



Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

22 March 2012*

((Dumping — Anti-dumping duty imposed on imports of certain prepared or preserved citrus fruits originating in China — Regulation (EC) No 1355/2008 — Validity — Regulation (EC) No 384/96 — Article 2(7)(a) — Determination of normal value — Non-market economy country — Commission's obligation to take due care to determine normal value on the basis of the price or constructed value in a market economy third country))

In Case C-338/10,

REFERENCE for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Germany), made by decision of 11 May 2010, received at the Court on 7 July 2010, in the proceedings

Grünwald Logistik Service GmbH (GLS)

v

Hauptzollamt Hamburg-Stadt,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, E. Juhász, G. Arestis (Rapporteur), T. von Danwitz and D. Šváby, Judges,

Advocate General: Y. Bot,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 8 September 2011,

after considering the observations submitted on behalf of:

- Grünwald Logistik Service GmbH (GLS), by K. Landry and F. Eckard, Rechtsanwälte,
- the Council of the European Union, by B. Driessen, acting as Agent, and by G. Berrisch, Rechtsanwalt,
- the European Commission, by T. Maxian Rusche and H. van Vliet, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 6 October 2011,

gives the following

* Language of the case: German.

Judgment

- 1 This reference for a preliminary ruling concerns the validity of Council Regulation (EC) No 1355/2008 of 18 December 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2008 L 350, p. 35, the 'definitive regulation').
- 2 The reference has been made in proceedings between Grünwald Logistik Service GmbH ('GLS') and Hauptzollamt Hamburg-Stadt (Principal Customs Office, City of Hamburg) concerning the collection by the tax authorities of a provisional anti-dumping duty on preserved mandarins imported from China by the applicant in the main proceedings.

Legal context

- 3 The provisions governing the application of anti-dumping measures by the European Union are set out in 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 2117/2005 of 21 December 2005 (OJ 2005 L 340, p. 17) ('the basic regulation').
- 4 Article 2(7)(a) of the basic regulation provides:

'In the case of imports from non-market economy countries ..., normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.'

- 5 In accordance with recital 42 in the preamble to Commission Regulation (EC) No 642/2008 of 4 July 2008 imposing a provisional anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2008 L 178, p. 19, 'the provisional regulation'), it was provisionally decided to determine normal value for all exporting producers in the sample on any other reasonable basis, in this case on the basis of the prices actually paid or payable in the European Union for a like product, in accordance with Article 2(7)(a) of the basic regulation.
- 6 Recital 58 of the provisional regulation contains the following statistics concerning the volumes of imports of the product in question from China:

‘Import volumes	2002/ 2003	2003/ 2004	2004/ 2005	2005/ 2006	IP
	PRC in tonnes	51 193	65 878	49 584	61 456

,

- 7 As is apparent from recital 12 of the provisional regulation, the Investigation Period [IP] covered the period from 1 October 2006 to 30 September 2007.
- 8 In recital 18 of the definitive regulation, it is concluded that, in the absence of any other comments, recitals 38 to 45 of the provisional regulation, on the determination of normal value, are thereby confirmed. In addition, recital 26 of the definitive regulation confirms the findings relating to the import volumes of the product in question in recital 58 of the provisional regulation.
- 9 Recital 17 of the definitive regulation states:

‘Following the imposition of provisional measures, all three Chinese sampled cooperating exporting producers and two unrelated EC importers questioned the use of Community Industry prices for the calculation of normal value. It was submitted that normal value should have been calculated on the basis of the [Chinese] production costs account taken of any appropriate adjustments relating to the differences between the [European Union] and the [Chinese] markets. In this respect it is noted that the use of information from a non-market economy country and in particular from companies which have not been granted MET [market economy treatment] would be contrary to the provisions of Article 2(7)(a) of the basic Regulation. This argument is therefore rejected. It was also argued that data on prices from all other importing countries or relevant published information could have been used as a reasonable solution account taken of the lack of analogue country cooperation. However, such general information, in contrast to the data used by the Commission, could not have been verified and cross checked with regard to [its] accuracy in line with the provisions of Article 6(8) of the basic Regulation. This argument is therefore rejected. No other argument was submitted that could cast doubt on the fact that the methodology used by the Commission is in line with the provisions of Article 2(7)(a) of the basic Regulation and, in particular, the fact that it constitutes in this particular case the only remaining reasonable basis for calculation of normal value.’

- 10 Article 1(1) and (2) of the definitive regulation provides:

‘1. A definitive anti-dumping duty is hereby imposed on imports of prepared or preserved mandarins (including tangerines and satsumas), clementines, wilkings and other similar citrus hybrids, not containing added spirit, whether or not containing added sugar or other sweetening matter, and as defined under CN [Combined Nomenclature] heading 2008, originating in the People’s Republic of China, falling within CN codes 2008 30 55, 2008 30 75 and ex 2008 30 90 (TARIC codes 2008 30 90 61, 2008 30 90 63, 2008 30 90 65, 2008 30 90 67, 2008 30 90 69) [“the product concerned”].

2. The amount of the definitive anti-dumping duty applicable for products described in paragraph 1 produced by the companies below shall be as follows:

Company	EUR/tonne net product weight	TARIC additional code
Yichang Rosen Foods Co., Ltd, Yichang, Zhejiang	531.2	A886
Huangyan No.1 Canned Food Factory, Huangyan, Zhejiang	361.4	A887
Zhejiang Xinshiji Foods Co., Ltd, Sanmen, Zhejiang and its related producer Hubei Xinshiji Foods Co., Ltd, Dangyang City, Hubei Province	490.7	A888
Cooperating exporting producers not included in the sample as set out in the Annex	499.6	A889
All other companies	531.2	A999’

11 Article 3(1) of the definitive regulation provides:

‘Amounts secured by way of the provisional anti-dumping duty pursuant to [the provisional regulation] shall be definitively collected at the rate of the provisional duty.’

The dispute in the main proceedings and the question referred for a preliminary ruling

12 GLS is a company which imports preserved mandarins from China into the European Union.

13 By declaration of 30 July 2008 GLS declared a consignment of preserved mandarins for importation, with CN code 2008 3055 900. By declaration of 9 October 2008, GLS released the consignment for free circulation. After the provisional regulation, but before the definitive regulation, had been adopted, the Hauptzollamt Hamburg-Stadt collected a provisional anti-dumping duty by way of security. By letter of 1 December 2008, GLS lodged an objection against that measure. Since its objection was dismissed, GLS brought an action, on 30 April 2009, before the Finanzgericht Hamburg (Finance Court, Hamburg).

14 The Finanzgericht Hamburg decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

‘Is an anti-dumping regulation adopted by the European Commission ... under the [basic Regulation] invalid because the Commission adopted that anti-dumping regulation by reference to a normal value determined on “[an]other reasonable basis” (in this case, on the basis of the prices actually paid or payable for like products in the Community) without conducting further investigations to ascertain a normal value after two companies in a country which the Commission had initially considered to be an analogue country had been contacted in writing but to no effect (one of them not replying at all and the other indicating its willingness to cooperate but failing to respond to the questionnaire which was then sent to it), and parties to the proceedings had drawn the Commission’s attention to another possible analogue country?’

15 By order of 15 June 2011, the Court asked the Commission to produce, inter alia, the Eurostat statistics for 2005 to 2008 which were available on 18 December 2008, relating to imports into the European Community of products ‘falling within CN codes ... 2008 30 55, 2008 30 75 and ex 2008 30 90’, referred to in Article 1 of the definitive regulation.

16 In response to that measure of inquiry, the Commission communicated to the Court the following statistics concerning imports of those products (in tonnes):

Volume imp.	2002/2003	2003/2004	2004/2005	2005/2006	2006/2007 (IP)
PRC	51 282.60	65 895.00	49 590.20	61 456.30	56 157.20
Israel	4 247.00	3 536.20	4 045.20	3 634.90	4 674.00
Swaziland	3903.10	3745.30	3785.70	3841.00	3155.50
Turkey	2 794.30	3 632.30	3 021.40	2 273.80	2 233.60
Thailand	235.80	457.90	485.10	532.50	694.80

Consideration of the question referred

17 By its question, the national court asks, in essence, whether the definitive regulation is invalid inasmuch as the Commission determined the normal value of the product concerned on the basis of the prices actually paid or payable for a like product in the European Union, without taking all the requisite care to determine that value on the basis of the prices paid for that same product in a market economy third country, contrary to Article 2(7)(a) of the basic regulation.

- 18 It should be noted that, under Article 3(1) of the definitive regulation, the amounts secured by way of the provisional anti-dumping duty pursuant to the provisional regulation are to be definitively collected at the rate of the provisional duty. Consequently, since, in those circumstances, GLS may place no reliance on any legal effect arising out of the provisional regulation (see, to that effect, Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport v Commission and Council* [1990] ECR I-2945, paragraph 13 and case-law cited), it must be found that the question referred for a preliminary ruling relates only to the validity of the definitive regulation.
- 19 First, it should be noted that, as far as concerns dumping, the determination of normal value constitutes one of the essential steps required to prove the existence of any dumping. Article 2(1) of the basic regulation lays down the general principle in accordance with which the normal value must, as a rule, be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.
- 20 Second, it should be noted that Article 2(7)(a) of the basic regulation provides that in the case of imports from non-market economy countries, in derogation from the rules set out in paragraphs 1 to 6 of Article 2, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country. The aim of that provision is to prevent account being taken of prices and costs in non-market-economy countries which are not the normal result of market forces (see Case C-26/96 *Rotexchemie* [1997] ECR I-2817, paragraph 9).
- 21 Under the second subparagraph of Article 2(7)(a) of the basic regulation, an appropriate market economy third country is to be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Indeed, it is for the European Union institutions, whilst taking account of the possible alternatives, to try to find a third country in which the prices for a like product are formed in circumstances which are as similar as possible to those in the country of export, provided that it is a market economy country.
- 22 The exercise of the European Union institutions' discretion is subject to review by the Court. As regards the choice of analogue country, it is desirable, in particular, to verify that those institutions have not neglected to take account of essential factors for the purpose of establishing the appropriate nature of the country chosen and that the information contained in the documents in the case was considered with all the care required for the view to be taken that the normal value was determined in an appropriate and not unreasonable manner (Case C-16/90 *Nölle* [1991] ECR I-5163, paragraphs 12 and 13).
- 23 Third, according to the wording of Article 2(7)(a) of the basic regulation, the normal value of imports from non-market economy countries is to be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the European Union, or where those are not possible, on any other reasonable basis.
- 24 It is therefore apparent from the wording and scheme of that provision that the main method of determining the normal value in the case of imports from non-market economy countries is that of 'the price or constructed value in a market economy third country' or 'the price from such a third country to other countries, including the [European Union]'. Failing that, the stated alternative method of determining the normal value is that that value is to be determined 'on any other reasonable basis, including the price actually paid or payable in the [European Union] for the like product, duly adjusted if necessary to include a reasonable profit margin'.
- 25 The use of that wording in Article 2(7)(a) of the basic regulation shows that the aim of according that priority to the main method laid down by the provision is to obtain a reasonable determination of the normal value in the country of export through the choice of a third country in which the price for a like product is formed in circumstances which are as similar as possible to those in the country of export, provided that it is a market economy country.

- 26 It follows that the discretion enjoyed by the European Union institutions in the choice of an analogue country does not authorise them to disregard the requirement to choose a market economy third country where such a choice is possible. As the Advocate General referred to in point 97 of his Opinion, they may choose not to apply the general rule set out in Article 2(7)(a) of the basic regulation for the determination of the normal value of products originating in non-market economy countries, using some other reasonable basis, only where it is impossible to apply that general rule.
- 27 In those circumstances, in accordance with the case-law referred to in paragraph 22 above, it is for the Court, in examining the validity of the definitive regulation, to verify that the European Union institutions have not neglected to take account of essential factors and that the information contained in the documents in the case was considered with all due care.
- 28 In the present case, no Chinese exporting producers were granted market economy treatment and the normal value was determined for all exporting producers, pursuant to Article 2(7)(a) of the basic regulation on any other reasonable basis, that is, on the basis of the data verified on-site at the premises of the cooperating European Union producers. Recitals 17 and 18 of the definitive regulation — which confirm the findings of the provisional regulation — state that no argument was submitted that could cast doubt on the methodology for determining the normal value. In particular, it is concluded that data on prices from all other importing countries or relevant published information could not have been used as a reasonable solution in view of the lack of analogue country cooperation, since such information could not have been verified in accordance with the provisions of Article 6(8) of the basic regulation. According to recital 40 of the provisional regulation, the Commission continued to seek potential analogue countries and, to that end, sought cooperation from two companies in Thailand, without success.
- 29 In that connection, in the Notice of initiation of an anti-dumping proceeding concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2007 C 246, p. 15), the Commission stated that, in accordance with the information in the complaint, the product concerned is not produced in significant quantities outside the European Union and China, and that interested parties were invited to comment on the choice of analogue country pursuant to the third subparagraph of Article 2(7)(a) of the basic regulation. Recital 41 of the provisional regulation states that two Chinese exporting producers and an association of importers disagreed with basing the normal value on the prices paid or payable in the European Union but did not offer any other appropriate solution.
- 30 However, Article 2(7)(a) of the basic regulation, under which priority is accorded to the main method laid down by that provision — which consists in determining normal value on the basis of the price or constructed value in a market economy third country — requires the European Union institutions to examine with all due care the information they possess, including, in particular, Eurostat statistics, in order to ascertain whether it is possible to select an analogue country for the purposes of that provision.
- 31 In particular, that provision's objective of seeking to find an analogue country where the price for a like product is formed in circumstances which are as similar as possible to those in the country of export would be jeopardised if the concept of 'reliable information made available', within the meaning of Article 2(7)(a) of the basic regulation, were restricted to information provided by the complainant in its complaint or to the information supplied subsequently by the parties concerned in the context of the investigation.
- 32 As the Advocate General stated in points 101 and 102 of his Opinion, the Commission has an obligation to consider on its own initiative all the information available, since in an anti-dumping investigation, it does not act as an arbitrator whose remit is limited to making an award solely on the basis of the information and the evidence provided by the parties to the investigation. In that

connection, it should be noted that Article 6(3) and (4) of the basic regulation authorises the Commission to request Member States to supply information to it and to carry out all necessary checks and inspections.

- 33 It is clear from the Eurostat statistics communicated to the Court, as referred to in paragraph 16 above, that during the years 2002/2003 to 2006/2007 there were significant imports into the European Union of products falling within CN codes 2008 30 55, 2008 30 75 and ex 2008 30 90, referred to in Article 1 of the definitive regulation, and coming from market economy third countries. The imports concerned came, in particular, from Israel, Swaziland, Turkey and Thailand.
- 34 In those circumstances, since the Eurostat statistics available at the time of the investigation suggest that products similar to the product concerned are produced in market economy third countries in quantities which are not insignificant, it was the duty of the Commission to examine on its own initiative whether one of those countries could constitute an analogue country for the purposes of Article 2(7)(a) of the basic regulation. The Commission was not entitled to confine itself to sending a single questionnaire to two Thai companies and conclude, because they did not reply, that it was impossible to determine the normal value on the basis of prices charged in a market economy third country. First, it must be noted that the quantity of imports from Thailand was markedly less than that from Israel, Swaziland or Turkey. The Thai companies' refusal to cooperate therefore in no way relieved the Commission of the task of examining the relevant data relating to other market economy third countries. Second, it must be noted that recital 17 of the definitive regulation simply states that calculating the normal value on the basis of prices in the European Union was the only reasonable basis, and fails to set out the grounds on which none of the abovementioned market economy third countries, other than Thailand, could be selected as an analogue country, from which it is apparent that the European Union institutions failed to examine with due care the information to be obtained from the data of the Eurostat statistics.
- 35 Lastly, the Commission's argument, raised at the hearing, according to which the Eurostat statistics produced in response to the Court's measure of inquiry concerned in large measure the imports of grapefruit and oranges, since they related to [the quantities of products imported] as an aggregate for the three CN codes, must be rejected. First, the statistics which the Court requested related to the 'product concerned', that is, the products referred to in Article 1 of the definitive regulation. Second, it is apparent from comparing the statistics reproduced in recital 58 of the provisional regulation relating to imports of the 'product concerned' from China and the statistics communicated to the Court during the present proceedings that the latter related entirely to imports of the product concerned.
- 36 In those circumstances, it must be found that since they have determined the normal value of the product concerned on the basis of the prices actually paid or payable in the European Union for a like product, without taking all due care to determine that value on the basis of the prices paid for that same product in a market economy third country, the Commission and the Council have infringed the requirements of Article 2(7)(a) of the basic regulation.
- 37 Consequently, the answer to the question referred for a preliminary ruling is that the definitive regulation is invalid.

Costs

- 38 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Council Regulation (EC) No 1355/2008 of 18 December 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China is invalid.

[Signatures]