Reports of Cases

JUDGMENT OF THE COURT (Fifth Chamber)

14 November 2013*

(Appeal — Dumping — Imports of cotton-type bed linen originating in Pakistan — Regulation (EC) No 384/96 — Article 3(7) — Concept of 'other factors')

In Case C-638/11 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 6 December 2011,

Council of the European Union, represented by J.-P. Hix, acting as Agent, and by G. Berrisch, Rechtsanwalt,

appellant,

the other parties to the proceedings being:

Gul Ahmed Textile Mills Ltd, represented by L. Ruessmann, avocat,

applicant at first instance,

European Commission, represented by A. Stobiecka-Kuik, acting as Agent, and by E. McGovern, Barrister,

intervener at first instance,

THE COURT (Fifth Chamber),

composed of T. von Danwitz, President of the Chamber, K. Lenaerts, Vice-President of the Court, acting as Judge of the Fifth Chamber, E. Juhász (Rapporteur), A. Rosas and C. Vajda, Judges,

Advocate General: E. Sharpston,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 21 February 2013,

after hearing the Opinion of the Advocate General at the sitting on 25 April 2013,

gives the following

* Language of the case: English.

Judgment

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of the General Court of the European Union of 27 September 2011 in Case T-199/04 *Gul Ahmed Textile Mills* v *Council* [2011] ('the judgment under appeal') by which that court annulled Council Regulation (EC) No 397/2004 of 2 March 2004 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Pakistan (OJ 2004 L 66, p. 1), in so far as it concerns Gul Ahmed Textile Mills Ltd ('Gul Ahmed Textile Mills').

Legal context

2 Article 3 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 1972/2002 of 5 November 2002 (OJ 2002 L 305, p. 1, 'Regulation No 384/96'), entitled 'Determination of injury', provides:

'1. Pursuant to this Regulation, the term "injury" shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and (b) the consequent impact of those imports on the Community industry.

3. With regard to the volume of the dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Community. With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree. No one or more of these factors can necessarily give decisive guidance.

...

5. The examination of the impact of the dumped imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation, the magnitude of the actual margin of dumping, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.

7. Known factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in this respect include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry.

...'

Background to the dispute

3 The judgment under appeal contains the following findings:

'1 The applicant, Gul Ahmed Textile Mills ..., is a company incorporated under Pakistani law, whose registered office is in Karachi (Pakistan). It is engaged, in particular, in export sales and marketing of bed linen. The applicant manufactures that product in Pakistan and exports it to the European Union. It does not sell any bed linen on the domestic market in Pakistan, although it does sell various commodities there.

2 Following a complaint lodged on 30 July 1996 by the Committee of the Cotton and Allied Textile Industries of the European Community ..., and the initiation of an anti-dumping proceeding on 13 September 1996, definitive anti-dumping duties were imposed on Pakistani and other producers by Council Regulation (EC) No 2398/97 of 28 November 1997 imposing a definitive anti-dumping duty on imports of cotton-type bed linen originating in Egypt, India and Pakistan (OJ 1997 L 332, p. 1; "the previous anti-dumping duties"). Pursuant to the first paragraph of Article 1 of that regulation, a definitive anti-dumping duty was imposed on imports of bed linen of cotton fibres, pure or mixed with man-made fibres or flax (flax not being the dominant fibre), bleached, dyed or printed, falling within CN codes ex 6302 21 00 (TARIC codes 6302 21 00*81 and 6302 21 00*89), ex 6302 22 90 (TARIC code 6302 22 90*19), ex 6302 31 10 (TARIC code 6302 31 10*90), ex 6302 31 90 (TARIC code 6302 31 90*90) and ex 6302 32 90 (TARIC code 6302 32 90*19).

3 In accordance with the Memorandum of Understanding between the European Community and the Islamic Republic of Pakistan on transitional arrangements in the field of market access for textile and clothing products, initialled in Brussels on 15 October 2001 (OJ 2001 L 345, p. 81), and following the adoption of Council Regulation (EC) No 2501/2001 of 10 December 2001 applying a scheme of generalised tariff preferences for the period from 1 January 2002 to 31 December 2004 (OJ 2001 L 346, p. 1), [the Islamic Republic of Pakistan] began to benefit from that scheme in so far as it applied to countries combating drug production and trafficking. As a consequence, textile and clothing products from Pakistan began, as from 1 January 2002, to enter the European Community free of duties after being subject to a customs duty of 12%. In accordance with Article 10 of Regulation No 2501/2001, read in combination with Annex IV to the same regulation, products exempted from duties by reason of their inclusion in the special arrangements to combat drug production and trafficking included the following products falling within Chapter 63 of the combined nomenclature: "other made-up textile articles; sets; worn clothing and worn textile articles".

4 The previous anti-dumping duties were abolished as from 30 January 2002, in relation to Pakistani producers, by Council Regulation (EC) No 160/2002 of 28 January 2002 amending Council Regulation (EC) No 2398/97 (OJ 2002 L 26, p. 1).

5 Following a fresh complaint lodged on 4 November 2002 by [the Committee of the Cotton and Allied Textile Industries of the European Community] on behalf of producers representing a major proportion of total Community production of cotton bed linen, the Commission of the European Communities initiated an anti-dumping proceeding with regard to imports into the Community of bed linen of cotton fibres, pure or mixed with man-made fibres or flax (flax not being the dominant fibre), bleached, dyed or printed originating in Pakistan …, in relation to which it stated "purely for information" that they fell within CN codes "ex 6302 21 00, ex 6302 22 90, ex 6302 31 10, ex 6302 31 90 and ex 6302 32 90". The notice of initiation of that proceeding was published in the *Official Journal of the European Communities* of 18 December 2002 (OJ 2002 C 316, p. 6).

6 The investigation relating to the dumping and resulting injury covered the period from 1 October 2001 to 30 September 2002 ("the investigation period"). The examination of the trends relevant for the assessment of injury covered the period from 1999 to the end of the investigation period ...

7 Taking account of the large number of exporting producers concerned by the anti-dumping proceeding, in accordance with Article 17 of … Regulation … No 384/96 …, the Commission chose a sample of six companies, representing more than 32% by volume of Pakistani exports of cotton bed linen to the Community during the investigation period. Those companies were invited to reply to the anti-dumping questionnaire.

8 Taking account of the large number of Community producers supporting the complaint, and in accordance with Article 17 of [Regulation No 384/96], the Commission also selected a sample, composed of five companies from three Member States, by reference to the production and sales volume considered as being the most representative of the size of the market. The Commission then sent questionnaires to those companies.

9 All the Pakistani exporting producers included in the sample provided answers to the questionnaire, as did the five Community producers behind the complaint included in the sample. In addition, answers to the questionnaire had also been provided by two independent importers in the Community, and by three Pakistani exporting producers not included in the sample who had requested individual treatment.

10 On 10 February 2003, the associations representing the Pakistani exporting producers of bed linen sent the Commission a document entitled "Observations on injury". In those observations, they dispute, inter alia, the legality of initiating the anti-dumping proceeding, the substance of the injury suffered by the Community industry, and the existence of a causal link between their [exports] and that alleged injury. On 2 June 2003, a hearing was arranged by the Commission, attended inter alia by the Pakistani exporting producers, including the applicant. The associations representing the Pakistani exporting producers then supplied the Commission with a document entitled "Observations post-hearing as to injury", in which they reacted to the points discussed at that hearing.

11 In accordance with Article 16 of [Regulation No 384/96], the Commission carried out verification visits at the premises of [two Pakistani] exporting producers in order to verify the information it had received in the replies to the questionnaire … [I]t was only possible to carry out a full verification at the premises of one exporting producer, namely Gul Ahmed, and a partial verification at the premises of another exporting producer. The exports of those two companies represent more than 50% of the total CIF value of exports to the Community by the exporting producers in the sample. Moreover, taking the view that the necessary conditions were not met for carrying out the investigation on the spot in Pakistan, the Commission did not accept the requests for individual treatment submitted by the three Pakistani exporting producers not included in the sample.

12 On 10 December 2003, the Commission sent the applicant a definitive disclosure document setting out the facts and grounds on which it proposed the adoption of definitive anti-dumping measures, as well as a specific definitive disclosure document for the applicant ("the final information documents"). By letter of 5 January 2004, the applicant officially disputed the Commission's submissions as set out in the final information documents. Other information was submitted to the Commission by the applicant in letters dated 16 February 2004.

13 On 17 February 2004, the Commission replied to the letter of 5 January 2004. Although it had made some corrections to its calculations, it confirmed the findings it had set out in the final information documents. By letter of 27 February 2004, the applicant drew particular attention to the errors allegedly made by the Commission in its analysis.

...

15 On 2 March 2004, the Council adopted Regulation … No 397/2004 ...

16 By [Regulation No 397/2004], the Council imposed anti-dumping duties of 13.1% on imports of bed linen of cotton fibres, pure or mixed with man-made fibres or flax (flax not being the dominant fibre), bleached, dyed or printed originating in Pakistan classifiable within CN codes ex 6302 21 00 (TARIC codes 6302 21 00 81 and 6302 21 00 89), ex 6302 22 90 (TARIC code 6302 22 90 19), ex 6302 31 10 (TARIC code 6302 31 10 90), ex 6302 31 90 (TARIC code 6302 31 90 90) and ex 6302 32 90 (TARIC code 6302 32 90 19).

17 Subsequently, [Regulation No 397/2004] was amended, in relation to the applicant, by Council Regulation (EC) No 695/2006 of 5 May 2006 (OJ 2006 L 121, p. 14). The amending regulation established the rate of definitive anti-dumping duty applicable to the products concerned manufactured by the applicant at 5.6%.'

The judgment under appeal

4 By application lodged on 28 May 2004, Gul Ahmed Textile Mills requested the General Court to annul Regulation No 397/2004 in so far as it concerns it.

5 Gul Ahmed Textile Mills relied on five pleas in law, alleging respectively:

— infringement, with regard to the initiation of the investigation, of Article 5(7) and (9) of Regulation No 384/96, and Articles 5.1 and 5.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (WTO-GATT 1994) (OJ 1994 L 336, p. 103, 'the 1994 Anti-dumping Code'), which is contained in Annex 1A to the Agreement establishing the World Trade Organisation, signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1);

— manifest error of assessment and infringement of Article 2(3) and (5) and Article 18(4) of Regulation No 384/96, and infringement of the 1994 Anti-dumping Code, with regard to calculation of the normal value;

— infringement of Article 2(10) of the Regulation No 384/96, of the 1994 Anti-dumping Code, and of the obligation to state adequate reasons under Article 253 EC, with regard to drawback adjustment in the comparison of the normal value and export price;

— manifest error of assessment and infringement of Article 3(1) to (3) and (5) of Regulation No 384/96, and of the 1994 Anti-dumping Code, with regard to the determination of material injury;

— manifest error of assessment and infringement of Article 3(6) and (7) of the Regulation No 384/96, and the 1994 Anti-dumping Code, with regard to the establishment of a causal link between the allegedly dumped imports and the alleged injury.

6 The General Court considered it appropriate to rule first on the third part of the fifth plea. By the third part of the fifth plea, the applicant alleged, in essence, that the Council made an error of law by failing to examine whether the abolition of the previous anti-dumping duties and the implementation of a scheme of generalised tariff preferences in favour of the Islamic Republic of Pakistan at the start of 2002, had the effect of breaking the causal link between the injury allegedly suffered by the Community industry and the imports from Pakistan.

7 First, in paragraphs 45 to 51 of the judgment under appeal, the General Court noted that, from the start of the administrative procedure, the associations representing exporting producers of Pakistani bed linen drew the attention of the EU institutions to the fact that the injury allegedly suffered by the Community industry had been caused by two factors, namely the abolition of (i) the previous anti-dumping duties and (ii) ordinary customs duties, in the context of the scheme of generalised tariff preferences in favour of the Islamic Republic of Pakistan, not by the dumping of products originating in Pakistan. The surge of imports of bed linen from Pakistan had, in the view of the Pakistani exporting producers, been facilitated by the exemption from certain duties and by the amendment of the legislative framework.

8 In paragraphs 53 to 59 of the judgment under appeal, the General Court found that, in order to discharge the obligation to examine, in accordance with Article 3(7) of Regulation No 384/96, all the 'known factors other than the dumped imports which at the same time are injuring the Community industry', the EU institutions had to separate correctly and distinguish the injurious effects of the dumped imports from the injurious effects of other known factors.

9 The General Court held, in paragraph 56 of the judgment under appeal, that the enumeration of 'known factors other than the dumped imports', in Article 3(7) of Regulation No 384/96 is not exhaustive but, on the contrary, indicative, as is shown by the use of the word 'include' introducing the list of factors which may be regarded as relevant. The General Court stated, in paragraph 57 of the judgment under appeal, that the common objective of Article 3(7) of that regulation and Article 3.5 of the 1994 Anti-dumping Code is to ensure that the imports forming the subject-matter of the investigation do not have attributed to them the possible negative effects of other possible factors having an impact on the injury suffered respectively by the Community or national industries, lest those industries have conferred upon them protection going beyond what is necessary.

10 The General Court held, in paragraph 59 of the judgment under appeal, that the abolition of the previous anti-dumping duties and ordinary customs duties under the scheme of generalised tariff preferences were known factors which the EU institutions had to take into account in assessing the reality of the causal link between the injury suffered by the Community industry and the imports from Pakistan of the product forming the subject-matter of the anti-dumping investigation.

11 The General Court inferred from this, in paragraph 84 of the judgment under appeal, that it was not apparent from the analysis carried out by the EU institutions, even in the form of a mere estimate, what the injury suffered by the Community industry would have been in the absence of any dumping; in other words, it was not apparent what injury would have arisen merely from the entry into force of the scheme of generalised tariff preferences and the abolition of the previous anti-dumping duties,

whether in terms of loss of market share, reduction in profitability or performance of the industry referred to above, renunciation of lower segments of the market or any other relevant economic indicator.

12 Consequently, the General Court upheld the third part of the fifth plea in law, and, without examining the other pleas, annulled Regulation No 397/2004 in so far as it concerns Gul Ahmed Textile Mills.

13 In that context, the Council brought the present appeal against the judgment under appeal, supported by the Commission, the intervener at first instance.

The appeal

Arguments of the parties

14 The Council submits that the General Court infringed Article 3(7) of Regulation No 384/96, by misconstruing the concept of 'other factors' provided for in that provision. Admittedly, the Council states that the General Court correctly found that Article 3(7) requires, in principle, that the injurious effects of other known factors are separated and distinguished from the injury caused by the dumped imports. However, it submits that the General Court erred in concluding that the two factors at issue, namely the abolition of the previous anti-dumping duties and the implementation of a scheme of generalised tariff preferences constituted 'other factors' within the meaning of Article 3(7) of Regulation No 384/96. Consequently, the General Court erred in finding that, in the present case, the institutions infringed that provision because they failed to separate or distinguish the alleged injurious effects of the two factors at issue.

15 The Council contends that an 'other factor' within the meaning of Article 3(7) of the Regulation 384/96 is, by definition a factor that is unrelated to the dumped imports. The two factors at issue are intimately related to the dumped imports from Pakistan. In the Council's view, 'a factor that merely facilitates an increase in the dumped imports is not itself a separate factor causing injury, as any injury that results from an increase of the dumped imports is caused by the dumped imports, not by the factors facilitating the increase in dumped imports'. That interpretation is confirmed by the findings of a WTO panel report of 28 October 2011, entitled 'European Union – Anti-dumping measures on certain footwear from China' (WT/DS405/R).

16 The Council states that, notwithstanding the fact that the list in Article 3(7) of Regulation No 384/96 is not exhaustive as such, it does not include the two factors at issue as 'other factors' within the meaning of that provision. Changes to the legislative regulatory framework matter only in so far as they had an effect on the market and the two factors at issue could have had an effect only on the dumped imports. However, in the Council's view, the two factors at issue did not affect the performance of the Community industry.

17 In addition, the Council submits that the legal error of the General Court is due to a misunderstanding of Article 3(6) and (7) of Regulation No 384/96, revealed by the statements in paragraph 84 of the judgment under appeal.

18 The Commission essentially supports the Council's arguments.

19 Gul Ahmed Textile Mills contends that the claims in the appeal invalidly restrict the consideration of 'other factors' under Article 3(7) of Regulation No 384/96. The Council's interpretation of the concept of 'other factors' is contrary to that provision. In addition, since the objective of that provision is to ensure that no injury is being attributed to dumped imports that results from another cause, there is no basis for an arbitrary limitation of the factors whose injurious effects are to be taken into account.

20 Gul Ahmed Textile Mills contends that, as regards the concept of 'other factors', it is not true that the factors at issue were 'intimately related' to the dumped imports. The removal of the previous anti-dumping duties reflected the European Union's correction of the invalid imposition of measures in 1997, and had nothing to do with dumped imports, whether during the investigation period or before. The European Union's granting of a special tariff preference to imports from Pakistan as of 1 January 2002 was not specific to bed linen imports, let alone to dumped bed linen imports. The amendments to the legislative framework of the market were due only to the action of the European Union and not 'intimately related' to actions of third country producers.

21 Gul Ahmed Textile Mills maintains that the factors at issue directly reduced the duty burden on all bed linen imports from Pakistan, thereby directly affecting the price levels of those imports on the European Union market. To characterise these tariff changes as 'only facilitating an increase in the volume of dumped imports' is manifestly inaccurate.

22 Gul Ahmed Textile Mills contends that the key question is whether the factors at issue would have directly influenced the level of any of the economic indicators which the EU institutions examine to determine whether and why the EU industry suffered material injury. Article 3(5) of Regulation No 384/96 requires an evaluation of 'all relevant economic factors and indices having a bearing on the state of the industry' and included in the illustrative list of Article 3(5) are 'factors affecting Community prices'. Gul Ahmed Textile Mills states that as a direct result of the factors at issue, without any change to the FOB prices of the Pakistani producers, the EU producers were suddenly facing imports which entered the EU market at a price level very substantially lower than what they had been previously. Changes to the legislative framework thereby had a direct effect on the economic circumstances considered in the determination of injury and of causation between that injury and dumping.

Findings of the Court

23 It is apparent from recitals 108 to 115 of Regulation No 397/2004 that the EU institutions examined the factors which they regarded as factors other than the dumped imports.

24 In particular, the imports from India, Turkey, Romania, Bangladesh and Egypt were examined and the factors linked to the contraction of demand, imports and exports by the Community industry, and the productivity of that industry.

25 In assessing the causal link between the dumped imports and the injury sustained by the Community industry, it is not disputed that the EU institutions did not examine the two measures in question, that is the abolition of the ordinary customs duties under the scheme of generalised tariff preferences and the abolition of the previous anti-dumping duties.

26 It should be noted that those measures concerned products originating in Pakistan and that Regulation No 397/2004 applies to all the Pakistani exporters. Thus, in accordance with that regulation, all exports of products listed therein constitute dumped imports within the meaning of Article 3 of Regulation No 384/96.

27 It is clear that the abolition of import duties of, first, 12% and, second, 6.7%, could have had the effect of facilitating and promoting the imports of the products concerned. However, the effect was on the dumped imports themselves.

28 It is apparent from the wording of Article 3(7) of Regulation No 384/96, in particular the words 'Known factors … which are injuring the Community industry', that that regulation requires the factors which are directly causing injury to be examined, which presupposes the existence of a direct causal link.

29 By contrast, in the present case, the changes to the legislative conditions under which the dumped imports take place cannot be regarded, as such, as causing injury. It is the imports themselves which are causing injury.

30 The dumped imports and the legislative conditions under which they take place are inseparable.

31 Therefore, the measures at issue which facilitate and promote imports are only indirect causes and cannot be regarded as 'other factors' within the meaning of Article 3(7) of Regulation No 384/96.

32 That interpretation is consistent with the report of the WTO Panel of 28 October 2011, entitled 'European Union – Anti-dumping measures on certain footwear from China', which examined the issue of the causal link between the lifting of an import quota and injury in the light of Article 3.5 of the 1994 Anti-Dumping Code. At point 7.527 of that report, it was found that the lifting of an import quota, which allows for an increase in the volume of dumped imports, is not itself a factor causing injury.

33 Import quotas are legislative conditions under which imports take place, in the same way as are customs duties on imports.

34 In those circumstances, the General Court erred in law in holding that the two factors at issue constitute 'other factors' within the meaning of Article 3(7) of Regulation No 384/96.

35 However, that conclusion does not prejudge the question whether the factors at issue must be taken into account when examining whether there is injury in accordance with Article 3(2), (3) and (5) of Regulation No 384/96.

36 The judgment under appeal must therefore be set aside.

37 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, where the Court of Justice sets aside a decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

38 In the present case, the conditions in which the Court may itself give final judgment on the matter are not met.

39 Consequently, it is necessary to refer the case back to the General Court and to reserve the costs.

On those grounds, the Court (Fifth Chamber) hereby:

1. Sets aside the judgment of the General Court of the European Union of 27 September 2011 in Case T-199/04 *Gul Ahmed Textile Mills* v *Council;*

2. Refers the case back to the General Court of the European Union;

3. Reserves the costs.

[Signatures]