COMMISSION DECISION

of 7 July 1988

on a request from Società Idrocarburi Laziale SpA, Rome, concerning import into Italy of a consignment of styrene monomer originating in the United States of America

(Only the Italian text is authentic)

(88/458/EEC)

THE COMMISSION OF THE EUROPEAN COMMUNITIES,

Having regard to the Treaty establishing the European Economic Community,

Having regard to Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community [1], as amended by Regulation (EEC) No 1761/87 [2], and in particular Article 16 thereof,

After consultation within the Advisory Committee set up by Regulation (EEC) No 2176/84,

WHEREAS:

A. PROCEDURE

(1) Council Regulation (EEC) No 1570/81 of 13 June 1981 [3] imposed a definitive anti-dumping duty of 14,8 % on imports of styrene monomer originating in the United States of America, with the exception of styrene monomer exported by Gulf Oil Chemicals Company.

(2) On 28 July 1983 SIL (Società Idrocarburi Laziale SpA), Rome, submitted an application to the Italian authorities under Article 15 of Council Regulation (EEC) No 3017/79 [4] for the reimbursement of (...) [5], paid in accordance with Regulation (EEC) No 1570/81 as a definitive anti-dumping duty on a consignment of styrene monomer imported from the United States of America. The Italian authorities forwarded the request to the Commission, ruling it admissible but not expressing an opinion as to its merits.

(3) The applicant company was informed of the main facts and considerations on which the Commission planned to base its Decision, and had the opportunity to make comments on them. The arguments which it put forward and the additional documents which it supplied were duly taken into consideration before this Decision was reached.

(4) The Commission informed the Member States and gave them its opinion.

(No Member State expressed disagreement with the Commission's opinion.)

B. ADMISSIBILITY

(5) Before examining the merits of the application, the Commission investigated whether it had been made in accordance with the relevant provisions of Community anti-dumping legislation, in particular as regards the time limits.

The application by SIL was submitted on 28 July 1983 on the basis of Article 15 of the anti-dumping legislation then in force, Regulation (EEC) No 3017/79. This was repealed and replaced by Regulation (EEC) No 2176/84, which entered into force on 1 August 1984 and also applies to proceedings already initiated (Article 19).

The admissibility of the application was therefore examined in accordance with the provisions of Article 16 of Regulation (EEC) No 2176/84, in particular paragraph 2:

'... the importer shall submit an application (...) within three months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities (...)'.

(6) The complex circumstances of the import transaction in question made it necessary to examine the facts in the light of Council Directive 79/623/EEC of 25 June 1979 on the harmonization of provisions laid down by law, regulation or administrative action relating to customs debt [6] and Council Directive 79/695/EEC of 24 July 1979 on the harmonization of procedures for the release of goods for free circulation [7].

[1] OJ No L 201, 30. 7. 1984, p. 1.
[2] OJ No L 167, 26. 6. 1987, p. 9.
[3] OJ No L 154, 13. 6. 1981, p. 10.
[4] OJ No L 339, 31. 12. 1979, p. 1.
[5] In the published text of this Decision, some figures have been omitted in accordance with the provisions on commercial confidentiality contained in Article 8 of Council Regulation (EEC) No 2176/84.
[6] OJ No L 179, 17. 7. 1979, p. 31.
[7] OJ No L 205, 13. 8. 1979, p. 19.

(7) Under the relevant provisions of Community anti-dumping and customs legislation, and having regard to standard customs practice, the application by SIL for reimbursement is held to be admissible.

C. THE APPLICANT'S CASE

(8) SIL argues that the consignment of styrene in question was not dumped by the exporter, Asoma Chemicals (Boston); alternatively, if dumping did take place, it was by a considerably smaller margin than the amount of the anti-dumping duty actually levied.

(9) Although the consignment of styrene in question was exported by Asoma Chemicals, it was not produced by that company, which has no production unit, but by Gulf Oil Chemicals, Houston, under a contract by which Gulf Oil Chemicals processed benzine and ethylene into styrene for Asoma. The consignment was exported on 3 January 1983 by Asoma Chemicals to SIL's plant at Porto Torres, Italy, and imported by Oxyde BV, Amsterdam, an importer associated with Asoma Chemicals within the Lissauer Group, New York.

SIL's arguments concern the determination of normal value and export price; according to SIL, Asoma Chemicals and Oxyde BV are linked by an association within the meaning of Article 2 (8) (b) of Regulation (EEC) No 2176/84, whereas Asoma Chemicals is in no way linked with the manufacturers, including Gulf Oil Chemicals, with which it enters into processing contracts.

Normal value

(10) As the Lissauer Group, of which Asoma is part, is a consumer rather than a seller of styrene monomer on the United States market, SIL points out that it is not possible to determine normal value on the basis of the exporter's sales on its domestic market.

The applicant therefore proposed two methods for calculating normal value:

— one would be to construct normal value by adding to the exporter's costs under its processing contracts with various manufacturers a 'reasonable' amount for sales, administrative and other general costs, and a 'reasonable' profit margin;

— the other would be to determine normal value on the basis of Asoma Chemicals' exports to countries other than the Member States of the Community.

Export price

(11) Since Asoma Chemicals and Oxyde BV are associated within the Lissauer Group, SIL points out that under Article 2 (8) (b) of Regulation (EEC) No 2176/84 the export price should be constructed on the basis of the price at which the imported product was first resold to an independent buyer, in other words SIL itself.

D. MERITS

(a) *Determination of normal value*

(12) Asoma Chemicals has sold no styrene monomer on the United States market, since the Lissauer Group is a consumer and not a seller of styrene on that market.

According to the applicant, the normal value must therefore be determined, in accordance with Regulation (EEC) No 2176/84, on the basis of the constructed value arrived at by adding together the cost of production and a reasonable margin of profit (Article 2 (3) (b) (ii)), or on the basis of prices of exports to a third country (Article 2 (3) (b) (i)).

Constructed normal value

(13) In this connection the applicant puts forward three calculations adding up the costs incurred by the exporter (Asoma) under its processing contracts with various manufacturers.

(a) The Commission noted that the consignment of styrene specified in the application (approximately 3 000 tonnes) was manufactured on commission by Gulf Oil Chemicals Company under a contract for a total of 15 000 tonnes, the Asoma/Gulf Contract TP-8988 of 18 September 1982. An annex to this contract specifies that 'Styrene monomer must be lifted for export. No other restriction as to destination or use'. Asoma was therefore forbidden to sell on the United States market the product manufactured by its supplier.

(b) SIL puts forward two other calculations of constructed value. Both concern consignments manufactured on commission by El Paso Chemicals Company under contract TP-1262 Asoma/El Paso of 21 January 1983 for a total of about 20 000 tonnes; in one case the benzine was supplied by Asoma and in the other by El Paso.

In both cases the goods were, according to SIL, used by Asoma for international consumption (captive use).

It is clear to the Commission that the terms of contract TP-1262 between Asoma and El Paso are not strictly relevant in determining the constructed value, since that contract concerns a supplier other than Gulf Oil, the manufacturer of the consignment under consideration; there is no reason to suppose that the cost structure and pricing policies of El Paso and Gulf Oil are identical, in particular as regards commission processing contracts.

It should be noted, however, that a common feature of the processing contracts between Asoma and its suppliers of styrene is that they in practice forbid the sale on the United States market of the styrene obtained. Asoma is therefore in no way in competition with its suppliers on the United States market.

(14) In these circumstances, given in particular the compulsory export clause in the contract between Asoma and its supplier Gulf Oil, we have to consider, when constructing the normal value, whether a figure based solely on the costs incurred by the exporter under processing contracts with various producers is a 'cost of production' as defined in Article 2 (3) (b) (ii) of Regulation (EEC) No 2176/84 computed on the basis of all costs of materials and manufacture, both fixed and variable, in the ordinary course of trade in the country of origin.

(a) The first point to be determined is whether the costs indicated by the applicant refer to 'the ordinary course of trade ... in the country of origin'.

Contrary to the applicant's assertion the question is not whether Asoma and its supplier or suppliers appear to be associated or have concluded a compensation deal nor whether a processing arrangement is or is not 'in the ordinary course of trade' on the United States market for the product in question.

However, the fact that Asoma does not as a matter of course sell styrene monomer on the United States market, and in particular its explicit acceptance of the contractual prohibition referred to above, lead the Commission to doubt the representative nature of the conversion prices put forward by the applicant, and therefore to reject them as a basis for calculation.

It may reasonably be assumed that there is a link between the price conditions in the processing arrangements agreed by Asoma's suppliers — indeed the very existence of these arrangements — and the fact that Asoma refrains, whether by contractual commitment or simply *de facto,* from selling the styrene obtained on the open market in the United States.

The Commission therefore called on SIL to show that Asoma's suppliers, in particular Gulf Oil, were willing to conclude processing arrangements on price conditions comparable to those offered to Asoma with producers who were present on the United States styrene market.

SIL was unable to provide such evidence though given time to do so. The Commission itself applied to a United States manufacturer for information, but the request was not answered. The contracts submitted by the applicant, referred to in point 12, did not convince the Commission that the conversion prices agreed between Asoma and its various suppliers were 'in the ordinary course of trade' on the United States market.

As a result, simply adding up the costs incurred by Asoma under its processing arrangements, whether with Gulf Oil or with El Paso, does not meet the definition of production costs in the ordinary course of trade laid down in Article 2 (3) (b) (ii) of Regulation 2176/84.

(b) Clearly, then, the total costs incurred by Asoma, which the applicants themselves admit was not the manufacturer of the product, had no production unit and therefore no fixed production costs to meet, cannot be taken to reflect the full cost of production, since they do not include fixed costs and are based on a processing price which, as we have seen, was not representative.

(15) In any case, the constructed value must be 'determined by adding cost of production and a reasonable margin of profit. The cost of production shall be computed on the basis of all costs ... of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses'.

According to the applicant, Asoma's margin to cover selling, administrative and other general expenses and profit was only 1,01 % of the constructed cost of production. The Commission is not convinced, in the light of its experience of

anti-dumping investigations concerning United States chemical products, that this margin is realistic or reasonable. Had the Commission been able to use the method proposed by the applicant, it would have been bound to allow for a higher profit margin.

(16) The analysis set out in paragraphs 13 and 14 leaves the Commission no alternative but to reject the method suggested by the applicant for constructing normal value, which does not comply with the definition laid down in Article 2 (3) (b) (ii) of Regulation (EEC) No 2176/84.

Normal value on the basis of selling prices on export to a third country

(17) Falling a constructed value, the applicant proposed that normal value be determined on the basis of Asoma's exports to countries not members of the European Economic Community.

Unfortunately, it is likely that these prices also reflect dumping. Since the firm in question, Asoma, has no production unit it is clear that all its exports consist of styrene supplied by companies, in particular Gulf Oil and El Paso, working to contract under processing arrangements comparable to those referred to in paragraphs 13 and 14.

As these processing arrangements are not, in this case, 'in the ordinary course of trade ... in the country of origin', the Commission cannot determine normal value on the basis of Asoma's exports to a third country, since the prices charged in these export transactions may be less than domestic selling prices in the ordinary course of trade.

(18) The Commission is not, therefore, convinced that a normal value determined on the basis of Asoma's selling price on export to third countries could be taken as representative.

Normal value determined on the basis of domestic sales

(19) Since Asoma does not sell styrene on the United States market and the two alternatives for normal values suggested by the applicant are not acceptable, the Commission considers that, for the purposes of this application, normal value for Asoma should be determined in the light of the method used in the anti-dumping proceeding leading to the imposition of a definitive duty by Regulation (EEC) No 1570/81. For the purposes of that proceeding, in 1980 and 1981, 'the Commission used as the normal value the domestic prices on the United States market; (...) for those exports to the Community for which the Commission was able to identify the producer, the latter's weighted average ex-factory price for sales to unrelated customers was taken; (...) in all other cases the Commission took the overall weighted ex-factory price for sales to unrelated customers of the four United States producers visited' [1] (i.e. United States manufacturers for which it had information concerning domestic prices).

(20) Since Asoma is not the manufacturer of the consignment of styrene in question, which was produced at Gulf Oil Chemicals, the Commission considers that for the purposes of this application the normal value for Asoma can be determined only on the basis of all Gulf Oil sales of styrene on the United States market over a representative period at the time of the transaction.

This method is entirely in accordance with the Commission's general practice in anti-dumping proceedings for determining normal value in the case of exporters who do not themselves manufacture the products in question and do not sell on the domestic market.

It also allows for the special circumstances of this application, submitted long after the completion of the relevant anti-dumping investigation, in that the applicant need only provide the Commission with information concerning domestic sales by the producer of the consignment, or have the information sent direct by the producer.

(21) SIL was informed of the Commission's position but despite the time allowed was unable to supply the Commission with price information relating to sales of styrene by its supplier Gulf Oil during a representative period at the time of the transaction. As the burden of proof in applications for reimbursement rests with the applicant, the Commission, lacking any other reliable evidence, is unable to determine normal value for Asoma over a representative period at the time of the transaction.

[1] See Regulation (EEC) No 384/81 (OJ NoL 4, 14. 2. 1981, p. 14) imposing a provisional anti-dumping duty, later confirmed by Commission Regulation (EEC) No 1321/81 (OJ No L 132, 19. 5. 1981, p. 17) and Regulation (EEC) No 1570/81.

(b) *Dumping margin*

(22) As the evidence presented by the applicant does not allow calculation of the dumping margin for the actual transaction in question, the Commission must use a margin based on the most reliable information available, i.e. the dumping margin as determined by the investigation leading to the imposition of the definitive anti-dumping duty to which the present application relates.

As Asoma Chemicals did not then appear in the proceeding as an interested party, the dumping margin applicable to it is that used in the original proceeding for exporters not specifically identified, i.e. 14,8 % of the free-at-Community-frontier price.

E. **REIMBURSEMENT**

(23) As the definitive duty imposed was identical to the dumping margin here applied, the application for a reimbursement is rejected,

HAS ADOPTED THIS DECISION:

Article 1

The application for a reimbursement submitted by SIL is hereby rejected.

Article 2

This Decision is addressed to the Italian Republic and Società Idrocarburi Laziale SpA, Piazzale Enrico Mattei 1, I — Roma.

Done at Brussels, 7 July 1988.

For the Commission

Willy DE CLERCQ

Member of the Commission