



Reports of Cases

Case C-337/09 P

Council of the European Union
v
Zhejiang Xinan Chemical Industrial Group Co. Ltd

(Appeal — Commercial policy — Dumping — Imports of glyphosate originating in China — Regulation (EC) No 384/96 — Article 2(7)(b) and (c) — Status of an undertaking operating under market economy conditions — Concept of ‘significant State interference’ within the meaning of the first indent of Article 2(7)(c) — State shareholder controlling de facto the general meeting of the producer’s shareholders — Equating such control to ‘significant interference’ — Assessment of an export contract stamping mechanism — Limits of judicial review — Assessment of the evidence submitted)

Summary of the Judgment

1. *Appeals — Interest in bringing proceedings — Event subsequent to the judgment of the General Court having removed the prejudicial effect thereof for the prospective appellant — Repeal by the author thereof of an act annulled by the General Court — Repeal ex nunc different from annulment ex tunc — Whether an interest in bringing proceedings is maintained*
2. *Appeals — Grounds — Incorrect assessment of the facts and evidence — Inadmissibility — Review by the Court of the assessment of the facts and evidence — Possible only where the clear sense of the evidence has been distorted*

(Art. 256 TFEU; Statute of the Court of Justice, Art. 58, first para.)

3. *Appeals — Grounds — Manifest error of assessment by the institutions — Assessment of complex economic circumstances — Discretion of the institutions — Scope — Point of law reviewed on appeal*
4. *Appeals — Grounds — Repetition, in order to challenge the reasoning of the General Court, of arguments already raised before it — Admissibility*
5. *Common commercial policy — Protection against dumping — Dumping margin — Determination of the normal value — The grant of market economy treatment — Conditions — No significant State interference in the commercial decision of a company — Meaning — Burden of proof*

(Council Regulations No 384/96, Art. 2(7)(c), first indent, and No 461/2004, Art. 2(7)(c), first indent)

6. *Common commercial policy — Protection against dumping — Discretion of the institutions — Observance of procedural guarantees*

1. The Court of Justice can declare an appeal to be inadmissible where an event subsequent to the judgment of the General Court has removed its prejudicial effect for the appellant. An interest in bringing the appeal proceedings assumes that the appeal is likely, if successful, to procure an advantage to the party bringing it. When a regulation, adopted subsequent to the judgment of the General Court, repeals only *ex nunc* and not *ex tunc* the regulation annulled by that court, the appellant retains an interest in bringing the proceedings as regards the annulment of the effects produced by the annulled regulation between the date on which it entered into force and the date of its repeal.

(see paras 46, 48, 49)

2. See the text of the decision.

(see para. 55)

3. See the text of the decision.

(see para. 58)

4. Provided that the appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose.

(see para. 61)

5. As regards the interpretation of the criteria laid down, in order to grant market economy treatment, in the first indent of Article 2(7)(c) of basic anti-dumping Regulation No 384/96, the General Court is fully entitled to hold that State control — evidenced by the facts that the State shareholders, even though minority shareholders, control the general meeting of a company and appoint the members of the board of directors and some of the directors of that company are connected to it by employment contracts or by a contract for the supply of services — cannot be equated, as a matter of principle, to ‘significant State interference’ within the meaning of that Article and cannot therefore relieve the Council and the Commission of the obligation to take into account the evidence, submitted by the producer concerned, of the real factual, legal and economic context in which it operates.

It clearly follows from the wording of the first indent of Article 2(7)(c) of Regulation No 384/96 that that provision is not directed at all types of State interference in producer undertakings, but only that concerning their decisions regarding prices, costs and inputs. In addition, the use of the word ‘interference’ indicates that it is not sufficient that a State may have a certain amount of influence over those decisions, but implies actual interference in them. Furthermore, the interference in the producer’s decisions regarding prices, costs and inputs must be ‘significant’. It is therefore not in dispute that Article 2 of Regulation No 384/96 allows a certain degree of State interference in those decisions.

Whether or not such State interference in the decisions is significant must be assessed in relation to the purpose of that provision, which is to ensure that a producer operates under market economy conditions and, in particular, that the costs to which it is subject and the prices which it charges are the result of market forces. Consequently, State interference that is neither by its nature nor effect capable of rendering a producer’s decisions regarding prices, costs and inputs incompatible with market economy conditions cannot be considered significant.

However, such an interpretation does not eliminate the criterion that the producer must take its decisions regarding prices, costs and inputs without such interference. Even when a producer has taken the decisions in response only to market signals, the criterion in question precludes granting it market economy treatment in the event that the State has significantly interfered with the operation of market forces, acting, for example, directly on the price of certain raw materials or the price of labour. In any event, it is for the producer to adduce evidence capable of proving that it does not suffer significant State interference when it takes its commercial decisions, and the Council and the Commission enjoy a wide discretion in that regard.

(see paras 78-83, 89-91)

6. See the text of the decision.

(see paras 106, 107)