's U.S. sale is correctly compared to a sale in the comparison market. With respect to the petitioners' comment that Euro SME's allegation concerning the program error is moot, we continue to find Euro SME's sale during the POR to be *bona fide* for the reasons discussed above, and we have, therefore, continued to calculate a dumping margin based on the sale. Thus, in accordance with our practice, we will assign the correct BEGINDAY and ENDDAY in the comparison market SAS program for these final results.

## VI. Recommendation

Based on our analysis of the comments received, we recommend adopting the above positions in the final results.

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Agree

\_\_\_\_\_  
Disagree

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Ronald K. Lorentzen  
Acting Assistant Secretary  
for Enforcement and Compliance

\_\_\_\_\_  
(Date)

<sup>38</sup> *Id.* at pages 5-6.

<sup>39</sup> See Letter from the petitioners, entitled, "Polyethylene Retail Carrier Bags from Malaysia: Petitioners' Rebuttal Brief," dated August 1, 2016.