



Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

1 October 2014*

(Appeal — Dumping — Implementing Regulation (EU) No 464/2011 — Importation of zeolite A powder originating in Bosnia and Herzegovina — Regulation (EC) No 1225/2009 — Article 2 — Determination of the normal value — Concept of ‘ordinary course of trade’)

In Case C-393/13 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 11 July 2013,

Council of the European Union, represented by J.-P. Hix, acting as Agent, assisted initially by G.M. Berrisch and subsequently by D. Geradin, avocats,

appellant,

the other parties to the proceedings being:

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

applicant at first instance,

European Commission,

intervener at first instance,

THE COURT (Second Chamber),

composed of R. Silva de Lapuerta, President of the Chamber, J.L. da Cruz Vilaça, G. Arestis (Rapporteur), J.-C. Bonichot and A. Arabadjiev, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 17 July 2014,

gives the following

* Language of the case: French.

Judgment

- 1 By its appeal, the Council of the European Union requests the Court to set aside the judgment of the General Court of the European Union in *Alumina v Council*, T-304/11, EU:T:2013:224 ('the judgment under appeal'), by which the General Court annulled 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') in so far as it concerns Alumina d.o.o. ('Alumina').

Legal context

- 2 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, and corrigendum at OJ 2010 L 7, p. 22) ('the basic regulation') provides in Article 2(1) to (4) and 2(6):

1. The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.

However, where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers.

Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship.

...

2. Sales of the like product intended for domestic consumption shall normally be used to determine normal value if such sales volume constitutes 5% or more of the sales volume of the product under consideration to the Community. However, a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned.

3. When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.

...

4. Sales of the like product in the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs (fixed and variable) plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price, and may be disregarded in determining normal value, only if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

...

6. The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

- (a) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;
- (b) the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;
- (c) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.'

Background to the dispute, the procedure before the General Court and the judgment under appeal

3 The background to the dispute relevant for the purposes of the present appeal is set out as follows in paragraphs 1, 3, 5 and 7 to 10 of the judgment under appeal:

'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).

...

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.

...

5 In calculating the normal value, the Commission used the method described in Article 2(3) of [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 to the provisional regulation).

...

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 [the contested regulation].
- 10 As regards the construction of the normal value, the Council ... 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.'
- 4 In support of its action before the General Court, Alumina raised two pleas in law, alleging an infringement, first, of Article 2(3) and (6) of the basic regulation and, secondly, of the first sentence of Article 2(6) of that regulation. By the second part of its second plea, Alumina claimed essentially that the Council had erred in law in regarding the sales by that company of the product at issue to its sole domestic customer as having been carried out in the ordinary course of trade, even though the prices had been increased by 25% by way of a premium covering the risk of late payment or non-payment. In that context, the General Court upheld that second part of the second plea in law by holding that the sale prices to Alumina's sole domestic customer did not reflect the ordinary course of trade within the meaning of Article 2 of the basic regulation and, consequently, it annulled the contested regulation in so far as it concerned Alumina.

Forms of order sought

- 5 By its appeal, the Council claims that the Court should:
- set aside the judgment under appeal;
 - dismiss the action brought by Alumina before the General Court; and
 - order Alumina to pay the costs of the proceedings at both instances.
- 6 Alumina contends that the Court should:
- primarily, dismiss the Council's appeal;
 - in the alternative, rule on the action at first instance and annul the contested regulation; and
 - order the Council to pay the costs.

The appeal

- 7 In support of its appeal, the Council relies on a single ground, directed against the General Court's findings in paragraphs 36 to 41 of the judgment under appeal, relating to the concept of sales carried out 'in the ordinary course of trade' within the meaning of the first subparagraph of Article 2(1) of the basic regulation.

Arguments of the parties

- 8 First of all, the Council takes the view that the General Court's assessment, in paragraphs 36 to 41 of the judgment under appeal, concerning the second part of the second plea in law raised by Alumina in its action, is vitiated by an error of law in so far as the General Court misconstrued the concept of sales carried out 'in the ordinary course of trade' within the meaning of Article 2(1) and (6) of the basic regulation. The General Court, it submits, erred in law in holding that sales which were not carried out in the ordinary course of trade by reason of the fact that the prices included a premium intended to cover the risk of non-payment by the purchaser, which is not connected to the value of the product, must not be taken into account in order to calculate the normal value. Such an interpretation of the concept of 'sales carried out in the ordinary course of trade' is, the Council submits, not substantiated either by the basic regulation or by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (GATT) included in Annex 1A to the Agreement establishing the World Trade Organisation (WTO) signed at Marrakech on 15 April 1994 (OJ 1994 L 336, p. 3) 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). The Council also takes the view that paragraph 17 of the judgment in *Minolta Camera v Council*, C-178/87, EU:C:1992:112, cited by the General Court in paragraph 27 of the judgment under appeal, referred to in paragraph 38 of that judgment, does not support the General Court's interpretation.
- 9 The criterion of the 'price reflecting the value of the product' chosen by the General Court is, according to the Council, inappropriate for determining whether a sale is carried out in the ordinary course of trade. In the first place, such an interpretation would oblige the institutions systematically to guess the basis of payment and of the implementation of the prices communicated and to determine the actual value of the product. In the second place, that interpretation carries a serious risk of abuse by favouring the inclusion, in sales contracts, of a clause stating that the prices include such a risk premium in order to avoid use of those prices in the determination of the normal value.
- 10 In particular, with regard to paragraph 38 of the judgment under appeal, the Council considers that the reference to Article 2(10)(k) of the basic regulation, concerning the other factors affecting prices, is not relevant. In any event, the adjustments provided for in that article are, it submits, intended to eliminate certain differences between the normal value and the export price and not only to adjust the normal value constructed on the basis of the price at which the product is sold in the ordinary course of trade on the domestic market.
- 11 In that regard, the Council considers that sales take place in the ordinary course of trade even if the seller has increased its sale price in order to cover the risk of late payment or non-payment. If that situation risked affecting the comparability of the normal value and the export price, it would be appropriate to make the adjustments provided for in Article 2(10) of the basic regulation at the time of the comparison between the normal price and the export price. In that regard, the Council notes that Article 2(10)(g) of the basic regulation provides expressly for adjustments to be made for differences in the cost of any credit granted for the sales under consideration.
- 12 Secondly, the Council takes the view that the General Court's interpretation of the concept of 'sales carried out in the ordinary course of trade', which excludes from that concept sales the price of which includes a premium intended to cover the risk that the purchaser may be unable or unwilling to pay, is contrary to the principle of legal certainty in so far as the institutions would be obliged systematically to guess the basis of payment and of the application of the prices stated and to determine the 'actual' value of the product, as has been pointed out in paragraph 9 of the present judgment.

- 13 Finally, the Council claims that the General Court failed to comply with its obligation to state reasons in so far as the judgment under appeal contains no explanations making it possible to conclude that the sales are not carried out in the ordinary course of trade if the price includes a premium to cover the risk of non-payment.
- 14 Alumina considers, principally, that the ground relied on by the Council in support of its appeal is inadmissible because it relates in reality to the assessment of the facts carried out by the General Court in paragraphs 31 to 35 of the judgment under appeal. It disputes, in the alternative, the merits of that ground of appeal and contends that it should be rejected.

Findings of the Court

Admissibility of the appeal

- 15 Alumina contends that the appeal is inadmissible on the ground that the Council challenges the findings of fact made in paragraphs 31 to 35 of the judgment under appeal by the General Court in order to hold that the sales of the products concerned were not carried out in the ordinary course of trade, without indicating the error of law which the General Court is alleged to have committed.
- 16 In this connection, it must be noted that it is clear from Article 256 TFEU and from the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to establish the facts and, second, to assess those facts. It is only where the material inaccuracy of the General Court's findings is evident from the procedural documents submitted to it or where the evidence used to support those facts has been distorted that those findings of fact and the appraisal of evidence constitute points of law subject to review by the Court of Justice on appeal. By contrast, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions which it has drawn from them (see the judgments in *Council v Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 55, and *Trubowest Handel and Makarov v Council and Commission*, C-419/08 P, EU:C:2010:147, paragraphs 30 and 31).
- 17 In the present case, the Council criticises the General Court for having misconstrued the concept of 'sales carried out in the ordinary course of trade' within the meaning of Article 2(1) and (6) of the basic regulation. On the basis of that interpretation, the Council submits, the General Court incorrectly classified the facts which served as the basis for the contested regulation in order to conclude that the defect connected with the taking into consideration of the risk premium affected the validity of the calculation of the normal value established for the purposes of assessing whether or not dumping had occurred.
- 18 The appeal therefore concerns neither the finding of fact as such nor the General Court's assessment of the evidence concerning the risk premium, but rather the interpretation of a provision of EU law and the application thereof to facts such as those established by the Council.
- 19 In those circumstances, the appeal must be declared admissible.

Substance

- 20 It should be noted that the determination of the normal value of a product constitutes one of the essential steps required to prove the existence of dumping. The first subparagraph of Article 2(1) of the basic regulation provides, in that regard, that '[t]he normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country'. In that regard, it should also be noted that, in the determination of the normal value, it is

apparent from both from the wording and the scheme of that provision that it is the price actually paid or payable in the ordinary course of trade which must, as a matter of priority, be taken into consideration in principle to establish the normal value. Under the first subparagraph of Article 2(3) of the basic regulation, that principle may be derogated from only when there are no sales of the like product in the ordinary course of trade or when such sales are insufficient or do not permit a proper comparison (judgment in *Goldstar v Council*, C-105/90, EU:C:1992:69, paragraph 12).

- 21 Those derogations from the method of establishing the normal value on the basis of actual prices are exhaustive in nature and relate to the characteristics of the sales effected rather than to the price of the product (judgment in *Ajinomoto and NutraSweet v Council and Commission*, C-76/98 P and C-77/98 P, EU:C:2001:234, paragraph 40).
- 22 However, as the Advocate General indicated in point 38 of his Opinion, neither the General Agreement on Tariffs and Trade of 1994 nor the basic regulation contains a definition of the concept of the ordinary course of trade. Admittedly, the basic regulation explicitly mentions, in Article 2, two cases of sales which, under certain conditions, cannot constitute sales in the ordinary course of trade.
- 23 In the first place, the third subparagraph of Article 2(1) of the basic regulation states that prices between parties which appear to be associated or to have concluded a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined, exceptionally, that those prices are unaffected by that relationship (judgment in *Petrotub and Republica v Council*, C-76/00 P, EU:C:2003:4, paragraph 85).
- 24 In the second place, under the first subparagraph of Article 2(4) of the basic regulation, sales of the like product on the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs may be disregarded in determining normal value only if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time.
- 25 However, Article 2 of the basic regulation does not thereby provide an exhaustive list of the methods making it possible to determine whether the prices were charged in the ordinary course of trade. In that regard, the Court has already stated that the ordinary course of trade is a concept which relates to the character of the sales themselves. It is designed to exclude, for the determination of the 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 (see the judgments in *Goldstar v Council*, EU:C:1992:69, paragraph 13, and *Ajinomoto and NutraSweet v Council and Commission*, EU:C:2001:234, paragraph 38).
- 26 In paragraph 36 of the judgment under appeal, the General Court found that the premium for non-payment constitutes compensation for the risk which the supplier takes by selling products to a particular customer. That premium does not therefore represent part of the value of the product sold and is also not linked to the characteristics of that product; rather, it depends on the customer's identity and on the supplier's assessment of that customer's financial capacity.
- 27 The General Court held, moreover, in paragraph 38 of the judgment under appeal, that the inclusion of such a risk premium 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 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.

- 28 As the Advocate General stated in point 43 of his Opinion, the purpose of the concept of ordinary course of trade is to ensure that the normal value of a product corresponds as closely as possible to the normal price of the like product on the domestic market of the exporter. Where a sale is concluded on terms and conditions that are incompatible with commercial practice for sales of the like product on that market at the relevant time for determining whether or not dumping has occurred, that sale does not constitute an appropriate basis on which to determine the normal value of the like product on that market.
- 29 In the present case, the General Court correctly held that the inclusion, in the determination of the normal value within the meaning of Article 2(3) of the basic regulation, of a premium such as that relating to the risk of non-payment amounted to the insertion into that calculation of a factor which does not go to establishing the price at which the product concerned would be sold in normal conditions on the domestic market. Such an element, relating exclusively to the financial capacity of the particular domestic buyer, is one of the elements of the sales which the institutions must take into account in order to decide whether those sales were carried out in the context of ordinary trade corresponding to the conditions of sale of the like product on the domestic market during the relevant period for determining whether or not dumping had occurred.
- 30 In that regard, it should be noted that the price of a product is only one of the conditions of a commercial transaction. The question whether a price is charged in the ordinary course of trade depends also on the other conditions of a transaction which are capable of affecting the prices charged, such as the volume of the transaction, the additional obligations assumed by the parties to that transaction or the delivery period. In the context of that assessment, which has to be carried out on a case-by-case basis, the institutions must take into consideration all the relevant factors and all the particular circumstances relating to the sales at issue.
- 31 In the present case, the General Court admittedly held, in paragraph 36 of the judgment under appeal, that the inclusion of the premium covering the risk of non-payment did not represent part of the value of the product sold and was not linked to the characteristics of that product and, in paragraph 38 of that judgment, it stated that the premium was an element which did not reflect part of the value of the product sold. However, as the Advocate General noted in point 58 of his Opinion, those paragraphs are not statements of principle by the General Court that the ordinary nature of sales necessarily depends on their price reflecting the value of the product.
- 32 It must therefore be held that the General Court's finding, in paragraph 38 of the judgment under appeal, that that premium artificially boosts the normal value calculated, is compatible with the Court's existing case-law according to which the inclusion of that risk premium was such as to affect the normal character of the sales (see the judgment in *Ajinomoto and NutraSweet v Council and Commission*, EU:C:2001:234, paragraphs 39 and 41). In this regard, it must be held that, in that context, the institutions must examine whether that condition of sale has been applied to all customers in general on the market of the like product or whether it was specific in the light of the situation of the customer at issue.
- 33 With regard to the Council's arguments concerning the reference made by the General Court to Article 2(10)(k) of the basic regulation in paragraphs 38 to 40 of the judgment under appeal, it should be noted that these are of no consequence because the determinant line of reasoning adopted by the General Court in that regard, set out in particular in paragraphs 36 and 37 of that judgment, is not vitiated by any error of law. Even if it should be established that that reference is mistaken, that would have no effect on the validity of the interpretation of the concept of sales carried out in the ordinary course of trade which was accepted by the General Court in the judgment under appeal and would therefore not be capable of leading to the setting-aside of that judgment.

- 34 With regard, finally, to the part of the ground of appeal alleging that the General Court failed in its obligation to state reasons, which, moreover, is not based on specific arguments, this can only be rejected given that the statement of reasons for the judgment under appeal sets out clearly and unequivocally the General Court's reasoning.
- 35 It follows from all of the foregoing that the single ground of appeal relied on by the Council cannot be upheld and, consequently, the appeal must be dismissed.

Costs

- 36 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Article 138(1) of those rules, applicable to appeal proceedings in accordance with Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Alumina has applied for the Council to be ordered to pay the costs, and as the latter has been unsuccessful, the Council must be ordered to pay the costs.

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

1. **Dismisses the appeal;**
2. **Orders the Council of the European Union to pay the costs.**

[Signatures]