



Reports of Cases

Case T-111/14

Unitec Bio SA

v

Council of the European Union

(Dumping — Imports of biodiesel originating in Argentina — Definitive anti-dumping duty — Action for annulment — Direct concern — Individual concern — Admissibility — Article 2(5) of Regulation (EC) No 1225/2009 — Normal value — Production costs)

Summary — Judgment of the General Court (Ninth Chamber), 15 September 2016

1. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Individual concern — Criteria — Regulation imposing anti-dumping duties — Action by an exporter of the product affected by that duty, expressly mentioned in the regulation — Admissibility*

(Art. 263, fourth para., TFEU)

2. *Common commercial policy — Protection against dumping — Dumping margin — Determination of the normal value — Recourse to the constructed value — Calculation of production costs on the basis of accounting registers — Derogation — Costs linked to the production and sale of the product subject to the investigation not reasonably reflected in those registers — Burden of proof borne by the institutions — Judicial review — Scope*

(Council Regulations No 1972/2002, fourth recital, and No 1225/2009, Art. 2(3), second para., and (5), first and second paras)

3. *Actions for annulment — Subject-matter — Partial annulment — Condition — Severability of the contested provisions — Provision of a regulation imposing definitive anti-dumping duties — Annulment entailing a modification of the substance of the regulation*

(Art. 263 TFEU; Council Regulation No 1194/2013, Art. 1)

1. Where a regulation imposes an individual definitive anti-dumping duty on the applicant and refers explicitly to it, that circumstance is in itself sufficient to conclude that the applicant is individually concerned and to render his action for annulment of that regulation admissible.

(see paras 30-32)

2. The objective of the first and second subparagraphs of Article 2(5) of basic anti-dumping Regulation No 1225/2009 on protection against dumped imports from countries not members of the European Community is to ensure that the costs associated with the production and sale of the like product used in calculating the normal value of that product reflect the costs that a producer would have incurred on the domestic market of the exporting country.

Moreover, it follows from the wording of the first subparagraph of Article 2(5) of the basic anti-dumping regulation that the records kept by the party under investigation are the prime source of information in order to establish the costs of production of the like product and that the use of the data included in those records constitutes the rule and the adaptation or replacement of that data on another reasonable basis is the exception. That exception must be interpreted narrowly.

Recital 4 of Regulation No 1972/2002, amending the earlier basic anti-dumping Regulation No 384/96, which introduced the provision corresponding to the second subparagraph of Article 2(5) of the basic anti-dumping regulation into the latter, envisages the possibility of relying on Article 2(5) of the basic regulation, in particular in a situation where the sales of the like product do not permit a proper comparison on account of distortion. It also follows that such a situation may arise, in particular, when a particular market situation exists, such as that referred to in the second subparagraph of Article 2(3) of the basic regulation, concerning artificially low prices of the product concerned, but that type of situation is not limited to cases in which there is direct regulation of prices of the like product or the main raw materials of that product by the exporting State.

By contrast, a measure of the public authorities of the exporting country may lead the institutions to disregard, in the context of calculating the normal value of the like product, the prices of the raw materials included in the records of the party under investigation only when it causes appreciable distortion of the prices of those raw materials. Another interpretation of the exception provided for in Article 2(5) of the basic regulation would risk disproportionately impairing the principle that those records are the prime source of information in order to establish the costs of production of that product.

Moreover, as regards the burden of establishing the existence of factors justifying the application of the first subparagraph of Article 2(5) of the basic regulation, where the institutions consider that they must disregard the costs of production contained in the records of the parties under investigation and replace them with another price deemed reasonable, it is for them to produce evidence, or at least circumstantial evidence, pointing to the existence of the factor for which the adjustment was made. Consequently, given the fact that the disregard, in the context of calculating the normal value of the like product, of the production costs of that product included in the records of the parties under investigation falls within the scope of an exception, where the distortion relied upon by the institutions is not an immediate consequence of the State measure from which it originates, but of the effects that that measure is deemed to produce on the market, those institutions must ensure that they explain the operation of the market in question and demonstrate the specific effects of that measure on it, without relying in that regard on mere conjecture.

In that regard, a review by the Court which merely determines whether the elements on which the European Union institutions base their findings are capable of substantiating the conclusions which they draw from them does not encroach on their broad discretion in the field of commercial policy.

(see paras 42-44, 54, 56-58, 70)

3. See the text of the decision.

(see paras 74-76)