

Analysis



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“Court recalls the Commission’s broad discretion in conducting anti-dumping investigations”

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Suggested citation: Jin Woo Kim, “Court recalls the Commission’s broad discretion in conducting anti-dumping investigations”, *EU Law Live*, 8 February 2022

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On 20 January 2022, the Court of the Justice issued its judgement in *Hubei Xinyegang Special Tube (C-891/19 P)*. In essence, the Court recalled the European Commission’s broad discretion in conducting anti-dumping (AD) investigations and, thus, annulled the General Court’s ruling, which had found that the Commission had violated the [EU Basic AD Regulation](#) and that [the regulation imposing AD duties](#) challenged by a Chinese producer were invalid, in so far as it concerned the producer.

Background

In February 2016, the Commission [initiated](#) an AD investigation on imports of certain seamless pipes and tubes of iron or steel from China. In May 2017, the Commission adopted the regulation imposing definitive AD duties on Chinese imports which was set at 54.9% for Hubei Xinyegang (Xinyegang). In August 2017, Xinyegang sought the annulment of AD duties before the General Court, arguing that the Commission failed to take into account certain segmentation of the market of the product and certain volume of the product in its price undercutting analysis. In September 2019,

the [General Court](#) agreed with Xinyegang, and ruled that the Commission failed to take account of all the relevant factors in its price undercutting analysis, in breach of the EU Basic AD Regulation. Thus, the General Court annulled the regulation imposing AD duties, in so far as it concerned Xinyegang. However, the Commission appealed the General Court ruling, asserting, in essence, that: (i) it was not required to carry out a price undertaking analysis by market segment, and the product control number (PCN) method, which is PCN-by-PCN comparison, was appropriate to take account of the market segmentation; (ii) the General Court misinterpreted Article 3(2) and (3) of the EU Basic AD Regulation; and (iii) the General Court applied an excessively strict standard of judicial review.

The ruling of the Court of Justice

PCN method in the price undercutting analysis

At the outset, the Court of Justice stressed that, given the broad discretion enjoyed by the Commission in AD investigations, **judicial review must be limited to verifying that there**

has been no manifest error of assessment. In this regard, the Court of Justice noted that the General Court did not find that the Commission, in applying the PCN method, manifestly erred in its assessment.

During the investigation, the relevant differences between product types were taken into consideration in the PCN, which allowed the Commission to ensure that only comparable products are compared with each other and that the main characteristics of the market segments are distinguished by PCN. Thus, the Court found that the Commission did take account of the market segments of the product in its price undercutting analysis by applying the PCN method. Accordingly, **the Commission cannot be criticised for having manifestly erred in its assessment, and the General Court exceeded the limits of judicial review.**

While the Commission may be, in principle, required to carry out an additional analysis of price undercutting in exceptional circumstances involving significant price variations between market segments, such an analysis was not required in the present case. The PCN method made it possible to establish that the dumped imports and the products sold by the EU industry were entirely comparable in the three market segments, and that price undercutting took place over each of those three segments. In other words, price differential between different segments of the market for the product had already been taken into account.

Article 3(2) and (3) of the EU Basic AD Regulation

The General Court found that: (i) the Commission was, in all circumstances, required to take account of all the PCNs sold by the sampled EU producers, including the 17 PCNs not exported by the sampled Chinese exporting producers; and (ii) the Commission failed to examine whether the 17 PCNs might have contributed to the decrease in the prices of the sampled EU producers. However, **the Court of Justice disagreed and held that that the General Court erred in law in its findings.**

First, the Court of Justice clarified that, as a matter of fact, the Commission did not take into account the 17 PCNs in the price undertaking analysis, because it could not calculate a price undercutting margin due to the absence of corresponding types of imported products. However, the Court of Justice ruled that this falls within the Commission's broad discretion in carrying out the analysis by using the PCN method, which has not been challenged before the General Court. Further, Article 3(2) and (3) of the EU Basic AD Regulation does not require the Commission to consider all sales of the like product by the EU industry in the analysis of the effect of the dumped imports on EU prices.

Moreover, the Court of Justice noted that Article 3(2) and (3) only requires the Commission to assess the effect of the 'dumped imports' on EU prices, but not the 17 PCNs at issue. Since the 17 PCNs were not exported to the EU by the sampled Chinese exporting producers, they are 'by definition' not part of 'dumped imports'. Thus, the Commission was not required to

examine whether the 17 PCNs might have contributed to the decrease in the prices of the sampled EU producers.

In this regard, the Court of Justice pointed out that the while General Court (wrongly) criticised the Commission for failing to examine the price effects of the 17 PCNs on the decrease in the prices of the sampled EU producers, it neverfound a manifest error of assessment attributable to the Commission. Accordingly, **the General Court exceeded the limits of judicial review.**

Implications

In this judgment, the Court of Justice recalled that the Commission enjoys broad discretion in conducting AD investigation and annulled the General Court’s ruling, which had found that the Commission violated the [EU Basic AD Regulation](#). In practice, this shows that it is difficult to successfully challenge the Commission’s finding before the Court. In order to challenge adverse AD duties before the EU courts, foreign exporting producers (EU importers and EU producers) have to overcome stringent standing requirements and high burden of proof to demonstrate substantive or procedural errors by the Commission during AD investigations.

Even if plaintiffs satisfy these requirements, the Court of Justice typically recognizes the Commission’s wide discretion, and it is very reluctant to reverse facts and substantive matters determined by the Commission in AD investigations. Instead, the Court often focuses its review on ‘whether the relevant procedural rules have been complied with, whether the facts on

which the disputed conclusion is based have been accurately stated and whether there has been a manifest error of appraisal or a misuse of powers’ ([T-410/06, Foshan City Nanhai Golden Step Industrial](#)). This risks limiting the role of EU courts to conduct reasonable judicial review that maintains proper checks and balances on the Commission’s conduct in AD investigations.

Jin Woo Kim is an international trade and customs lawyer based in Brussels. He advises clients on international trade and customs matters, including EU trade remedy proceedings, World Trade Organization dispute settlement, EU customs rules, EU-Korea trade relations, trade policy and EU Carbon Border Adjustment Mechanism. Jin is also a member of the Editorial Board of the Global Trade & Customs Journal.

The analysis does not constitute legal advice. The author thanks Yves Melin for his thoughtful comments and input. The opinions expressed in this analysis are exclusive to the author



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ISSN

EU Law Live	2695-9585
EU Law Live Weekend Edition	2695-9593

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