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The General Court of the EU annuls the AD duties on imports of biodiesel from Argentina and Indonesia

General Court, 15 September 2016



In a series of rulings issued on 15
September 2016, the General Court of
the European Union (GC) annulled the
anti-dumping (AD) duties imposed on
imports of biodiesel from Argentina
and Indonesia but confirmed the
possibility for the EU to tackle price
distortions through the AD
instrument¹.

The GC rulings address the issue whether the finding of price distortions caused by State interventions can entitle the EU disregard the prices of the raw materials included in the records of an exporter of a market economy country and use data from third countries to adjust those records, when calculating the normal value in the context of an AD investigation.

In principle, the normal value is determined on the basis of the price of the product under investigation on the exporter's domestic market. However, Article 2 (3) of the basic AD Regulation allows the EU institutions to construct the normal value on the basis of the costs of production of the product in question in two situations: where there are no or insufficient sales of the product in the ordinary course of trade, or where sales in the ordinary course of trade do not permit a proper comparison because of a "particular market situation". Such a "particular market situation" exists when the prices of the product concerned are artificially low.

Under the first paragraph of Article 2 (5) of the basic Regulation, when using a constructed normal value, the EU institutions should use the cost data indicated in the records of the parties under investigation. By way of derogation, the second paragraph of Article 2 (5) of the basic Regulation provides for a possibility to adjust the costs on the basis of information from other representative markets, when the investigating authority considers that the costs associated with the production and sale of the product "are not reasonably reflected" in the records of the parties concerned.

This provision, which forms the legal basis of the so called "cost adjustment methodology", transposes Article 2.2.1.1 of the WTO Anti-dumping agreement (WTO ADA).

In practice, Article 2 (5) of the basic Regulation is used by the EU institutions to adjust the costs of production for exporting producers operating in market economies, when they consider that the prices are artificially low due to government intervention. This usually results in the imposition of higher AD duties.

As argued by some authors, this possibility of determining the normal value on the basis of cost data from third countries should only be possible under Article 2 (7) of the basic Regulation, for AD proceedings involving non-market economy countries.

This methodology has nevertheless been used by the EU in context of the AD investigation against imports of biodiesel from Argentina and Indonesia, two market economies. The Commission considered that the Argentinian and Indonesian domestic prices of soybean and crude palm oil, the main raw materials for the production of biodiesel in these countries, were distorted due to the Differential Export Tax System (DET system) applied in those countries. Under this DET system, there was a higher export tax on inputs (i.e. soybean and crude palm oil) and a lower export tax on the end product (biodiesel). As argued by the Commission, this artificially lowered the prices for the inputs on the domestic market, thereby distorting the production costs of Argentinian and Indonesian biodiesel producers.

Consequently, when constructing the Argentine and Indonesian producers' normal value, the Commission replaced the costs reported in their records for soybeans and crude palm by reference prices published by the Argentinian and Indonesian authorities.

In the Commission's view, these prices reflected the level of international prices and the price that would have prevailed without the alleged distortion.

¹ Rulings issued by the General Court in cases T- 139/14, T-121/14, T-120/14, T-118/14, T-117/14, T-112/14, T-111/14 and T- 80/14.

Argentina and Indonesia challenged the EU AD measures before the WTO, in two separate cases. In parallel, 13 exporters of Argentinian and Indonesian biodiesel challenged the duties before the GC. The parties claimed that the EU institutions acted inconsistently with the WTO ADA by failing to calculate the cost of production of biodiesel on the basis of the records kept the parties under investigation.

In a report of 29 March 2016, which is currently under appeal before the WTO's appellate body, the WTO panel upheld Argentina's claim. It considered that the reason stated by the EU authorities for disregarding exporters' costs – i.e. because the prices for the input were artificially lower than international prices due to an alleged distortion – is an insufficient legal basis for concluding that the exporters' records do not reasonably reflect the costs associated with the production and sale of biodiesel.

As stressed by the WTO panel, the proper interpretation of "provided such records ... reasonably reflect the costs associated with the production and sale of the product under consideration" under Article 2.2.1.1 calls for an assessment of whether the costs set out in a producer's records correspond – within acceptable limits – in an accurate and reliable manner, to all the actual costs incurred by the particular producer or exporter for the product under consideration" (emphasis added).²

The WTO panel's report therefore suggests that the cost adjustment methodology provided in Article 2.2.1.1 of the WTO ADA and transposed in Article 2 (5) of the AD basic regulation of the EU only pertains to the quality of the exporters' records and should not be used as a tool to tackle price distortions caused by State intervention.

The Court of Justice of the European Union (CJEU) seems to have adopted a different position. In a ruling issued prior to the publication of the WTO panel's report, *Acron and Dorogobuzh v. Council* of 7 February 2013, (T-235/08), the CJEU ruled that the EU institutions were entitled to disregard the prices of the raw

materials included in the exporting producers' records and use data from third country markets to adjust those records, when such prices were distorted because of government interventions. In this case, the prices of the raw materials for the production of the product under investigation were directly regulated by Russia, the exporting State.

The situation was different in the biodiesel case. In effect, contrary to the Russian case, the prices of the raw materials in Argentina and Indonesia were not directly regulated by the government but indirectly influenced by the DET system. Nonetheless, the GC considered that this factor did not "in itself", rule out the possibility for the institutions to adjust the exporter's cost data on the basis of information from third countries.

However, the GC ruled that where the distortion relied upon by the EU institutions is not an "immediate consequence" of the State measure from which it originates, the EU institutions must prove that this measure have led to an "appreciable distortion" of the prices of the raw materials. As stressed by the GC, another interpretation of the exception provided for in Article 2(5) of the basic AD regulation, would risk jeopardizing the principle that the exporting producer's records are the prime source of information in order to establish the costs of production of a product under investigation.

In the cases at issue, the GC considered that the EU institutions failed to establish the extent to which the DET system had led to an appreciable distortion of the prices of the main raw materials in Argentina and Indonesia. As a result, the GC concluded that by disregarding the prices of the raw materials contained in the records of the Argentinian and Indonesian exporting producers, the EU institutions had infringed Article 2 (5) of the basic AD Regulation. On this basis, the GC annulled the AD duties imposed on the biodiesel exported by the applicant companies.

² Paragraph 7.247 of the WTO panel's report.

While tightening its interpretation of the conditions set in Article 2 (5) of the basic AD regulation, the GC nonetheless confirmed the possibility for the EU institutions to use the cost adjustment methodology as a tool to tackle price distortions caused by State interventions in the context of AD proceedings involving market economy countries.

This interpretation of Article 2 (5) of the basic AD regulation, which does not seem fully in line with the position expressed by the WTO panel, could be challenged before the WTO. This could particularly be the case if the WTO appellate body confirms the findings of the WTO panel of 29 March 2016 and if China obtains the market economy status as of December 2016.

However, in any case, the GC's rulings will not take effect until 26 November 2016, the deadline for a possible appeal. If an appeal is then filed by the EU institutions biodiesel exports from the two countries would still be subject to duties until the CJEU issues its final ruling.

Contact:

Steven Verschuur

T: +32(0) 2 774 6440

E: steven.verschuur@hvglaw.nl

Laurène Mélia

T: +32(0) 2 774 9928

E: laurene.melia@hvglaw.be

Melina Stroungi

T: +32(0) 2 774 9062

E: melina.stroungi@hvglaw.be

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