

STATE CONTROL DOES NOT CONSTITUTE "SIGNIFICANT STATE INTERFERENCE"

In a case of fundamental importance for future trade relations between the EU and China, Advocate General Kokott finds that State control through State ownership in itself is insufficient to find "significant State interference" when analysing "market economy treatment" claims.

Today (19 January 2012), Advocate General Kokott delivered her Opinion, in favour of Zhejiang Xinan Chemical, in an appeal of the European Council against a General Court ruling that annulled anti-dumping measures imposed on glyphosate from China. In a case the Advocate General 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", Advocate General Kokott proposes to dismiss the appeal by the Council in its entirety.

This case is the first one brought before the Court of Justice on the interpretation of the criteria for market economy treatment (MET).

More specifically, the case centres on the issue of whether the mere existence of State control over a company is equivalent to significant State interference in its decisions regarding prices, costs and inputs and therefore *a priori* excludes State-controlled companies from MET.

Advocate General Kokott sided with the General Court that "control of an undertaking by the State in its capacity as shareholder, including the appointment of the board of directors, is not necessarily synonymous with the existence of 'significant State interference' in that undertaking's business decisions".

The Advocate General considered that *a priori* excluding State-owned or State-controlled companies from MET solely because of the State shareholding "would not be consistent with economic reality". Indeed, 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. Such companies cannot by definition be excluded from obtaining MET by creating an “*irrebuttable presumption of significant State interference.*”

In this respect, Advocate General Kokott stressed that the Council’s and Commission’s favoured interpretation that State-control automatically and in itself disqualifies undertakings for MET is excessively restrictive. Such an interpretation may result in MET being withheld from producers in emerging economies solely because of their shareholder structure even though in reality they operate under market economy conditions. Such an interpretation therefore runs counter to the EU’s particular concern to take account of the fundamentally altered conditions in emerging economies.

If the Court of Justice follows the Opinion of the Advocate General, this will have a profound impact on the Commission’s practice with respect to MET. Unlike under the current practice, MET claims by State-owned and State-controlled companies can no longer be rejected on the sole basis that such companies are State-owned and/

or State-controlled. Instead, the Commission will need to examine the evidence presented by such companies that their business decisions reflect market signals and are not subject to significant State interference and can no longer consider such evidence irrelevant.

The judgment by the Court of Justice is expected later this year.

Holman Fenwick Willan acts for Zhejiang Xinan Chemical Industrial Group Co Ltd. The company is represented by [Folkert Graafsma](#), Partner (Brussels); [Konstantinos Adamantopoulos](#), Partner (Brussels); [Anthony Woolich](#), Partner (London) and [Joris Cornelis](#), Associate (Brussels). Zhejiang Xinan Chemical was also represented by the late Dan Horovitz of Holman Fenwick Willan in 2009 proceedings: *Zhejiang Xinan Chemical Industrial Group Co Ltd v Council of the European Union* [Case T-498/04].

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