



Reports of Cases

Case T-304/11

Alumina d.o.o.

v

Council of the European Union

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

Summary — Judgment of the General Court (Second Chamber), 30 April 2013

1. *Common commercial policy — Protection against dumping — Dumping margin — Determination of normal value — Constructed value — Factors to be taken into consideration — Price charged in the ordinary course of trade — Representativeness threshold of domestic sales — Interaction between those two factors*

(Council Regulation No 1225/2009, Art. 2(2), (3) and (6))

2. *Common commercial policy — Protection against dumping — Dumping margin — Determination of normal value — Constructed value — Factors to be taken into consideration — Price charged in the ordinary course of trade — Sales made in the ordinary course of trade — Concept*

(Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 'the 1994 Anti-dumping Agreement', Art. 2.1; Council Regulation No 1225/2009, Art. 2(1),(3), (4) and (6))

3. *Common commercial policy — Protection against dumping — Dumping margin — Determination of normal value — Constructed value — Account to be taken of a risk premium increasing the price of sales made to a particular customer — Artificial boosting of the sale price — No adjustment — Invalidity of the calculation of the normal value and of the finding of the existence of dumping*

(Council Regulation No 1225/2009, Arts 2(2), (3), (6) and 10(k))

1. In principle, when determining the normal value of a product, the question of the representativeness of domestic sales for the purposes of Article (2) of basic anti-dumping Regulation No 1225/2009, 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 Article 2(3) and (6) of that regulation, which establish a qualitative criterion linked to the nature of the sales themselves. Nevertheless, in so far as the volume of domestic sales constitutes a factor liable to affect price formation, the two criteria may interact, for example, where the domestic market is so limited that the prices are not determined by supply and demand. 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.

(see paras 24, 25)

2. When determining the normal value of a product, the ordinary course of trade is a concept designed to exclude 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. As is apparent from the third subparagraph of Article 2(1) and from Article 2(4) of basic anti-dumping Regulation No 1225/2009, those situations are examples of circumstances in which sales may be regarded as not having been made in the ordinary course of trade.

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, but also by the operators targeted, in circumstances which undermine the ordinary character of the relevant trade.

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 found in relation to Article 2.1 of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade 1994.

(see paras 27-30)

3. When determining the normal value of a product, a risk premium increasing sale prices to a particular domestic customer amounts in reality to compensation for the risk which the supplier takes by selling products to that customer and by allowing him 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 customer's identity and to the supplier's assessment of that customer'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, but which relates exclusively to the financial capacity of the particular domestic buyer.

Thus, 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 basic anti-dumping Regulation No 1225/2009 – 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. The flaw 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 of the existence of dumping.

(see paras 36, 38, 39)