Reports of Cases

JUDGMENT OF THE COURT (Seventh Chamber)

16 April 2015*

(Reference for a preliminary ruling — Dumping — Imports of certain pipes and tubes of iron or steel — Regulation (EC) No 384/96 — Article 3(7) — Damage to industry — Known factors — Causal link — Failure to take into account an investigation into anti-competitive practices by Community undertakings in the relevant sector — Regulation (EC) No 2320/97 — Validity)

In Case C-143/14,

REQUEST for a preliminary ruling from the Finanzgericht Berlin-Brandenburg (Germany), made by decision of 18 December 2013, received at the Court on 26 March 2014, in the proceedings

TMK Europe GmbH

v

Hauptzollamt Frankfurt (Oder),

THE COURT (Seventh Chamber),

composed of J.-C. Bonichot (Rapporteur), President of the Chamber, A. Arabadjiev and C. Lycourgos, Judges,

Advocate General: M. Wathelet,

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 29 January 2015,

after considering the observations submitted on behalf of:

— TMK Europe GmbH, by N. Meyer, Rechtsanwalt,

— the Italian Government, by G. Palmieri, acting as Agent, and by A. Collabolletta, avvocato dello Stato,

— the Council of the European Union, by B. Driessen, acting as Agent, and by R. Bierwagen, Rechtsanwalt,

— the European Commission, by T. Maxian Rusche and R. Sauer, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

* Language of the case: German.

gives the following

Judgment

1 The reference for a preliminary ruling concerns the validity of Council Regulation (EC) No 2320/97 of 17 November 1997 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic, repealing Regulation (EEC) No 1189/93 and terminating the proceeding in respect of such imports originating in the Republic of Croatia (OJ 1997 L 322, p. 1).

2 This reference has been made in proceedings between TMK Europe GmbH ('TMK Europe') and the Hauptzollamt Frankfurt (Oder) (the principal customs office in Frankfurt am Oder) ('the Hauptzollamt') concerning anti-dumping duties claimed from TMK Europe under Regulation No 2320/97 on the basis of imports made between 2001 and 2003.

Legal context

Regulation (EC) No 384/96

3 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) was repealed and replaced by 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, corrigenda in OJ 2010 L 7, p. 22). Nonetheless, having regard to the date of adoption of Regulation No 2320/97, whose legality is in issue before the referring court, the case must be considered on the basis of Regulation No 384/96 ('the basic regulation').

4 Article 1(1) of the basic regulation provides:

'An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.'

5 Article 3(1), (2) and (5) to (7) of the basic regulation under the heading 'Determination of injury' provides:

'1. Pursuant to this Regulation, the term "injury" shall, unless otherwise specified, be taken to mean material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and (b) the consequent impact of those imports on the Community industry.

…

5. The examination of the impact of the dumped imports on the Community industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation, the magnitude of the actual margin of dumping, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity;

factors affecting Community prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this Regulation. Specifically, this shall entail a demonstration that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Community industry as provided for in paragraph 5, and that this impact exists to a degree which enables it to be classified as material.

7. Known factors, other than the dumped imports, which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in this respect include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry.'

Regulation (EC) No 2320/97

6 Under Article 1(1) of Regulation No 2320/97, definitive anti-dumping duties were imposed on imports, in particular, seamless pipes falling within code 7304 31 99 of the Combined Nomenclature appearing in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987, concerning the tariff and statistical nomenclature and the Common Customs Tariff (OJ 1987 L 256, p. 1) and originating in, inter alia, Russia. Article 1(2) fixed at 26.8% the rate of the anti-dumping duties applicable to those imports.

Regulation (EC) No 1322/2004

7 Council Regulation (EC) No 1322/2004 of 16 July 2004 amending Regulation (EC) No 2320/97 imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in, inter alia, Russia and Romania (OJ 2004 L 246, p. 10), includes, in particular, the following recitals:

'…

(9) In Commission Decision 2003/382/EC [of 8 December 1999, concerning proceedings on the application of Article 81 of the EC Treaty (Case IV/E-1/35.860-B — Seamless steel tubes (OJ 1999 L 140, p. 1] ("the competition decision"), several Community producers were fined for involvement in two cases of infringement of Article 81(1) of the EC Treaty.

(10) Following the adoption of the competition decision, it was initially considered that the potential link with Regulation (EC) No 2320/97 was not such as to require a re-examination of the conclusions in that Regulation. However, following the publication of the competition decision, one of the interested parties has raised the issue of the possible impact of the anti-competitive conduct on the anti-dumping measures in force, and has provided further information regarding issues related to the injury and causation findings of Regulation (EC) No 2320/97. This Regulation aims at examining whether the competition decision should have any consequences for the anti-dumping measures currently in force.

…

(19) Given that the overlap in the product scope, the companies involved and the time period of the two proceedings, is only partial, it has been found that the impact of this anti-competitive conduct has affected, to only a limited extent, the anti-dumping investigation on which the definitive duties imposed in 1997 were based. In addition, when excluding the data of the companies found to have infringed Article 81(1) of the EC Treaty, the results appear to remain comparable to those calculated on the basis of the data of the ten cooperating Community producers, including those participating in the abovementioned anti-competitive conduct, i.e. injurious dumping would still exist. Thus, it is highly unlikely that the anti-competitive behaviour of the Community producers has had a material impact on the original findings of the anti-dumping investigation. However, it cannot be confirmed with certainty that the overall market conditions would have been the same in the absence of this anti-competitive conduct.

(20) In view of the above, it is considered appropriate to no longer apply the measures established by Regulation (EC) No 2320/97. This is in line with the principles of sound administration and good administrative practice. …'

8 Article 1 of Regulation No 1322/2004 amends Regulation No 2320/97 by inserting an Article 8 in accordance with which: 'Articles 1, 2 and 3 shall not be applied as from 21 July 2004'.

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

9 TMK Europe imported pipes originating in Russia during the years 2001 to 2003. The Hauptzollamt, being of the opinion that these imports fell within the scope of Regulation No 2320/97, requested it to pay anti-dumping duties in the sum of EUR 375178.13.

10 Before the Hauptzollamt, on 18 November 2003, TMK denied that it had to pay those duties, first maintaining that the imported pipes did not fall within the scope of that regulation.

11 Following publication of Regulation No 1322/2004 suspending application of Regulation No 2320/97 from 21 July 2004 on account of the competition decision imposing penalties on certain Community producers in that sector, TMK Europe submitted a new application for a refund of the antidumping duties relying on the illegality of Regulation No 2320/97.

12 Its objections having been rejected on 29 October 2010, TMK Europe brought an action for a refund of the contested antidumping duties before the Finanzgericht Berlin-Brandenburg (the Finance Court Berlin-Brandenburg) reiterating its two pleas in law alleging, first, that the imported pipes did not fall within the scope of Regulation No 2320/97, and, second, that the Regulation was unlawful.

13 According to the national court, if the first plea in law cannot succeed, by contrast, doubts remain on the answer to be given to the second plea.

14 Although the national court is inclined to the view that Regulation No 2320/97 is valid, it cannot determine with certainty whether the reasons that led the Council of the European Union to decide, by Regulation No 1322/2004, no longer to apply Articles 1 to 3 of Regulation No 2320/97 from 21 July 2004 should also have a retroactive effect on the validity of the latter regulation.

15 According to the national court, the question arises whether the Council, when it adopted Regulation No 2320/97 on 17 November 1997, should not have taken into account an investigation carried out by the European Commission from 25 November 1994 into the possible existence of anti-competitive practices within the Community industry. In accordance with the first sentence of Article 3(7) of the basic regulation, the known factors, other than the dumped imports, which at the same time are injuring the Community industry are also to be examined to ensure that injury caused by these other factors is not attributed to the dumped imports.

16 In those circumstances, the Finanzgericht Berlin-Brandenburg decided to stay proceedings and refer the following question to the Court for a preliminary ruling:

'Is Regulation No 2320/97 … invalid because [the Council], in breach of the requirements applicable to the determination of injury laid down in Article 3(7) of the basic regulation, assumed such injury to exist without taking into account in this regard the fact that, pursuant to an unpublished decision of 25 November 1994 (Case IV/35.304), adopted on the basis of, inter alia, Article 14(3) of Council Regulation No 17 of 6 February 1962, First Regulation implementing Articles 81 EC and 82 EC …, the Commission had carried out an investigation into the possible existence of anti-competitive practices concerning pipes and tubes of non-alloy steel that could be contrary to Article 53 of the Agreement on the European Economic Area of 2 May 1992 (OJ 1994 L 1, p. 3) and Article 81 EC?'

The question referred for a preliminary ruling

Admissibility of the plea of illegality raised before the national court

17 The Italian Government and the Commission maintain that the legality of Regulation No 2320/97 could no longer be called into question by means of an objection before the national court, on account of the failure of the applicant in the main proceedings to contest it within the period laid down in Article 230 EC, then in force.

18 In this regard, it must be borne in mind that the general principle which is intended to ensure that every person has, or will have had, the opportunity to challenge a Community measure which forms the basis of a decision adversely affecting him, does not in any way preclude a regulation from becoming definitive as against an individual in regard to whom it must be considered to be an individual decision and who could undoubtedly have sought its annulment under Article 230 EC, a fact which prevents that individual from pleading the illegality of that regulation before the national court. Such a conclusion applies to regulations instituting anti-dumping duties by virtue of their dual nature as acts of a legislative nature and acts liable to be of direct and individual concern to certain traders (see judgment in *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 37 and the case-law cited).

19 Regulations imposing an anti-dumping duty, although by their nature and scope of a legislative nature, may be of direct and individual concern to those producers and exporters of the product in question who are charged with practising dumping on the basis of information originally from their business activities. Generally, that is the case with those exporters and producers who are able to establish that they were identified in the measures adopted by the Commission and Council or were concerned by the preliminary investigations (see judgments in *Allied Corporation and Others* v *Commission*, 239/82 and 275/82, EU:C:1984:68, paragraphs 11 and 12; *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 21; and in addition *Valimar*, C-374/12, EU:C:2014:2231, paragraph 30).

20 The same is true of those importers of the product concerned whose resale prices were taken into account for the construction of export prices and who are consequently concerned by the findings relating to the existence of dumping (see judgments in *Nashua Corporation and Others* v *Commission and Council*, C-133/87 and C-150/87, EU:C:1990:115, paragraph 15; *Gestetner Holdings* v *Council and Commission*, C-156/87, EU:C:1990:116, paragraph 18; in addition, *Valimar*, C-374/12, EU:C:2014:2231, paragraph 31).

21 The Court has also held that importers associated with exporters in third countries on whose products anti-dumping duties have been imposed may challenge the regulations imposing such duties, particularly where the export price has been calculated on the basis of those importers' resale prices on the Community market and where the anti-dumping duty itself is calculated on the basis of those

resale prices (see judgments in *Neotype Techmashexport* v *Commission and Council*, C-305/86, EU:C:1990:295, paragraphs 19 and 20, and in addition *Valimar*, C-374/12, EU:C:2014:2231, paragraph 32).

22 Furthermore, the recognition of the right of certain categories of traders to bring an action for the annulment of an anti-dumping regulation cannot, however, prevent other traders from also being able to claim that they are individually concerned by such a regulation by reason of certain attributes which are peculiar to them and which differentiate them from all other persons (see judgments in *Extramet Industrie* v *Council*, C-358/89, EU:C:1991:214, paragraph 16, and *Valimar*, C-374/12, EU:C:2014:2231, paragraph 33).

23 However, as regards the case in the main proceedings, it has not been established that TMK Europe can be considered as belonging to one of the categories of traders identified above.

24 First, it is common ground that neither TMK Europe nor Sinara Handel GmbH ('Sinara'), the company it succeeded, is identified in Regulation No 2320/97 as an exporting undertaking. Nor do they appear as importing undertakings having been affected by the preparatory inquiries for that regulation.

25 Second, even though Sinara has been linked to the group of Russian exporting undertakings that participated in the anti-dumping procedure, it is not apparent from the documents before the Court either that the cost of exportation used to determine the anti-dumping duties has been calculated based on the price of resale within the Community by that importer, or that the anti-dumping duty itself has been calculated on the basis of those resale prices.

26 Last, having challenged the admissibility of the plea of illegality raised before the national court, the Commission must provide sufficient evidence to justify that inadmissibility. However, the arguments raised by the Commission in that regard do not establish that Sinara was sufficiently linked to the Russian exporting undertakings or fell within a particular situation differentiating it from all other economic operators, for it to be considered that that undertaking was concerned directly and individually, in the sense of Article 230 EC during the period allowed by that article for seeking annulment of Regulation No 2320/97 of 17 November 1997.

27 In those circumstances, and even if all the rights and obligations of Sinara had been transferred to TMK Europe, the only criteria submitted to the Court do not allow it to be considered established that TMK Europe could undoubtedly have sought the annulment of Regulation No 2320/97, in so far as that regulation fixed an anti-dumping duty on the importation of seamless pipes originating in Russia.

28 Such an assessment of the situation of the importing undertaking in the light of Regulation No 2320/97 cannot be called into question either because the exporting undertakings have not cooperated with the anti-dumping procedure or, as argued by the Italian Government, because TMK Europe could have challenged the basis for Regulation No 1322/2004.

29 It follows from the foregoing that TMK Europe could raise the plea of illegality in relation to Regulation No 2320/97 before the national court, which was not, therefore, bound by the definitive character of the anti-dumping duty imposed by that regulation.

30 Consequently, it is necessary for the Court to answer the question of the referring court.

On the validity of Regulation No 2320/97

31 The referring court raises the question whether, by failing to take into account the procedure that had been begun by the Commission from 25 November 1994, to establish the possible existence of anti-competitive practices within the Community industry, the Council in adopting Regulation No 2320/97 on 17 November 1997 had failed to have regard to the requirements of the basic regulation.

32 Pursuant to Article 3(5) of the basic regulation, the examination of the impact of the dumped imports on Community industry includes an evaluation of all relevant economic factors and indices having a bearing on the state of the Community industry. That provision contains a list of factors which may be taken into account and states that that list is not exhaustive and that decisive guidance is not necessarily given by any one or more of those factors (see judgment in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, EU:C:2013:865, paragraph 20 and the case-law cited).

33 Article 3(7) of the basic regulation provides that known factors other than the dumped imports which are injuring the Community industry at the same time must also be examined in order to ensure that injury caused by those factors is not attributed to the dumped imports pursuant to Article 3(6) which provides that it must be demonstrated, from all the relevant evidence presented, that the dumped imports are causing material injury to Community industry (see in this regard judgment in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, EU:C:2013:865, paragraph 21 and the case-law cited).

34 It is settled case-law that the determination of the existence of harm caused to the Community industry requires an appraisal of complex economic situations and the judicial review of such an appraisal must therefore be limited to verifying whether relevant procedural rules have been complied with, whether the facts relied on have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers. That is particularly the case as regards the determination of the factors injuring the Community industry in an anti-dumping investigation (see judgment in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, EU:C:2013:865, paragraph 22 and the case-law cited).

35 In determining injury, the institutions of the European Union are under an obligation to consider whether the injury on which they intend to base their conclusions does in fact derive from the dumped imports and must disregard any injury deriving from other factors, particularly from the conduct of Community producers themselves (see judgment in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, EU:C:2013:865, paragraph 23 and the case-law cited).

36 In this regard, it is for the EU institutions to ascertain whether the effects of those other factors were not such as to break the causal link between, on the one hand, the imports in question and, on the other, the injury suffered by the Community industry. It is also for them to verify that the injury attributable to those other factors is not taken into account in the determination of injury within the meaning of Article 3(7) of the basic regulation and, consequently, that the anti-dumping duty imposed does not go beyond what is necessary to offset the injury caused by the dumped imports (see judgment in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, EU:C:2013:865, paragraph 24 and the case-law cited).

37 However, if the EU institutions find that, despite such factors, the injury caused by the dumped imports is material under Article 3(1) of the basic regulation, the causal link between those imports and the injury suffered by the Community industry can consequently be established (see judgment in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, EU:C:2013:865, paragraph 25 and the case law cited).

38 So far as the case in the main proceedings is concerned, it must be stated that it is clear, both from the provisions of Regulation No 1322/2004 and from the grounds for the competition decision, that by virtue of a Commission decision an investigation was initiated on 25 November 1994 into the existence of anti-competitive conduct between undertakings operating on the Community market for seamless steel pipes. Nor is it disputed that this investigation did not enable the Commission to initiate a proceeding pursuant to Article 81 EC until 20 January 1999 by means of the statement of objections to the undertakings concerned.

39 Accordingly, on 17 November 1997, the date on which Regulation No 2320/97 was adopted, the competition decision had not yet been taken. Consequently, that decision itself cannot be considered a 'known factor' within the meaning of Article 3(7) of the basic regulation, which the Council was required to take into account in determining whether harm had been caused to Community industry so as to justify the anti-dumping measure under Regulation No 2320/97.

40 Concerning the investigation established by the Commission on 25 November 1994, it must be held that its purely preliminary nature prevents the anti-competitive conduct it was concerned with from being regarded, at least until the outcome of that investigation, as established and causing harm to Community industry.

41 Admittedly, as has been observed in paragraph 35 of the present judgment, the institutions of the Union are obliged to consider whether the injury they intend to rely on for the adoption of the anti-dumping measure in fact derives from the dumped imports and to put aside any harm deriving from other factors, especially those deriving from the conduct of Community producers. Relying on that obligation, TMK Europe contends, in essence, that it follows that if one of the institutions was aware of an investigation whose outcome was liable to establish that the actual conduct of Community producers could, at least in part, have contributed to the injury to Community industry, those institutions have not taken into account, in the anti-dumping procedure, harm duly established.

42 However, it is necessary to recall that it is, at all events, for the parties pleading the illegality of an anti-dumping regulation to adduce evidence to show that factors other than those relating to the imports could have had such importance that they called into question the causal link between the harm suffered by Community industry and the dumped imports (see, to this effect, judgment in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, C-10/12 P, EU:C:2013:865, paragraph 28 and the case-law cited).

43 TMK Europe has not provided such evidence, merely arguing that the fact that the Commission opened the investigation giving rise to the competition decision must necessarily have had an effect on the anti-dumping investigation, and further arguing that the mere fact that the outcome of the first of these investigations finally led the Council to suspend Regulation No 2320/97 is sufficient for it to be accepted that the first investigation influenced the anti-dumping investigation.

44 It follows that TMK Europe has not provided proof that factors other than those relating to imports could have been so significant as to call into question the existence of a causal link between the harm suffered by Community industry and the dumped imports.

45 Having regard to all the foregoing considerations, it must be held that consideration of the question referred has not disclosed anything that might affect the validity of Regulation No 2320/97.

Costs

46 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 (Seventh Chamber) hereby rules:

Consideration of the question raised has disclosed nothing to affect the validity of Council Regulation (EC) No 2320/97 of 17 November 1997, imposing definitive anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating in Hungary, Poland, Russia, the Czech Republic, Romania and the Slovak Republic, repealing Regulation (EEC) No 1189/93 and terminating the proceeding in respect of such imports originating in the Republic of Croatia.

[Signatures]