Commission Implementing Regulation (EU) 2018/28 of 9 January 2018 re-imposing a definitive anti-dumping duty on imports of bicycles whether declared as originating in Sri Lanka or not from City Cycle Industries

COMMISSION IMPLEMENTING REGULATION (EU) 2018/28

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re-imposing a definitive anti-dumping duty on imports of bicycles whether declared as originating in Sri Lanka or not from City Cycle Industries

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union[(1)] ('the basic Regulation'), and in particular Article 13 thereof,

Whereas:

A. MEASURES IN FORCE AND JUDGMENTS OF THE COURTS

1. Measures in force

(1) In 2011, by Implementing Regulation (EU) No 990/2011[(2)], the Council imposed definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China ('the original measures') following an expiry review under Article 11(2) of the basic Regulation.

(2) In 2013, by Implementing Regulation (EU) No 501/2013[(3)] ('the contested Regulation'), the Council extended the original measures to imports of bicycles consigned from Indonesia, Malaysia, Sri Lanka and Tunisia, whether declared as originating in Indonesia, Malaysia, Sri Lanka and Tunisia or not ('the anti-circumvention measures' or 'the extended measures') following an anti-circumvention investigation under Article 13 of the basic Regulation.

2. Judgments of the General Court of the European Union and the Court of Justice of the European Union

(3) On 9 August 2013, a Sri Lankan producer, City Cycle Industries ('City Cycle') lodged an application at the General Court of the European Union ('the General Court') seeking the annulment of the contested Regulation in so far as it applies to this producer[(4)]. In its judgment of 19 March 2015[(5)], the General Court annulled the contested Regulation to the extent that it applies to City Cycle.

(4) In July 2015 the Council of the European Union[(6)], European Commission[(7)] and Maxcom Ltd[(8)] (a Union manufacturer of bicycle), appealed the General Court's judgment. By its judgment of 26 January 2017 ('the judgment'), the Court of Justice

Changes to legislation: *There are currently no known outstanding effects for the Commission Implementing Regulation (EU) 2018/28. (See end of Document for details)*

of the European Union ('the Court of Justice') dismissed the appeals submitted by the Union industry, the European Commission and the Council of the European Union.

(5) In particular, the Court of Justice found, in paragraph 73 of its judgment, that recital (78) of the contested Regulation did not contain an individual analysis of circumvention practices in which City Cycle may have been engaged. The Court of Justice also found in paragraphs 75 and 76, that the conclusion as to the existence of transhipment operations in Sri Lanka could not legally be based only on the two findings expressly made by the Council, that is, first, that there had been a change in the pattern of trade and, second, that some of the producer-exporters had failed to cooperate[(9)].

3. Consequences of the judgment

(6) In line with Article 266 of the Treaty of the Functioning of the European Union, the Union institutions need to take the necessary steps to comply with the judgment of 26 January 2017.

(7) In cases where a proceeding consists of several administrative steps, the annulment of one of those steps does not annul the complete proceeding[(10)]. The anti-dumping proceeding is an example of such a multi-step proceeding. Consequently, the annulment of the contested Regulation in relation to one party does not imply the annulment of the entire procedure prior to the adoption of that Regulation. The EU institutions have the possibility to remedy the aspects of the contested Regulation which led to its annulment, while leaving unchanged the uncontested parts which are not affected by the Court judgment[(11)].

B. PROCEDURE

1. Procedure until the judgment

(8) The Commission confirms recitals (1) to (23) of the contested Regulation. They are not affected by the judgment.

2. Reopening

(9) Following the judgment, on 11 April 2017 the Commission published a Notice[(12)] partially reopening the anti-circumvention investigation concerning imports of bicycles consigned from Sri Lanka, whether declared as originating in Sri Lanka or not that led to the adoption of the contested Regulation ('the Notice of re-opening') and resumed it at the point at which the irregularity occurred. The reopening was limited in scope to the implementation of the judgment with regard to City Cycle.

(10) The Commission informed City Cycle, the representatives of the exporting country, the Union industry and other interested parties known to be concerned from the original investigation of the partial reopening of the investigation. Interested parties were given the opportunity to make their views known in writing and to request a hearing within the time-limit set out in the notice.

(11) All interested parties who so requested were granted the opportunity to be heard by the Commission services and/or the Hearing officer in trade proceedings.

Nobody requested a hearing either with the Commission services or the Hearing officer in trade proceedings.

3. **Registration of imports**

(12) Following the judgment, the European Bicycle Manufacturers Association and Maxcom Ltd requested that imports of bicycles in so far as it concerns City Cycle are made subject to registration under Article 14(5) of the basic Regulation so that measures may subsequently be applied on those imports from the date of such registration.

(13) On 11 April 2017, the Commission made imports of bicycles consigned from Sri Lanka, whether declared as originating in Sri Lanka or not, in so far as it concerns the Sri Lankan company City Cycle Industries subject to registration ('Registration Regulation')[13].

4. **Product under investigation**

(14) The product under investigation is the same as in the contested Regulation that is bicycles and other cycles (including delivery tricycles, but excluding unicycles), not motorised, originating in the People's Republic of China ('China' or 'PRC'), currently falling within CN codes ex 8712 00 30 and ex 8712 00 70. The Commission confirms recitals (25) to (27) of the contested Regulation.

C. **ASSESSMENT FOLLOWING THE JUDGMENT**

1. **Preliminary remarks**

(15) First, the Court of Justice held that the contested Regulation did not contain an individual analysis of circumvention practices in which City Cycle may have been engaged. The two findings expressly made by the Council, that that there had been a change in the pattern of trade and that some of the producer-exporters had failed to cooperate were found by the Court of Justice not to be sufficient to entitle the Council to conclude either that City Cycle was involved in transhipment operations or that transhipment operations existed at national level in Sri Lanka.

(16) Second, it is recognised in paragraphs 29 and 31 of the judgment that the evidence communicated by City Cycle during the investigation did not show that it was a genuine producer or that its assembly operations did not constitute circumvention practice according to the criteria laid down in Article 13(2) of the basic Regulation. Recitals (124) to (127) of the contested Regulation are therefore confirmed.

(17) Third, it follows from the judgment, in conjunction with the judgment of the General Court, that the Council was entitled to consider City Cycle as a non-cooperating party in the investigation and that there was a certain level of non-cooperation at national level in Sri Lanka. Recitals (35) to (42) of the contested Regulation are therefore confirmed.

2. **Undermining of the remedial effect of the anti-dumping duty**

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(18) The Commission had found, in recitals (93) to (96) of the contested Regulation, undermining of the remedial effect of the anti-dumping duty. Those findings are confirmed.

3. **Evidence of dumping**

(19) The Commission had found, in recitals (97) and (98) as well as (107) to (110) of the contested Regulation, evidence of dumping. Those findings are confirmed.

4. **Existence of circumvention practices**

(20) The contested Regulation has been annulled because the Council failed to provide, in the contested Regulation, sufficient substantiation as to the existence of circumventing practices for City Cycle Industries. It is recalled that the existence of circumvention practices can be established, inter alia, on the basis of transhipment or on the basis of assembly operations.

(21) The reopened investigation revealed that there was no further available evidence at company level which could support the finding of transhipment. Therefore, no further reasoning regarding transhipment could be put forward under recital (78) of the contested Regulation.

(22) However, available evidence shows that circumvention practices via assembly operations took place. The evidence was based on the data submitted by City Cycle itself during the original investigation. The Council had not assessed that data in detail, because it considered that that was not necessary in order to demonstrate, to the required legal standard, existence of circumvention practices. Now that the Court has clarified the applicable legal standard, the Commission considers it appropriate to reassess all the evidence available in the administrative file in the light of the applicable legal standard.

(23) During the anti-circumvention investigation City Cycle came forward and requested exemption from the possible anti-circumvention measures. As described in recitals (37), (38) and (144) of the contested Regulation, City Cycle was unable to prove that it merited an exemption. The company afforded insufficient cooperation and Article 18(1) of the basic Regulation was applied. The lack of reliable information as regards the value and volume of parts of Chinese origin purchased by the company made it impossible to positively establish that City Cycle was a genuine producer not involved in circumvention or that its assembly operations were not a form of circumvention. As explained in recitals (16) and (17) above, these findings were not affected by the judgment.

(24) In any event, however, the data submitted by the company itself demonstrate that:

(1) the raw materials (bicycle parts) from China constituted more than 60 % of the total value of the parts of the assembled product (60/40 test), while

(2) the value added to the parts brought in during the assembly operation, was lower than 25 % of the manufacturing cost (25 % value added test).

(25) According to the criteria of Article 13(2)(a) and (b) of the basic Regulation, this means that such assembly operations should be considered to constitute circumvention practice given the fulfilment of the other criteria as described in recitals (18) and (19) above.

(26) Consequently, the existence of circumvention practices via assembly operations should be established at country level in Sri Lanka on the basis of the above evidence available at the company level that tends to show circumvention practices and given the high level of non-cooperation in Sri Lanka.

(27) Consequently, the existence of assembly operations within the meaning of Article 13(2) of the basic Regulation was established in Sri Lanka.

(28) After disclosure, City Cycle contested the competence of the Commission to adopt findings on the existence of assembly operations within the meaning of Article 13(2) of the basic Regulation. It argued that the Commission could not reassess the finding on the assembly operation because it had not been challenged in the court proceedings and that the Commission was therefore obliged to abandon the pursuit of measures against City Cycle.

(29) This argument should be rejected. First, it results from the judgments of the Court of Justice cited in recitals (4) and (5) that the condition for imposing anti-circumvention measures relates to the existence of circumventing practices as defined in Article 13(1) of the basic Regulation, and not to a specific subset of these practices. Second, City Cycle interprets incorrectly the obligation imposed on the Commission by Article 266 of the Treaty on the Functioning of the European Union ('TFEU') in the present case. As made clear in recital (6) of the Notice of re-opening, it is the lack of sufficient reasoning in the contested Regulation concerning the available evidence on the existence of circumventing practices in Sri Lanka that must be corrected in the current procedure. The Commission is therefore competent for readopting a measure with an improved reasoning making clear that City Cycle is engaged in circumventing practices in Sri Lanka, which is fully in line with the case-law of the Court of Justice. In any event, the contested Regulation has been annulled in its totality. Hence, none of its recitals has become definitive. Rather, the Commission needs to assess afresh all aspects of the file. Where no new developments have taken place in the Court proceedings, the Commission may limit itself to confirming the findings of the initial investigation. For the contested part, in the present case circumvention practices, a fresh assessment has to take place.

(30) After disclosure, City Cycle also contested the competence of the Commission to rely on the evidence that it had submitted in the course of the investigation that lead to the imposition of anti-circumvention measures mentioned in recital (2) and to arrive at a different conclusion.

(31) This argument should also be rejected. The Commission is indeed entitled to assess differently the evidence already provided, to the extent that such a new assessment is in line with Article 13 of the basic Regulation as interpreted by the