Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 26 July 2017 [1]

Case C-61/16 P

European Bicycle Manufacturers Association (EBMA)
v

Giant (China) Co. Ltd

(Appeal — Dumping — Regulation (EU) No 502/2013 — Imports of bicycles originating in the People's Republic of China — Regulation (EC) No 1225/2009 — Article 18(1) — Cooperation — Concept of 'necessary information' — Claim for individual treatment — Risk of circumvention)

I. Introduction

1. The present case concerns an appeal brought by the European Bicycle Manufacturers Association ('EBMA'), an association representing the interests of European bicycle producers. In its appeal, EBMA asks the Court to set aside the judgment of the General Court of the European Union of 26 November 2015, *Giant (China)* v *Council* [2] ('the judgment under appeal'), by which the General Court annulled Council Regulation (EU) No 502/2013 of 29 May 2013 [3] ('the regulation at issue'), in so far as it concerned the Chinese bicycle producer Giant (China) Co. Ltd. ('Giant').

2. EBMA, supported by the Council of the European Union and by the European Commission (together, 'the institutions'), disputes, in essence, the General Court's conclusion, in the judgment under appeal, that none of the evidence relied on by the Council permitted that institution to refuse, in the regulation at issue, to apply an individual anti-dumping duty to Giant.

3. The present case provides the Court with the opportunity to provide clarification as to the application of Article 18 of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [4] ('the basic regulation'), a provision which lays down the rules relating to the non-cooperation of interested parties in anti-dumping investigations, and, more specifically, as to the concept of 'necessary information' as provided for in Article 18(1).

1 Original language: French.

2 T-425/13, not published, EU:T:2015:896.

3 Council Implementing Regulation (EU) No 502/2013 of 29 May 2013 amending Implementing Regulation (EU) No 990/2011 imposing a definitive anti-dumping duty on imports of bicycles originating in the People's Republic of China following an interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009 (OJ 2013 L 153, p. 17).

4 At the time of the investigation at issue in the present case, the provisions governing the adoption of anti-dumping measures by the European Union were to be found in Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51 and corrigendum OJ 2010 L 7, p. 22).

II. Legal framework

4. Under Article 2(8) and (9) of the basic regulation, concerned with determination of the export price:

‘8. The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.

9. In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.’

5. Under Article 18 of the basic regulation:

‘1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time-limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the facts available. Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of facts available. Interested parties should be made aware of the consequences of non-cooperation.

…

3. Where the information submitted by an interested party is not ideal in all respects it should nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.

…’

III. The background to the dispute and the regulation at issue

A. The procedure which led to the adoption of the regulation at issue

6. The background to the dispute is set out in detail in paragraphs 1 to 25 of the judgment under appeal, to which I refer. For the purposes of these proceedings, I would confine myself to recalling that, on 9 March 2012, the Commission announced the initiation, ex officio, of an interim review of the anti-dumping measures which it had imposed (and reviewed on several occasions) on imports into the European Union of bicycles originating in China.[5]

7. The group to which Giant belongs (‘the Giant group’) was one of the Chinese groups of exporting producers which reported exports to the European Union during the investigation period (from 1 January to 31 December 2011).

8. One of the companies belonging to the Giant group was Shanghai Giant & Phoenix Bicycle Co. Ltd (‘GP’), a joint venture formed between the Giant group and Jinshan Development and Construction (‘Jinshan’).[6] As GP had ceased all operations in September 2011 and was in liquidation, the Giant group asked the Commission to exclude it from the investigation.

5 See, for more details, paragraphs 2 to 8 of the judgment under appeal.

6 See paragraph 14 of the judgment under appeal, setting out the control structure of GP.

9. On 15 May 2012, the Commission sent Giant a claim form for market economy treatment ('MET'), in accordance with Article 2(7)(b) of the basic regulation. It also informed Giant that if it wished to claim MET, every related company situated in China had to complete a MET claim form, including GP, since that company produced bicycles and was the Giant group's biggest exporter to the European Union during the investigation period.

10. In several exchanges of correspondence over the course of the investigation, the Commission, in essence, informed Giant that it considered that, through GP, the Giant group was related to the group to which Jinshan belonged ('the Jinshan group'), the principal investments of which related to the manufacturing and sale of bicycles. Thus, according to the Commission, Giant also had to return the MET claim form and the replies to the anti-dumping questionnaire for the entities belonging to the Jinshan group. Moreover, the Commission informed Giant that, if those forms and questionnaires were not submitted, it would apply Article 18 of the basic regulation and would reject the claim for MET submitted by the Giant group. [7]

11. In the course of the investigation, Giant submitted the MET claim forms for six companies belonging to its group, including GP, and subsequently sent the responses to the anti-dumping questionnaire for 11 companies from its group, including GP, that participated in the production and export of the product concerned, and for 6 sales subsidiaries established in the European Union. However, on several occasions, it stated that since it was only very indirectly related to Jinshan through GP, it was neither required nor able to submit a claim for MET or to complete the anti-dumping questionnaire for Jinshan and its subsidiaries. [8]

12. On 23 October 2012 the Commission informed Giant that, not having received a MET claim for the Jinshan group companies, it could not examine the merits of its claim for MET. Consequently, the Commission decided to apply Article 18(1) of the basic regulation and not to take into account the information submitted by Giant in relation to its MET claim as a whole.

13. On 21 March 2013, the Commission informed Giant that it intended to apply Article 18(1) and to base its findings on the facts available also for the purposes of establishing the export price, given that, without complete information on all the parties related to GP, it was impossible to perform appropriate and reliable calculations on the export price and thereby to determine an individual margin of dumping for GP and, consequently, for the Giant group as a whole.

B. The regulation at issue

14. On 5 June 2013, the Council adopted the regulation at issue. In recitals 63 and 64 of that regulation, the Council rejected the claim for MET submitted by the Giant group on account of the significantly deficient nature of the reply sent by that group in response to the Commission's requests for information. The Council stated that since Giant refused to provide all the necessary information on the structure of the group, Article 18(1) of the basic regulation was applied and the claim was rejected.

15. Next, in recitals 131 to 141 of the regulation at issue, the Council also stated that Article 18(1) of the basic regulation was applied concerning Giant's export price.

16. The Council stated that Giant had refused to provide the Commission's services with the necessary information on the structure of the group and essential information concerning production, export sales volume and prices of the product concerned to the European Union of the Jinshan group in the investigation period. The investigation had confirmed that one of the Giant group's subsidiaries -

7 See paragraphs 15 and 17 of the judgment under appeal.

8 See paragraphs 16, 18 to 20, 22 and 24 of the judgment under appeal.

namely GP - was related, via common shareholding and close structural and management links, to Jinshan group and that this group was involved in the production and sales of the product concerned in China. In the absence of a returned MET claim form and a reply to the anti-dumping questionnaire for the companies in the Jinshan group, the Council had not been able to assess to what extent the production and sales of the product concerned of that group had an impact on the export price determination with regard to GP and as a consequence for Giant as a group. According to the Council it had therefore been impossible to perform complete and reliable calculations on the export price and therefore to obtain an individual margin determination for GP and as a consequence for the Giant Group as a whole. [9]

17. In response to Giant's argument that, in any event, there was no risk of circumvention of any potential anti-dumping measures as GP, the only link between the two groups, had ceased all operations in September 2011, the Council noted that at the end of the investigation period GP still existed as an entity and that, therefore, the production activity could have resumed at any moment in the future. [10]

18. The regulation at issue therefore maintained for Giant the definitive anti-dumping duty of 48.5% applicable to all Chinese exporting producers not granted individual treatment.

IV. Procedure before the General Court and the judgment under appeal

19. By application lodged at the Court Registry on 19 August 2013, Giant brought an action for the annulment of the regulation at issue. In support of its action Giant put forward eight pleas in law. In the judgment under appeal, however, the General Court examined only three pleas. [11]

20. As a preliminary point, the General Court noted that the Council had refused to grant individual treatment to Giant on the basis of two factors: first, the lack of complete information on all the parties related to GP - specifically the Jinshan group companies - which, in its view, made it impossible to calculate the Giant group's export price and thus an individual anti-dumping margin for that group; secondly, the existence of an intrinsic risk of circumvention of the anti-dumping measures. In those circumstances, the General Court decided to examine, first of all, the pleas in law concerning those two issues.

21. As regards the first issue, the General Court noted that, on the basis of the information provided by Giant, the Council had the information necessary to calculate a reliable export price for the Giant group and, therefore, to establish an individual dumping margin and individual anti-dumping duty for that group. According to the General Court, the Council was wrong to apply to Giant Article 18(1) of the basic regulation and to reach its conclusions regarding the determination of the Giant group's export price on the basis of the facts available. [12] The General Court went on to reject the arguments put forward by the Council in support of its claim that Giant had provided false or misleading information during the procedure. [13]

22. As regards the second issue, the General Court found that in the circumstances of the present case the Council could not rely on a risk of circumvention to justify the refusal to apply an individual anti-dumping duty to Giant. [14]

9 See recitals 131 to 135 of the regulation at issue.

10 See recital 137 of the regulation at issue.

11 Those were, first, the first part of the third plea and the fifth plea and, secondly, the seventh plea put forward by Giant before the General Court. See, in more detail, paragraphs 46 to 51 of the judgment under appeal.

12 Paragraphs 56 to 70 and 77 of the judgment under appeal.

13 Paragraphs 71 to 76 of the judgment under appeal.

14 Paragraphs 79 to 90 of the judgment under appeal.

23. The General Court thus concluded that none of the evidence relied on by the Council permitted it to refuse Giant individual treatment and, consequently, the General Court annulled the regulation at issue in so far as it concerned that exporting producer, without examining the other pleas raised by it.

V. Forms of order sought

24. By its appeal, EBMA asks the Court to set aside the judgment under appeal, give a ruling on the substance and dismiss the action for annulment or refer the case back to the General Court for a ruling on the substance of the action for annulment. EBMA also asks the Court to order Giant to pay the costs of the appeal and its intervention before the General Court.

25. Giant claims that the Court should declare the appeal manifestly inadmissible and/or manifestly unfounded and, consequently, dismiss it in its entirety by way of a reasoned order, [and] in any event dismiss the appeal as inadmissible and/or unfounded and order EBMA to pay the costs of the present proceedings.

26. In their responses, submitted pursuant to Article 172 of the Rules of Procedure of the Court of Justice, the Council and the Commission claim that the Court should set aside the judgment under appeal, give a ruling on the substance and dismiss the action for annulment or refer the case back to the General Court for a decision on the substance of the action for annulment. Lastly, they also ask that the Court order Giant to pay the costs incurred by both institutions before the General Court and the Court.

VI. Analysis

27. In support of its appeal, EBMA puts forward three grounds of appeal, which the Council and the Commission endorse.

28. The first two grounds of appeal, which should be examined together, allege several errors of law in the application of Article 18(1) of the basic regulation. In that context, EBMA complains that the General Court exceeded its power of judicial review. By its third ground of appeal, EBMA claims that the Court erred in law in its analysis concerning the absence of a risk of circumvention.

A. The first and second grounds of appeal

1. Summary of the arguments of the parties

29. By its first two grounds of appeal, EBMA, supported by the institutions, disputes the General Court's analysis contained in paragraphs 56 to 78 of the judgment under appeal. In those two grounds of appeal, EBMA puts forward, in essence, four complaints, of which the first three allege misapplication of Article 18(1) of the basic regulation and the fourth [15] alleges that the General Court exceeded its power of judicial review.

30. In the first place, EBMA complains that the General Court applied an erroneous legal analysis in its assessment of the Council's application in the regulation at issue of Article 18(1) of the basic regulation.

15 That complaint in fact constitutes a separate ground of appeal.

31. EBMA submits that the institutions can use the 'facts available' within the meaning of Article 18(1) and (3) of the basic regulation in three ways: 'globally', by reference to all the information and facts provided by a party; by reference to a complete set of information or facts, such as a claim for MET, or a claim for individual treatment; or solely by reference to certain aspects of a set of information or facts.

32. In the judgment under appeal, the General Court starts from the mistaken premiss that the Council applied Article 18(1) of the basic regulation to Giant's export price (a situation corresponding to the second of the three scenarios described in the previous point). However, the Council applied Article 18(1) 'globally' to the Giant group on account of the refusal to provide complete information concerning its structure and in particular concerning all the relationships existing, through GP, between the companies of the Giant group and those of the Jinshan group. That refusal prevented the institutions from gaining an accurate picture of the identity of the party which was cooperating.

33. The Commission endorses that complaint and submits that the General Court incorrectly interpreted the regulation at issue in considering that the application of Article 18(1) of the basic regulation is concerned not with determining the extent of the actual exporter but with the subsequent issue of determining the export price.

34. In the second place, EBMA complains that the General Court committed an error of law in the assessment of Giant's cooperation for the purposes of Article 18(1) of the basic regulation. The General Court should have found that Giant had not cooperated with the investigation because it had not provided a minimum level of information enabling the institutions to gain a complete and accurate picture of the activities of all the companies related to its group which were involved in the production or sale of the product concerned. Contrary to what the General Court held, the relevance of the relationships between the Giant group, GP and the Jinshan group was not confined to the transactions concerning direct sales. Without basic minimum information, the institutions were not in a position to assess the relevance of the Jinshan group's involvement and, in particular, the possible ways in which that group could have influenced the activities of GP and, in that way, of the Giant group. By way of example, EBMA cites the possible existence of market-sharing agreements or of common pricing policies between the Giant group and the Jinshan group, which would not be apparent from the tables relating to sales or from the consolidated statements submitted by Giant in the course of the investigation but which it would be possible to trace by comparing the sets of facts from all the companies. The Council endorses that complaint.

35. In the third place, EBMA claims that the judgment under appeal wrongly imposes on the Commission the excessive burden of having to demonstrate the necessity of the basic minimum information required concerning the related companies involved in the production or sale of the product concerned. The existence of a link and an involvement of that kind are sufficient to make the response to the anti-dumping questionnaire 'necessary' information within the meaning of Article 18(1) of the basic regulation. The Commission endorses that complaint and submits that the General Court's misinterpretation reverses the burden of proof under Article 18 of the basic regulation and offers an 'inducement' to undertakings which decide not to comply fully with the Commission's requests in anti-dumping investigations.

36. In the fourth place, EBMA, supported by the institutions, complains, in essence, that the General Court took the place of the institutions by drawing conclusions from the partial evidence submitted, thus disregarding the broad discretion enjoyed by those institutions.

37. In that regard, the Council notes that the assessment of the necessity of the information and the examination of that information are complex operations and that the institutions enjoy a broad discretion in choosing the information that they deem pertinent in an anti-dumping investigation. The Council claims that the General Court wrongly found that a potential error of assessment was manifest and, more specifically, did not apply the test of plausibility set out in the case-law. In particular, it did

not review whether the evidence provided by the Giant group was sufficient to conclude that the assessment by the institutions during the investigation was implausible. The Commission notes that it is itself responsible for determining what information is 'necessary' and what consequences arise from not providing such information. It is not for the General Court to carry out the investigation for a second time or to substitute its own assessments for those of the institutions.

38. Giant contends, first of all, that the first and second grounds of appeal are inadmissible because they are concerned with the assessment of the facts carried out by the General Court, which does not fall within the jurisdiction of the Court in the context of an appeal. In the alternative, it contends that the grounds of appeal relied upon by EBMA should be dismissed as to their substance.

2. Assessment

(a) Admissibility

39. It is necessary, first of all, to examine the admissibility of the first two grounds of appeal, which is disputed by Giant.

40. In that regard, it should be recalled that, according to the case-law of the Court, the General Court has exclusive jurisdiction to find and appraise the relevant facts and, in principle, to examine the evidence it accepts in support of those facts. Save where the clear sense of the evidence has been distorted, the appraisal of the facts and evidence does not therefore constitute a point of law which is subject as such to review by the Court. However, when the General Court has found or assessed the facts, the Court has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. [16]

41. In the present case, in the context of its first two grounds of appeal, EBMA complains that the General Court committed errors of law in applying Article 18(1) of the basic regulation. In the first place, it applied an erroneous legal analysis in its assessment based on that provision; in the second place, it wrongly assessed Giant's cooperation in the light of that provision, and, in the third place, it placed an excessive burden on the Commission. In the fourth place, EBMA alleges that the General Court exceeded its power of review by disregarding the discretion enjoyed by the institutions. It is clear that all of these complaints indisputably raise points of law which are subject, as such, to review by the Court.

42. Thus, in so far as the complaints raised in the first two grounds of appeal do not relate to the assessment of the facts carried out by the General Court but are concerned with infringements of law, those complaints must be considered admissible. However, where the complaints set out by EBMA or by the institutions in relation to the first two grounds contain arguments concerning the General Court's assessments of the facts, those arguments must be considered inadmissible.

16 See, to that effect, judgment of 12 January 2017, *Timab Industries and CFPR* v *Commission* (C-411/15 P, EU:C:2017:11, paragraph 89 and the case-law cited).

(b) Substance

(1) The first three complaints, alleging misapplication of Article 18(1) of the basic regulation.

(i) Article 18(1) of the basic regulation and the concept of 'necessary information'

43. Article 18(1) of the basic regulation, entitled 'Non-cooperation' authorises the institutions to use the facts available in cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time-limits provided in that regulation, or in which it significantly impedes the investigation. The use of facts available is also authorised if any interested party supplies false or misleading information. It is apparent from the wording of that provision that these four conditions are alternatives, so that if just one of them is satisfied, the institutions may use the facts available as the basis for their provisional or final findings.[17]

44. First of all, it should be noted that, as is clear from the actual wording of Article 18(1) of the basic regulation, that provision must be considered as transposing into EU law Article 6.8 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,[18] and must therefore be interpreted in the light thereof in so far as possible.[19]

45. Furthermore, it should be noted that the present case concerns the first of the four conditions referred to above, which, under Article 18(1) of the basic regulation, permit the institutions to use the facts available. As is apparent from points 14 to 16 and 21 of this Opinion, the Council applied in the regulation at issue Article 18(1) of the basic regulation because Giant failed to provide the information that the Council considered necessary and the General Court annulled the regulation at issue on account of a misapplication of that provision in that respect.

46. In that regard, it is clear that no definition of the concept of necessary information is given in the basic regulation (or, for that matter, in any other provision of EU law). The Court itself has not yet had the opportunity to examine that concept. Nevertheless, the decision-making practice of the WTO bodies, set out in the case-law of the General Court, provides useful guidance for identifying the principal characteristics of that concept.

17 In that regard, see paragraph 44 of the judgment of 22 May 2014, *Guangdong Kito Ceramics and Others* v *Council* (T-633/11, not published, EU:T:2014:271). That form of words has been repeated in several judgments of the General Court, including the judgment under appeal (see paragraph 61).

18 OJ 1994 L 336, p. 103 ('the anti-dumping agreement'). This agreement is in Annex 1A to the Agreement establishing the World Trade Organisation (WTO) signed at Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1). The wording of Article 6.8 of the anti-dumping agreement is as follows: 'In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within a reasonable period or significantly impedes the investigation, preliminary and final determinations, affirmative or negative, may be made on the basis of the facts available. The provisions of Annex II shall be observed in the application of this paragraph.'

19 In that regard, see, in more detail, points 34 to 37 of my Opinion in Joined Cases *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2016:928) and the references to case-law cited therein. See, in particular, the judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraphs 44 to 46 and the case-law cited). As regards, specifically, the relationship between Article 18(1) of the basic regulation and Article 6.8 of the Anti-dumping Agreement, see judgments of 4 March 2010, *Sun Sang Kong Yuen Shoes Factory* v *Council* (T-409/06, EU:T:2010:69, paragraph 103) and of 22 May 2014, *Guangdong Kito Ceramics and Others* v *Council* (T-633/11, not published, EU:T:2014:271, paragraph 40).

47. Thus, the WTO panel stated that the decision as to whether or not a given piece of information constitutes 'necessary information' within the meaning of Article 6.8 of the Anti-dumping Agreement has to be made in the light of the specific circumstances of each investigation, not in the abstract. [20] A specific piece of information which may play a decisive role in a particular enquiry may, therefore, not have the same relevance in another investigation. It follows that the necessity of a piece of information must be assessed on a case-by-case basis and *in concreto*.

48. That WTO panel also stated that that necessary information, within the meaning of the same provision, refers to specific information held by an interested party that is requested by the authority responsible for the anti-dumping investigation for the purpose of making determinations. [21]

49. As is clear from paragraph 44 of this Opinion, that guidance is also relevant for interpreting the concept of necessary information as provided for in Article 18(1) of the basic regulation. In defining that concept, however, the configuration of the anti-dumping procedure as provided for in the basic regulation cannot be disregarded.

50. In that regard, whilst, in the context of the basic regulation, it is for the Commission as the investigating authority to determine, inter alia, whether the product concerned by the anti-dumping procedure has been dumped and it is not, therefore, for that institution, in that context, to exonerate itself from part of the burden of proof which it bears in that regard, the fact remains that the basic regulation does not confer on the Commission any power of investigation allowing it to compel companies to participate in the investigation or to provide information. In those circumstances, in anti-dumping procedures, the institutions depend on the voluntary cooperation of the parties in supplying the necessary information within the time-limits set. The cooperation of the parties and, in particular, their replies to the anti-dumping questionnaire referred to in Article 6(2) of the basic regulation are therefore essential to the operation of anti-dumping procedures. [22]

51. Furthermore, it is clear from Article 18(6) of the basic regulation that, if an interested party does not cooperate, or cooperates only partially, so that relevant information is thereby withheld, that party may find itself in a less favourable position than if it had cooperated.

52. It follows from those considerations that, in applying Article 18(1) of the basic regulation and, in particular, in interpreting the concept of 'necessary information' within the meaning of that provision, different requirements must be taken into account.

53. On the one hand, it must be ensured that interested parties cooperate genuinely and fully with the investigation acting to the best of their ability [23] and without impeding the investigation. From that perspective, they must provide all the information that they have and that the institutions consider necessary for the purposes of making their determinations. The negative consequences to which an interested party may be exposed in the case of defective or partial cooperation — in that that party may find itself in a less favourable situation than that which it would have been in if it had cooperated fully with the investigation — must function as an incentive to cooperate fully and unconditionally with the investigation.

20 See the WTO panel report entitled 'Korea — Anti-Dumping Duties on Imports of Certain Paper from Indonesia' (WT/DS312/R), adopted on 28 October 2005, paragraph 7.43. In that regard, see also, judgment of the General Court of 22 May 2014, *Guangdong Kito Ceramics and Others* v *Council* (T-633/11, not published, EU:T:2014:271, paragraph 46).

21 See the WTO panel report entitled 'European Communities — Anti-dumping measure on farmed salmon from Norway' (WT/DS337/R), adopted on 15 January 2008, paragraph 7.343. In that regard, see also, judgment of the General Court of 22 May 2014, *Guangdong Kito Ceramics and Others* v *Council* (T-633/11, not published, EU:T:2014:271, paragraph 46).

22 See, to that effect, judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council* (T-249/06, EU:T:2009:62, paragraph 87). As regards the circumvention procedure, see, by analogy, judgment of 4 September 2014, *Simon, Evers & Co.* (C-21/13, EU:C:2014:2154, paragraph 32).

23 In so far as concerns the requirement for interested parties to act to the best of their ability to provide the institutions with the necessary information, see the wording of the final limb of Article 18(3) of the basic regulation. In that regard, see also paragraph 5 of Annex II to the Anti-dumping Agreement.

54. On the other hand, the institutions may not, however, demand that an interested party provide information which is manifestly unnecessary for the purpose of making their determinations or that is impossible for it to supply, given that the requirement to act to the best of their abilities places the interested parties under an obligation to make a significant degree of effort. [24]

55. It is therefore in the light of all the foregoing considerations that it is necessary to assess whether, as the EBMA claims, supported by the institutions, the General Court's analysis in the judgment under appeal is vitiated by infringements of Article 18(1) of the basic regulation.

(ii) Assessment of the General Court's analysis

56. It is clear from point 47 of this Opinion that the determination of whether a piece of information is necessary and, consequently, the application of Article 18(1) of the basic regulation by the institutions, must be assessed in the light of the specific circumstances of each investigation. For the purposes of assessing the General Court's analysis in the judgment under appeal, it is therefore necessary to take into account the specific circumstances of the present case.

57. In the present case, it is common ground that the Giant group and the Jinshan group, during the period concerned by the investigation, were to be considered as being related through their joint venture GP. [25] As the General Court found, during that period, GP was the only link between those two groups. [26] That link was, moreover, in the process of being dissolved - and was, in fact, dissolved prior to the adoption of the regulation -, since Giant's share in GP was then being transferred. [27] Apart from that link, which could be described as horizontal in so far as the Jinshan group was also active in the production of bicycles, the two groups, during the relevant period, constituted two separate entities.

58. The classification of the two groups as related parties led the Commission, in keeping with its practice, to ask the Giant group to complete the MET claim form and, subsequently, the anti-dumping questionnaire for Jinshan and for all of the companies belonging to its group. [28]

59. In the course of the proceedings, Giant, however, claimed that on account of the indirect nature of its link with the Jinshan group, limited to the shareholding in the joint venture GP, it was unnecessary for it to provide such information and that, in any event, it would have been impossible for it to complete the MET claim and, subsequently, the anti-dumping questionnaire for the Jinshan group companies.

60. Nevertheless, as the General Court found in the judgment under appeal, [29] Giant provided complete information in respect of all the companies belonging to its group, including GP, and also provided information concerning the Jinshan group. More specifically, it provided the Jinshan group's consolidated statements. As the General Court noted, those documents allowed all the companies

24 In that regard, see as regards Article 6.8 of the Anti-dumping Agreement, the considerations contained in paragraphs 7.244 and 7.245 of the WTO panel report entitled 'Egypt — Definitive Anti-Dumping Measures on Steel Rebar from Turkey'(WT/DS 211/R) and adopted on 1 October 2002.

25 In that regard, for the purposes of determining whether two parties are associated, the fourth subparagraph of Article 2(1) of the basic regulation refers to the definition of related parties set out in Article 143 of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1). That definition is also relevant for determining the existence of an 'association' for the purposes of establishing the export price within the meaning of Article 2(9) of the basic regulation. The MET claim form and the anti-dumping questionnaire use that definition of related parties.

26 See paragraph 89 of the judgment under appeal.

27 Ibid.

28 See the end of the previous footnote. See, also, points 10 and 11 of this Opinion and paragraphs 14 to 17 of the judgment under appeal.

29 See paragraphs 63 to 66 of the judgment under appeal.

belonging to that group to be identified and, read together with the other information supplied, the inference to be drawn that, among the companies belonging to the Jinshan group, only the joint venture GP had carried out transactions with the Giant group during the period concerned by the investigation.

61. Moreover, Giant submitted a statement from the Jinshan board of directors confirming that the only connection between Giant and the Jinshan company was the joint venture GP and that neither Jinshan nor any of its subsidiaries had any relationship whatsoever with Giant. [30]

62. In those circumstances, the General Court concluded that, using the information available to determine Giant's export price, the Council had infringed Article 18(1) of the basic regulation.

63. EBMA claims that that conclusion is incorrect.

64. In the first place, it complains that the General Court did not consider that the Council had applied Article 18 of the basic regulation 'globally' to the Giant group because of that group's refusal to provide basic minimum information concerning its structure.

65. In that regard, it should, however, be noted that the interpretation of Article 18(1) of the basic regulation put forward by EBMA - summarised in point 31 of this Opinion -, according to which the institutions could apply that provision in three different ways, has no basis in the wording of the provision at issue, or in any other provision of the basic regulation or in the case-law of the EU courts. Nor is it supported by the decision-making practice of WTO bodies concerning Article 6.8 of the Anti-dumping Agreement.

66. However, contrary to what EBMA claims, several factors indicate that, in the present case, the institutions used the facts available as provided for in Article 18(1) of the basic regulation specifically to determine the Giant group's export price.

67. Thus, in its letter of 21 March 2013, referred to in point 13 of this Opinion, the Commission informed Giant of its intention to apply Article 18(1) of the basic regulation and to make its findings on the basis of the facts available specifically for the purposes of determining the export price. Moreover, recital 131 of the regulation at issue explicitly states that 'Article 18(1) of the basic Regulation was applied concerning the export price'.

68. Furthermore, as is clear from points 47 and 48 of this Opinion, the necessity of a piece of information must be assessed not in the abstract or 'globally', but in relation to a determination that the authority responsible for the investigation must make, namely, in the present case, the determination of the export price.

69. Of course, it is necessary for the EU institutions to obtain, at the start of the investigation, a certain amount of general information concerning the companies related to the exporting producers in order to determine the true 'extent' of those exporting producers, and there is no need for those institutions to justify why that information is necessary to take a decision under the basic regulation.

30 See paragraph 67 of the judgment under appeal.

70. However, as I noted in point 60 of this Opinion, in the present case the General Court found that, in addition to complete information concerning the subsidiaries belonging to its group, Giant had provided information allowing the identification of all the companies of the Jinshan group as well as all the transactions that took place between that group and the Giant group in the relevant period. In those circumstances, EBMA cannot genuinely claim that Giant did not provide basic minimum information in respect of Jinshan. [31]

71. In those circumstances, the complaint put forward by EBMA alleging that the General Court did not consider that the Council had applied Article 18(1) of the basic regulation 'globally' to the Giant group, must, in my view, be rejected.

72. In the second place, EBMA calls into question the General Court's assessment of Giant's cooperation with the investigation. In essence, EBMA argues that the General Court should have considered that the application of Article 18(1) of the basic regulation to Giant was justified on account of Giant's non-cooperation.

73. In that regard, it should be recalled that, as I noted in point 57 of this Opinion, apart from the link between the Giant group and the Jinshan group through GP, the two groups constituted two different entities, or even two competing groups. That situation is the reason why, in the course of the investigation, when the Commission asked it to submit the MET claim form and the anti-dumping form for Jinshan and the companies belonging to its group, Giant claimed that it was impossible for it to provide that information.

74. It is clear from the case file that the Commission did not really take into consideration Giant's claim that it was impossible for it to provide the information requested. Instead, it insisted that it was necessary that Giant respond with those forms for Jinshan and its companies, intending, in the event that no reply was forthcoming, to apply Article 18(1) of the basic regulation.

75. Without doubt, those forms contain very meticulous questions. In order to complete such forms in the appropriate manner, it is necessary to have access to very detailed commercial data, which is often confidential. Normally an undertaking will not have (and according to competition rules should not even be expected to have) access to all that information in respect of a group which is a competitor. In those circumstances, even if it is conceivable that Giant could have procured some of the information requested concerning Jinshan and its group, it was not supposed to have available all the information necessary to complete the required forms for Jinshan and its group.

76. As I have noted above, [32] in an anti-dumping investigation the interested parties are required to cooperate genuinely and fully, acting to the best of their abilities. They must, in particular, provide all the information *which is available to them* and which the institutions consider necessary for the purpose of making their determinations. Nevertheless, the application of Article 18(1) of the basic regulation must be assessed on a case-by-case basis taking into account the circumstances of the case at issue.

31 The present case thus differs from the case which gave rise to the judgment of 22 May 2014, *Guangdong Kito Ceramics and Others* v *Council* (T-633/11, not published, EU:T:2014:271). In that judgment the General Court considered that the institutions did not commit an error in using the available information as provided for in Article 18(1) of the basic regulation, because of the interested party's failure to communicate the name of two subsidiaries of the group concerned, which amounted to a failure to provide full and wholly reliable information regarding the precise composition of the whole group of companies (see paragraph 49 of that judgment).

32 See points 47, 48, 53 and 54 of this Opinion.

77. The present case is characterised by a rather particular situation in which: (i) the relationship between the related parties was horizontal; (ii) the joint venture which constituted the sole link between those parties was in the process of being transferred, such that that link was being dissolved; (iii) the interested party at issue cooperated fully with the investigation in so far as it was concerned and also provided all the information concerning the party related to it; (iv) it claims that it was impossible for it to provide the very detailed information requested by the institutions concerning the party related to it.

78. In such a situation, I consider that the institutions should have taken into account Giant's claim that it was impossible for it to take into consideration the requested information and should, if necessary, have clarified which specific pieces of information they needed for the purpose of making their determinations. They should then have reviewed in what way Giant could, while acting to the best of its ability, have provided that information.

79. In that regard, I note that, in general, it is for the institutions to indicate to the parties covered by the investigation what information they must provide. [33]

80. Moreover, it is clear that, in paragraph 69 of the judgment under appeal, the General Court noted that neither in its pleadings nor at the hearing was the Council able to specify what information additional to that provided by Giant during the investigation concerning the Jinshan group companies might have proved necessary for the calculation of Giant's export price. It was, also, on the basis of that finding that the General Court concluded that Giant could not be criticised for not having provided certain information which had been declared necessary on the basis of vague allegations, particularly since the absence of a relationship between Giant and the Jinshan group companies clearly undermined the allegations as to the necessity of the replies to the anti-dumping questionnaire for the latter companies. In that regard, I would also note that where, at the hearing before the Court, the same question was put to the Council, it was not able to respond to the question in a satisfactory manner.

81. It would appear from a reading of recital 131 of the regulation at issue that the institutions considered that Giant should have provided information concerning production, export sales volume and prices of the product concerned to the European Union in the relevant period of the Jinshan group companies. In its appeal, EBMA, for its part, refers, as an example of the information that should have been reviewed, to the potential existence of market-sharing agreements or common pricing policies between the Giant group and the Jinshan group. If that was the information required by the institutions, in the light of the specific circumstances of the present case as set out in paragraph 77 of this Opinion, they should have requested it specifically and checked whether Giant, acting to the best of its abilities, could have reasonably provided more information than it had already provided. In such circumstances, however, the institutions could not simply overlook all the detailed information that Giant had provided.

33 See, in that regard, paragraph 1 of Annex II to the Anti-dumping Agreement, which provides, inter alia, that the investigating authorities should specify to the parties covered by the investigation the 'information required from [them]'.

82. In that regard, it should be recalled that although the parties to an anti-dumping proceeding are in principle required, pursuant to Article 6(2) of the basic regulation, to lodge a reply to the Commission's questionnaire, it follows from the wording of Article 18(3) of that regulation that information presented in another form or in the context of another document does not have to be ignored where the four conditions set out in that article are satisfied. [34]

83. It is clear from the foregoing considerations that the General Court did not incorrectly assess Giant's cooperation and did not infringe Article 18(1) of the basic regulation in that regard.

84. In the third place, EBMA complains that the General Court infringed Article 18(1) of the basic regulation by wrongly imposing on the institutions the excessive burden of having to demonstrate the necessity of the basic minimum information required concerning the related companies involved in the production or sale of the product concerned.

85. However, it is clear from the foregoing considerations that that complaint must also be rejected. As I have already stated several times, there is no doubt that it falls to the institutions to assess the necessity of a piece of information for the purpose of making their determinations.

86. Nonetheless, in the present case the General Court noted that Giant had provided basic information about the party related to it, which, in the context of the particular situation in the present case, was sufficient to establish the institutions' determination concerning the export price.

87. Lastly, a response must still be given to the two arguments put forward by the Council in its response. First, as regards the argument that the General Court wrongly declared that the requested information was not necessary, it must be considered inadmissible in that it calls into question an assessment of the facts made by the General Court. Secondly, as regards the argument that the General Court committed an error of law in finding that the institutions had applied Article 18(1) of the basic regulation because the Giant group had sent them false or misleading information, it is clear that it is based on a misreading of the judgment under appeal, since that judgment contained no such findings. [35]

88. In the light of all the foregoing considerations, I take the view that the complaints put forward by EBMA alleging misapplication by the General Court of Article 18(1) of the basic regulation must be rejected.

(2) Whether the General Court exceeded its power of judicial review

89. EBMA claims that the General Court took the place of the institutions by drawing conclusions from the partial evidence submitted and thus disregarded the broad discretion enjoyed by those institutions and exceeded its power of judicial review.

34 See paragraph 150 of the judgment of 16 February 2012, *Council and Commission* v *Interpipe Niko Tube and Interpipe* NTRP (C-191/09 P and C-200/09 P, EU:C:2012:78). In that judgment, the Court endorsed the analysis of the General Court, which, in its judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council* (T-249/06, EU:T:2009:62, paragraphs 90 and 91), had held that under Article 18(3) of the basic regulation, where a party has failed to lodge a reply to the questionnaire, but has supplied information in the context of another document, it cannot be accused of lack of cooperation if, first, any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding; secondly, the information is submitted in good time; thirdly, it is verifiable; and, fourthly, the party has acted to the best of its ability.

35 On the contrary, in paragraphs 71 to 75 of the judgment under appeal, the General Court analysed the items of evidence put forward by the Council and concluded, in paragraph 76 of the same judgment, that, taken individually or in conjunction, they did not support the conclusion, in this case, that the information provided by Giant regarding the export price was false or misleading.

90. In that regard, it should be recalled that it is settled case-law that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine. The judicial review of such an appraisal must therefore be limited to verifying whether the 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 in the appraisal of those facts or a misuse of powers. [36]

91. It should be noted that although the institutions do enjoy a wide margin of discretion which also covers the identification of the information which they need for the purposes of making their determinations, this nevertheless does not mean that, as is clear from point 54 of this Opinion, they may demand from an interested party any information whatsoever or that the possibility for them to use the facts available as provided for in Article 18(1) of the basic regulation is limitless.

92. In the present case, the General Court, on the basis of the information in the case-file and the findings it made during the proceedings before it, concluded that in the particular situation of the present case, the Council infringed Article 18(1) of the basic regulation. The Council could not use the facts available to determine Giant's export price in a situation in which, first, the information provided by Giant enabled the calculation of such a price and, secondly, the Council had been unable to determine what additional information would have been necessary to that end.

93. In those circumstances, I do not believe that the General Court disregarded the discretion enjoyed by the institutions and that it exceeded its power of judicial review.

94. It follows from all the foregoing considerations that, in my view, the first two grounds of appeal put forward by EBMA must be rejected.

B. The third ground of appeal

95. By its third ground of appeal, EBMA challenges paragraphs 79 to 91 of the judgment under appeal, in which the General Court held that the Council could not rely on the risk of circumvention to justify the refusal to apply an individual anti-dumping duty to Giant. The General Court based that conclusion on three grounds.

96. First, the General Court noted that the Council had confirmed that the conditions set out in the second subparagraph of Article 9(5) of the basic regulation had not been taken into consideration in the examination of Giant's situation and that that institution did not rely on any other provision of the basic regulation providing that the existence of a risk of circumvention may justify the refusal to grant an individual anti-dumping duty to an exporting producer. In those circumstances, the General Court considered that such a risk could not be relied on by the Council to justify the application to the applicant of the countrywide duty rate. [37]

97. Secondly, the Court considered that the Council could not invoke a solely hypothetical risk of circumvention, intrinsic to the concept of 'related companies', to refuse the grant of an individual anti-dumping duty. In support of its reasoning, the General Court referred to the decision-making practice of the WTO Dispute Settlement Body, according to which the risk that the imposition of individual anti-dumping duties might be ineffective for combating dumping cannot, in itself, justify the imposition of a countrywide duty on exporting producers. [38]

36 See, inter alia, judgment of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Council* and *Council* v *Hubei Xinyegang Steel* (C-186/14 P and C-193/14 P, EU:C:2016:209, paragraph 34 and the case-law cited).

37 Paragraphs 81 and 82 of the judgment under appeal.

38 Paragraphs 83 and 84 of the judgment under appeal and the reports of the WTO Dispute Settlement Body cited.

98. Thirdly, the General Court held that, in any event, on the basis of the information available to the institutions when adopting the regulation at issue, they should have concluded that there was no risk of circumvention between the Giant and Jinshan groups. The General Court considered, in particular, that Giant's withdrawal from GP was capable of eliminating the only link between the Giant group and the Jinshan group and therefore of eliminating the existence of a risk of circumvention owing to the existence of that link between the two groups.[39]

1. Summary of the arguments of the parties

99. EBMA takes the view, first, that it is on the basis of the mistaken premiss that the present case concerns the determination of the export price[40] that the General Court concluded that the institutions could not rely on the risk of circumvention in the present case.

100. Secondly, according to EBMA, where companies are related, such as, in the present case, the Giant and Jinshan groups, there is always a risk of circumvention if one related entity is granted a lower anti-dumping duty than another entity belonging to the same group. It follows that the line of argument contained in the judgment under appeal concerning the hypothetical risk of circumvention between non-related undertakings is fundamentally invalid and incorrect in law. The institutions' concerns as regards circumvention by related companies in the present case are therefore justified. Moreover, the references by the General Court to the decisions of the WTO Dispute Settlement Body are not relevant.

101. Thirdly and lastly, EBMA submits that it cannot be ruled out that the Giant and Jinshan groups were related during the investigation period in a way that goes beyond what is apparent from the replies to the questionnaires concerning the Giant group companies and the consolidated statements of Jinshan.

102. The Council, first of all, endorses that ground of appeal. It goes on to add that the General Court infringed Article 9(5) of the basic regulation. In that regard, it notes that Article 9(5)(e) of that regulation provides that the risk of circumvention may exist in the case of exports from a country that does not have a market economy, such as China. Provision is made for that eventuality by the basic regulation in the case of State interference. That is precisely the case as regards the Giant group since, during the relevant period, the Chinese Government held 33.13% of Jinshan, information which, incidentally, was not communicated by the Giant group during the investigation. The risk of circumvention, as referred to in Article 9(5)(e) of that regulation was, moreover, referred to in recital 114 of the regulation at issue.

103. First of all, Giant submits that the third ground of appeal is inadmissible because, like the first and second grounds of appeal, it is concerned, in Giant's view, with the assessment of the facts, which does not fall within the jurisdiction of the Court in the context of an appeal. In the alternative, Giant submits that the third ground of appeal is unfounded.

2. Assessment

104. It is necessary first to examine, in the light of the case-law which I recalled in point 40 of this Opinion, the plea of inadmissibility raised by Giant in response to EBMA's third ground of appeal.

39 Paragraphs 85 to 89 of the judgment under appeal.

40 See point 32 of this Opinion.

105. In that regard, I consider that there is no doubt that the first two complaints, summarised in points 99 and 100 of this Opinion, raise questions of law which the Court may adjudicate upon on appeal. Those two complaints call into question two legal premisses underpinning the reasoning of the General Court. The second complaint also seeks to dispute the relevance of the references, contained in the judgment under appeal, to the decision-making practice of the WTO Dispute Resolution Panel.

106. By contrast, the third ground of appeal, summarised in point 101 of this Opinion, seeks to call into question the finding of fact, contained in paragraph 89 of the judgment under appeal, that the joint venture GP constituted the only link between the Giant group and the Jinshan group. That complaint must therefore be declared inadmissible.

107. As to the substance, I would observe, first of all, that the first complaint, alleging that the General Court based its decision on the mistaken premiss that the case was concerned with the determination of the export price, must be rejected in the light of the considerations which I set out in points 64 to 67 of this Opinion. It is clear, in fact, from those considerations that that premiss was not incorrect.

108. As to the remainder, I would note that by its arguments EBMA does not genuinely call into question the finding made in paragraph 85 of the judgment under appeal, on the basis of the information set out in the subsequent paragraphs 86 to 88, according to which, *in any event*, the information available to the institutions *when adopting the contested regulation* was sufficient to conclude that there was no risk of circumvention between the Giant and Jinshan groups. EBMA does not specifically dispute, in law, the finding made by the General Court in paragraph 89 of the judgment under appeal that Giant's withdrawal from GP was capable of eliminating such a risk of circumvention.

109. That finding is sufficient in itself to serve as the basis for the conclusion, contained in paragraph 90 of the judgment under appeal, that the Council could not invoke a risk of circumvention to justify the refusal to apply an individual anti-dumping duty to Giant.

110. It follows that, even if the considerations contained in paragraphs 82 to 84 of the judgment under appeal were wrong, the conclusion contained in paragraph 90 of the judgment under appeal would still be valid. In those circumstances, the arguments relating to those paragraphs must, in my view, be declared ineffective.

111. Lastly, as regards the Council's line of argument, summarised in point 102 of this Opinion, it should be recalled that it is clear from Articles 172, 174, 178(1) and the second sentence of Article 178(3) of the Rules of Procedure, read in conjunction, that the response lodged pursuant to Article 172 of those rules may not seek the setting aside of the judgment under appeal on the basis of distinct and independent grounds from those raised in the appeal, since such grounds may be raised only as part of a cross-appeal. [41]

112. It is clear that in the context of its third ground of appeal, EBMA did not, at any time, claim infringement of Article 9(5) of the basic regulation. In those circumstances, I am of the view that the ground of appeal relied on by the Council in its response constitutes a distinct and independent ground for setting aside the judgment under appeal which must be declared inadmissible.

41 In that regard, see judgments of 10 November 2016, *DTS Distribuidora de Televisión Digital* v *Commission* (C-449/14 P, EU:C:2016:848, paragraphs 97 to 102) and of 30 May 2017, *Safa Nicu Sepahan* v *Council* (C-45/15 P, EU:C:2017:402, paragraphs 20 to 22).

113. In any event, that ground is, in my view, also unfounded. The Council cannot genuinely claim infringement of a provision - Article 9(5) of the basic regulation - which, as it itself acknowledged before the General Court,[42] was not applied in the present case in respect of Giant. Moreover, the reference to recital 114 of the regulation at issue is clearly misplaced, since that recital makes reference solely to the relevant provisions of the basic regulation.

114. It is clear from all the foregoing that, in my view, EBMA's third ground of appeal must also be rejected and that, consequently, the appeal must be dismissed in its entirety.

VII. Conclusion

115. In the light of the foregoing considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order the European Bicycle Manufacturers Association (EBMA) to pay, in addition to its own costs, the costs of Giant (China) Co. Ltd;

(3) order the Council of the European Union and the European Commission to pay their own costs.

42 See paragraph 82 of the judgment under appeal.