



Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

15 October 2020*

(Reference for a preliminary ruling – Customs union – Implementing Regulation (EU) No 999/2014 – Definitive anti-dumping duty on imports of solid fertilisers with an ammonium nitrate content exceeding 80% by weight – Definition – Regulation (EC) No 945/2005 – Determination of the ammonium nitrate content – Presumption that a product with a nitrogen content exceeding 28% by weight has an ammonium nitrate content exceeding 80% by weight)

In Case C-117/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Tax Disputes Commission under the Government of the Republic of Lithuania), made by decision of 8 February 2019, received at the Court on 15 February 2019, in the proceedings

‘Linas Agro’ AB

v

Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos,

THE COURT (Ninth Chamber),

composed of N. Piçarra, President of the Chamber, S. Rodin and K. Jürimäe (Rapporteur), Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

- ‘Linas Agro’ AB, by M. Juozaitis, E. Lenkauskas and V. Mitrauskas, advokatai,
- the Lithuanian Government, by K. Dieninis, G. Taluntytė and R. Butvydytė, acting as Agents,
- the European Commission, by S.L. Kalėda and N. Kuplewatzky, acting as Agents,

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

gives the following

* Language of the case: Lithuanian.

Judgment

- 1 This request for a preliminary ruling concerns the interpretation of Council Regulation (EC) No 945/2005 of 21 June 2005 amending Regulation (EC) No 658/2002 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia and Regulation (EC) No 132/2001 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in, inter alia, Ukraine, following a partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96 (OJ 2005 L 160, p. 1).
- 2 The request has been made in proceedings between ‘Linas Agro’ AB and the Muitinės departamentas prie Lietuvos Respublikos finansų ministerijos (Customs Department under the Ministry of Finance, Lithuania; ‘the central tax authority’) concerning the payment of definitive anti-dumping duty on imports of ammonium nitrate fertilisers.

Legal context

The basic regulations

- 3 Since the imports at issue in the main proceedings took place during the period from 1 January 2016 to 31 December 2017, they were subject in turn to 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 then to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21) (‘the basic regulations’). However, since the relevant provisions of those regulations were not substantially amended, only the relevant provisions of Regulation 2016/1036 will be set out.
- 4 Article 11 of Regulation 2016/1036, entitled ‘Duration, reviews and refunds’, provides in paragraphs 1 to 3:

‘1. An anti-dumping measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury.

2. A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury. Such an expiry review shall be initiated on the initiative of the Commission, or upon a request made by or on behalf of Union producers, and the measure shall remain in force pending the outcome of that review.

An expiry review shall be initiated where the request contains sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. Such likelihood may, for example, be indicated by evidence of continued dumping and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious dumping.

In carrying out investigations under this paragraph, the exporters, importers, the representatives of the exporting country and the Union producers shall be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request, and conclusions shall be reached with due

account taken of all relevant and duly documented evidence presented in relation to the question as to whether the expiry of measures would be likely, or unlikely, to lead to the continuation or recurrence of dumping and injury.

A notice of impending expiry shall be published in the *Official Journal of the European Union* at an appropriate time in the final year of the period of application of the measures as defined in this paragraph. Thereafter, the Union producers shall, no later than three months before the end of the five-year period, be entitled to lodge a review request in accordance with the second subparagraph. A notice announcing the actual expiry of measures pursuant to this paragraph shall also be published.

3. The need for the continued imposition of measures may also be reviewed, where warranted, on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter or importer or by the Union producers which contains sufficient evidence substantiating the need for such an interim review.

An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.

In carrying out investigations pursuant to this paragraph, the Commission may, inter alia, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established under Article 3. In those respects, account shall be taken in the final determination of all relevant and duly documented evidence.'

- 5 Article 13 of Regulation 2016/1036, entitled 'Circumvention', states, in the first to third subparagraphs of paragraph 1:

'Anti-dumping duties imposed pursuant to this Regulation may be extended to imports from third countries of the like product, whether slightly modified or not, or to imports of the slightly modified like product from the country subject to measures, or parts thereof, when circumvention of the measures in force is taking place.

Anti-dumping duties not exceeding the residual anti-dumping duty imposed in accordance with Article 9(5) may be extended to imports from companies benefiting from individual duties in the countries subject to measures when circumvention of the measures in force is taking place.

Circumvention shall be defined as a change in the pattern of trade between third countries and the Union or between individual companies in the country subject to measures and the Union, which stems from a practice, process or work for which there is insufficient due cause or economic justification other than the imposition of the duty, and where there is evidence of injury or that the remedial effects of the duty are being undermined in terms of the prices and/or quantities of the like product, and where there is evidence of dumping in relation to the normal values previously established for the like product, if necessary in accordance with the provisions of Article 2.'

- 6 Article 14 of Regulation 2016/1036, entitled 'General provisions', provides, in the first sentence of the first subparagraph of paragraph 1:

'Provisional or definitive anti-dumping duties shall be imposed by regulation, and collected by Member States in the form, at the rate specified and according to the other criteria laid down in the regulation imposing such duties.'

Implementing Regulation (EU) No 999/2014

- 7 Recitals 1, 2 and 44 to 48 of Commission Implementing Regulation (EU) No 999/2014 of 23 September 2014 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Article 11(2) of Regulation No 1225/2009 (OJ 2014 L 280, p. 19) are worded as follows:
- (1) By [Council] Regulation (EC) No 2022/95 [of 16 August 1995 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia (OJ 1995 L 198, p. 1)], the Council imposed a definitive anti-dumping duty on imports of ammonium nitrate currently falling within CN codes 3102 30 90 and 3102 40 90 and originating in Russia. Pursuant to a further investigation, which established that the duty was being absorbed, the measures were amended by Council Regulation (EC) No 663/98 [of 23 March 1998 amending Regulation No 2022/95 (OJ 1998 L 93, p. 1)]. Following a first expiry review and a first interim review pursuant to Articles 11(2) and 11(3) of [Regulation No 1225/2009] the Council, by Regulation (EC) No 658/2002 [of 15 April 2002 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia (OJ 2002 L 102, p. 1)], imposed a definitive anti-dumping duty of EUR 47.07 per tonne on imports of ammonium nitrate falling within CN codes 3102 30 90 and 3102 40 90 and originating in Russia. Subsequently, a product scope interim review pursuant to Article 11(3) of [Regulation No 1225/2009] was carried out and, by [Regulation No 945/2005], a definitive anti-dumping duty ranging between EUR 41.42 per tonne and EUR 47.07 per tonne was imposed on imports of solid fertilisers with an ammonium nitrate content exceeding 80% by weight, currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 20 originating in Russia.
- (2) Following a second expiry review and a second partial interim review pursuant to Article 11(2) and (3) of [Regulation No 1225/2009], the Council, by Regulation (EC) No 661/2008 [of 8 July 2008 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Article 11(2) and a partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96 (OJ 2008 L 185, p. 1)], maintained the measures in force. ...
- ...
- (44) The product concerned by this review is the same as the product defined in Regulation [No 661/2008], i.e. solid fertilisers with an ammonium nitrate content exceeding 80% by weight, currently falling within CN codes 3102 30 90, 3102 40 90, ex 3102 29 00, ex 3102 60 00, ex 3102 90 00, ex 3105 10 00, ex 3105 20 10, ex 3105 51 00, ex 3105 59 00 and ex 3105 90 20 and originating in Russia (hereinafter “AN” or “the product concerned”). ...
- (45) The main raw material used in the production of AN is gas, which accounts for 70% to 80% of the total costs of production. The product scope extension in 2005 aimed to cover also ammonium nitrate to which were added phosphorus and/or potassium nutrients, since it was found out that these mixtures had essentially the same basic physical and chemical characteristics and the same agronomic properties.
- (46) It should be noted that the CN codes 3102 30 90 and 3102 40 90 (respectively, “ammonium nitrate other than in aqueous solutions” and “mixtures of ammonium nitrate with calcium carbonate or other inorganic non-fertilising substances, with a nitrogen content exceeding 28% by weight”) can include AN used for industrial purposes (such as the production of explosives) as well as AN used for agricultural purposes. Both types have the same technical and chemical characteristics, can easily be interchangeable and are considered as the product concerned.

(47) Following disclosure, the representatives of the Russian authorities claimed that the product scope extension made in 2005 is inconsistent with the [World Trade Organisation (WTO)] Anti-Dumping Agreement because no determination of dumping, injury and causal link would have been made with respect to the additional products covered by the 2005 extension.

(48) This claim is unfounded for the reasons already mentioned in recital 22 and therefore rejected.’

- 8 Article 1(1) of Implementing Regulation No 999/2014 provides that ‘a definitive anti-dumping duty is hereby imposed on imports of solid fertilisers with an ammonium nitrate content exceeding 80% by weight currently falling within CN codes ... ex 3105 20 10 ... and originating in Russia’.
- 9 Pursuant to Article 1(2)(c) of Implementing Regulation No 999/2014, the fixed amount of duty (in euros per tonne) for all goods produced by companies other than those referred to in Article 1(2)(a) and (b) (TARIC additional code A999) is EUR 42.83 per tonne for solid fertilisers with an ammonium nitrate content exceeding 80% by weight, and a phosphorus content evaluated as P_2O_5 and/or a potassium content evaluated as K_2O of 6% by weight or more but less than 9% by weight (CN code 3105 20 10, TARIC code 50).

Regulation No 945/2005

- 10 Recitals 4, 6, 7, 16, 20 to 23, 28, 35 and 37 of Regulation No 945/2005 state:

‘(4) On 15 March 2004, the Commission received a request pursuant to Article 11(3) of [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)] to examine the scope of existing measures with a view to including new product types.

...

(6) The request referred to new product types defined as ammonium nitrate fertilisers with a nitrogen (“N”) content exceeding 28% and up to 33% by weight, to which up to and including 5% of P_2O_5 equivalent (phosphorus nutrient, “P”) and/or up to and including 5% of K_2O equivalent (potassium nutrient, “K”) were added, blended, mixed or processed. These products are referred to hereafter as “new product types mentioned in the request”.

(7) It was argued that the new product types mentioned in the request had essentially the same basic physical and chemical characteristics as the product concerned and were sold through the same channel of sales to the same end-users for the same purposes. In addition, the request mentioned that the new product types were classified, when imported into the Community, under the following CN codes: 3105 10 00, 3105 20 10, 3105 20 90, 3105 51 00, 3105 59 00 and 3105 90 91.

...

B. PRODUCT CONCERNED UNDER THE ORIGINAL REGULATIONS

(16) The product concerned is ammonium nitrate originating in Russia and Ukraine, falling within CN codes 3102 30 90 (ammonium nitrate other than in aqueous solutions) and 3102 40 90 (mixtures of ammonium nitrate with calcium carbonate or other inorganic non-fertilising substances, with an N content exceeding 28% by weight). Ammonium nitrate is a solid nitrogen fertiliser commonly used in agriculture. It is manufactured from ammonia and nitric acid, and its N content exceeds 28% by weight in prilled or granular form.

...

C. Results OF THE INVESTIGATION

...

1. Chemical and physical characteristics and end-uses of the product concerned and of the new product types mentioned in the request

- (20) The product concerned is manufactured from ammonia (NH_3) and nitric acid (HNO_3), the combination of which results in ammonium nitrate (NH_4NO_3 , hereinafter referred to as “AN”). The N content of the product concerned exceeds 28% by weight (it normally ranges between 33% and 34%). The ratio between the AN content and the N content, which depends on the atomic weight of the elements, is 2.86. Consequently, since the product concerned contains more than 28% by weight of N, it automatically contains more [than] 80% by weight of AN (normally between 94% and 97%). As mentioned in recital 17, the product concerned also incorporates marginal substances and/or nutrients, the overall content of which can never exceed 20% by weight, given that at least 80% of the product concerned is represented by AN.
- (21) Two key features characterise the chemical composition of the product concerned: the expression of the N content and the overall level of the N and AN content. The N is expressed as nitric nitrogen (nitrate ion NO_3^-) and as ammoniacal nitrogen (ammonium ion NH_4^+), and the ratio between the two is 1:1. The level of the N content always exceeds 28% by weight and, consequently, as seen above, the level of AN always exceeds 80% by weight.
- (22) With respect to the new product types mentioned in the request, it was found that they were also manufactured from ammonia and nitric acid, the N content exceeded 28% by weight and, consequently, the AN content exceeded 80% by weight. Beside AN, these new product types could also incorporate marginal substances and/or nutrients. In these products the N was also expressed as nitric nitrogen and ammoniacal nitrogen and the ratio between the two was also approximately 1:1.
- (23) However, the new product types mentioned in the request underwent an additional process aimed at adding primary nutrients ... other than N, i.e. P and/or K, whose presence transformed the product into a compound fertiliser ... This compound fertiliser could be obtained chemically or by blending. In spite of this addition of other primary nutrients and regardless of the type of transformation (chemical or blending), it was found that this process did not affect any of the key chemical features of the AN contained therein, that is to say the expression of the N content and the overall level of N and AN, which exceeded, respectively, 28% and 80% by weight.

...

- (28) It was therefore concluded that, from a chemical and physical/agronomic point of view, the new product types mentioned in the request could not be considered as the product concerned because of the presence of primary nutrients other than N, namely P and/or K. However, the product concerned and the new product types mentioned in the request were identical in relation to their AN content – as long as it exceeded 80% by weight – the marginal substances and nutrients that they might contain, as well as their basic end-uses. Therefore, the AN content and the marginal substances and nutrients of the new product types mentioned in the request should also be considered as the product concerned.

...

3. Conclusions

(35) In the light of the above findings, it is concluded that all new product types should be considered as the product concerned exclusively in relation to their content of AN – as long as this exceeds 80% by weight – together with marginal substances and nutrients, but not as far as the primary nutrients P and K are concerned. As a consequence, in order to apply the existing measures only to the product concerned incorporated in all new product types, the proportional application of the existing measures appears warranted.

...

(37) Finally, it is concluded that the description of the product concerned given in the operative part of the original Regulations needs to be clarified: the wording “ammonium nitrate” should be replaced by “solid fertilisers with an ammonium nitrate content exceeding 80% by weight”, to acknowledge that several fertilisers have an AN content exceeding 80% by weight, and have an N content expressed as nitric nitrogen and ammoniacal nitrogen exceeding 28% by weight, and to avoid confusion between the product concerned and its major content (AN).’

11 Recital 20 of Regulation No 945/2005 has the following footnote:

‘The atomic weight of N is 14.0067, of H – hydrogen – is 1.00794 and of O – oxygen – 15.9994. The overall weight of AN is therefore 80.04, of which 28.01 is represented by N. The ratio between AN and N corresponds to 2.86.’

12 Article 1(1) of Regulation No 945/2005 provides:

‘1. Article 1(1) of Regulation (EC) No 658/2002 shall be replaced by the following:

“1. A definitive anti-dumping duty is hereby imposed on imports of solid fertilisers with an ammonium nitrate content exceeding 80% by weight, falling within CN codes ... ex 3105 20 00, ... and originating in Russia.”

Combined Nomenclature

13 The Combined Nomenclature (CN) is set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as successively amended, so far as concerns the period at issue in the main proceedings, by Commission Implementing Regulation (EU) 2015/1754 of 6 October 2015 (OJ 2015 L 285, p. 1) and Commission Implementing Regulation (EU) 2016/1821 of 6 October 2016 (OJ 2016 L 294, p. 1).

- 14 Section VI, entitled ‘Products of the chemical or allied industries’, of Part Two of the CN, relating to the ‘schedule of customs duties’, includes Chapter 31 of the CN, which is entitled ‘Fertilisers’ and contains a table worded, so far as specifically concerns heading 3105 and its subheadings, as follows:

3105	Mineral or chemical fertilisers containing two or three of the fertilising elements nitrogen, phosphorus and potassium; other fertilisers; goods of this chapter in tablets or similar forms or in packages of a gross weight not exceeding 10 kg
...	...
3105 20	- Mineral or chemical fertilisers containing the three fertilising elements nitrogen, phosphorus and potassium
3105 20 10	- - With a nitrogen content exceeding 10% by weight on the dry anhydrous product
3105 20 90	- - Other
...	...

Integrated Tariff of the European Communities

- 15 Article 2 of Regulation No 2658/87, as amended, cited in paragraph 13 of the present judgment, provides:

‘An Integrated Tariff of the European [Union], hereinafter referred to as the “Taric”, which meets the requirements of the Common Customs Tariff, external trade statistics, the commercial, agricultural and other [European Union] policies concerning the importation or exportation of goods, shall be established by the Commission.

The tariff shall be based on the [CN] and include:

- (a) the measures contained in this Regulation;
- (b) the additional [European Union] subdivisions, referred to as ‘Taric subheadings’, which are needed for the implementation of specific [European Union] measures listed in Annex II;

...’

- 16 TARIC code 3105 20 10 50 is worded as follows: ‘Solid fertilisers with an ammonium nitrate content exceeding 80% by weight, and a phosphorus content evaluated as P_2O_5 and a potassium content evaluated as K_2O of 6% by weight or more but less than 9%’.
- 17 TARIC code 3105 20 10 90 is defined as follows: ‘Other’.

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

- 18 During the period from 1 January 2016 to 31 December 2017, Linas Agro, a company established in Lithuania, imported into Lithuanian territory ammonium nitrate fertiliser NPK 30-4-4 – which has a content by weight of 30% nitrogen, 4% phosphorus and 4% potassium – manufactured by the Russian undertaking PAO ‘Dorogobuzh’. In its import declarations, Linas Agro stated that the imported goods fell under TARIC code 3105 20 90 00 (‘other mineral or chemical fertilisers containing the three

fertilising elements nitrogen, phosphorus and potassium’) or TARIC code 3105 20 10 90 (‘other mineral or chemical fertilisers with a nitrogen content exceeding 10% by weight on the dry anhydrous product’).

- 19 When the Kauno teritorinė muitinė (Kaunas Customs Office, Lithuania; ‘the customs office’) carried out an audit, it found, on the basis of quality certificates from the manufacturer, that the nitrogen content of the fertiliser at issue in the main proceedings was 30% by weight, that is to say, more than 28%, and that the phosphorus and potassium content was 4% by weight for each of those elements. The customs office also carried out laboratory tests which confirmed that the nitrogen content of the fertiliser exceeded 28% by weight.
- 20 The customs office deduced therefrom, on the basis of the presumption set out in recitals 21 to 23 of Regulation No 945/2005, that the fertiliser at issue in the main proceedings necessarily had an ammonium nitrate content exceeding 80% by weight and that, in the light of the presence of the other primary nutrients (phosphorus and potassium), it fell under TARIC code 3105 20 10 50, the TARIC additional code being A 999.
- 21 The customs office thus imposed in respect of the fertiliser customs duty on imports of 6.5% and definitive anti-dumping duty of EUR 42.83 per tonne, and concluded that Linas Agro was liable to pay the sum of EUR 496 302 in respect of definitive anti-dumping duty, sums in respect of value added tax (VAT), default interest and a fine.
- 22 The complaint submitted by Linas Agro to the central tax authority was rejected by a decision of 16 November 2018.
- 23 In that decision, the central tax authority confirmed the position of the customs office. It stated that, by virtue of the presumption set out in recitals 21 to 23 of Regulation No 945/2005, it was not necessary to determine the precise ammonium nitrate content by means of laboratory tests as it was presumed. The documents provided by the manufacturer of the fertiliser at issue in the main proceedings, which indicated the primary nutrients contained in the fertiliser and their amount, were sufficient for the tariff classification of the fertiliser and imposition of the corresponding anti-dumping duty.
- 24 On 12 December 2018, Linas Agro brought proceedings against that decision before the Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Tax Disputes Commission under the Government of the Republic of Lithuania). Whilst, in support of its action, Linas Agro does not dispute the fact that the primary nutrient, namely nitrogen, accounts for 30% of the weight of the fertiliser at issue in the main proceedings, it contends that the mere fact that its nitrogen content is above 28% does not necessarily mean that its ammonium nitrate content exceeds 80% by weight and that the fertiliser was correctly classified under TARIC code 3105 20 10 50. Indeed, the proportion of ammonium nitrate in the fertiliser could not be determined solely on the basis of the ratio, as specified in the recitals of Regulation No 945/2005, between the ammonium nitrate content and the nitrogen content. Linas Agro states that the recitals of Regulation No 945/2005 do not have binding legal force, so that the central tax authority lacked a legal basis for its decision, in relying not on factual data resulting from laboratory tests but on the presumptions set out in the recitals of Regulation No 945/2005 regarding the ammonium nitrate content of compound fertilisers such as that at issue in the main proceedings.
- 25 Linas Agro also contests the central tax authority’s interpretation of the recitals of Regulation No 945/2005, observing that the term ‘product concerned’ referred to in recital 17 does not denote a compound fertiliser such as that at issue in the main proceedings but ammonium nitrate. It follows that the quantity of nitrogen must be measured in relation not to the total mass of the compound fertiliser but only in relation to that of the ammonium nitrate which that fertiliser contains.

26 It was in those circumstances that the Mokestinių ginčų komisija prie Lietuvos Respublikos Vyriausybės (Tax Disputes Commission under the Government of the Republic of Lithuania) decided to stay the proceedings and to refer the following questions to the Court for a preliminary ruling:

- (1) Are the statements set out in the preamble to Regulation No 945/2005, in particular in recitals 20 to 23, that, “if the nitrogen content of the product concerned exceeds 28% by weight, it consequently always contains more than 80% by weight of ammonium nitrate” to be regarded as a settled presumption enabling it to be concluded that, if the product concerned (ammonium nitrate fertiliser) contains 28% or more of nitrogen (N), its ammonium nitrate (AN) content is always more than 80%?
- (2) Is that presumption applicable to the new types of product concerned that are specified in Regulation No 945/2005, that is to say, to NPK fertilisers with a nitrogen (N) content equal to or exceeding 28% by weight, a ratio between ammoniacal and nitric nitrogen of approximately 1:1, and a phosphorus (P) and/or potassium (K) content not exceeding 12% by weight, for example, the NPK 30-4-4 fertiliser discussed in the present dispute?
- (3) If the answer to the above questions is in the affirmative, does the aforementioned presumption in Regulation No 945/2005 have binding legal force, that is to say, can it be relied on in classifying the NPK fertilisers specified in [the second question] under the TARIC codes, and, accordingly, for the purposes of the application of the measures (anti-dumping duty) in force, although Article 1(1) and Article 1(3) of Regulation No 945/2005 (and, correspondingly, Article 1(1) and Article 1(2)(c) of Implementing Regulation No 999/2014 which was in force at the time of completion of the import procedures at issue) relate the imposition of definitive anti-dumping duty not to the content of the chemical element nitrogen (N) in a product but to the content of the chemical compound ammonium nitrate (AN) and the content of phosphorus and potassium in a product?
- (4) For the purposes of the classification under TARIC codes of the NPK fertilisers referred to in [the second question] and, accordingly, for the purposes of the application of the measures (anti-dumping duty) in force – having regard to the objectives set out in recitals 35 and 36 of Regulation No 945/2005 of applying the measures in force to the new product types on the basis of the principle of proportionality, and of simplifying the customs procedure and the application of the appropriate duty rates corresponding to the amount of product concerned incorporated in the compound – can the presumption specified in [the first question] be relied upon when calculating (determining) the ammonium nitrate (AN) content of such fertilisers? In other words, after the content of nitrogen (N) in the NPK fertilisers referred to in [the second question] has been determined (on the basis of the documents provided by the importer at the time of customs clearance, or during laboratory tests), is the ammonium nitrate content calculated (determined) having regard to the ratio between the ammonium nitrate (AN) content and nitrogen (N) content defined in recital 20 of Regulation No 945/2005, which depends on the atomic weight of the elements and is 2.86, without any additional laboratory tests being conducted to determine the exact ammonium nitrate content?’

Consideration of the questions referred

27 By way of preliminary points, it should, first, be noted that Regulation No 945/2005, which the Court is asked by the referring court to interpret, amended Regulation No 658/2002 (‘the original regulation’) and clarified the definition of the product concerned by the measures imposed by the original regulation. Those measures were, subsequently, retained in force successively by Regulation No 661/2008 and Implementing Regulation No 999/2014, which consistently reproduced the definition of the product concerned as clarified by Regulation No 945/2005. It follows that, whilst

Implementing Regulation No 999/2014 is the anti-dumping regulation applicable *ratione temporis* to the dispute in the main proceedings, Regulation No 945/2005 remains relevant for the purpose of interpreting it.

- 28 Second, by judgment of 10 September 2008, *JSC Kirovo-Chepetsky Khimichesky Kombinat v Council* (T-348/05, not published, EU:T:2008:327), as interpreted by the judgment of the General Court of 9 July 2009, *JSC Kirovo-Chepetsky Khimichesky Kombinat v Council* (T-348/05 INTP, not published, EU:T:2009:261), the General Court annulled Regulation No 945/2005 in so far as it concerned JSC Kirovo-Chepetsky Khimichesky Kombinat, on the ground of infringement of Article 11(3) of Regulation No 384/96. Regulation No 945/2005 became final with regard to the other manufacturers and exporters of the product concerned, such as Dorogobuzh, as they did not seek its annulment within the period prescribed in the fifth paragraph of Article 230 EC.
- 29 The questions referred for a preliminary ruling should be examined in the light of those considerations.
- 30 By those questions, which it is appropriate to examine together, the referring court asks, in essence, whether Article 1 of Implementing Regulation No 999/2014, read in the light of recitals 20 to 23 of Regulation No 945/2005, must be interpreted as meaning that an ammonium nitrate fertiliser with a nitrogen content exceeding 28% by weight, a ratio between nitric nitrogen and ammoniacal nitrogen of approximately 1:1 and an overall phosphorus and potassium content not exceeding 12% by weight is presumed to have an ammonium nitrate content of more than 80% by weight for the purpose of imposition of the definitive anti-dumping duty which that article lays down, without it being necessary to carry out laboratory testing in order to determine the precise ammonium nitrate content.
- 31 Article 1 of Implementing Regulation No 999/2014 imposed a definitive anti-dumping duty on imports of solid fertilisers originating in Russia, having an ammonium nitrate content exceeding 80% by weight and falling within the various CN codes to which it refers.
- 32 Linas Agro contends, in essence, that that regulation is not applicable to the fertiliser at issue in the main proceedings since, despite a nitrogen content exceeding 28% by weight, its ammonium nitrate content does not exceed 80% by weight.
- 33 First, it must be examined whether the ammonium nitrate content of a fertiliser such as that at issue in the main proceedings may be presumed to exceed 80% when its nitrogen content exceeds 28% by weight.
- 34 As is clear from recital 1 of Implementing Regulation No 999/2014, the definition of the products to which that regulation applies results *inter alia* from the further detail provided in that regard by Regulation No 945/2005. As is apparent from recital 16 of Regulation No 945/2005, the product concerned by the original regulation was ammonium nitrate, a solid nitrogen fertiliser commonly used in agriculture, which is manufactured from ammonia and nitric acid and has a nitrogen content exceeding 28% by weight. Recitals 4 and 6 of Regulation No 945/2005 also state that the Commission received a request pursuant to Article 11(3) of Regulation No 384/96 to examine the scope of existing measures with a view to including new product types. Those new product types were defined as ammonium nitrate fertilisers with a nitrogen content exceeding 28% and up to 33% by weight, to which up to and including 5% of P_2O_5 equivalent and/or up to and including 5% of K_2O equivalent were added, blended, mixed or processed.
- 35 Recitals 20 to 23 of Regulation No 945/2005 thus provided certain details regarding the chemical and physical characteristics and end uses both of the product concerned as referred to in the original regulation and of the new product types subject to the anti-dumping measures.

- 36 Those recitals explained that the product concerned as referred to in the original regulation is manufactured from ammonia and nitric acid, the combination of which results in ammonium nitrate. Two key features characterise its chemical composition: the expression of the nitrogen content and the overall level of the nitrogen and ammonium nitrate content. First, the nitrogen is expressed as nitric nitrogen (nitrate ion NO_3^-) and ammoniacal nitrogen (ammonium ion NH_4^+), and the ratio between the two is approximately 1:1. Second, the nitrogen content always exceeds 28% by weight. The ratio between ammonium nitrate and nitrogen is 2.86 and is accounted for by the atomic weights. The atomic weight of nitrogen is 14.0067, that of hydrogen is 1.00794 and that of oxygen is 15.9994. The overall weight of ammonium nitrate is therefore 80.04, of which 28.01 is represented by nitrogen. Thus, given that the nitrogen content in the product concerned always exceeds 28% by weight, the ammonium nitrate content always exceeds 80% by weight. The product concerned as referred to in the original regulation also incorporates marginal substances and/or nutrients, the overall content of which can never exceed 20% by weight, given that at least 80% of the product concerned is represented by ammonium nitrate.
- 37 In other words, the original regulation was based on the premiss that, if the nitrogen content of the product concerned as referred to in that regulation exceeds 28% by weight, it may be presumed that the ammonium nitrate content exceeds 80% by weight, given that the nitrogen in a product of that kind comes from ammonium nitrate.
- 38 As is clear from recital 6 of Regulation No 945/2005, the review request referred to new product types defined as ammonium nitrate fertilisers with a nitrogen content exceeding 28% and up to 33% by weight, to which up to and including 5% of P_2O_5 equivalent (phosphorus nutrient, P) and/or up to and including 5% of K_2O equivalent (potassium nutrient, K) were added, blended, mixed or processed.
- 39 The presumption referred to in paragraph 37 of the present judgment also applies to those new product types. It was indeed found that the nitrogen content of those new product types exceeded 28% by weight and that, consequently, their ammonium nitrate content exceeded 80% by weight. In those products, the nitrogen was also expressed as nitric nitrogen and ammoniacal nitrogen, and the ratio between the two was also approximately 1:1.
- 40 Despite the addition of other primary nutrients and regardless of the type of transformation (chemical or blending), it was found that the process to which the new product types are subject did not affect any of the key chemical features of the ammonium nitrate contained therein, that is to say, the expression of the nitrogen content and the overall level of nitrogen and ammonium nitrate, which exceeded, respectively, 28% and 80% by weight.
- 41 Accordingly, it was concluded, in recital 35 of Regulation No 945/2005, that all new product types had to be considered as the product concerned, as referred to in the original regulation, exclusively in relation to their ammonium nitrate content, as long as this exceeded 80% by weight, and, in recital 37 of that regulation, that the description of the product given in the operative part of the original regulation needed to be clarified, in order to acknowledge that several fertilisers had an ammonium nitrate content exceeding 80% by weight and a nitrogen content, expressed as nitric nitrogen and ammoniacal nitrogen, exceeding 28% by weight, and to avoid confusion between the product concerned and its major content, ammonium nitrate. Thus, by virtue of Article 1 of Regulation No 945/2005, the term ‘ammonium nitrate’ which appeared in Article 1(1) of the original regulation was replaced by the words ‘solid fertilisers with an ammonium nitrate content exceeding 80% by weight’, and that definition of the product concerned was repeated word for word in the successive regulations imposing an anti-dumping duty, in particular Implementing Regulation No 999/2014.
- 42 It follows that, contrary to what Linas Agro contends, the presumption established in recitals 20 to 23 of Regulation No 945/2005 applies not only to the product concerned as referred to in the original regulation but also to the new product types, so that Article 1 of Implementing Regulation No 999/2014, read in the light of those recitals, cannot be interpreted as precluding the ammonium

nitrate content of an ammonium nitrate fertiliser from being presumed to exceed 80% by weight for the purpose of its tariff classification and the imposition of an anti-dumping duty under that implementing regulation where its nitrogen content exceeds 28% by weight.

- 43 Second, it should nevertheless be made clear that such a presumption is rebuttable.
- 44 As provided in Article 14(1) of the basic regulations, anti-dumping duties are to be imposed by regulation and collected by Member States in the form, at the rate specified and according to the other criteria laid down in the regulation imposing such duties. It is only where a product is classified under the CN subheading covered by an anti-dumping regulation and also displays all the characteristics of the product concerned that the duty becomes chargeable on that product (see, to that effect, judgment of 18 April 2013, *Steinel Vertrieb*, C-595/11, EU:C:2013:251, paragraphs 30 and 31).
- 45 It follows from the clear wording of Article 1 of Implementing Regulation No 999/2014 and the TARIC codes which are set out therein that the decisive criterion for the purpose of the tariff classification and of imposition of the anti-dumping duty is the actual ammonium nitrate content of the imported fertiliser, and not the ammonium nitrate content presumed on the basis of the nitrogen content. Accordingly, the presumption referred to in recitals 20 to 23 of Regulation No 945/2005 cannot be maintained if proof is provided that, despite a nitrogen content exceeding 28% by weight, the fertiliser concerned in fact has an ammonium nitrate content not exceeding 80% by weight.
- 46 Any other interpretation of Implementing Regulation No 999/2014, in the light of Regulation No 945/2005, would have the effect of extending the application of the anti-dumping measures to fertilisers which do not fall within the definition of the products covered by Implementing Regulation No 999/2014. It should be noted that the extending of the application of anti-dumping duties to products that are different from the product concerned by an anti-dumping regulation is incompatible with the objective and general scheme of the basic regulations (see, by analogy, judgment of 18 April 2013, *Steinel Vertrieb*, C-595/11, EU:C:2013:251, paragraph 43).
- 47 Third, in order to respond to the referring court's queries concerning the means of proof for the purpose of rebutting that presumption, such as laboratory testing, it should be recalled that it has been consistently held that, in the absence of EU rules governing the matter, it is for the domestic legal system of each Member State to lay down the detailed procedural rules governing actions for safeguarding rights which individuals derive from EU law, provided that the principles of equivalence and effectiveness are observed (see, to that effect, judgment of 13 March 2007, *Unibet*, C-432/05, EU:C:2007:163, paragraphs 39 and 82).
- 48 It is therefore for the referring court to determine, pursuant to the national procedural rules, whether the evidence adduced by Linas Agro is capable of rebutting the presumption set out in recitals 20 to 23 of Regulation No 945/2005 and, as the case may be, whether laboratory testing should be carried out in order to determine the actual ammonium nitrate content of the fertiliser at issue in the main proceedings.
- 49 It follows from the foregoing that Article 1 of Implementing Regulation No 999/2014, read in the light of recitals 20 to 23 of Regulation No 945/2005, must be interpreted as meaning that an ammonium nitrate fertiliser with a nitrogen content exceeding 28% by weight, a ratio between nitric nitrogen and ammoniacal nitrogen of approximately 1:1 and an overall phosphorus and potassium content not exceeding 12% by weight may be presumed, until proof to the contrary is provided, to have an ammonium nitrate content of more than 80% by weight for the purpose of imposition of the definitive anti-dumping duty which that article lays down, without it being necessary to carry out laboratory testing in order to determine the precise ammonium nitrate content.

Costs

50 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 (Ninth Chamber) hereby rules:

Article 1 of Commission Implementing Regulation (EU) No 999/2014 of 23 September 2014 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009, read in the light of recitals 20 to 23 of Council Regulation (EC) No 945/2005 of 21 June 2005 amending Regulation (EC) No 658/2002 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia and Regulation (EC) No 132/2001 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in, inter alia, Ukraine, following a partial interim review pursuant to Article 11(3) of Regulation (EC) No 384/96, must be interpreted as meaning that an ammonium nitrate (AN) fertiliser with a nitrogen (N) content exceeding 28% by weight, a ratio between nitric nitrogen and ammoniacal nitrogen of approximately 1:1 and an overall phosphorus and potassium content not exceeding 12% by weight may be presumed, until proof to the contrary is provided, to have an ammonium nitrate (AN) content of more than 80% by weight for the purpose of imposition of the definitive anti-dumping duty which that article lays down, without it being necessary to carry out laboratory testing in order to determine the precise ammonium nitrate content.

[Signatures]