Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

28 February 2019*

(Appeal — Dumping — Implementing Regulation (EU) No 157/2013 — Imports of bioethanol originating in the United States of America — Definitive anti-dumping duty — Country-wide dumping margin — Actions for annulment — Non-exporting producer — *Locus standi* — Direct concern)

In Case C-466/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 20 August 2016,

Council of the European Union, represented by S. Boelaert, acting as Agent, and by N. Tuominen, avocată,

appellant,

the other parties to the proceedings being:

Marquis Energy LLC, established in Hennepin (United States), represented by P. Vander Schueren, advocaat, and by N. Mizulin and M. Peristeraki, avocats,

applicant at first instance,

European Commission, represented by T. Maxian Rusche and M. França, acting as Agents,

ePURE, de Europese Producenten Unie van Hernieuwbare Ethanol, represented by O. Prost and A. Massot, avocats,

interveners at first instance,

THE COURT (Third Chamber),

composed of M. Vilaras (Rapporteur), President of the Fourth Chamber, acting as President of the Third Chamber, J. Malenovský, L. Bay Larsen, M. Safjan and D. Šváby, 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 3 October 2018,

* Language of the case: English.

gives the following

Judgment

1 By its appeal, the Council of the European Union asks the Court to set aside the judgment of the General Court of the European Union of 9 June 2016, *Marquis Energy* v *Council* (T-277/13, 'the judgment under appeal', not published, EU:T:2016:343), by which the General Court, first, declared admissible the action brought by Marquis Energy LLC for the annulment of Council Implementing Regulation (EU) No 157/2013 of 18 February 2013 imposing a definitive anti-dumping duty on imports of bioethanol originating in the United States of America (OJ 2013 L 49, p. 10) ('the regulation at issue'), and, secondly, annulled the regulation at issue in so far as it concerned Marquis Energy.

Background to the dispute

2 The background to the dispute was set out in paragraphs 1 to 14 of the judgment under appeal and may, for the purposes of the present proceedings, be summarised as follows.

3 Marquis Energy is a US undertaking and producer of bioethanol.

4 Following a complaint lodged on 12 October 2011 by ePURE, de Europese Producenten Unie van Hernieuwbare Ethanol (the European Producers Union of Renewable Ethanol Association), the European Commission published, on 25 November 2011, a notice of initiation of an anti-dumping proceeding concerning imports of bioethanol originating in the United States of America (OJ 2011 C 345, p. 7), in which it stated its intention to use sampling to select the exporting producers in the United States of America to be investigated in the context of that proceeding ('the investigation').

5 On 16 January 2012, the Commission notified Marquis Energy and four other companies, namely, Patriot Renewable Fuels LLC, Plymouth Energy Company LLC, POET LLC and Platinum Ethanol LLC, that they had been selected to be part of the sample of exporting producers.

6 On 24 August 2012, the Commission sent Marquis Energy the provisional disclosure document stating its intention to continue the investigation, without the adoption of provisional measures, and to extend the investigation to traders/blenders. That document stated that it was not possible at that stage to assess whether the exports of bioethanol originating in the United States had been made at dumped prices, on the ground that the sampled producers did not make a distinction between domestic sales and sales for export, and all their sales were to unrelated traders/blenders established in the United States, which then blended the bioethanol with gasoline and sold it on.

7 On 6 December 2012, the Commission sent Marquis Energy the definitive disclosure document in which it examined, on the basis of the data from the unrelated traders/blenders, the existence of dumping causing injury to the Union industry and envisaged imposing definitive measures at the rate of 9.6% countrywide, for a period of three years.

8 On 18 February 2013, the Council adopted the regulation at issue, on the basis 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) ('the basic anti-dumping regulation'), imposing an anti-dumping duty on bioethanol, referred to as 'fuel ethanol', at a rate of 9.5% countrywide for a period of five years.

9 It is apparent from paragraph 13 of the judgment under appeal that the Council stated, in recitals 12 to 16 of the regulation at issue, that the investigation had shown that none of the sampled producers had exported bioethanol to the EU market and that it was not the US producers of bioethanol but the traders/blenders who were the exporters of the product concerned to the European Union, so that, in order to complete the dumping investigation, the Council had relied on the data of the two traders/blenders that had agreed to cooperate.

10 It is also stated, in paragraph 14 of the judgment under appeal, that the Council explained, in recitals 62 to 64 of the regulation at issue, that it was appropriate to establish a countrywide dumping margin, since the structure of the bioethanol industry and the way in which the product concerned was produced and sold on the US market and exported to the European Union made it impracticable to establish individual dumping margins for US producers.

The procedure before the General Court and the judgment under appeal

11 By application lodged at the General Court Registry on 15 May 2013, Marquis Energy brought an action for annulment of the regulation at issue.

12 The General Court, first of all, found that Marquis Energy's action was admissible, in the light of the arguments set out in paragraphs 40 to 118 of the judgment under appeal, after recalling first the principal conclusions in the relevant case-law on the interpretation of the fourth paragraph of Article 263 TFEU in general and in relation to dumping, and then examining in turn Marquis Energy's standing to bring proceedings and its interest in bringing proceedings against the regulation at issue.

13 The General Court upheld next, in paragraphs 121 to 168 and 203 of the judgment under appeal, the second part of the first plea in law raised by Marquis Energy, alleging an infringement by the Council of Article 9(5) of the basic anti-dumping regulation and, therefore, annulled the regulation at issue in so far as it concerned that undertaking.

14 In paragraphs 55 to 80 of the judgment under appeal, the General Court examined more specifically the issue of whether Marquis Energy was directly concerned by the regulation at issue, within the meaning of the fourth paragraph of Article 263 TFEU.

15 First, the General Court recalled, in paragraph 55 of the judgment under appeal, its case-law in accordance with which a company on whose products an anti-dumping duty is imposed is directly concerned by a regulation imposing that anti-dumping duty because it obliges the Member States' customs authorities to levy the duty imposed without leaving them any discretion.

16 Secondly, the General Court found, in the first place, in paragraphs 56 to 67 of the judgment under appeal, that Marquis Energy was directly concerned by the anti-dumping duty imposed by the regulation at issue, on the ground that it was a producer of the product, which — when imported into the European Union from the coming into force of the regulation at issue — was subject to the anti-dumping duty.

17 In that regard, the General Court relied, in paragraph 60 of the judgment under appeal, on four findings relating to the operation of the bioethanol market set out by the Council, the Council itself having considered, in the regulation at issue, that a significant volume of bioethanol from Marquis Energy had been exported on a regular basis to the European Union during the investigation period.

18 First, it observed, in paragraph 56 of the judgment under appeal, that Article 1(1) of the regulation at issue imposed a single countrywide anti-dumping duty on all imports of bioethanol, without identifying imports of bioethanol by their individual source by indicating the relevant exporting operators in the marketing chain.

19 Secondly, it pointed out, in paragraph 57 of the judgment under appeal, that the Council had noted, in recital 12 of the regulation at issue, that since none of the US sampled producers had exported bioethanol to the EU market, their sales had been made on the domestic market to unrelated traders/blenders, which had then blended the bioethanol with gasoline for the purpose of reselling it on the domestic market and for export, in particular to the European Union.

20 Thirdly, the General Court pointed out, in paragraph 58 of the judgment under appeal, that the Council had noted, in recital 12, that the five US producers included in the sample had mentioned exports of bioethanol to the European Union in their sampling form.

21 Fourthly, it recalled, in paragraph 59 of the judgment under appeal, that the Commission had initially selected a sample of six US bioethanol producers based on the largest representative quantity of exports of bioethanol to the European Union which could reasonably be investigated within the time available, although one company had been removed from the sample during the investigation because it had been found that its production had not been exported to the European Union during the investigation period.

22 In the second place, in paragraphs 68 to 79 of the judgment under appeal, the General Court rejected the various arguments raised by the Council and the Commission. It found in particular in that regard, in paragraph 76 of that judgment, that even supposing that the traders/blenders bore the anti-dumping duty and it were proven that the bioethanol marketing chain was interrupted so that they were not able to pass on the anti-dumping duty to the producers, the fact remained that the imposition of an anti-dumping duty changed the legal conditions under which the bioethanol produced by the sampled producers was marketed on the EU market, so that the legal position of the producers in question on that market was, in any event, directly and substantially affected.

Procedure before the Court and forms of order sought

23 By its appeal, the Council claims that the Court should:

– set aside the judgment under appeal;

– dismiss the action brought at first instance by Marquis Energy;

– order Marquis Energy to pay the costs incurred by the Council in the proceedings at first instance and on appeal.

24 In the alternative, the Council claims that the Court should:

– refer the case back to the General Court for reconsideration;

– reserve the costs of the proceedings at first instance and on appeal.

25 In its response, the Commission claims that the Court should:

– set aside the judgment under appeal;

– declare the action at first instance inadmissible;

– order Marquis Energy to pay the costs of the proceedings before the General Court and before the Court of Justice.

26 In the alternative, the Commission claims that the Court should:

– set aside the judgment under appeal;

– reject the second part of the first plea in law raised by Marquis Energy at first instance and, as regards the other parts of the first plea and the other pleas, refer the case back to the General Court for reconsideration;

– reserve the costs of both sets of proceedings.

27 In its response, Marquis Energy contends that the Court should:

– dismiss the appeal in its entirety and confirm the judgment under appeal;

– order the Council to pay the costs of the appeal and of the proceedings before the General Court.

The appeal

28 In its appeal, the Council raises three grounds. The first ground alleges that the General Court misinterpreted Article 263 TFEU and the relevant case-law, and failed to state reasons in the judgment under appeal. The second ground of appeal alleges that the General Court misinterpreted Article 9(5) of the basic anti-dumping regulation. The third ground of appeal alleges that the General Court was wrong to conclude that it was not impracticable to apply individual duties to the US sampled producers.

29 In its response and rejoinder, the Commission states that it fully supports the Council's appeal and endorses the arguments presented by the Council in its reply. In its rejoinder, the Commission submits, however, first of all, that Marquis Energy's response has been electronically signed by a person who claims to be a member of the Athens bar (Greece) and the Brussels bar (Belgium), but that neither that person's practising certificate nor power of attorney has been submitted which, if not rectified, is sufficient for that pleading to be declared non-existent.

30 Marquis Energy contends that the appeal is inadmissible in its entirety. First, it submits that, in its first and second grounds of appeal, the Council essentially contests factual issues, without raising distortion of the evidence by the General Court. Secondly, it contends that, in its third ground of appeal, the Council does not set out its arguments sufficiently clearly.

31 The Court will examine, first, the plea advanced by Marquis Energy alleging that the appeal is inadmissible and, secondly, the first part of that first ground of appeal raised by the Council, alleging that the General Court erred in law in concluding that Marquis Energy was directly concerned by the regulation at issue.

32 The Court must, however, examine, first of all, the Commission's claim that Marquis Energy's response was not validly signed and should, therefore, be rejected as non-existent.

33 In the present case, the original of Marquis Energy's response was, as the Advocate General observed in point 31 of his Opinion, duly signed by a lawyer, whose status is not in dispute and who has, in any event, in accordance with Article 44(1)(b) of the Rules of Procedure of the Court, duly produced, first, a certificate that she is authorised to practise before a court of a Member State and, secondly, the authority to act issued by Marquis Energy, signed by its president.

34 The Commission's claim must, therefore, be rejected as manifestly lacking any foundation.

Admissibility

35 It should be noted that the assessment of facts and evidence does not indeed constitute, save where the clear sense of the facts and evidence has been distorted, a question of law which is subject, as such, to review by the Court of Justice in the context of an appeal. However, where the General Court has determined or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review their legal characterisation and the legal conclusions which were drawn therefrom (judgments of 28 May 1998, *Deere* v *Commission*, C-7/95 P, EU:C:1998:256, paragraph 21; of 10 December 2002, *Commission* v *Camar and Tico*, C-312/00 P, EU:C:2002:736, paragraph 69; and of 28 June 2018, *Andres (insolvency of Heitkamp BauHolding)* v *Commission*, C-203/16 P, EU:C:2018:505, paragraph 77).

36 In the present case, by its first ground of appeal, the Council submits that the General Court made two errors of law in its interpretation of the fourth paragraph of Article 263 TFEU, in concluding that Marquis Energy was first directly, and secondly individually, concerned by the regulation at issue, in its capacity as a sampled US bioethanol producer. In the context of that first ground of appeal, the Council denies, more specifically, that Marquis Energy may be considered directly concerned by the regulation at issue, since, in essence, it did not directly export bioethanol to the European Union.

37 In so doing, the Council therefore puts in issue the legal conclusions which the General Court drew from its findings of fact, in this case recognising that Marquis Energy had standing to bring proceedings for the annulment of the regulation at issue, as provided for in the fourth paragraph of Article 263 TFEU, so that the appeal must, at the very least to that extent, be declared admissible (see, to that effect, judgments of 10 December 2002, *Commission* v *Camar and Tico*, C-312/00 P, EU:C:2002:736, paragraph 71; of 28 June 2018, *Germany* v *Commission*, C-208/16 P, not published, EU:C:2018:506, paragraph 76; and of 28 June 2018, *Germany* v *Commission*, C-209/16 P, not published, EU:C:2018:507, paragraph 74).

38 It follows that without needing at this stage to rule on whether the two other grounds of appeal raised by the Council are admissible, the plea of Marquis Energy alleging that the first ground of the appeal is inadmissible must be rejected.

The first part of the first ground of appeal, alleging an error of law on the part of the General Court in its assessment of whether Marquis Energy was directly concerned

Arguments of the parties

39 The Council submits that the General Court erred in law in concluding, in paragraph 67 of the judgment under appeal, that Marquis Energy was directly concerned by the regulation at issue, that conclusion being justified moreover by the factors set out in paragraphs 76, 78 and 79 of that judgment.

40 The Council states that the General Court held that Marquis Energy was directly concerned since it was a producer of the product which — when imported into the European Union — was subject to the anti-dumping duty. The imposition of such a duty changed the legal conditions under which the bioethanol was marketed on the EU market. According to the Council, the finding of such a direct effect is incompatible with the finding by the Court of Justice in its judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284, paragraphs 44 to 51). As a producer with no direct sales into the European Union, Marquis Energy can at most be indirectly affected in an economic manner, in that it is potentially placed at a competitive disadvantage compared to other bioethanol manufacturers on whose products there are no duties.

41 The Council argues that the General Court erred in finding that the anti-dumping duties changed the legal conditions under which the relevant product was marketed and therefore directly and substantially affected the position of all — exporting or non-exporting — sampled producers. In concluding that all producers were by default directly concerned, the General Court went beyond the settled case-law it cites, thereby engaging in judicial 'overreach'.

42 The General Court therefore disregarded the requirement relating to direct concern laid down in the fourth paragraph of Article 263 TFEU — which requires that the contested EU measure must directly affect the legal situation of the individual and leave no discretion to its addressees responsible for implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules — in accepting as sufficient a presumed and indirect change in Marquis Energy's economic situation.

43 Marquis Energy contends that the General Court did not err in law in concluding that it was directly concerned by the regulation at issue.

Findings of the Court

44 In accordance with the settled case-law of the Court of Justice, referred to by the General Court in paragraph 44 of the judgment under appeal, the condition that a natural or legal person must be directly concerned by the measure being challenged requires two cumulative criteria to be met, namely, first, the contested measure must directly affect the legal situation of that person and, secondly, it must leave no discretion to its addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules (see, in particular, judgment of 5 May 1998, *Compagnie Continentale (France)* v *Commission*, C-391/96 P, EU:C:1998:194, paragraph 41, and orders of 10 March 2016, *SolarWorld* v *Commission*, C-142/15 P, not published, EU:C:2016:163, paragraph 22, and of 21 April 2016, *Makro autoservicio mayorista and Vestel Iberia* v *Commission*, C-264/15 P and C-265/15 P, not published, EU:C:2016:301, paragraph 45).

45 As the Advocate General observed, in point 38 of his Opinion, it is the General Court's assessment of the first criterion that is being challenged by the Council and the Commission.

46 The institutions contend, in essence, that the General Court erred in law in concluding that Marquis Energy was directly concerned by the regulation at issue because a significant volume of its bioethanol production had been exported on a regular basis to the European Union, by traders/blenders, during the investigation period, so that its legal position on the EU market had been substantially affected as a result of the imposition of the anti-dumping duty.

47 It should be recalled in that regard that, in accordance with the Court's settled case-law, while regulations imposing anti-dumping duties on a product are by their nature and scope of a legislative nature, in that they apply generally to the economic operators concerned, it is conceivable that they may be of direct and individual concern to some of those operators, in particular, under certain conditions, to producers and exporters of that product (see, to that effect, judgment of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 19 and the case-law cited).

48 In that regard, the Court has repeatedly held that measures imposing anti-dumping duties are liable to be of direct and individual concern to producers and exporters of the product at issue who are alleged to be involved in dumping on the basis of data concerning their commercial activities. That is so where producers and exporters are able to establish that they were identified in the measures adopted by the Commission or the Council, or were concerned by the preliminary investigations (see, to that effect, in

particular, judgments of 21 February 1984, *Allied Corporation and Others* v *Commission*, 239/82 and 275/82, EU:C:1984:68, paragraphs 11 and 12, and of 7 May 1987, *NTN Toyo Bearing and Others* v *Council*, 240/84, EU:C:1987:202, paragraph 5).

49 It is apparent from that case-law that an undertaking cannot be considered directly concerned by a regulation imposing an anti-dumping duty solely on account of its capacity as a producer of the product subject to the duty, since the capacity as an exporter is essential in that regard. It is apparent from the wording of the case-law cited in the preceding paragraph that whether certain producers and exporters of the product at issue are directly concerned by a regulation imposing anti-dumping duties is connected, in particular, with the fact that they are alleged to be involved in dumping practices. A producer that does not export its production to the EU market, but simply sells it on its national market, cannot be alleged to be involved in dumping.

50 Consequently, as the Advocate General observed in point 57 of his Opinion, the mere fact that a product enters the EU market, even in a significant volume, is not a sufficient basis for finding that, once an anti-dumping duty has been imposed on that product, the legal situation of its producer is directly affected by that duty.

51 In the present case, as is apparent from recitals 12 and 63 of the regulation at issue and as the General Court found in paragraph 57 of the judgment under appeal, the sampled US producers, including Marquis Energy, did not directly export their production to the EU market during the investigation period. They were not, therefore, alleged to be involved in any dumping and no individual dumping margin could be established for them, as is apparent from recitals 64 and 76 of the regulation at issue and as found by the General Court in paragraphs 69 to 74 of the judgment under appeal.

52 Since those producers, including Marquis Energy, did not directly export their production to the EU market and were not, therefore, definitively identified in the regulation at issue as being exporters, they were neither directly concerned by the findings concerning the existence of a dumping practice, nor even directly affected in terms of their assets, since their production was not directly made subject to the anti-dumping duties imposed.

53 While US bioethanol producers, including Marquis Energy, were indeed identified in the acts of the institutions, in so far as they had initially been selected by the Commission in the sample of US exporting producers, that fact, noted moreover by the General Court in paragraph 81 of the judgment under appeal on the analysis of Marquis Energy's individual concern, is not sufficient for it to be concluded that the latter is directly concerned by the regulation at issue.

54 It is apparent from the case-law referred to in paragraph 48 above that only 'producers and exporters' of the product subject to anti-dumping duties alleged to be involved in dumping and also able to establish that they were identified in the acts of the institutions are considered directly concerned by the regulation imposing that duty.

55 As noted in paragraph 51 above, it is common ground that Marquis Energy did not directly export its bioethanol production to the EU market.

56 While the regulation at issue may indeed place a US bioethanol producer such as Marquis Energy at a competitive disadvantage, such a fact, if proven, cannot of itself allow the view to be taken that that company's legal position was affected by the provisions of that regulation and that those provisions were, therefore, of direct concern to it (see, to that effect, judgments of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 37, and of 17 September 2015, *Confederazione Cooperative Italiane and Others* v *Anicav and Others*, C-455/13 P, C-457/13 P and C-460/13 P, not published, EU:C:2015:616, paragraph 49).

57 The General Court erred in law, therefore, in concluding that Marquis Energy was directly concerned by the regulation at issue. Consequently, the judgment under appeal must be set aside, and there is no need to examine the other grounds of appeal.

The action before the General Court

58 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, after quashing a decision of the General Court, refer the case back to it for judgment or, where the state of the proceedings so permits, itself give final judgment in the matter.

59 In the present case, the Court considers that it has before it all the necessary information to give judgment itself on the admissibility of the action brought before the General Court by Marquis Energy.

60 In the present case, in order to prove that it was directly concerned by the regulation at issue, Marquis Energy pleaded, first, the fact that it had been identified in that regulation as being an exporting producer and included in the sample of exporting producers and, secondly, the fact that anti-dumping duties will apply to its future exports.

61 However, as is apparent from paragraphs 44 to 57 above, such evidence is insufficient to prove that Marquis Energy was directly concerned, within the meaning of the fourth paragraph of Article 263 TFEU, by the regulation at issue.

62 Consequently, bearing in mind that it was for Marquis Energy to prove that it was not only individually, but also directly, concerned by the regulation at issue, since those two conditions are cumulative (see, to that effect, judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, C-583/11 P, EU:C:2013:625, paragraph 76, and of 13 March 2018, *Industrias Químicas del Vallés* v *Commission*, C-244/16 P, EU:C:2018:177, paragraph 93), the plea of inadmissibility raised by the Council must be upheld and the action for annulment of the regulation at issue dismissed as inadmissible.

Costs

63 Under Article 184(2) of the Rules of Procedure, where the appeal is unfounded or where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs.

64 Under Article 138(1) of those rules, applicable to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

65 Since the Council has applied for costs and Marquis Energy has been unsuccessful, Marquis Energy must be ordered to bear its own costs and to pay those incurred by the Council relating to the appeal proceedings. Furthermore, since its action before the General Court has been dismissed in its entirety, Marquis Energy must be ordered to bear its own costs and to pay those incurred by the Council in the proceedings at first instance.

66 Pursuant to Article 140(1) of the Rules of Procedure, applicable to the procedure on appeal by virtue of Article 184(1) of those rules, the Member States and institutions which have intervened in the proceedings are to bear their own costs.

67 The Commission must bear its own costs both in the proceedings at first instance and on appeal.

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

1. **Sets aside the judgment of the General Court of the European Union of 9 June 2016, *Marquis Energy* v *Council* (T-277/13, not published, EU:T:2016:343);**

2. **Dismisses the action for annulment brought by Marquis Energy LLC as inadmissible;**

3. **Orders Marquis Energy LLC to bear its own costs and to pay those incurred by the Council of the European Union both in relation to the proceedings at first instance and the appeal;**

4. **Orders the European Commission to bear its own costs both in the proceedings at first instance and on appeal.**

Vilaras Malenovský Bay Larsen

Safjan Šváby

Delivered in open court in Luxembourg on 28 February 2019.

A. Calot Escobar
Registrar

K. Lenaerts
President