

Case T-274/02

Ritek Corp. and Prodisc Technology Inc.

v

Council of the European Union

(Dumping — Recordable compact discs originating in Taiwan — Determination of the dumping margin — Choice of the asymmetrical method of calculation — Pattern of export prices which differ according to the purchasers, regions or periods — ‘Zeroing’ technique)

Judgment of the Court of First Instance (Fifth Chamber, Extended Composition), 24 October 2006 II - 4310

Summary of the Judgment

1. *Common commercial policy — Protection against dumping — Dumping margin (Council Regulation No 384/96, Art. 2(11))*

2. *Common commercial policy — Protection against dumping — Dumping margin (Council Regulation No 384/96, Art. 2)*
3. *Common commercial policy — Protection against dumping — Dumping margin (Council Regulation No 384/96, Art. 2(11))*
4. *Common commercial policy — Protection against dumping — Dumping margin (Agreement on the implementation of Article VI of the General Agreement on Tariffs and Trade 1994, 'the 1994 Anti-Dumping Code', Art. 2.4.2; Council Regulation No 384/96, Art. 2(11))*
5. *Common commercial policy — Protection against dumping — Dumping margin (Council Regulation No 384/96, Art. 2(11))*

1. In relation to protection against dumping, the purpose of the asymmetrical method is to enable the full degree of the dumping practised to be reflected where, in the event that a difference in the export price pattern has been found, irrespective of its cause, this would not be possible using the two other methods. The question as to whether there is an export price pattern differing according to the purchasers is a purely objective one, irrespective, therefore, of the presence or absence of any fraudulent intent underlying that situation. Requiring proof of intent would prevent use of the asymmetrical method in situations where that method alone would enable the full degree of the dumping practised to be reflected, and thus, by introducing a requirement not provided for under Article 2(11) of the basic anti-dumping

regulation No 384/96, would prevent that provision from operating correctly.

This does not alter the fact that dumping may be a deliberate act, likely to be the subject of attempts to disguise, so that the difference in the export price pattern found may be the result of manoeuvring by the exporters. However, there is no indication — quite the contrary, in fact — that the asymmetrical method was provided for only to be used against deliberately disguised dumping. Use of

the asymmetrical method does not depend on the institutions' making a finding of an intention to disguise dumping, but only on finding that the result of using the symmetrical methods would be to 'disguise' technically or even to 'mask' the full degree of dumping, that is, to prevent it from being correctly assessed.

This is supported by the fact that the concept of intent is generally alien to the anti-dumping rules. There is nothing in the wording of the basic regulation requiring the institutions to prove intent in order to establish that there is dumping or injury.

(see paras 54, 55, 58)

looking into the reasons for domestic and export price levels. The reasons which might have led an exporter to make sales on his domestic market at prices below his production costs, or to make sales to the Community at prices below the normal value, are irrelevant to the dumping calculation. The exporter cannot therefore claim that the domestic prices actually practised should be used as opposed to a constructed normal value, on the ground that the pressure which competitors exerted on prices left him with no choice but to sell on his domestic market at below the cost of production. He can also not deny that there is dumping on the ground that the level of prices in the Community forced him to export at below the normal value.

(see para. 59)

2. A finding of dumping, the first stage in the assessment of whether an anti-dumping duty should be imposed, is a purely objective comparison between the normal value and export prices. That comparison, conducted in accordance with Article 2 of the basic anti-dumping regulation No 384/96, is based on an examination of the economic and accounting data of the undertakings concerned and in no way extends to
3. In the sphere of measures to protect trade, the Community institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine. It follows that review by the Community judicature of assessments made by the institutions must be limited

to establishing whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of the facts or a misuse of power.

In that regard, the implementation by the institutions of Article 2(11) of the basic anti-dumping regulation No 384/96, and, in particular, of the second condition for applying the asymmetrical method, relating to the inability of the symmetrical methods to reflect the full degree of the dumping practised, entails complex economic assessments on the part of the institutions.

Finally, when they exercise the discretion conferred on them by the basic regulation, the institutions are not obliged to explain in detail and in advance the criteria which they intend to apply in every situation, even where they create new policy options.

(see paras 80-82, 86)

4. Zeroing is the technique by which a dumping margin of a negative amount, a sign that an export sale has been made at a price above the normal value, is set to zero in order to prevent the disguising effect that taking that negative dumping margin into account would have on the positive dumping found to have taken place elsewhere. Although not mentioned in the 1994 Anti-dumping Code of the GATT or the basic anti-dumping regulation No 384/96, it is commonly used by importing countries and customs unions, including the European Union.

Its application in the context of the asymmetrical procedure is prohibited neither by the wording of Article 2.4.2 of the 1994 Anti-dumping Code nor by that of Article 2(11) of the basic regulation.

(see paras 97, 103)

5. Article 2(11) of the basic anti-dumping regulation No 384/96 provides for the application, in the calculation of the dumping margin, of one of three possible methods, of which two — the symmetrical methods — are the normal methods, and one — the asymmetrical

method — is an exceptional method. The condition relating to the existence of a pattern of export prices differing according to the periods, purchasers or regions is only one of the conditions for applying the asymmetrical method. The fact of laying down that condition is therefore in no way intended to allow the institutions to break up the investigation period according to the periods, purchasers or regions, in order to

combine, according to those periods, those purchasers or those regions, one method of calculation with another. The institutions thus could not, in any event, combine the methods for calculating the dumping margin.

(see para. 113)