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HISTORIC EU COURT RULING LIBERALISES COMMISSION PRACTICE IN ASSESSING "MARKET ECONOMY TREATMENT" AND IMPROVES PROSPECTS FOR CHINESE EXPORTERS TO THE EU

Zhejiang Xinan Chemical ("Xinanchem") wins appeal

In a case that Advocate General Kokott described as *"of fundamental importance for future trade relations between the European Union and a number of dynamic emerging countries, such as the People's Republic of China"*, the Grand Chamber of the Court of Justice of the European Union ("ECJ") rendered a landmark judgment on 19 July 2012 that sided with Zhejiang Xinan Chemical ("Xinanchem").

The ECJ dismissed in its entirety an appeal by the Council of the European Union (the "Council") against the judgment of 17 June 2009 by the General Court. The General Court had already held that a finding by the European Commission (the "Commission") of State control of an undertaking is insufficient grounds for concluding that "significant State interference" exists, and that claims by an undertaking for "market economy treatment" ("MET") in an anti-dumping investigation could not be rejected on that basis. Holman Fenwick Willan and Moulis Legal successfully argued on appeal on behalf of Xinanchem that State-controlled companies should be able to qualify for MET.

The ECJ's ruling will require the Commission to reform its approach towards MET assessment in a way which should improve the future prospects of Chinese exporters to the EU.

Background

The granting of MET to certain producers subject to an anti-dumping investigation is a commercially significant status. Producers granted MET are not subjected to the discriminatory non-market economy regime that applies to exporters from some countries - such as China - who cannot prove their market-economy status. Conferral of MET on a producer allows it to obtain an individual anti-dumping margin, assessed on the basis of its own business figures, rather than on the basis of replacement values from substitute producers in a reference country.

The present case arose from an anti-dumping proceeding concerning imports of glyphosate, a chemical herbicide from the People's Republic of China. The Commission and the Council refused to grant MET to Xinanchem. Both the Commission and the Council justified this decision on the grounds that Xinanchem was under significant State control, and that therefore the Chinese State interfered with the decisions of Xinanchem.

The effects of State shareholding in Xinanchem

The ECJ agreed with Advocate General Kokott's view that *a priori* excluding State-owned or State-controlled companies from MET solely because of the existence of State shareholding *"would not be consistent with economic reality"*. Indeed, as Advocate General Kokott noted, there may well be State-owned firms in China which decide on their prices, costs, and inputs in response to market signals because the State, as a shareholder, limits itself to a role largely equivalent to that of a private investor in market economy systems. Advocate General Kokott therefore found that such companies could not by definition be excluded from obtaining MET by creating an *"irrebuttable presumption of significant State interference"*.

In dismissing the appeal, the ECJ noted that *"the General Court was fully entitled to hold (…) that State control (…) cannot be equated, as a matter of principle, to 'significant State interference' (…) and cannot therefore relieve the Council and the Commission of the obligation to take into account the evidence (…) of the real factual, legal and economic context in which [a producer] operates"*.

The ECJ also stressed that *"the first indent of Article 2(7)(c) of the basic regulation (…) is not directed at all types of State interference (…) but only that concerning their decisions regarding prices, costs and inputs"*. The ECJ further noted that *"the use of the word 'interference' indicates that it is not sufficient that a State may have a certain amount of influence over those decisions, but implies actual interference in them"* and stressed that such interference must be 'significant' and that, therefore, *"the first indent of Article 2(7)(c) of the basic regulation allows (…) a certain degree of State interference in those decisions"*.

The ECJ thus concluded that *"State interference that is neither by its nature nor effect capable of rendering a producer's decisions regarding prices, costs and inputs incompatible with market economy conditions cannot be considered significant"* and found that, even though the State had a certain *de facto* influence over Xinanchem, it does not, however, follow that the State actually interfered - still less significantly - in Xinanchem's decisions regarding prices, costs and inputs.

Conclusion

The ECJ's decision will have a profound impact on the Commission's future anti-dumping proceedings vis-à-vis non-market economy countries. MET claims by State-owned and State-controlled companies can now no longer be rejected on the sole basis that such companies are State-owned and/or State-controlled. Instead, the Commission Services will need to undertake a full and fair examination of all of the evidence presented by such companies to demonstrate that their business decisions reflect market signals and that they are not subject to significant State interference. This should create better opportunities for exporters - from China, especially - to obtain MET.

The successful defence against the Council's appeal was handled by Konstantinos Adamantopoulos, Partner, and Folkert Graafsma, Partner of Holman Fenwick Willan in association with Xinanchem's international trade counsel, Daniel Moulis of Moulis Legal[1].

Xinanchem was supported by Audace, the Association of Users and Distributors of AgroChemicals in Europe.

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1. The case was originally initiated under the guidance of the late Dr Dan Horovitz, who represented Xinanchem before the General Court in collaboration with Daniel Moulis of Moulis Legal. Both HFW and Moulis Legal wish to pay their respect to Dr Dan Horowitz for his role in successfully conceptualising and initiating this historic proceeding.

Adamantopoulos and Graafsma commented that *"this judgment will dramatically alter the way in which the EU treats State-owned companies in China"* while Daniel Moulis added that *"courts around the world, and the WTO, are increasingly being called upon to introduce legal disciplines into the trade policy environment"*.

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