

The judgment by the European Court of Justice in the glyphosate case: A storm in a glass?

On 19 July 2012, the EU Supreme Court (i.e., the Court of Justice), in the Zhejiang Xinan Chemical Industrial Group Co., Ltd. case (Case C-337/09) confirmed the judgment rendered by the lower EU court, the General Court, on 17 June 2009.

The General Court had invalidated Council Regulation (EC) No 1683/2004 of 24 September 2004 imposing a definitive anti-dumping duty on imports of glyphosate originating in China¹ (“Regulation 1683/2004”). It ruled that the EU institutions cannot merely rely on the existence of State shareholding to conclude that there is significant interference by the Chinese State and refuse to grant market economy treatment (“MET”) to Zhejiang Xinan Chemical Industrial Group. Co. Ltd. (“Zhejiang Xinan” or “Xinanchem”). The Council of the European Union lodged an appeal with the Court of Justice against this judgment.

Under Article 2(7)(c) of the EU Anti-Dumping Regulation, MET cannot be granted if there is significant State interference in the decisions of firms regarding prices, costs and inputs. The judgment of the Court of Justice is significant as both European Courts have now clearly stated that the fact that the Chinese State or a State body holds shares in a company does not automatically equate to State interference and *a fortiori* to significant State interference such that MET can be refused.

However, the European Court of Justice has also confirmed that

- the existence of a State shareholding raises serious doubts as to whether the company’s management is sufficiently independent of the State to be able to take decisions regarding prices, costs and inputs autonomously and in response to market signals;
- the evidence provided by the company requesting MET must be examined before it can be determined whether there is State interference.

Strikingly, the Court of Justice has added that even if a producer has taken commercial decisions in response to market signals, MET can still be rejected if the State has significantly interfered with the operation of market forces such as when it interfered with the price of raw materials or labor. It ruled that a twofold determination needs to be made. The determinations whether

- (i) the company applying for MET took commercial decisions in response to market signals and
- (ii) the State interfered with market forces

must be based on a case-by-case analysis taking into account the evidence submitted by the company applying for MET. In making this assessment, the EU institutions must examine the evidence with all due care in order to determine whether it is sufficient to show that this company satisfies the two criteria mentioned above.

Both Courts have further emphasized that

- (i) it is the company applying for MET that bears the burden to prove that the conditions set in Article 2(7)(c) of the Anti-Dumping Regulation to obtain MET is met;
- (ii) the need for the EU institutions to examine the evidence submitted by the MET applicant leaves intact the wide discretion enjoyed by those institutions in assessing that evidence.

Thus, the judgment of the European Court of Justice prevents the EU institutions from taking a “short-cut” in denying MET by relying only on shareholding.

¹ O.J. No L 303/2004, p. 1.

However, the burden of proof that rests on the applicant for MET and the discretion of the EU institutions in the case-by-case analysis on the existence of State interference mean that the granting MET will likely continue to be the rule rather than the exception. One also has to bear in mind that the absence of State interference is only one of the 5 criteria that must all be met for MET to be achieved. Two of these criteria, i.e., the existence accounting records kept in accordance with international accounting standards or the existence of production costs / financial situations are that are not subject to significant distortions carried over from the non-market economy system (read: the existence of subsidies) will likely remain significant stumbling-stones for Chinese companies to obtain MET.

If you have any questions or require specific advice on any matter discussed in this alert, please contact:

Paulette Vander Schueren

Partner

pvanderschueren@mayerbrown.com

T 32 2 551 5950

Nikolay Mizulin

Partner

nmizulin@mayerbrown.com

T +32 2 551 5967

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