



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

30 April 2013 *

(Dumping — Imports of zeolite A powder originating in Bosnia and Herzegovina — Normal value — Representativeness of domestic sales — Profit margin — Ordinary course of trade)

In Case T-304/11,

Alumina d.o.o., established in Zvornik (Bosnia and Herzegovina), represented by J.-F. Bellis and B. Servais, lawyers,

applicant,

v

Council of the European Union, represented by J.-P. Hix, acting as Agent, assisted by G. Berrisch and A. Polcyn, lawyers,

defendant,

supported by

European Commission, represented by É. Gippini Fournier and H. van Vliet, acting as Agents,

intervener,

APPLICATION for annulment of Council Implementing Regulation (EU) No 464/2011 of 11 May 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of zeolite A powder originating in Bosnia and Herzegovina (OJ 2011 L 125, p. 1), in so far as it concerns the applicant,

THE GENERAL COURT (Second Chamber),

composed of N.J. Forwood (Rapporteur), President, F. Dehousse and J. Schwarcz, Judges,

Registrar: C. Kristensen, Administrator,

having regard to the written procedure and further to the hearing on 15 January 2013,

gives the following

* Language of the case: French.

Judgment

- 1 On 17 February 2010, following a complaint lodged on 4 January 2010, the European Commission published a notice of initiation of a proceeding concerning imports of zeolite A powder originating in Bosnia and Herzegovina (OJ 2010 C 40, p. 5).
- 2 The applicant – Alumina d.o.o. ('Alumina'), a member of the Birac group – submitted its reply to the anti-dumping questionnaire on 9 April 2010. The Commission carried out on-site verification visits at Alumina's headquarters from 29 June until 1 July 2010.
- 3 Pursuant to Commission Regulation (EU) No 1036/2010 of 15 November 2010 imposing a provisional anti-dumping duty on imports of zeolite A powder originating in Bosnia and Herzegovina (OJ 2010 L 298, p. 27; 'the Provisional Regulation'), the Commission imposed provisional anti-dumping duties at the rate of 28.1% on imports of zeolite A powder, also referred to as Zeolite NaA or Zeolite 4A powder, originating in Bosnia and Herzegovina. According to recital 11 to the Provisional Regulation, the investigation period covers the period between 1 January and 31 December 2009.
- 4 It emerges from recitals 3 and 10 to the Provisional Regulation that the Birac group, to which Alumina belongs, is the sole exporting producer of the product concerned in Bosnia and Herzegovina.
- 5 In calculating the normal value, the Commission used the method described in Article 2(3) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, Corrigendum OJ 2010, L 7, p. 22; 'the Basic Regulation'), since Alumina's sales on the internal market were not 'representative' for the purposes of Article 2 of that regulation. In order to construct the normal value, the Commission used the weighted average profit made by the group to which Alumina belongs on domestic sales of a like product (recitals 21 to 26 of the Provisional Regulation).
- 6 By letter of 16 November 2010, the Commission sent Alumina, pursuant to Article 20 of the Basic Regulation, a copy of the Provisional Regulation, a communication concerning the specific calculation of the dumping margin, a communication concerning the specific calculation of the injury margin and, lastly, a response to the arguments put forward by Alumina concerning the initiation of the investigation.
- 7 By letter of 1 December 2010, Alumina submitted its observations, alleging infringement of Article 2(3) and (6) of the Basic Regulation by reason of the use, for the purposes of constructing the normal value, of the profit margin on sales to Alumina's sole domestic client, which presented a higher risk of non-payment or late payment and could not, in consequence, be regarded as transactions in the ordinary course of trade.
- 8 By letter of 16 March 2011, the Commission sent Alumina, pursuant to Article 20 of the Basic Regulation, a final disclosure document and a reply rejecting the allegations relating to the domestic sales referred to in the preceding paragraph. As part of a letter dated 18 March 2011, Alumina reiterated its position, as set out in the preceding paragraph.
- 9 A definitive duty at a rate of 28.1%, applicable to the net, free-at-European Union-frontier price, before duty, was applied to the products referred to in paragraph 3 above, pursuant to Council Implementing Regulation (EU) No 464/2011 of 11 May 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of zeolite A powder originating in Bosnia and Herzegovina (OJ 2011 L 125, p 1; 'the Contested Regulation').
- 10 As regards the construction of the normal value, the Council of the European Union states in recitals 19 and 20 to the Contested Regulation that the domestic sales taken into account had been made in the ordinary course of trade and that the institutions could rely on the resulting data despite the fact

that those data are not representative for the purposes of Article 2(2) of the Basic Regulation. Since the sales in question were profitable, the constructed normal value was identical to the value which would have resulted from application of the first subparagraph of Article 2(1) of the Basic Regulation.

- 11 By Commission Decision 2011/279/EU of 13 May 2011 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of zeolite A powder originating in Bosnia and Herzegovina (OJ 2011 L 125, p. 26), the Commission accepted the undertaking offered, in the form of a minimum price, by Alumina.

Procedure and forms of order sought

- 12 By application lodged at the Court Registry on 16 June 2011, Alumina brought the present action.
- 13 By document lodged at the Court Registry on 29 July 2011, the Commission sought leave to intervene in the present proceedings in support of the Council. By order of 12 September 2011, the President of the Second Chamber of the Court granted leave to intervene.
- 14 Alumina claims that the Court should:
- annul the Contested Regulation in so far as it concerns Alumina;
 - order the Council to pay the costs.
- 15 The Council contends that the Court should:
- dismiss the action;
 - order Alumina to pay the costs.
- 16 The Commission contends that the Court should dismiss the action.

Law

- 17 In support of its action, Alumina raises two pleas in law, alleging (i) infringement of Article 2(3) and (6) of the Basic Regulation and (ii) infringement of the first sentence of Article 2(6) of that regulation.
- 18 By the first plea in law, Alumina claims that, under Article 2(3) of the Basic Regulation, if domestic sales are insufficient, normal value must be constructed in accordance with Article 2(6). By definition, that *modus operandi*, which reflects the consistent practice of the institutions in situations where domestic sales do not reach the level at which they are regarded as representative ('the representativeness threshold'), cannot be identical to the calculation of normal value on the basis of non-representative domestic sales, as provided for under Article 2(2) of the Basic Regulation. On the contrary, Alumina argues, the circumstances call for the application of a reasonable profit margin in accordance with Article 2(6)(c) of the Basic Regulation. However, the weighted average profit margin of the group to which Alumina belongs – expressed as 58.89% in relation to the cost of production and as 37.06% in relation to the turnover, and used to calculate the normal value – is manifestly unreasonable, as is borne out, furthermore, by a comparison with the margin of 5.9% used to calculate the elimination of injury to the European Union industry.

- 19 By the first part of the second plea in law, Alumina alleges that, according to the case-law of the Court of Justice, sales which are non-representative under Article 2(2) of the Basic Regulation cannot be regarded as having been made in the ordinary course of trade. The concepts of ‘representative sales’, on the one hand, and of ‘sales carried out in the ordinary course of trade’, on the other, are intrinsically linked. Since the domestic sales taken into account by the institutions represent only 1.9% of exports to the European Union during the investigation period, it must be held that, in breach of the first sentence of Article 2(6) of the Basic Regulation, the institutions based the calculation of normal value on non-representative transactions and, accordingly, on transactions which were not carried out in the ordinary course of trade.
- 20 By the second part of the second plea in law, Alumina adds that, in any event, the Commission had received information during the administrative procedure demonstrating that the prices of sales to Company D – the sole domestic client of Alumina taken into account – had been increased by 25% through the application of a premium to cover the risk of late payment or non-payment and, accordingly, those prices did not reflect ordinary commercial transactions. In that regard, the fact that the Commission had chosen not to check that information in the course of the on-site verification visit is irrelevant. Moreover, according to the information that Alumina submitted to the Commission, Company D’s debts vis-à-vis Alumina had been settled over a prolonged period through offsetting or credit assignment, which means that the sales to that company are a form of barter or compensatory arrangement giving rise to a particular market situation within the meaning of Article 2(3) of the Basic Regulation.
- 21 As is apparent from paragraphs 27, 29 and 50 of the application initiating proceedings, the arguments put forward by Alumina in support of each plea are predicated on the view that the first sentence of Article 2(6) of the Basic Regulation is inapplicable in the present case. Alumina bases its claims, in essence, on two grounds: (i) that the construction of a value based on the profit margin made through sales to Company D – the sole domestic client of Alumina taken into account – takes account only of non-representative transactions, which is contrary to Article 2(2) of the Basic Regulation (first plea); and (ii) that the sales to Company D were not made in the ordinary course of trade, since they were not representative and their prices had been increased by a margin linked to that client’s financial situation (second plea).
- 22 When questioned at the hearing, Alumina stated that, even if its domestic sales had met the representativeness threshold laid down in Article 2(2) of the Basic Regulation, it would still dispute the assessment that those sales had been made in the ordinary course of trade, on the ground that the institutions had included the margin, incorporated in the prices, linked to Company D’s financial situation.
- 23 In that context, it should be pointed out that the examination of the second plea – linked, as regards the concept of the ‘ordinary course of trade’, to the representativeness of the domestic sales and to the inclusion of the 25% premium in the calculation of the profit margin – focuses on the central point of Alumina’s argument and, accordingly, it is appropriate to examine the second plea first.
- 24 In that connection, it must be pointed out as regards the first part of that plea that, in principle, the question of the representativeness of domestic sales for the purposes of paragraph 2 of Article 2 of the Basic Regulation, which establishes a quantitative criterion, is distinct from the question whether those sales were made in the ordinary course of trade for the purposes of paragraphs 3 and 6 of Article 2 of the Basic Regulation, which establish a qualitative criterion linked to the nature of the sales themselves (see, to that effect, Case C-105/90 *Goldstar v Council* [1992] ECR I-677, paragraph 13). Nevertheless, the volume of domestic sales constitutes a factor liable to affect price formation and, accordingly, the two criteria may interact, for example, where the domestic market is so limited that the prices are not determined by supply and demand (see, to that effect, *Goldstar v Council*, paragraphs 15 to 18).

- 25 However, that possibility of interaction does not mean that, if the representativeness threshold of 5% is not reached, domestic sales are not to be regarded as having been made in the ordinary course of trade. It is not wholly inconceivable that, despite their low volume, domestic sales may be made in the ordinary course of trade, if they nevertheless reflect the ordinary behaviour of the operators concerned. In those circumstances, it is necessary to rule, first, on the inclusion of the 25% premium in the calculation of the profit margin, and therefore to examine the second part of the second plea, set out in paragraph 20 above.
- 26 In that regard, it should be pointed out that, according to the definition of ‘dumping’ in Article 1(2) of the Basic Regulation, the export price must be compared with the price for the like product in the ordinary course of trade, as established in the exporting country, a provision which is laid down again in the first subparagraph of Article 2(1) and in Article 2(6) of the Basic Regulation and which reflects the fifth recital to that regulation, according to which normal value should in all cases be based on representative sales made in the ordinary course of trade.
- 27 In addition, if normal value cannot be established under Article 2(1) of the Basic Regulation, its construction in accordance with Article 2(3) and (6) of that regulation is intended to establish a normal value which comes as close as possible to the selling price that a product would have if it were sold in the country of origin or the exporting country in the ordinary course of trade (Case C-178/87 *Minolta Camera v Council* [1992] ECR I-1577, paragraph 17).
- 28 It follows that the purpose of establishing normal value is to enable the institutions to assess, in accordance with objective rules ensuring that the conclusion reached is free from bias, whether dumping was carried out during the investigation period. The ordinary course of trade is thus a concept designed to exclude, for the determination of normal value, situations in which sales on the domestic market are not made under conditions corresponding to the ordinary course of trade, in particular where a product is sold at a price below production costs or where transactions take place between parties which are associated or have a compensatory arrangement with each other (*Goldstar v Council*, paragraph 24 above, paragraph 13). As is apparent from the third subparagraph of Article 2(1) and from Article 2(4) of the Basic Regulation and as the Council states in paragraph 57 of the defence, those situations are examples of circumstances in which sales may be regarded as not having been made in the ordinary course of trade.
- 29 In that context, the concept of ‘sales made in the ordinary course of trade’ is objective and may be relied upon not only by the institutions in order to eliminate practices liable to disguise the dumping or its magnitude (compensatory arrangements with artificially low sales prices, domestic sales at prices below production costs over long periods), but also by the operators targeted, in circumstances which undermine the ordinary character of the relevant trade (see, by way of illustration, Case C-76/00 P *Petrotub and Republica* [2003] ECR I-79, paragraphs 65 to 68 and 84 to 86).
- 30 Accordingly, in the calculation of normal value, the institutions are required to exclude sales which have not been made in the ordinary course of trade, whether the sales price is higher or lower than the price charged in the ordinary course of such trade, whatever the reason why the transaction did not take place in the ordinary course of trade and whatever the effect of that exclusion on the conclusion concerning the existence of dumping or its magnitude. As the Appellate Body of the World Trade Organisation (WTO) found in relation to Article 2.1 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103), which is set out in Annex 1A to the Agreement establishing the WTO (OJ 1994 L 336, p. 3), to take into account sales made outside the ordinary course of trade, whether at low or high prices, would distort what is defined as a ‘normal’ value (report of the WTO Appellate Body of 24 July 2011 in the case ‘United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan’, paragraphs 144 and 145).

- 31 In the present case, Alumina asserted in its reply to the anti-dumping questionnaire of 9 April 2010 that its financial relations with Company D, its sole domestic client, had deteriorated owing to late payments, justifying the application of a risk premium increasing the sale price of zeolite A. Additional information was provided in that regard in Alumina's observations submitted by letter of 1 December 2010 (see paragraph 7 above), one of the documents appended to which was a contract dated 29 May 2009 between Alumina and Company D fixing the premium in question at 25%.
- 32 In reply to those arguments, the Commission stated in its letter of 16 March 2011 (see paragraph 8 above) that, as Company D is Alumina's sole domestic client, it was impossible to check whether the prices of sales to that company actually incorporated a risk premium of 25%. Accordingly, the Commission concluded that Alumina's claims had to be dismissed, without it even being necessary to examine whether the circumstances at issue justified a finding that the sales made in those circumstances had not been made in the ordinary course of trade. Nevertheless, according to recital 20 to the Contested Regulation, 'the investigation established that the data and evidence provided by Birac constituted a reliable basis for determining the normal value' and, as a consequence, Alumina's argument that the domestic sales should not be regarded as having been made in the ordinary course of trade had to be rejected.
- 33 In that regard, first, it should be pointed out that, contrary to the assertions made by the Commission in its letter of 16 March 2011, the fact that there were no domestic sales to clients other than Company D does not make it impossible to carry out the relevant check. First of all, the information on the application of a risk premium had already been given in Alumina's reply to the antidumping questionnaire, that is to say, before the verification visit. Next, Clause 6 of the contract sent by Alumina to the Commission (see paragraph 31 above) clearly refers to the premium in question, the calculation of a profit margin of 58.89% on the production costs or 37.06% on the turnover being strong indications, moreover, that the premium had actually been applied. Furthermore, it emerges from Annexes 3.2 and 3.3 to Alumina's letter of 1 December 2010 that Company D had been late in settling its debts at least since 2008 and that tendency had continued in 2009, as is shown by the table in Annex 2 to that letter. Lastly, in the letter of 16 March 2011, the Commission accepted – and even used – the argument that the premium of 25% had actually been charged, in order to answer another of Alumina's arguments concerning the normality of the sales in question, this time based on the compensation arrangements concluded with Company D.
- 34 Secondly, the Commission's claim that Alumina had not called into question the ordinary nature of the commercial transactions at issue fails to have due regard for the fact that Alumina had stated in its reply to the antidumping questionnaire that the prices invoiced to Company D had been increased by a risk premium and that it had further expounded that argument on pages 7 to 9 of its letter of 1 December 2010.
- 35 Thirdly, the Council indicated in paragraph 30 of the rejoinder that the Commission had not checked that information, since it had contended that Alumina's claims should be dismissed as those circumstances did not make the commercial transactions in question 'abnormal'. If that is how recital 20 to the Contested Regulation should be understood (see paragraph 32 above), the following should be noted.
- 36 A risk premium such as that at issue amounts in reality to compensation for the risk which the supplier takes by selling products to a particular client and by allowing that client time to pay. That premium does not therefore represent part of the value of the product sold; nor is it linked to the characteristics of the product; rather, it owes its existence and its size to the client's identity and to the supplier's assessment of that client's financial capacity. Accordingly, the effect of taking such a premium into account in the construction of normal value is that of inserting into the calculation a factor which does not go to establishing the price at which the product would be sold in the country of origin (see paragraph 27 above), but which relates exclusively to the financial capacity of the particular domestic buyer.

- 37 Against that background, the Council's assertion in paragraph 58 of the defence that a risk linked to the financial soundness of a client can be managed through proceedings for damages, letters of credit or advance payments, but not by means of a risk premium which increases the sales price, does not explain why it would not be open to the seller to choose to apply such a premium; nor, in consequence, does it explain why the existence of such a risk would not justify increasing the sales price by a premium intended to offset both that risk and the costs which might be incurred by the supplier in the event that he was ultimately obliged to take legal action against his client.
- 38 In the circumstances of the present case, the inclusion of a risk premium such as that at issue in the calculation of the profit margin established for the purposes of constructing normal value takes into account an element which does not reflect part of the value of the product sold and, as a consequence, artificially boosts the 'normal value' arrived at by means of that calculation, with the result that that 'normal value' no longer reflects as closely as possible – subject to the subsequent application of an appropriate adjustment pursuant to Article 2(10)(k) of the Basic Regulation – the sale price of a product as it would be if the product in question were sold in the country of origin in the ordinary course of trade (see paragraphs 27 to 30 above).
- 39 It must be added that the arguments, submitted at the hearing by the Council and by the Commission, to the effect that the reasons for which a producer engages in dumping are irrelevant for the purposes of determining anti-dumping duties cannot succeed in the present case. In that regard, while it is true that the reasons which may have led an exporter to engage in dumping have no bearing on the related calculations, the fact remains that a finding of dumping – the first stage of the assessment as to whether an anti-dumping duty should be imposed – depends upon a strictly objective comparison between the normal value and the export price (Case T-274/02 *Ritek and Prodisc Technology v Council* [2006] ECR II-4305, paragraph 59). However, the flaw relied upon by the applicant in the present case, which is linked to the taking into account of the risk premium, affects the validity of the calculation of the normal value established for the purposes of assessing whether dumping had taken place; this means that it arises prior to the finding relating to the existence of dumping and, accordingly, it is liable to affect the validity of the finding itself.
- 40 Similarly, the Council cannot rely on the case-law relating to domestic sales at prices allegedly increased because of the patent protection enjoyed by the manufacturer of the product (Joined Cases C-76/98 P and C-77/98 P *Ajinomoto and NutraSweet v Council and Commission* [2001] ECR I-3223 and Joined Cases T-159/94 and T-160/94 *Ajinomoto and NutraSweet v Council* [1997] ECR II-2461). In that regard, it should be pointed out that – as the Court of First Instance (now the General Court) and the Court of Justice observed – the applicants in those cases did not claim that the existence of that patent had no effect on the actual market situation of the targeted third country; nor did they claim that the sales taken into account had not been made in the ordinary course of trade (*Ajinomoto and NutraSweet v Council and Commission*, paragraph 41, and *Ajinomoto and NutraSweet v Council*, paragraphs 127 to 129). On that point, it must be added that Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1), in relation to which the above case-law was developed, was based on a philosophy different from that underlying the Basic Regulation, in that it did not provide for the possibility of adjusting the normal value if purchasers systematically pay different prices on the domestic market because of certain factors particular to that market which affect price comparability – a possibility which, by contrast, is provided for in Article 2(10)(k) of the Basic Regulation.
- 41 In the light of the foregoing considerations, and without there being any need to rule, in response to the complaints put forward in the context of the first plea, on the lawfulness of the reliance on the first sentence of Article 2(6) of the Basic Regulation, the action must be upheld and the Contested Regulation must be annulled in so far as it concerns Alumina.

Costs

- ⁴² Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by Alumina. Pursuant to the first subparagraph of Article 87(4) of the Rules of Procedure, the Commission must bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Annuls Council Implementing Regulation (EU) No 464/2011 of 11 May 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of zeolite A powder originating in Bosnia and Herzegovina, in so far as it concerns Alumina d.o.o.;**
2. **Orders the Council of the European Union to bear its own costs and to pay the costs incurred by Alumina;**
3. **Orders the European Commission to bear its own costs.**

Forwood

Dehousse

Schwarcz

Delivered in open court in Luxembourg on 30 April 2013.

[Signatures]