Reports of Cases

OPINION OF ADVOCATE GENERAL
TANCHEV
delivered on 23 April 2020[1]

Case C-461/18 P

Changmao Biochemical Engineering Co. Ltd
v
Distillerie Bonollo SpA,
Industria Chimica Valenzana (ICV) SpA,
Distillerie Mazzari SpA,
Caviro Distillerie Srl,

Council of the European Union

(Appeal — Dumping — Imports of tartaric acid originating in China —Appeal brought by an intervener at first instance — Article 11(9) of Regulation (EC) No 1225/2009 — Action for annulment brought by a Union producer — Admissibility — Direct concern)

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1. By this appeal, Changmao Biochemical Engineering Co. Ltd requests the Court to set aside the judgment of 3 May 2018, *Distillerie Bonollo and Others* v *Council* ('the judgment under appeal') [2] by which the General Court annulled Council Implementing Regulation (EU) No 626/2012 ('the regulation at issue'). [3]

2. Given that Changmao Biochemical Engineering was not a party, but an intervener in the proceedings before the General Court, this appeal presents the Court with an opportunity to rule on the scope of the second paragraph of Article 56 of the Statute of the Court of Justice ('the Statute'), which provides that interveners at first instance may bring an appeal against a decision of the General Court only where that decision directly affects them. This case also raises the question of the scope of Article 11(9) of Council Regulation (EC) No 1225/2009 ('the basic regulation'), [4] which requires that, where a review of anti-dumping measures is carried out, the same methodology is applied as in the original investigation, unless the circumstances have changed. Furthermore, given that the Commission has brought a cross-appeal, whereby it challenges the General Court's finding that the applicants, who are Union producers, are directly concerned by the regulation at issue, the Court will

2 T-431/12, EU:T:2018:251.

3 Regulation of 26 June 2012 amending Implementing Regulation (EU) No 349/2012 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China (OJ 2012 L 182, p. 1).

4 Regulation of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51).

have to determine whether the interpretation of the condition relating to direct concern in the recent judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873), applies in the field of anti-dumping.

I. Legal framework

3. Article 11 of the basic regulation, headed 'Duration, reviews and refunds', provides, in paragraph 9, as follows:

'In all review or refund investigations carried out pursuant to this Article, the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of Article 2, and in particular paragraphs 11 and 12 thereof, and of Article 17.'

II. Background to the proceedings

4. Tartaric acid is used in the production of wine and other beverages, as a food additive and as a retardant in plaster and other products. In both the European Union and Argentina, L+ tartaric acid is produced from by-products of winemaking, known as wine lees. In China, L+ tartaric acid and DL tartaric acid are produced from benzene. The tartaric acid produced by chemical synthesis has the same physical and chemical characteristics and the same basic uses as that produced from by-products of winemaking.

5. Changmao Biochemical Engineering is a Chinese exporting producer of tartaric acid. Distillerie Bonollo SpA, Industria Chimica Valenzana (ICV) SpA, Distillerie Mazzari SpA, Caviro Distillerie Srl and Comercial Química Sarasa SL ('the applicants at first instance') are Union producers of tartaric acid.

6. On 24 September 2004, the European Commission received a complaint concerning dumping in the tartaric acid sector from several Union producers, including Industria Chimica Valenzana (ICV), Distillerie Mazzari and Comercial Química Sarasa.

7. On 30 October 2004, the Commission published in the *Official Journal of the European Union* a notice of initiation of an anti-dumping proceeding concerning imports of tartaric acid originating in the People's Republic of China.[5]

8. On 27 July 2005, the Commission adopted Regulation (EC) No 1259/2005 imposing a provisional anti-dumping duty on imports of tartaric acid originating in the People's Republic of China.[6]

9. On 23 January 2006, the Council of the European Union adopted Regulation (EC) No 130/2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of tartaric acid originating in the People's Republic of China.[7]

5 OJ 2004 C 267, p. 4.

6 OJ 2005 L 200, p. 73.

7 OJ 2006 L 23, p. 1.

10. Under Regulation No 130/2006, Changmao Biochemical Engineering and Ninghai Organic Chemical Factory ('the two Chinese exporting producers') were granted market economy treatment ('MET') pursuant to Article 2(7)(c) of the basic regulation. Anti-dumping duties of 10.1% and 4.7% respectively were imposed on the goods produced by the two Chinese exporting producers.[8] An anti-dumping duty of 34.9% was imposed on all other companies.

11. Following the publication on 4 August 2010 of a notice on the impending expiry of certain anti-dumping measures,[9] on 27 October 2010 the Commission received a request for review of those measures, lodged by the five Union producers mentioned in point 5 above. On 26 January 2011, the Commission published a notice of initiation of an expiry review.[10]

12. On 9 June 2011, the Commission received a request for a partial interim review concerning the two Chinese exporting producers, pursuant to Article 11(3) of the basic regulation. That request was lodged by the five Union producers mentioned in point 5 above. On 29 July 2011, the Commission published a notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China.[11]

13. On 16 April 2012, the Council adopted Implementing Regulation (EU) No 349/2012 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of the basic regulation.[12]

14. Regulation No 349/2012 maintained the anti-dumping duties imposed by Regulation No 130/2006.

15. At the end of the partial interim review procedure concerning the two Chinese exporting producers, on 26 June 2012 the Council adopted the regulation at issue, which amends Regulation No 349/2012.

16. In essence, the regulation at issue does not grant MET to the two Chinese exporting producers, and, after having calculated the constructed normal value on the basis of information provided by a cooperating producer in an analogue country, namely Argentina, increases the anti-dumping duties applicable to the goods produced by those two companies from 10.1% to 13.1% and from 4.7% to 8.3% respectively.[13]

17. On 5 October 2012, Changmao Biochemical Engineering brought an action for the annulment of the regulation at issue.

18. By judgment of 1 June 2017,[14] the General Court annulled that regulation in so far as it applied to Changmao Biochemical Engineering, on the ground that in refusing to communicate to that company the information relating to the price difference between DL tartaric acid and L+ tartaric acid, which was one of the fundamental elements of the calculation of the normal value of DL acid, the Council and the Commission infringed the rights of defence of Changmao Biochemical Engineering and Article 20(2) of the basic regulation. That judgment was not contested by way of appeal.

8 See recitals 14 to 17 of Regulation No 1259/2005, and recitals 12 and 42 of Regulation No 130/2006.

9 OJ 2010 C 211, p. 11.

10 Notice of initiation of an expiry review and a review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China (OJ 2011 C 24, p. 14).

11 OJ 2011 C 223, p. 16.

12 OJ 2012 L 110, p. 3.

13 See recitals 17 to 21 and 27 to 29 of the regulation at issue.

14 Judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372).

III. Proceedings before the General Court and judgment under appeal

19. On 28 September 2012, the applicants at first instance brought an action for the annulment of the regulation at issue.

20. By decision of 9 September 2016, and by order of 15 September 2016, the President of the Sixth Chamber of the General Court granted the Commission and Changmao Biochemical Engineering leave to intervene in support of the form of order sought by the Council, stating that, because their applications to intervene were lodged after the expiry of the period referred to in Article 116(6) of the Rules of Procedure of the General Court of 2 May 1991,[15] as last amended on 19 June 2013, they were authorised only to submit their observations during the oral procedure, on the basis of the Report for the Hearing which would be communicated to them.

21. By the judgment under appeal, the General Court held the action to be admissible, upheld the first plea raised by the applicants and annulled the regulation at issue.

22. First, the General Court rejected the plea of inadmissibility raised by the Council alleging that the applicants were not directly and individually concerned by the regulation at issue, and, further, that they had no interest in bringing proceedings.

23. In particular,[16] the General Court held that the applicants were directly concerned by the regulation at issue. The General Court recalled that, according to case-law, that condition requires that the contested EU measure directly affect the legal situation of the applicant on the one hand, and that there must be no discretion left to the addressees of that measure who are responsible for its implementation, on the other. The latter requirement was met because the Member States, who were responsible for implementing the regulation at issue, had no discretion as regards the rate of anti-dumping duty and the imposition of that duty on the product concerned. As regards the former requirement, the Council and the Commission argued that the modification of the rate of anti-dumping duty brought about by the regulation at issue was incapable of producing legal effects vis-à-vis the applicants because, on the one hand, the applicants did not pay any anti-dumping duty, and, on the other hand, they did not have a subjective right to have a certain level of anti-dumping duties imposed on their competitors. The General Court rejected this contention. Indeed, had the EU Courts adopted such a restrictive interpretation of that requirement, any action brought by a Union producer against a regulation imposing anti-dumping duties would have to be declared automatically inadmissible; the same would apply to any action brought by a competitor of the beneficiary of aid declared compatible with the internal market by the Commission at the end of the formal investigation procedure, as well as to any action brought by a competitor against a decision declaring a concentration compatible with the internal market. However, case-law has declared these types of action admissible. Given that, in the present case, the applicants had lodged the request for the partial interim review, and the anti-dumping duties imposed at the end of the partial interim review procedure were intended to offset the injury they had suffered as competing producers operating on the same market, the General Court concluded that they were directly concerned by the regulation at issue.

24. Second, the General Court upheld the first plea raised before it, alleging infringement of Article 11(9) of the basic regulation.

15 OJ 1991 L 136, p. 1.

16 Given that Changmao Biochemical Engineering challenges only the assessment of the condition relating to direct concern in its appeal, and not the General Court's analysis of the condition relating to individual concern or the requirement that the applicants have an interest in bringing proceedings, I will summarise the General Court's assessment of the condition relating to direct concern.

25. Article 11(9) of the basic regulation, the General Court recalled, requires that, in all review investigations, the Commission apply the same methodology as in the original investigation, provided that circumstances have not changed, with due account being taken of Article 2 of that regulation.

26. In the present case, during the original investigation the normal value was calculated for the two Chinese exporting producers, which had been granted MET, on the basis of each company's actual domestic sales prices, and, for the exporting producers not granted MET, on the basis of information received from the producer in the analogue country, in particular, the domestic sales prices in Argentina. In the regulation at issue, the two Chinese exporting producers were denied MET during the review investigation, with the result that the normal value could no longer be established on the basis of the actual domestic sales prices charged by each of those two companies. It was calculated, in essence, on the basis of the costs of production in Argentina.

27. The General Court found that the fact that, in the regulation at issue, the normal value for exporting producers not granted MET was calculated on the basis of the costs of production in Argentina rather than on the basis of domestic sales prices in Argentina constitutes a change in methodology within the meaning of Article 11(9) of the basic regulation. Given that the regulation at issue did not refer to a change in circumstances, this change of methodology was inconsistent with that provision.

28. Consequently, the General Court annulled the regulation at issue.[17]

29. At the applicants' request, it maintained the anti-dumping duty imposed by the regulation at issue as regards Ninghai Organic Chemical Factory until the Commission and the Council had adopted the measures necessary to comply with the judgment under appeal. In the light of the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372), that duty could not be maintained as regards Changmao Biochemical Engineering.

IV. Procedure before the Court of Justice and forms of order sought

30. By the present appeal, Changmao Biochemical Engineering requests the Court to set aside the judgment under appeal in its entirety, and order the applicants at first instance to pay the appellant's costs, both at first instance and on appeal.

31. Distillerie Bonollo, Industria Chimica Valenzana (ICV), Distillerie Mazzari and Caviro Distillerie (collectively 'Distillerie Bonollo') contend that the Court should dismiss the appeal as inadmissible and, in any event, unfounded. Distillerie Bonollo further requests the Court to order the appellant and any intervening parties to pay its costs at first instance and on appeal.

32. The Council contends that the Court should dismiss the appeal as inadmissible and order the appellant to pay the costs of the appeal.

33. The Commission contends that the Court should dismiss the appeal as inadmissible and, in any case, unfounded, and that it should order the appellant to pay the costs.

17 There was thus no need for the General Court to examine the other four pleas raised by the applicants, alleging (i) infringement of Article 2(7)(a) of the basic regulation, read in conjunction with Article 2(1), (2) and (3) of that regulation, by using a constructed normal value rather than the actual domestic sales prices in the analogue country; (ii) infringement of Article 2(3) of the basic regulation by constructing the normal value on the basis of the costs in a country other than the analogue country; (iii) infringement of Article 2(3) of the basic regulation by constructing the normal value using a raw material which was not equivalent; and (iv) infringement of the rights of the defence and failure to state reasons.

34. The Commission has brought a cross-appeal. It requests the Court to set aside the judgment under appeal, declare that the first four pleas raised before the General Court are inadmissible,[18] and declare that the fifth plea raised before the General Court is unfounded or, in the alternative, refer the case back to the General Court for it to rule on the fifth plea raised at first instance.[19] In the alternative, the Commission requests the Court to set aside the judgment under appeal to the extent that it orders the Council to adopt the measures necessary to comply with it. The Commission also requests the Court to order Changmao Biochemical Engineering to pay the costs.

35. Distillerie Bonollo requests the Court to reject the second limb of the first ground of the cross-appeal[20] as inadmissible or, in the alternative, as unfounded. Distillerie Bonollo further requests the Court to dismiss the remainder of the cross-appeal as unfounded or ineffective. Finally, it requests the Court to order the Commission to pay Distillerie Bonollo's costs of the proceedings before the Court and those incurred in the event of a referral back to the General Court.

36. The Council supports the forms of order sought by the Commission in the cross-appeal.

37. Changmao Biochemical Engineering requests the Court to set aside the judgment under appeal, declare that the first four pleas raised before the General Court are inadmissible, declare that the fifth plea raised before the General Court is unfounded or, in the alternative, refer the case back to the General Court for it to rule on the fifth plea raised at first instance. In the alternative, it requests the Court to set aside the judgment under appeal to the extent that it orders the Council to adopt the measures necessary to comply with it. Finally, it requests the Court to order Distillerie Bonollo to pay Changmao Biochemical Engineering's costs.

38. At the hearing on 24 October 2019, Changmao Biochemical Engineering, Distillerie Bonollo, the Council and the Commission presented oral argument.

V. The cross-appeal

39. Given that the cross-appeal brought by the Commission contests primarily the admissibility of the action at first instance, it should be examined first.

A. Arguments of the parties

40. The Commission asks the Court to set aside the judgment under appeal, reject as inadmissible the first four pleas raised before the General Court,[21] and reject as unfounded the fifth plea raised at first instance or, in the alternative, to refer the case back to the General Court for it to rule on the fifth plea.[22] In the alternative, the Commission asks the Court to set aside the judgment under appeal to the extent that, in the second paragraph of the operative part of that judgment, the Council was ordered to adopt the measures necessary to comply with it.

18 The first four pleas raised before the General Court alleged (i) infringement of Article 11(9) of the basic regulation; (ii) infringement of Article 2(7)(a) of the basic regulation, read in conjunction with Article 2(1), (2) and (3) of that regulation; (iii) infringement of Article 2(3) of the basic regulation; and (iv) infringement of Article 2(3) of the basic regulation (see footnote 17 above).

19 The fifth plea raised before the General Court alleged an infringement of the rights of the defence and a failure to state reasons (see footnote 17 above).

20 The second limb of the first ground of the cross-appeal alleges that the fifth plea raised before the General Court (see footnote 19 above) is unfounded.

21 As mentioned in footnote 18 above, the first four pleas raised before the General Court alleged (i) infringement of Article 11(9) of the basic regulation; (ii) infringement of Article 2(7)(a) of the basic regulation, read in conjunction with Article 2(1), (2) and (3) of that regulation; (iii) infringement of Article 2(3) of the basic regulation; and (iv) infringement of Article 2(3) of the basic regulation.

22 As mentioned in footnote 19 above, the fifth plea raised before the General Court alleges an infringement of the rights of the defence and a failure to state reasons.

41. In support of the form of order whereby it requests the Court to set aside the judgment under appeal, the Commission puts forward a single ground of appeal. It submits that the General Court erred in law in finding, in paragraphs 51 to 73 of the judgment under appeal, that Distillerie Bonollo was directly concerned by the regulation at issue.

42. First, the Commission argues that the General Court could not invoke the right to effective judicial protection, as enshrined in Article 47 of the Charter of Fundamental Rights of the European Union ('the Charter'), in order to adopt a broad interpretation of the condition relating to direct concern. That interpretation, according to which that requirement is satisfied when the contested EU act has a *material* effect on the applicant's situation, is also inconsistent with settled case-law, which requires a *legal* effect on the applicant's situation. Second, the Commission contends that, for the regulation at issue to affect the legal situation of Distillerie Bonollo, it must confer on the latter a substantive right. However, the Commission argues that Distillerie Bonollo does not have a right to require that a certain level of anti-dumping measures be imposed on competing third-country producers, given that Article 21 of the basic regulation allows the Council and the Commission to refrain from imposing measures where this would not be in the interest of the Union.

43. The Commission concludes that the judgment under appeal must be set aside.

44. Consequently, the Commission asks the Court to reject as inadmissible the first four pleas put forward before the General Court and to reject as unfounded the fifth plea raised at first instance. As regards the latter plea, which alleges an infringement of the rights of defence and the duty to state reasons, the Commission acknowledges that it is admissible because it is a procedural plea, not a substantive one. However, the Commission claims that that plea is unfounded, given that, during the administrative procedure, Distillerie Bonollo had numerous written and oral exchanges with the Commission. Should, however, the Court find that it cannot give final judgment on the fifth plea put forward before the General Court, the Commission requests that the case be referred back to the General Court for it to rule on that plea.

45. In the alternative, the Commission requests the Court to set aside the second paragraph of the operative part of the judgment under appeal. In support of that form of order, the Commission puts forward a single ground of appeal, alleging that the General Court erred in law in maintaining the anti-dumping duty imposed by the regulation at issue 'until the [Commission] and the [Council] have adopted the measures necessary to comply with [that] judgment'. It claims that, since the entry into force of Regulation (EU) No 37/2014 of the European Parliament and of the Council,[23] only the Commission may impose anti-dumping measures.

46. Changmao Biochemical Engineering agrees with all forms of order put forward by the Commission, except that, first, it disagrees with the alternative form of order put forward by the Commission (summarised in the preceding point), and, second, it asks the Court to order Distillerie Bonollo to pay the costs of Changmao Biochemical Engineering.

47. Distillerie Bonollo submits that the cross-appeal should be dismissed.

48. First, as regards the Commission's claim that the fifth plea put forward before the General Court is unfounded, Distillerie Bonollo submits that that claim is inadmissible. This is because, first, the General Court did not examine that plea, second, it is a question of fact, and, third, the cross-appeal refers to the Council's reply to the written questions of the General Court, of which the Commission should not have received a copy since it was granted leave to intervene solely on the basis of the Report for the Hearing. Distillerie Bonollo argues that that claim is, in any event, unfounded.

23 Regulation (EU) No 37/2014 of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for the adoption of certain measures (OJ 2014 L 18, p. 1).

49. Second, as regards the single ground put forward in support of the form of order seeking the annulment of the judgment under appeal, Distillerie Bonollo submits that it is inadmissible in so far as it is directed against paragraphs 59 and 63 of the judgment under appeal. This is because, as regards the former paragraph, the Commission challenges a finding of fact, and, as regards the latter paragraph, the Commission merely seeks to substitute its own interpretation for that adopted by the General Court.

50. Distillerie Bonollo further submits that that single ground of appeal is wholly unfounded or ineffective. Distillerie Bonollo argues, in particular, that the General Court did not rely on the principle of effective judicial protection in order to enlarge the notion of direct concern, given that the reference, in paragraph 93 of the judgment under appeal, to that principle is superfluous. Moreover, an applicant is directly concerned by an EU act where, as the General Court held in paragraph 52 of the judgment under appeal, it is affected in its capacity as a market participant in competition with other market participants. This test has been endorsed by the Court of Justice in its judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 43). Therefore, Distillerie Bonollo argues that it is directly concerned as a direct competitor of the two Chinese exporting producers, on whose products the regulation at issue fails to impose adequate anti-dumping duties.

51. Third, Distillerie Bonollo submits that the single ground put forward in support of the Commission's alternative form of order is unfounded. The second paragraph of the operative part of the judgment under appeal requires not only the Council, but also the competent institution, namely the Commission, to adopt the measures necessary to comply with that judgment.

52. The Council supports both forms of order put forward by the Commission.

53. First, the Council submits that the judgment under appeal should be set aside as the General Court erred in finding the four substantive pleas raised before it to be admissible. Although the condition relating to direct concern must be interpreted in the light of the principle of effective judicial protection, that principle cannot have the effect of setting aside the conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU. Moreover, the case-law that requires the EU act to affect the legal situation of the applicant, rather than its factual situation, is still good law. A regulation imposing anti-dumping duties is not capable of having any legal effect on Union producers since, first, those producers do not pay those duties, and, second, they do not have a right to have duties imposed on third-country exporting producers. Therefore, in paragraphs 52 and 53 of the judgment under appeal, the General Court erred in holding, in essence, that the requirement relating to direct concern is satisfied where the factual situation of the applicant is affected.

54. Second, the Council contends that, if the Court sets aside the judgment under appeal, it should reject as unfounded the fifth plea put forward before the General Court.

55. Third, the Council submits that, if the Court decides that the judgment under appeal is not to be set aside, it should nonetheless set aside the second paragraph of the operative part of that judgment, as Regulation No 37/2014 confers the power to adopt anti-dumping measures solely on the Commission.

B. Assessment

56. By its cross-appeal, the Commission seeks to have the judgment under appeal set aside ('the Commission's main form of order') on the ground that the General Court erred in finding, in paragraphs 51 to 73 of that judgment, that Distillerie Bonollo was directly concerned by the regulation at issue. In the alternative, the Commission seeks to have set aside the second paragraph of the

operative part of the judgment under appeal, to the extent that that paragraph orders the Council to adopt the measures necessary to comply with that judgment ('the Commission's alternative form of order'), on the ground that, since the entry into force of Regulation No 37/2014, only the Commission may impose anti-dumping measures.

57. Distillerie Bonollo submits that both forms of order sought by the Commission should be rejected, while the Council and Changmao Biochemical Engineering support both forms of order.

1. Admissibility of the cross-appeal

58. Distillerie Bonollo challenges the admissibility, first, of the single ground of appeal put forward in support of the Commission's main form of order, alleging an error in the assessment of direct concern, to the extent that that ground is directed against certain paragraphs of the judgment under appeal, and, second, of the Commission's request that the Court should reject the fifth plea raised before the General Court.[24]

59. Those pleas of inadmissibility should, in my view, be rejected.

(a) Admissibility of the single ground of appeal put forward in support of the Commission's main form of order, in so far as it is directed against paragraphs 59 and 63 of the judgment under appeal

60. First, Distillerie Bonollo contends that the single ground of appeal raised by the Commission is inadmissible in so far as it is directed against paragraph 59 of the judgment under appeal, in which the General Court found that Distillerie Bonollo was directly concerned by the regulation at issue because that regulation imposes on the two Chinese exporting producers anti-dumping duties that are intended to offset the injury suffered by Distillerie Bonollo as a competitor of those two Chinese producers. In Distillerie Bonollo's view, this is a question of fact.

61. In my view, that plea of inadmissibility must be rejected. The Commission does not challenge the General Court's finding, in paragraph 59 of the judgment under appeal, that Distillerie Bonollo was in direct competition with the two Chinese exporting producers, which is indeed a finding of fact not amenable to review by the Court.[25] Rather, the Commission's argument in relation to paragraph 59 of the judgment under appeal is that the injury suffered by the Union industry was assessed not in the regulation at issue, but in 'previous legal acts' (namely, Regulation No 349/2012 and Regulation No 130/2006), with the result that any effects on the legal situation of Distillerie Bonollo are caused not by the regulation at issue, but by those 'previous legal acts'. That is a point of law.

62. Second, Distillerie Bonollo submits that the single ground of appeal is inadmissible in so far as it is directed against paragraph 63 of the judgment under appeal, in which the General Court rejected the Council's argument that, in order to meet the condition relating to direct concern, the applicant must 'have a subjective right to have a specific level of anti-dumping duties imposed'. This is because, according to Distillerie Bonollo, the Commission merely seeks to substitute its own interpretation for that adopted by the General Court.

63. That plea of inadmissibility must also, in my opinion, be rejected. It is true that that argument was put forward at first instance by the Council and that the Commission intervened in support of the Council at first instance. However, according to case-law, where an appellant challenges the interpretation or application of EU law by the General Court, the points of law examined at first

24 For the sake of clarity, I point out that all pleas of inadmissibility concern the Commission's main form of order. They do not concern the Commission's alternative form of order.

25 Judgment of 26 September 2018, *Philips and Philips France* v *Commission* (C-98/17 P, not published, EU:C:2018:774, paragraph 40).

instance may be raised again in the course of an appeal. If an appellant could not thus base his or her appeal on pleas and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose.[26] Moreover, the Commission contests a specific paragraph in the judgment under appeal, that is, paragraph 63.

(b) Admissibility of the Commission's request that the fifth plea put forward before the General Court be rejected as unfounded

64. In the cross-appeal, the Commission, after setting out the reasons why, in its view, Distillerie Bonollo is not directly concerned by the regulation at issue and concluding that the judgment under appeal must be set aside in its entirety, claims that the Court should reject as unfounded the fifth plea raised before the General Court, alleging an infringement of the rights of defence and the duty to state reasons.

65. Distillerie Bonollo disputes the admissibility of the Commission's request to reject as unfounded the fifth plea raised before the General Court. This is because, first, the General Court did not rule on that fifth plea, and, second, the question whether, in particular, Distillerie Bonollo's rights of defence were infringed is a question of fact.

66. In my opinion, that plea of inadmissibility must be rejected.

67. First, it is true that, in the judgment under appeal, the General Court did not examine the fifth plea raised before it. It did not need to, given that it upheld the first plea, alleging infringement of Article 11(9) of the basic regulation, and annulled the regulation at issue on that ground.[27] However, it does not follow that the Commission's request to dismiss as unfounded the fifth plea raised at first instance is inadmissible. This is because it is clear from the cross-appeal that the Commission asks the Court to examine and reject as unfounded the fifth plea raised at first instance *in the exercise of the Court's power, under Article 61 of the Statute, to give final judgment* after it has set aside the decision of the General Court. Indeed, in the cross-appeal, it is only *after* setting out the reasons why Distillerie Bonollo is not directly affected by the judgment under appeal and why, consequently, that judgment must be set aside, that the Commission requests the Court to reject as unfounded the fifth plea raised at first instance. Moreover, in its reply, the Commission explains that it is 'in order to assist the Court of Justice in exercising its powers under Article 61 of the Statute' that it presents its views on the fifth plea raised before the General Court.

68. Second, although Article 61 of the Statute does not specify whether, when the Court gives final judgment, it may decide questions of fact, the Court has, in practice, assumed that competence.[28] Therefore, should the determination of the fifth plea raised at first instance require factual assessments, this would have no impact on the admissibility of the Commission's request that that plea be rejected as unfounded.

26 Judgment of 27 March 2019, *Canadian Solar Emea and Others* v *Council* (C-236/17 P, EU:C:2019:258, paragraph 124).

27 See paragraphs 142 and 143 of the judgment under appeal.

28 See, for instance, judgments of 1 July 2008, *Chronopost* v *UFEX and Others* (C-341/06 P and C-342/06 P, EU:C:2008:375, paragraphs 141 to 164); of 21 January 2010, *Audi* v *OHIM* (C-398/08 P, EU:C:2010:29, paragraphs 52 to 60); of 3 May 2012, *Spain* v *Commission* (C-24/11 P, EU:C:2012:266, paragraphs 50 to 59); and of 28 November 2019, *ABB* v *Commission* (C-593/18 P, not published, EU:C:2019:1027, paragraphs 95 to 101).

(c) Admissibility of the Commission's request that the Court reject as unfounded the fifth plea put forward before the General Court in so far as it refers to the arguments put forward by the Council in its reply to the written questions of the General Court

69. In the cross-appeal, the Commission, in support of its request that the Court reject as unfounded the fifth plea raised before the General Court, refers to the Council's reply to the written questions asked by the General Court [29] by way of measures of organisation of procedure. [30]

70. Distillerie Bonollo submits that the references in the cross-appeal to the Council's reply to the written questions of the General Court are inadmissible. This follows, in Distillerie Bonollo's view, from the fact that the Commission was granted leave to intervene at first instance under Article 116(6) of the Rules of Procedure of the General Court of 2 May 1991, that is, on the basis of the Report for the Hearing. The Commission was thus not entitled to receive a copy of the Council's reply to the written questions of the General Court. Consequently, Distillerie Bonollo asks the Court to decline to rule on the Commission's request that the Court reject as unfounded the fifth plea raised before the General Court.

71. In my opinion, the cross-appeal cannot be held inadmissible in so far as it refers to the arguments put forward by the Council in its reply to the written questions of the General Court.

72. In the present case, the Commission was granted leave to intervene before the General Court under Article 116(6) of the Rules of Procedure of the General Court of 2 May 1991. [31]

73. According to Article 116(6) of the Rules of Procedure of the General Court of 2 May 1991, where the application to intervene is made after the expiry of the period of six weeks following the publication in the *Official Journal of the European Union* of the notice pertaining to the initiation of proceedings, the intervener 'may, on the basis of the Report for the Hearing communicated to him, submit his observations during the oral procedure'. It follows that, in that situation, the intervener is not entitled to receive a copy of the application, the defence, the reply or the rejoinder. [32]

74. In the present case, the Commission was, however, entitled to receive a copy of the application and the defence. This is because Article 24(7) of the Rules of Procedure of the General Court of 2 May 1991 [33] provides that 'where the Council or the [Commission] is not a party to a case, the General Court shall send to it copies of the application and of the defence, without the annexes thereto, to enable it to assess whether the inapplicability of one of its acts is being invoked under Article 277 TFEU'.

75. I observe that the arguments put forward by the Council in its reply to the written questions of the General Court, to which the Commission refers in its cross-appeal, [34] were also set out in the Council's defence before the General Court, [35] a copy of which the Commission was entitled to receive.

29 More precisely, the Commission refers to the Council's statement, in its reply to the written questions of the General Court, according to which, in order to determine whether the Council infringed its duty to state reasons, account must be taken not only of the wording of the regulation at issue, but also of the oral and written exchanges that took place during the administrative procedure. The Commission also refers to another statement made by the Council in its reply to the written questions of the General Court, according to which Distillerie Bonollo does not contend that the reasoning is insufficient, but merely disputes the approach taken by the Council and the Commission, which does not suffice to establish an infringement of the rights of defence or of the duty to state reasons.

30 See paragraph 34 of the judgment under appeal.

31 See point 20 above.

32 Judgment of 26 March 2009, *Selex Sistemi Integrati* v *Commission* (C-113/07 P, EU:C:2009:191, paragraphs 37 to 39).

33 Now Article 82 of the Rules of Procedure of the General Court.

34 See footnote 29 above.

35 The Council states, in its defence before the General Court, that the question whether the Council infringed its duty to state reasons must be assessed not only in the light of the wording of Article 296 TFEU, but also in the light of the exchanges that took place during the anti-dumping procedure. The Council further states, still in its defence before the General Court, that the applicants at first instance, rather than taking issue with the sufficiency of the statement of reasons, criticise the substance of the approach taken by the Council and the Commission.

76. Therefore, irrespective of whether the Commission was entitled to receive a copy of the Council's reply to the written questions of the General Court, the fact that, in its cross-appeal, the Commission refers to arguments put forward by the Council in its reply to those written questions cannot lead to the inadmissibility of the cross-appeal in so far as it refers to the Council's arguments.

2. Substance

77. As mentioned in point 56 above, the Commission seeks to have the judgment under appeal set aside or, in the alternative, to have the second paragraph of the operative part of that judgment set aside. I will examine each form of order in turn.

(a) On the Commission's main form of order, in which it requests that the judgment under appeal be set aside

78. By its single ground of appeal, the Commission contends that the General Court erred in holding that Distillerie Bonollo was directly concerned by the regulation at issue.

79. Under the fourth paragraph of Article 263 TFEU, natural or legal persons may institute proceedings against an act which is not addressed to them if the act is of direct and individual concern to those persons.

80. According to settled case-law, the condition that the decision forming the subject matter of the proceedings must be of direct concern to a natural or legal person, requires the fulfilment of two cumulative criteria, namely the contested measure must, first, directly affect the legal situation of the individual and, second, leave no discretion to the addressees who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules. [36]

81. The General Court held, in paragraph 59 of the judgment under appeal, that the regulation at issue directly affected the legal situation of the applicants at first instance because the latter triggered the partial interim review procedure, and the anti-dumping duties imposed at the end of that procedure were intended to offset the injury suffered by it as a competitor of the two Chinese exporting producers. As regards the second criterion for direct concern, it was also fulfilled, given that the Member States had no discretion concerning the rate of anti-dumping duty and the imposition of that duty on the goods concerned.

82. I observe that the cross-appeal challenges only the assessment made by the General Court, in paragraphs 51 to 73 of the judgment under appeal, of the first criterion for direct concern, not the analysis, in paragraph 50 of that judgment, of the second criterion.

83. The Commission's argument is that the regulation at issue does not affect the legal situation of Distillerie Bonollo because the latter does not have any rights that could be affected by the adoption of that regulation. In the Commission's view, while the basic regulation confers procedural rights on Distillerie Bonollo in its capacity as complainant, only substantive rights, not procedural rights, are relevant in order to determine whether the legal situation of Distillerie Bonollo is affected. However, neither the FEU Treaty nor the basic regulation confers on Distillerie Bonollo a substantive right to have a certain level of anti-dumping duties imposed on competing third-country producers.

36 Judgments of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 42); of 28 February 2019, *Council* v *Growth Energy and Renewable Fuels Association* (C-465/16 P, EU:C:2019:155, paragraph 69); and of 5 November 2019, *ECB and Others* v *Trasta Komercbanka and Others* (C-663/17 P, C-665/17 P and C-669/17 P, EU:C:2019:923, paragraph 103).

84. Distillerie Bonollo, for its part, considers that the regulation at issue directly affects its legal situation because it has a right not to be subject to competition *distorted by dumping* on the market on which it is active. This follows, by analogy, from paragraph 50 of the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873).

85. I am of the opinion that the Court should dismiss the single ground of appeal put forward in support of the Commission's main form of order. As will be explained below, I propose to apply to the present case the solution reached by the Court in the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873), and to conclude that the regulation at issue directly affects the legal situation of Distillerie Bonollo on account of the latter's right not to be subject to competition distorted by dumping on the market in which it is active.

86. At the outset, I note that, contrary to what the Council argues, it does not follow from the fact that the regulation at issue does not require Distillerie Bonollo to pay anti-dumping duties that that regulation does not affect its legal situation.

87. This is because anti-dumping duties are, by definition, imposed on goods manufactured by third-country producers, not on goods manufactured by Union producers such as Distillerie Bonollo. Consequently, were the Court to follow the Council's approach, Union producers would not have standing to seek the annulment of a regulation imposing anti-dumping measures. This would hardly be consistent with the judgments of 20 March 1985, *Timex* v *Council and Commission* (264/82, EU:C:1985:119, paragraphs 12 to 16) and of 18 October 2018, *ArcelorMittal Tubular Products Ostrava and Others* v *Commission* (T-364/16, EU:T:2018:696, paragraphs 36 to 53), in which the action for annulment brought by a Union producer was held admissible.

88. Another argument in favour of the opinion set out in point 85 above is that anti-dumping duties are paid by the importers of the product concerned into the EU and collected by the customs authorities of the Member States upon release of that product in the EU. They are not paid by exporting producers. Therefore, were the Court to follow the Council's approach, exporting producers would not have standing to bring proceedings for the annulment of a regulation imposing anti-dumping duties on the imports of their own goods into the EU. This, too, would hardly be consistent with settled case-law, which holds admissible actions brought by the producers and exporters of the product in question alleged to have carried out dumping on the basis of information relating to their business activities. [37]

89. Moreover, as mentioned in point 85 above, I agree with Distillerie Bonollo that, by placing it in an unfavourable competitive position, the regulation at issue directly affects its right not to be subject to distorted competition on the market in which it is active.

90. First, this follows from the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873). In that judgment, the Court held that the decision whereby the Commission, first, found certain measures to constitute incompatible State aid but

37 Judgments of 21 February 1984, *Allied Corporation and Others* v *Commission* (239/82 and 275/82, EU:C:1984:68, paragraphs 11 to 14), and of 7 May 1987, *NTN Toyo Bearing and Others* v *Council* (240/84, EU:C:1987:202, paragraphs 5 to 7). See also, inter alia, the judgments of 18 September 1996, *Climax Paper* v *Council* (T-155/94, EU:T:1996:118, paragraphs 45 to 53); of 25 September 1997, *Shanghai Bicycle* v *Council* (T-170/94, EU:T:1997:134, paragraphs 35 to 42); of 13 September 2013, *Huvis* v *Council* (T-536/08, not published, EU:T:2013:432, paragraphs 23 to 29); of 13 September 2013, *Cixi Jiangnan Chemical Fiber and Others* v *Council* (T-537/08, not published, EU:T:2013:428, paragraphs 20 to 29); of 16 January 2014, *BP Products North America* v *Council* (T-385/11, EU:T:2014:7, paragraphs 74 to 78); of 15 September 2016, *Unitec Bio* v *Council* (T-111/14, EU:T:2016:505, paragraphs 25 to 32); of 15 September 2016, *Molinos Río de la Plata and Others* v *Council* (T-112/14 to T-116/14 and T-119/14, not published, EU:T:2016:509, paragraphs 57 to 64); of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council* (T-351/13, not published, EU:T:2016:616, paragraphs 22 to 39); and of 10 October 2017, *Kolachi Raj Industrial* v *Commission* (T-435/15, EU:T:2017:712, paragraphs 49 to 55).

refrained from ordering their recovery, and, second, found other measures not to constitute State aid, directly affected the legal situation of the applicants at first instance because it placed them in an unfavourable competitive position and thereby affected their right not to be subject to competition distorted by the measures in question on the market in which they were active.[38] That right was, as the Court held, conferred upon the applicants at first instance by the Treaty provisions on State aid, namely Articles 107 and 108 TFEU, whose objective is to preserve competition.[39]

91. I propose that the solution reached by the Court in the judgment mentioned in the preceding point be applied to the present case, which concerns not State aid rules, but anti-dumping provisions. I take the view that the regulation at issue directly affects the legal situation of Distillerie Bonollo on account of its right not to be subject to competition distorted, not by State aid (as was the case in that judgment), but by dumping practices on the market in which it is active.

92. In support of that solution, I note that anti-dumping rules seek to preserve competition, as do Articles 107 and 108 TFEU. Admittedly, according to Article 21(1) of the basic regulation, anti-dumping measures have a twofold objective: they seek, on the one hand, to eliminate the trade distorting effects of dumping, and, on the other hand, to restore effective competition. However, I stress that dumping practices must be regarded as *unfair competition* from third-country producers, against which Union producers must be protected.[40] It follows that, according to case-law, the adoption of anti-dumping duties is a protective and preventive measure against unfair competition resulting from dumping practices.[41] Therefore, in my view, the elimination of trade distorting effects is, above all, a condition for the restoration of fair competition in the internal market.

93. I also note that the importance of the effective competition objective of anti-dumping duties is evidenced by the lesser-duty rule. Under that rule, as laid down in the last sentence of Article 9(4) of the basic regulation, the level of the anti-dumping duty must be determined on the basis of the dumping margin, unless the injury margin is lower than the dumping margin, in which case the anti-dumping duty must be calculated on the basis of the injury margin. The lesser-duty rule ensures that the Union industry is not granted protection beyond what is necessary to counter the injurious effects of the dumped imports,[42] in other words, that the Union industry is not afforded a greater competitive advantage over dumped imports.[43]

94. Therefore, by analogy with the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873), the regulation at issue must be considered directly to affect the right of Distillerie Bonollo not to be subject to competition distorted by dumping on the market in which it is active, and, consequently, directly to affect its legal situation. As the General Court found in paragraph 59 of the judgment under appeal, Distillerie Bonollo is a Union

38 The Court relied on the fact that the applicants at first instance, namely Mr Ferracci, the owner of a bed and breakfast establishment, and Scuola Elementare Maria Montessori, a private educational establishment, offered services similar to those provided by the beneficiaries of the aid scheme, namely ecclesiastical and religious entities. Moreover, the establishments of Mr Ferracci and of Scuola Elementare Maria Montessori were situated in the immediate vicinity of the aid beneficiaries. Therefore, they were active in the same geographical market for services. Given that Mr Ferracci and Scuola Elementare Maria Montessori were a priori eligible for the aid which formed the subject matter of the decision at issue, that decision was liable to place them in an unfavourable competitive position. Ssee paragraph 50 of the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873).

39 See paragraphs 43 and 52 of the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873).

40 See, in that regard, Reymond, D., *Action antidumping et droit de la concurrence dans l'Union européenne*, Bruylant, 2016 (paragraph 60).

41 Judgments of 3 October 2000, *Industrie des poudres sphériques* v *Council* (C-458/98 P, EU:C:2000:531, paragraph 91), and of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council* (T-351/13, not published, EU:T:2016:616, paragraph 50). See also the Opinions of Advocate General Van Gerven in *Nölle* (C-16/90, not published, EU:C:1991:233, point 11), and of Advocate General Sharpston in *Gul Ahmed Textile Mills* v *Council* (C-100/17 P, EU:C:2018:214, point 105).

42 Judgment of 27 March 2019, *Canadian Solar Emea and Others* v *Council* (C-236/17 P, EU:C:2019:258, paragraphs 167 and 168).

43 Opinion of Advocate General Trstenjak in *Moser Baer India* v *Council* (C-535/06 P, EU:C:2008:532, point 170), and judgment of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council* (T-351/13, not published, EU:T:2016:616, paragraph 51).

producer of tartaric acid operating on the same market as the two Chinese exporting producers. Therefore, by imposing allegedly inadequate anti-dumping duties on the two Chinese exporting producers, the regulation at issue was liable to place it in an unfavourable competitive position in the internal market.

95. Second, contrary to what the Commission argues, it does not follow from Article 9(4) and Article 21 of the basic regulation that Distillerie Bonollo does not have a right not to be subject to competition distorted by dumping on the market in which it is active.

96. The Commission's argument is that, where it is established that there is dumping and injury, and that the latter is caused by the former, the Commission may nevertheless, under Article 9(4) and Article 21 of the basic regulation, refrain from imposing anti-dumping measures if those measures are not in the interest of the Union. The Commission argues that it follows that Distillerie Bonollo does not have a substantive right to protection against dumping.

97. I disagree with that argument.

98. Admittedly, according to the case-law of the General Court, the Union industry does not have the right to have protective measures imposed, even where the existence of dumping and injury have been established, given that such measures may only be imposed where it has also been established, in accordance with Article 9(4) and Article 21 of the basic regulation, that they are justified in the Union interest.[44] Examination of the Union interest requires an evaluation of the likely consequences both of applying and of not applying the measures proposed for the interest of the Union industry and for the other interests at stake, that is, importers, the upstream industry, users and processors of the product concerned, and consumers.[45] It requires a balancing of the interests of those parties.[46]

99. However, I observe that this a negative requirement. According to Article 21(1) of the basic regulation, it is only if the anti-dumping measures proposed are *not* in the interest of the Union that the Commission may refrain from adopting such measures.[47] In practice, the Commission has very seldom decided not to impose anti-dumping measures on the grounds that, despite the other three conditions (namely, dumping, injury and causation) being met, it was not in the interest of the Union to impose them.[48]

100. Moreover, I emphasise that the fact that the Commission may decline to order recovery of unlawful and incompatible State aid if this would be contrary to a general principle of Union law[49] and the fact that the Member State concerned may decline to execute the recovery decision if it is absolutely impossible to implement it correctly[50] did not preclude the Court from holding, in the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873), that the competitors of the beneficiaries of State aid have a right not to be subject to competition distorted by State aid on the market in which they are active.

44 Judgments of 8 July 2003, *Euroalliages and Others* v *Commission* (T-132/01, EU:T:2003:189, paragraph 44), and of 30 April 2015, *VTZ and Others* v *Council* (T-432/12, not published, EU:T:2015:248, paragraph 162).

45 See Article 21(2) of the basic regulation.

46 Judgment of 15 June 2017, *T.KUP* (C-349/16, EU:C:2017:469, paragraph 44).

47 Judgment of 30 April 2015, *VTZ and Others* v *Council* (T-432/12, not published, EU:T:2015:248, paragraph 163).

48 See Juramy, H., 'Anti-Dumping in Europe: What About Us(ers)?', *Global Trade and Customs Journal*, 2018, Issue 11/12, pp. 511-518 (pp. 516 and 517); and Melin, Y., 'Users in EU Trade Defence Investigations: How to Better Take their Interests into Account, and the New Role of Member States as User Champions after Comitology', *Global Trade and Customs Journal*, 2016, Issue 3, pp. 88-121 (p. 96).

49 The last sentence of Article 16(1) of Council Regulation (EU) 2015/1589 of 13 July 2015 laying down detailed rules for the application of Article 108 TFEU (OJ 2015 L 248, p. 9) provides that '[t]he Commission shall not require recovery of the aid if this would be contrary to a general principle of Union law'.

50 Judgments of 9 November 2017, *Commission* v *Greece* (C-481/16, not published, EU:C:2017:845, paragraph 28), and of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873, paragraph 80).

101. Where, in particular, the recovery of unlawful and incompatible aid would infringe the principle of protection of the legitimate expectations of the beneficiary of the aid,[51] the Commission is no longer obliged to order recovery.[52] It must not order recovery. In that case, the finding of incompatibility of the aid with the internal market does not lead to the restoration of competition on the market concerned. However, as mentioned in the preceding point, this did not preclude the Court from finding that the competitors of the beneficiary of aid have a right not to be subject to competition distorted by State aid.

102. Similarly, where the imposition of anti-dumping measures would not be in the interest of the Union, the Commission may decide not to adopt such measures. In that case, the trade distortions resulting from dumping are not eliminated, and competition is not restored in the internal market. This should not preclude the Court from holding that a Union producer has a right not to be subject to competition distorted by dumping.

103. Third, contrary to what the Commission and the Council contend, if the Court finds that the first criterion for direct concern is met in the present case, this would not be on account of the mere factual effects of the regulation at issue on the situation of Distillerie Bonollo (as opposed to the legal effects of that regulation).

104. Indeed, as mentioned in point 85 above, the regulation at issue directly affects the situation of Distillerie Bonollo on account of its *right* not to be subject to competition distorted by dumping, not on account of any factual effects of that regulation.

105. I also note that there is no contradiction between the solution proposed in point 85 above and paragraph 81 of the judgment of 28 February 2019, *Council* v *Growth Energy and Renewable Fuels Association* (C-465/16 P, EU:C:2019:155). In that paragraph, the Court held that the fact that a regulation imposing anti-dumping duties on imports of bioethanol originating in the United States of America placed US bioethanol producers at a competitive disadvantage could not of itself allow the view to be taken that that regulation was of direct concern to them. I point out, first, that those US bioethanol producers were *third-country producers* whose goods were subject to anti-dumping duties, whereas I propose to consider that *Union producers* have a right not to be subject to competition distorted by dumping. Second, those US bioethanol producers were not active in the internal market,[53] whereas I propose to consider that actual operators on the market, not potential operators, have that right.[54]

106. Fourth, contrary to what the Commission and the Council argue, the solution proposed in point 85 above does not amount to a 'loosening' of the first criterion for direct concern.

107. As mentioned in point 87 above, in the judgment of 20 March 1985, *Timex* v *Council and Commission* (264/82, EU:C:1985:119, paragraphs 11 to 16), Union producers have been found to have standing to seek the annulment of a regulation imposing anti-dumping measures. Moreover, in the judgment of 18 October 2018, *ArcelorMittal Tubular Products Ostrava and Others* v *Commission* (T-364/16, EU:T:2018:696, paragraphs 36 to 53), Union producers were held to have standing to challenge the decision whereby the Commission, for the purposes of implementing a judgment of the Court, prescribed the non-collection of anti-dumping duties on the imports of goods manufactured by a specific exporting producer.

51 Judgment of 29 April 2004, *Italy* v *Commission* (C-372/97, EU:C:2004:234, paragraph 111).

52 Judgment of 15 November 2018, *World Duty Free Group* v *Commission* (T-219/10 RENV, EU:T:2018:784, paragraphs 264 and 268).

53 The US bioethanol producers did not directly export their production to the EU market, but sold it on the domestic (US) market to unrelated traders/blenders, which then blended the bioethanol with gasoline for, in particular, export to the EU (Opinion of Advocate General Mengozzi in *Council* v *Growth Energy and Renewable Fuels Association*, C-465/16 P, EU:C:2018:794, point 63).

54 This is in line with paragraphs 46 and 50 of the judgment of 6 November 2018, *Scuola Elementare Maria Montessori* v *Commission*, *Commission* v *Scuola Elementare Maria Montessori* and *Commission* v *Ferracci* (C-622/16 P to C-624/16 P, EU:C:2018:873).

108. It follows that, if the Court finds that the regulation at issue directly affects the legal situation of Distillerie Bonollo, contrary to what is argued by the Commission and the Council, this would not constitute a 'loosening' of the condition of direct concern. Its decision would be in line with the case-law mentioned in the preceding point.

109. One particular argument in favour of that conclusion is that, in the field of anti-dumping, where applicants (whether Union producers, exporting producers or importers) have been found to lack standing to seek the annulment of a regulation imposing anti-dumping measures, this was because they were not individually concerned by that regulation. This was not because they were not directly concerned by it. [55]

110. To my knowledge, there is only one exception. It is the judgment of 28 February 2019, *Council* v *Growth Energy and Renewable Fuels Association* (C-465/16 P, EU:C:2019:155), in which the US bioethanol producers were denied standing on the ground that they were not directly concerned by the contested act. However, as mentioned in point 105 above, this was due to the particular circumstance that those producers did not directly export bioethanol to the EU and that, therefore, their production was not directly made subject to the anti-dumping duties imposed.

111. Moreover, in cases where applicants were held to have standing to seek the annulment of a regulation imposing anti-dumping measures, either the condition of direct concern was not examined, [56] or it was found to be met. Where it was found to be met, this was on account of the second criterion for direct concern, that is, as mentioned in point 80 above, on the ground that the customs authorities of the Member States are required, without having any margin of discretion, to levy the duties imposed by an anti-dumping regulation. The first criterion was not examined. [57]

112. There are, to my knowledge, only two exceptions. In the judgment of 26 September 2000, *Starway* v *Council* (T-80/97, EU:T:2000:216), a regulation extending anti-dumping measures was found directly to affect the legal situation of an importer. This was because the possibility, foreseen in that regulation, that the Commission might grant the applicant an exemption from the extended duty (where imports did not constitute circumvention of the initial duty) was, in the circumstances of the case, purely theoretical. [58] Similarly, in the judgment of 18 October 2018, *ArcelorMittal Tubular Products Ostrava and Others* v *Commission* (T-364/16, EU:T:2018:696), a decision prescribing the non-collection of anti-dumping duties was found directly to affect the situation of Union producers 'in the context of the procedure that led to the adoption of the anti-dumping measures'. The General

55 Judgment of 28 February 2002, *BSC Footwear Supplies and Others* v *Council* (T-598/97, EU:T:2002:52, paragraphs 49 to 64); order of 27 January 2006, *Van Mannekus* v *Council* (T-280/03, not published, EU:T:2006:32, paragraphs 108 to 141); judgment of 19 April 2012, *Würth and Fasteners (Shenyang)* v *Council* (T-162/09, not published, EU:T:2012:187); order of 5 February 2013, *BSI* v *Council* (T-551/11, not published, EU:T:2013:60, paragraphs 23 to 41); judgment of 13 September 2013, *Cixi Jiangnan Chemical Fiber and Others* v *Council* (T-537/08, not published, EU:T:2013:428, paragraphs 28 and 29); order of 21 January 2014, *Bricmate* v *Council* (T-596/11, not published, EU:T:2014:53, paragraphs 21 to 60); order of 7 March 2014, *FESI* v *Council* (T-134/10, not published, EU:T:2014:143, paragraphs 41 to 76); judgment of 15 September 2016, *Molinos Río de la Plata and Others* v *Council* (T-112/14 to T-116/14 and T-119/14, not published, EU:T:2016:509, paragraphs 48 to 56); and order of 25 January 2017, *Internacional de Productos Metálicos* v *Commission* (T-217/16, not published, EU:T:2017:37, paragraphs 26 to 33), confirmed on appeal (judgment of 18 October 2018, *Internacional de Productos Metálicos* v *Commission*, C-145/17 P, EU:C:2018:839).

56 Judgments of 21 February 1984, *Allied Corporation and Others* v *Commission* (239/82 and 275/82, EU:C:1984:68, paragraphs 12 to 14); of 20 March 1985, *Timex* v *Council and Commission* (264/82, EU:C:1985:119, paragraphs 12 to 17); of 7 May 1987, *NTN Toyo Bearing and Others* v *Council* (240/84, EU:C:1987:202, paragraphs 5 to 7); of 14 March 1990, *Nashua Corporation and Others* v *Commission and Council* (C-133/87 and C-150/87, EU:C:1990:115, paragraphs 14 to 20); of 14 March 1990, *Gestetner Holdings* v *Council and Commission* (C-156/87, EU:C:1990:116, paragraphs 17 to 23); of 11 July 1990, *Neotype Techmashexport* v *Commission and Council* (C-305/86 and C-160/87, EU:C:1990:295, paragraphs 19 to 22); of 16 May 1991, *Extramet Industrie* v *Council* (C-358/89, EU:C:1991:214, paragraphs 13 to 18); of 13 September 2013, *Huvis* v *Council* (T-536/08, not published, EU:T:2013:432, paragraphs 25 to 29); and of 13 September 2013, *Cixi Jiangnan Chemical Fiber and Others* v *Council* (T-537/08, not published, EU:T:2013:428, paragraphs 22 to 27).

57 Judgments of 18 September 1996, *Climax Paper* v *Council* (T-155/94, EU:T:1996:118, paragraph 53); of 25 September 1997, *Shanghai Bicycle* v *Council* (T-170/94, EU:T:1997:134, paragraph 41); of 16 January 2014, *BP Products North America* v *Council* (T-385/11, EU:T:2014:7, paragraph 72); of 15 September 2016, *Unitec Bio* v *Council* (T-111/14, EU:T:2016:505, paragraph 28); of 15 September 2016, *Molinos Río de la Plata and Others* v *Council* (T-112/14 to T-116/14 and T-119/14, not published, EU:T:2016:509, paragraph 62); of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council* (T-351/13, not published, EU:T:2016:616, paragraph 24); and of 10 October 2017, *Kolachi Raj Industrial* v *Commission* (T-435/15, EU:T:2017:712, paragraph 54).

58 Judgment of 26 September 2000, *Starway* v *Council* (T-80/97, EU:T:2000:216, paragraphs 61 to 69).

Court invoked, inter alia, the fact that both the complaint which led to the adoption of the original regulation and the request for an expiry review had been made by a trade association on behalf of Union producers which included the applicants.[59] In that regard, I recall that, as mentioned in point 85 above, I propose to rely, not on the applicant's procedural rights, but on the right not to be subject to distorted competition in order to determine whether the first criterion for direct concern is met. Indeed, the procedural rights conferred by the basic regulation vary significantly from person to person,[60] and it may thus be queried whether the legal situation of *any* person upon which that regulation confers procedural rights may be directly affected by a regulation imposing anti-dumping measures.

113. Consequently, there is, in my view, no support in the case-law in the field of anti-dumping for the Commission's argument that a Union producer must be denied standing on the ground that it does not have a right to protection against dumping and that, consequently, the regulation imposing anti-dumping duties does not directly affect its legal situation. Rather, it seems to me that the judgment under appeal is in line with the case-law of the Courts of the European Union, according to which, as mentioned in point 110 above, to my knowledge, standing to bring proceedings was denied on account of the fact that the applicant was not directly concerned by the contested act only on one occasion, in circumstances which differ from those of the present case.

114. Fifth, I am not persuaded by the argument of the Commission and the Council that, in paragraphs 92 and 93 of the judgment under appeal, the General Court erroneously invoked the right to effective judicial protection, as enshrined in Article 47 of the Charter, to 'enlarge' the condition relating to direct concern.

115. In those paragraphs, the General Court found that, given that the regulation at issue was incapable of laying down implementing measures concerning Distillerie Bonollo, the latter did not, in principle, have any alternative national remedies. Although that fact could not, according to the General Court, have the effect of setting aside the condition relating to individual concern, the condition that a person must be directly and individually concerned was nonetheless to be interpreted in the light of the right to effective judicial protection.

116. While Article 47 of the Charter is indeed not intended to change the system of judicial review laid down by the Treaties, and particularly the rules relating to the admissibility of direct actions brought before the Courts of the Union,[61] this is not, in my view, what the General Court did in paragraphs 92 and 93 of the judgment under appeal.

117. The General Court did not reach the conclusion that Distillerie Bonollo was directly concerned by the regulation at issue by invoking Article 47 of the Charter. That conclusion was based on other grounds, that is, on the circumstance, mentioned in paragraph 59 of the judgment under appeal, that Distillerie Bonollo triggered the partial interim review procedure and that the anti-dumping duties imposed by that regulation were intended to offset the injury it suffered as a competitor operating on the same market as the two Chinese exporting producers. Paragraphs 92 and 93 of that judgment merely support that conclusion, which the General Court had already reached.

118. I also point out that, in finding that the regulation at issue directly affected the legal situation of Distillerie Bonollo for the reasons mentioned in the preceding point, the General Court did not disregard the condition relating to direct concern. It took a broader interpretation of that condition than that advocated by the Commission and the Council, but that does not amount to disregarding it.

59 Judgment of 18 October 2018, *ArcelorMittal Tubular Products Ostrava and Others* v Commission (T-364/16, EU:T:2018:696, paragraphs 41 and 42).

60 For instance, the procedural rights conferred upon Union producers differ significantly from those conferred on consumer groups.

61 Judgments of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 97), and of 27 March 2019, *Canadian Solar Emea and Others* v *Council* (C-236/17 P, EU:C:2019:258, paragraph 99).

119. I conclude that, given that the regulation at issue is liable to place Distillerie Bonollo in an unfavourable competitive position on the market in which it competes with the two Chinese exporting producers, that regulation directly affects Distillerie Bonollo's right not to be subject to competition distorted by dumping on that market. It follows that the General Court did not err in finding, in paragraph 59 of the judgment under appeal, that the regulation at issue directly affected the legal situation of Distillerie Bonollo, and that the single ground of appeal must be rejected.

120. Consequently, the cross-appeal should be dismissed in so far as it seeks the annulment of the judgment under appeal.

(b) On the Commission's alternative form of order, in which it asks the Court to set aside the second paragraph of the operative part of the judgment under appeal

121. In the alternative, the Commission asks the Court to set aside the second paragraph of the operative part of the judgment under appeal in so far as that paragraph maintains the anti-dumping duty imposed by the regulation at issue on Ninghai Organic Chemical Factory's goods until not only the Commission, but also the Council have adopted the measures necessary to comply with the judgment under appeal. The Commission argues that, since Regulation No 37/2014 entered into force, only the Commission may adopt anti-dumping measures.

122. The Council and Changmao Biochemical Engineering agree with the Commission, while Distillerie Bonollo disagrees.

123. I take the view that the alternative form of order sought by the Commission should be upheld.

124. In the second paragraph of the operative part of the judgment under appeal, the General Court maintained the anti-dumping duty imposed by the regulation at issue on Ninghai Organic Chemical Factory's goods 'until the [Commission] and the [Council] have adopted the measures necessary to comply with [the] judgment [under appeal]'.

125. I note that, under the first paragraph of Article 266 TFEU, the institution whose act has been declared void is required to take the necessary measures to comply with the judgment of the Court of Justice. In the present case, the regulation at issue was adopted by the Council. However, it does not follow that the Council must, or even can, take the measures necessary to comply with the judgment under appeal.

126. Indeed, according to case-law, the obligation to act laid down in the first paragraph of Article 266 TFEU does not constitute a source of competence and does not relieve the institution concerned of the need to base the act that contains the measures necessary to comply with a judgment annulling a measure on a legal basis that, first, empowers it to adopt that act, and, second, is in force on the date of adoption of that act. [62]

127. Article 1 of Regulation No 37/2014 amends Article 9(4) of the basic regulation to the effect that definitive anti-dumping duties, which were previously imposed by the Council, are now to be imposed by the Commission. [63]

62 Judgments of 14 June 2016, *Commission* v *McBride and Others* (C-361/14 P, EU:C:2016:434, paragraphs 38, 40 and 45), and of 19 June 2019, *C & J Clark International* (C-612/16, not published, EU:C:2019:508, paragraphs 39 and 40).

63 See paragraph 5 of point 22 of the Annex to Regulation No 37/2014.

128. In the present case, the measures necessary to comply with the judgment under appeal can be adopted only after the date on which that judgment was delivered, that is, after 3 May 2018. They can thus be adopted only after the entry into force, on 20 February 2014, of Regulation No 37/2014.[64] It follows that the measures necessary to comply with the judgment under appeal must be based on Article 9(4) of the basic regulation, as amended by Regulation No 37/2014, and on Article 14(1) of the basic regulation.[65]

129. Therefore, only the Commission may adopt those measures.

130. I conclude that the second paragraph of the operative part of the judgment under appeal must be set aside in so far as that paragraph maintains the anti-dumping duty imposed by the regulation at issue on Ninghai Organic Chemical Factory's goods until *the Council* has adopted the measures necessary to comply with that judgment. The second paragraph of the operative part of the judgment under appeal, however, remains valid in so far at it maintains that duty until the Commission has adopted the measures necessary to comply with that judgment.

131. The cross-appeal must be dismissed as to the remainder.

VI. The main appeal

132. Changmao Biochemical Engineering seeks to have the judgment under appeal set aside on the ground that the General Court erred in upholding the plea alleging infringement of Article 11(9) of the basic regulation.

A. Arguments of the parties

133. By its single ground of appeal, Changmao Biochemical Engineering challenges paragraphs 132 to 137 and 139 to 141 of the judgment under appeal.

134. That ground of appeal is divided into three parts.

135. In the first part of its single ground of appeal, Changmao Biochemical Engineering submits that the fact that, in the regulation at issue, normal value is established on the basis of production costs in Argentina, rather than on the basis of domestic sales prices in Argentina, does not constitute a change of methodology within the meaning of Article 11(9) of the basic regulation, and that, in any event, there has been a change in circumstances. Furthermore, according to Changmao Biochemical Engineering, the General Court erred in finding that applying the methodology used in the original investigation was consistent with Article 2 of the basic regulation and in failing thereby to take into account the differences in the production process of tartaric acid in Argentina and China.

136. In the second and the third parts of its single ground of appeal, Changmao Biochemical Engineering claims, in essence, that the General Court erred in finding that the fact that the same normal value applies to all exporting producers not granted MET removes any distinction between cooperating and non-cooperating exporting producers.

64 Article 4 of Regulation No 37/2014 provides that that regulation 'shall enter into force on the thirtieth day following that of its publication in the *Official Journal of the European Union*', that is, on the thirtieth day following 21 January 2014.

65 Article 14(1) of the basic regulation (which was not amended by Regulation No 37/2014) provides that the anti-dumping duties are to be imposed by regulation. According to case-law, Article 9(4) of the basic regulation, as amended by Regulation No 37/2014, and Article 14(1) of the basic regulation, read together, are the legal basis that empowers the Commission to re-impose anti-dumping duties following the delivery of a judgment annulling a regulation imposing anti-dumping duties (judgment of 19 June 2019, *C & J Clark International*, C-612/16, not published, EU:C:2019:508, paragraphs 42 to 44). See also the judgment of 15 March 2018, *Deichmann* (C-256/16, EU:C:2018:187, paragraph 55).

137. Distillerie Bonollo contends, first, that the appeal is inadmissible, second, that the single ground of appeal is inadmissible, and, third, that that ground of appeal is, in any event, unfounded.

138. First, Distillerie Bonollo supports the plea alleging that the appeal is inadmissible raised by the Council and the Commission.

139. Second, Distillerie Bonollo alleges that the first, second and third parts of the single ground of appeal are inadmissible in so far as one or more of those parts (i) merely reiterate arguments put forward before the General Court; (ii) raise a question of fact; (iii) request the Court to rule on a plea on which the General Court did not rule; or (iv) challenge a subsidiary ground in the judgment under appeal.

140. Third, Distillerie Bonollo submits that the single ground of appeal is, in any event, unfounded. It claims that there was a change of methodology in the regulation at issue, given that the methodology involving calculating the normal value on the basis of domestic sales prices in Argentina was not applied. It argues that there is no evidence of a change in circumstances. Moreover, contrary to what Changmao Biochemical Engineering argues, the General Court did not fail to take into account the differences in the production costs of Argentina and China. As regards Changmao Biochemical Engineering's allegation that the application of the same normal value removes any distinction between cooperating and non-cooperating exporting producers, Distillerie Bonollo notes that no provision of the basic regulation provides for the favourable treatment of cooperating exporting producers with regard to the establishment of normal value.

141. The Council contends that the appeal is inadmissible. This is because the judgment under appeal does not directly affect Changmao Biochemical Engineering, as required by the second paragraph of Article 56 of the Statute. Indeed, the regulation at issue was already annulled, in so far as it applies to Changmao Biochemical Engineering, by the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372). Therefore, any measures taken in order to comply with the judgment under appeal, such as the recalculation of the normal value on the basis of domestic sales prices in Argentina, may apply only to Ninghai Organic Chemical Factory.

142. The Commission alleges that the appeal is inadmissible on the same ground as that put forward by the Council. In any event, according to the Commission, the appeal is unfounded. This is because the wording of Article 11(9) of the basic regulation refers to the methodology used 'in the [original] investigation', not to the methodology used for a particular company. That provision cannot be applied on a company-by-company basis. Moreover, the legislative history of that provision supports a broad interpretation of the obligation to apply the same methodology in the review investigation. Finally, Article 11(9) of the basic regulation must be seen as an expression of the principle of equal treatment, now enshrined in Article 47 of the Charter. It follows that, in the regulation at issue, the normal value should be determined on the basis of domestic sales prices for all producers not granted MET, including the two Chinese exporting producers.

B. Assessment

143. Changmao Biochemical Engineering puts forward a single ground of appeal, alleging that the General Court erred in law in finding that Article 11(9) of the basic regulation does not allow the Council, in an interim review, to calculate the normal value on the basis of production costs in an analogue country, namely Argentina, where, in the original investigation, normal value was determined on the basis of domestic sales prices in Argentina.

144. Distillerie Bonollo, the Council and the Commission contend that the appeal should be dismissed.

1. Admissibility of the appeal

145. The Council and the Commission contend that the appeal is inadmissible because the judgment under appeal does not directly affect Changmao Biochemical Engineering, as required by the second paragraph of Article 56 of the Statute, given that the regulation at issue was already annulled in so far as it applies to Changmao Biochemical Engineering by the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372). Distillerie Bonollo supports the plea of inadmissibility raised by the Council and the Commission, while Changmao Biochemical Engineering contends that the appeal is admissible.

146. For the reasons set out below, I take the view that the appeal is admissible.

147. The appeal is brought by Changmao Biochemical Engineering, who was not a party, but an intervener in the proceedings before the General Court. [66]

148. Under the second paragraph of Article 56 of the Statute, for an intervener at first instance (other than a Member State or an institution of the Union) to bring an appeal against a judgment of the General Court, that judgment must 'directly affec[t]' that person.

149. As the Council and the Commission note, when the judgment under appeal was delivered, the regulation at issue had already been annulled, in so far as it applied to Changmao Biochemical Engineering, by the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372), which is now final.

150. However, I note that, in the judgment under appeal, the annulment of the regulation at issue is not limited in scope. [67]

151. I also note that, according to case-law, the institution whose act has been declared void by a judgment is required, in order to comply with its obligation, under the first paragraph of Article 266 TFEU, to take the necessary measures to comply with that judgment, to have regard not only to the operative part, but also to the grounds which led to the judgment and constitute the essential basis for it, in so far as they are necessary to determine the exact meaning of what is stated in the operative part. [68]

152. By the judgment under appeal, the regulation at issue was annulled on the ground that, by initially establishing the normal value for exporting producers not granted MET on the basis of domestic sales prices in Argentina and then using a constructed normal value determined, in essence, on the basis of the costs of production in Argentina in the review investigation which led to the adoption of the regulation at issue, the Council had changed the methodology and thereby infringed

66 See point 20 above.

67 The first paragraph of the operative part of the judgment under appeal does not annul the regulation at issue only in so far as it applies to Ninghai Organic Chemical Factory. It annuls that regulation without any restriction as to the effects of the annulment. This follows from the fact that the action at first instance was brought by Union producers, not by an exporting producer who could have sought the annulment of the regulation at issue only in so far as it applied to it.

68 Judgments of 3 October 2000, *Industrie des poudres sphériques* v *Council* (C-458/98 P, EU:C:2000:531, paragraph 81); of 28 January 2016, *CM Eurologistik and GLS* (C-283/14 and C-284/14, EU:C:2016:57, paragraph 49); and of 14 June 2016, *Commission* v *McBride and Others* (C-361/14 P, EU:C:2016:434, paragraph 35).

Article 11(9) of the basic regulation. Consequently, in order to comply with its obligation, under the first paragraph of Article 266 TFEU, to take the necessary measures to comply with the judgment under appeal, the Commission should reopen the procedure and recalculate the normal value on the basis of domestic sales prices in Argentina.[69]

153. Given that, as mentioned in point 150 above, the annulment of the regulation at issue is not limited in scope, the Commission should, in order to comply with the judgment under appeal, recalculate the normal value on the basis of domestic sales prices in Argentina not only for Ninghai Organic Chemical Factory, *but also for Changmao Biochemical Engineering*.

154. By contrast, in the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372), the regulation at issue was annulled on the ground that, in refusing to supply Changmao Biochemical Engineering with information relating to the calculation of the normal value, the Council and the Commission had infringed Article 20(2) of the basic regulation and the rights of defence. Consequently, in order to comply with its obligation to take the necessary measures to comply with that judgment, the Commission should give Changmao Biochemical Engineering access to that information and allow it to make representations in that regard.

155. Therefore, the measures that should be taken in order to comply with the judgment under appeal differ from the measures necessary to implement the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372).

156. It follows that Changmao Biochemical Engineering is directly affected by the judgment under appeal on account of the Commission's duty, in order to comply with that judgment, to reopen the proceeding and recalculate the normal value on the basis of domestic sales prices in Argentina.

157. This is consistent with the judgment of 2 October 2003, *International Power and Others* v *NALOO* (C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P, EU:C:2003:534). In that judgment, the Court held that the judgment of the General Court annulling the decision whereby the Commission rejected a complaint brought against three undertakings, directly affected those three undertakings. This was because, 'in order to comply with the judgment under appeal, the Commission [was] obliged to conduct a fresh examination of the [complaint]', and 'it [was] possible that at the end of that examination the Commission would adopt a measure disadvantageous to [the three undertakings], which could then run the risk of being exposed to an action for damages before national courts'.[70]

158. In the present case, Changmao Biochemical Engineering alleges that the calculation of the normal value on the basis of domestic sales prices in Argentina would lead to the imposition of a rate of duty significantly higher than the 13.1% rate imposed by the regulation at issue. None of the other parties contests that allegation. Therefore, as was the case in the judgment cited in the preceding point, there is a risk that the measures taken by the Commission in order to comply with the judgment under appeal will be disadvantageous to Changmao Biochemical Engineering, and that the latter will be exposed to actions for the payment of such duty.

69 While it is not for the EU Courts to take the place of the institution concerned in order to specify the measures to be taken to comply with their judgments (Opinion of Advocate General Tanchev in *National Iranian Tanker Company* v *Council*, C-600/16 P, EU:C:2018:227, point 109), it is nevertheless the case that those measures must have regard to, and be compatible with, the operative part and the grounds of the judgment in question (judgment of 28 January 2016, *CM Eurologistik and GLS*, C-283/14 and C-284/14, EU:C:2016:57, paragraphs 76 and 77).

70 Judgment of 2 October 2003, *International Power and Others* v *NALOO* (C-172/01 P, C-175/01 P, C-176/01 P and C-180/01 P, EU:C:2003:534, paragraph 52).

159. My conclusion in point 156 above cannot be called into question by Distillerie Bonollo's argument that Changmao Biochemical Engineering is affected not by the judgment under appeal, but by the measures taken in order to comply with that judgment, with the result that it is only when those measures are adopted that Changmao Biochemical Engineering will be directly affected by the judgment under appeal within the meaning of the second paragraph of Article 56 of the Statute.

160. This is because the admissibility of an appeal brought by an intervener at first instance against a judgment annulling an EU act is not subject to the condition that the competent institution has complied with its obligation, under Article 266 TFEU, to take the necessary measures to comply with that judgment. Indeed, the second paragraph of Article 56 of the Statute does not lay down such a condition. That provision requires only that 'the decision of the General Court' directly affects the intervener at first instance. It follows that, in order to determine whether that is the case, account may be taken only of the judgment of the General Court and of the competent institution's obligation, which arises from the judgment annulling an EU act, to take the necessary measures to comply with it. Account cannot be taken of those measures themselves, of whether they are adopted in a timely manner and of whether they correctly implement the judgment.

161. It is true that Changmao Biochemical Engineering will be able to seek the annulment of the measures taken to implement the judgment under appeal. However, contrary to what Distillerie Bonollo argues, this does not give Changmao Biochemical Engineering 'two bites of the same apple'. Indeed, were the latter to raise, in support of the action seeking annulment of the measures taken to implement the judgment under appeal, a plea on which the General Court has already ruled, that plea would be inadmissible as it would infringe the principle of *res judicata*.[71]

162. I also point out that, where, as is the case here, the EU act annulled by the judgment of the General Court is a regulation, the obligation on the competent institution to take the necessary measures to comply with that judgment arises only as from the date of dismissal of the appeal.[72] Therefore, were Distillerie Bonollo's approach followed, the admissibility of the appeal brought by an intervener at first instance would, in that case, depend on the good will of the competent institution to implement the judgment under appeal.

163. Therefore, it is irrelevant that the Commission has not yet taken the measures necessary to comply with the judgment under appeal, or with the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372).[73]

164. It is equally irrelevant that, following an expiry review of the anti-dumping measures imposed by Regulation No 349/2012, the Commission adopted, on 28 June 2018, Implementing Regulation (EU) 2018/921,[74] which maintains the 10.1% duty imposed on Changmao Biochemical Engineering by Regulation No 349/2012.[75]

71 See the judgment of 25 June 2010, I*mperial Chemical Industries* v *Commission* (T-66/01, EU:T:2010:255, paragraphs 196 to 211).

72 This follows from the second paragraph of Article 60 of the Statute, which provides that, by way of derogation from Article 280 TFEU, a judgment of the General Court annulling a regulation takes effect only as from the date of dismissal of the appeal.

73 By notice published on 7 September 2017, the Commission reopened the procedure which led to the adoption of the regulation at issue in order to implement the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372) (Notice concerning the judgment of 1 June 2017 in case T-442/12 in relation to [the regulation at issue], OJ 2017 C 296, p. 16). According to that notice, the procedure was reopened solely to implement that judgment.

74 Regulation imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EU) 2016/1036 of the European Parliament and of the Council (OJ 2018 L 164, p. 14).

75 In an expiry review, the Commission may only maintain or repeal the anti-dumping duties previously imposed, but cannot amend them, according to Article 11(6) of the basic regulation. Given that the regulation at issue, which amends Regulation No 349/2012, was annulled by the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372), and that the effects of that regulation were not maintained by that judgment until it is implemented by the Commission, the latter had to maintain the duty of 10.1% imposed by Regulation No 349/2012 on Changmao Biochemical Engineering. By contrast, Regulation 2018/921 maintains the 8.3% rate imposed on Ninghai Organic Chemical Factory by the regulation at issue. This is because, although that regulation was annulled by the judgment under appeal, its effects are maintained by that judgment as regards Ninghai Organic Chemical Factory until the competent institution complies with its obligation under Article 266 TFEU (which, as explained in point 162 above, it must only do when, and if the present appeal is dismissed).

165. I conclude that the appeal is admissible.

2. Admissibility of the single ground of appeal

166. First, Distillerie Bonollo's plea alleging inadmissibility of the first, second and third parts of the single ground of appeal in so far as they merely reiterate arguments put forward at first instance by the Council must be dismissed. As mentioned in point 63 above, the points of law examined at first instance may be raised again in the course of an appeal. I note that the appeal challenges specific paragraphs of the judgment under appeal: namely, as regards the argument that there was no change of methodology, paragraph 132; as regards the argument that the differences in the production process of tartaric acid between Argentina and China should be taken into account when determining a fair normal value, paragraphs 132 and 135 to 137; as regards the argument that there has been a change in circumstances, paragraph 134; and, as regards the argument that, should the methodology applied in the original investigation be applied to all exporting producers not granted MET in the review investigation, this would remove any distinction between cooperating and non-cooperating exporting producers, paragraphs 139 to 141.

167. Second, in so far as Distillerie Bonollo's pleadings must be understood as alleging that the argument that there is a change in circumstances is inadmissible on the ground that this is a question of fact, that plea must be rejected. Whether the circumstance that MET was granted, then denied to the two Chinese exporting producers demonstrates a change in circumstances within the meaning of Article 11(9) of the basic regulation is, in my view, a question of law.

168. Third, while I agree with Distillerie Bonollo that a plea alleging that the rights of defence have been infringed would be inadmissible as the General Court did not rule on that plea in the judgment under appeal, it seems to me that no such plea was raised in the appeal. The appeal briefly states, as an introduction to the third part of the single ground of appeal, that the General Court's findings on normal value 'run counter to established … case-law … ensuring fair price comparisons *and respecting the exporters' right of defence*'.[76] Changmao Biochemical Engineering did not, by those few words and in the absence of other elements, raise a plea alleging infringement of the rights of defence.

169. Fourth, the argument that the General Court erred in holding, in paragraph 141 of the judgment under appeal, that the same normal value is applied to all exporting producers where it is determined on the basis of data relating to an analogue country is not, as Distillerie Bonollo argues, inadmissible on the ground that it is directed at a subsidiary ground in the judgment under appeal. It is, as Distillerie Bonollo itself suggests, ineffective.[77]

170. I conclude that the single ground of appeal is therefore admissible in its entirety.

3. Substance

171. According to Article 11(9) of the basic regulation, in all review investigations within the meaning of that article, the Commission must, provided that circumstances have not changed, apply the same methodology as that used in the investigation which led to the imposition of the duty, with due account being taken of, inter alia, Article 2 of that regulation.

76 Emphasis added.

77 See point 208 below.

172. According to case-law, the exception whereby the institutions may, in the review procedure, apply a method different from that used in the original investigation when the circumstances have changed must be interpreted strictly.[78]

173. In the present case, in the investigation which led to the adoption of Regulation No 130/2006, as regards the two Chinese exporting producers, which had been granted MET, normal value was established on the basis of their actual domestic sales prices, pursuant to Article 2(1) to (6) of the basic regulation,[79] whereas, as regards exporting producers not granted MET, normal value was calculated on the basis of domestic sales prices in an analogue country, namely Argentina, under Article 2(7)(a) of that regulation.[80]

174. By contrast, in the investigation which led to the adoption of the regulation at issue, the two Chinese exporting producers were denied MET. Therefore, the normal value could no longer be established in accordance with Article 2(1) to (6) of the basic regulation. It was calculated, in essence, on the basis of the costs of production in Argentina, pursuant to Article 2(7)(a) of that that regulation.[81]

175. By its single ground of appeal, Changmao Biochemical Engineering contends that the General Court erred in finding that the Council infringed Article 11(9) of the basic regulation by using, in the review investigation, a constructed normal value for the two Chinese exporting producers that was based on production costs in Argentina, whereas it had, in the original investigation, established normal value for exporting producers not granted MET on the basis of domestic sales prices in Argentina.

176. The single ground of appeal is divided into three parts. In the first part, Changmao Biochemical Engineering alleges that there has been no change of methodology and that, in any event, the circumstances have changed, with the result that the General Court erred in finding an infringement of Article 11(9) of the basic regulation.

177. I take the view that the first part of the single ground of appeal should be upheld.

178. Contrary to what Changmao Biochemical Engineering argues,[82] there has been a change in methodology within the meaning of Article 11(9) of the basic regulation.

179. According to case-law, there is a change in methodology for the purposes of that provision where, in the original investigation, the export price was established on the basis of actual export prices to the Union under Article 2(8) of the basic regulation, whereas, in the review investigation, a constructed export price was established on the basis of actual export prices to third countries under Article 2(9) of that regulation.[83] Similarly, where, in the original investigation, the Council calculated the normal

78 Judgments of 19 September 2013, *Dashiqiao Sanqiang Refractory Materials* v *Council* (C-15/12 P, EU:C:2013:572, paragraph 17), and of 18 September 2014, *Valimar* (C-374/12, EU:C:2014:2231, paragraph 43).

79 Recitals 18 to 28 of Regulation No 1259/2005, and recital 13 of Regulation No 130/2006.

80 Recitals 29 to 34 of Regulation No 1259/2005, and recital 13 of Regulation No 130/2006.

81 Recitals 27 to 29 of the regulation at issue.

82 For the sake of clarity, I point out that Changmao Biochemical Engineering alleges that the calculation of the normal value not on the basis of domestic sales prices in Argentina, but on the basis of production costs in Argentina as regards exporting producers not granted MET, constitutes a change in methodology. It does not allege that the fact that it was granted MET in the original investigation, but denied that treatment in the review investigation, constitutes in itself a change in methodology that is inconsistent with Article 11(9) of the basic regulation.

83 Judgment of 18 September 2014, *Valimar* (C-374/12, EU:C:2014:2231, paragraphs 21, 44 and 59), and Opinion of Advocate General Cruz Villalón in *Valimar* (C-374/12, EU:C:2014:118, point 78).

value on the basis of the actual export prices of a producer located in an analogue third country and of the domestic sales prices of that producer, whereas, in the review investigation, the Council established the normal value on the basis of the production costs of the same producer, there has been a change in methodology. [84]

180. In the present case, in the original investigation, the normal value was established on the basis of domestic sales prices in Argentina as regards exporting producers not granted MET, whereas, in the review investigation, it was calculated, in essence, on the basis of the costs of production in Argentina as regards the two Chinese exporting producers, which were no longer eligible for MET. In the light of the case-law mentioned in the preceding point, it seems to me that this constitutes a change in methodology within the meaning of Article 11(9) of the basic regulation.

181. Moreover, it has not, in my view, been shown that the circumstances have changed.

182. It has been held that, in particular, a minimum price undertaking (whose effect was that the actual export prices to the Union were no longer reliable, and that, in the review investigation, a constructed export price had to be calculated on the basis of export prices to third countries), [85] or a considerable change in the costs of production of the product concerned [86] constitute a change in circumstances within the meaning of Article 11(9) of the basic regulation. [87]

183. Changmao Biochemical Engineering, however, merely states that there has been a major change in circumstances, and that this is evidenced by the fact that the Council and the Commission granted it MET in the original investigation, but denied it such treatment in the review investigation. This does not, in my view, suffice to establish a change of circumstances within the meaning of Article 11(9) of the basic regulation.

184. In particular, I note that, according to recital 27 of the regulation at issue, the reason why it was decided, in the review investigation, to use a constructed normal value based on production costs in Argentina, rather than use domestic sales prices in Argentina, was the existence of a 'difference in the production method between Argentina and [China], which [had] a significant impact on prices and costs'. As Changmao Biochemical Engineering explains, while, in Argentina, tartaric acid is produced from by-products of winemaking, in China, it is produced by chemical synthesis. However, it appears from Regulation No 349/2012 that the differences in the production process and the production costs of tartaric acid already existed when the original investigation was carried out. [88] It has not been alleged before the Court that a change occurred in the production costs of tartaric acid in Argentina and/or in China between the original investigation period and the interim review period. In my view, it follows that it has not been shown that the circumstances have changed within the meaning of Article 11(9) of the basic regulation.

185. However, it seems to me that the General Court did not provide adequate and sufficient reasoning for the finding, in paragraphs 135 to 137 of the judgment under appeal, that applying the methodology used in the original investigation would not be contrary to Article 2 of the basic regulation.

84 Judgment of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council* (T-299/05, EU:T:2009:72, paragraphs 170 to 172). See also the judgments of 8 July 2008, *Huvis* v *Council* (T-221/05, not published, EU:T:2008:258, paragraphs 27, 28 and 43), and of 16 December 2011, *Dashiqiao Sanqiang Refractory Materials* v *Council* (T-423/09, EU:T:2011:764, paragraph 57).

85 Judgment of 18 September 2014, *Valimar* (C-374/12, EU:C:2014:2231, paragraphs 45 to 49).

86 Judgment of 15 November 2018, *CHEMK and KF* v *Commission* (T-487/14, EU:T:2018:792, paragraph 63).

87 See also the judgment of 16 December 2011, *Dashiqiao Sanqiang Refractory Materials* v *Council* (T-423/09, EU:T:2011:764, paragraph 63).

88 Reference is made to recital 26 of Regulation No 349/2012, which states that 'the different production processes in Argentina and China and the resulting impact on the costing and the valuation of the production concerned were already carefully considered in the original investigation'.

186. I observe that Article 11(9) of the basic regulation requires the Commission to apply, in all review investigations, the same methodology as in the original investigation, 'with due account being taken of Article 2, and in particular paragraphs 11 and 12 thereof, and of Article 17'.

187. I note that, where, as is the case here, there has been no change in circumstances, it is not sufficient, in order to justify a change of methodology, that the new methodology be more appropriate than the former one.[89] In the absence of a change in circumstances, a change of methodology is only justified if the former methodology is contrary to Articles 2 or 17 of the basic regulation.

188. Indeed, it follows from the wording of Article 11(9) of that regulation and from the case-law cited at point 172 above that the general rule is that the methodology used in the original investigation must be applied in the review investigation, and that the use of a different methodology in the review investigation is the exception. Were it considered that a new methodology may, in the absence of a change in circumstances, be applied in the review procedure *even where the former methodology has not been found to be contrary to Articles 2 or 17 of the basic regulation*, the exception would become the rule.

189. Therefore, it must be determined whether applying, in the review investigation, the methodology used in the original investigation would be contrary to Article 2 of the basic regulation.

190. According to case-law, it is for the Council to demonstrate that the methodology used in the original investigation was contrary to Article 2 of the basic regulation.[90]

191. Before the General Court, the Council argued that, given the differences in the production process of tartaric acid in Argentina and in China,[91] it could not apply, in the review investigation, the methodology used in the original investigation without infringing Article 2(10) of the basic regulation, which requires that the comparison between the normal value and the export price be fair. The Council claimed that the comparison between, on the one hand, the normal value calculated using domestic sales prices in Argentina, and thus based on data relating to the natural production process, and, on the other hand, the *actual* export prices of the two Chinese exporting producers, thus relating to the synthetic production process, would have been unfair.

192. In paragraphs 135 to 137 of the judgment under appeal, the General Court rejected the Council's argument that applying the methodology used in the original investigation would not allow for a fair comparison between the normal value and the export prices on the ground that, first, were the comparison unfair, this should also have led the Council and the Commission to modify the anti-dumping duty applicable to the other exporting producers, which they had not done, and, second, the tartaric acid produced by chemical synthesis has 'the same characteristics and the same basic uses' as that produced from by-products of winemaking.

193. It seems to me that the General Court could not conclude that applying the methodology used in the original investigation 'does not appear to be contrary to Article 2 of the basic regulation'[92] by relying solely on those grounds.

89 Judgment of 8 July 2008, *Huvis* v *Council* (T-221/05, not published, EU:T:2008:258, paragraph 50).

90 Judgment of 8 July 2008, *Huvis* v *Council* (T-221/05, not published, EU:T:2008:258, paragraph 51).

91 See point 184 above.

92 See paragraph 137 of the judgment under appeal.

194. First, the fact that the Council failed to amend the duty imposed on the other exporting producers not granted MET does not demonstrate that the methodology used in the original investigation is not contrary to Article 2 of the basic regulation. It may as well suggest that the Council infringed that provision by failing to modify the duty imposed on the other exporting producers not granted MET. No conclusion may be drawn from the conduct of the Council as to the lawfulness of either the former or the new methodology.

195. Second, it seems to me that, in order to find that the application of the methodology used in the original investigation would not have been contrary to Article 2 of the basic regulation, the General Court could not merely state that the tartaric acid produced by chemical synthesis has 'the same characteristics and the same basic uses' as that produced from the by-products of winemaking. This is because the differences in the production process of tartaric acid in Argentina and in China, on which the Council relied when it claimed that applying the former methodology would be inconsistent with Article 2(10) of the basic regulation, have, according to recital 27 of the regulation at issue,[93] 'a significant impact on prices and costs'.

196. Moreover, I note that the differences in the production process are the reason why, in the regulation at issue, the methodology was changed and the normal value was calculated, as regards exporting producers not granted MET, not on the basis of domestic sales prices in Argentina, but using production costs in Argentina.[94] Therefore, it seems to me that, in so far as the Council relies on the differences in the production process in order to show that applying the former methodology in the review investigation would have been unlawful, the General Court should have examined not only whether those differences made the comparison between the normal value and the export prices unfair, but also whether those differences precluded domestic sales prices in Argentina from being used to calculate the normal value. Only if the General Court found that, notwithstanding the differences in the production process, the domestic sales prices in Argentina could be used to calculate the normal value could it conclude that applying the former methodology would not have been contrary to Article 2 of the basic regulation and that, consequently, the Council could not apply a new methodology in the regulation at issue.

197. It is true that the Council, which bears the burden of demonstrating that applying the former methodology would be unlawful, only alleged before the General Court that the differences in the production process would not allow for the fair comparison required by Article 2(10) of the basic regulation; it did not allege that those differences would preclude the use of domestic sales prices in Argentina when calculating the normal value. However, it seems to me that the two issues are linked, as evidenced by recital 42 of the regulation at issue, according to which '[a]ttempting the same calculation *using domestic sales prices in Argentina* and then adjusting the normal value and/or export price under Article 2(10) of the basic [r]egulation would not have provided for a fair comparison'.[95]

198. It follows that the General Court failed to provide adequate and sufficient reasoning for the finding, in paragraph 137 of the judgment under appeal, that applying the methodology used in the original investigation would not be contrary to Article 2 of the basic regulation.

199. As the Commission argues, it cannot be claimed that Article 11(9) of the basic regulation must be interpreted as meaning that the requirement that the same methodology must be applied in the original and the review investigations refers not to the methodology applied in the original procedure *as a whole*, but to the methodology used, in the original procedure, for *each exporting producer*.

93 See point 184 above.

94 According to recital 27 of the regulation at issue, '*given the difference in the production method between Argentina and [China] which has a significant impact on prices and costs*, it was decided to construct normal value, rather than use [the] domestic sales prices [in Argentina]' (emphasis added).

95 Emphasis added.

200. Were this the case, in the review investigation, normal value would have to be established, as regards the two Chinese exporting producers, on the basis of their actual domestic sales prices.[96] This would, however, be contrary to Article 2(7)(a) of the basic regulation, given that, according to the review investigation, the two Chinese exporting producers are no longer eligible for MET. The Council could thus apply a new methodology without infringing Article 11(9) of the basic regulation.[97]

201. However, Article 11(9) of the basic regulation cannot, in my view, be interpreted as meaning that the requirement to apply, in the review investigation, the methodology applied in the original investigation refers to the methodology used for *each exporting producer*. First, the wording of that provision runs counter to that interpretation, given that it requires the application of the same methodology that was used in 'the investigation which led to the duty'. By definition, an investigation concerns all exporting producers of the product concerned. There is nothing to suggest, in the wording of Article 11(9) of the basic regulation, that account must be taken of the individual situation of exporting producers. Second, although, in order to 'ensure greater coherence over across the board', the Commission proposed repealing Article 11(9) of the basic regulation, on account, inter alia, of the fact that 'it has sometimes led to the continued use of clearly outdated methodologies',[98] that provision was not repealed. This suggests a broad interpretation of the rule laid out in Article 11(9) of the basic regulation. That rule would thus apply to the methodology used in the investigation as a whole, not to the methodology used for each exporting producer.

202. It follows that the first part of the single ground of appeal must be upheld, and the judgment under appeal set aside.

203. For the sake of completeness, I will, however, examine briefly the second and the third parts of the single ground of appeal.

204. In the second and the third parts of its single ground of appeal, Changmao Biochemical Engineering claims that the General Court erred in finding, in paragraphs 139 to 141 of the judgment under appeal, that the fact that the same normal value applies to all exporting producers not granted MET removes any distinction between cooperating and non-cooperating exporting producers.

205. In my view, the second and the third parts of the single ground of appeal cannot succeed.

206. In paragraphs 139 to 141 of the judgment under appeal, the General Court dismissed the Council's argument that, should the normal value be calculated on the basis of the domestic sales prices in Argentina as regards, on the one hand, the two Chinese exporting producers, who cooperated, and, on the other hand, the other exporting producers, who did not cooperate, this would remove any distinction between cooperating and non-cooperating exporting producers. According to the General Court, there would still be a distinction, given that cooperating exporting producers may be granted individual treatment under Article 9(5) of the basic regulation, whereas non-cooperating exporting producers cannot be granted such treatment.

96 See point 173 above.

97 Article 2(7)(a) of the basic regulation requires that, in the case of imports from non-market economy countries, normal value be determined on the basis of the price or constructed value in a market economy third country, or, where those are not possible, on any other reasonable basis. In other words, normal value cannot, in that situation, be determined on the basis of actual domestic sales prices in the non-market economy country concerned.

98 Point 2.6.2 of the Communication from the Commission to the Council and the European Parliament, of 10 April 2013, on Modernisation of Trade Defence Instruments – Adapting trade defence instruments to the current needs of the European economy (COM(2013) 191 final). See also Article 1(5)(b) of the Proposal for a regulation of the European Parliament and of the Council amending [the basic regulation] and Council Regulation (EC) No 597/2009 on protection against subsidised imports from countries not members of the European Community, submitted on 10 April 2013 (COM(2013) 192 final).

207. In so far as Changmao Biochemical Engineering argues that the fact that cooperating exporting producers may, unlike non-cooperating exporting producers, be granted individual treatment does not allow for a distinction between cooperating and non-cooperating exporting producers *as regards the calculation of normal value*, that argument is ineffective. It is true that, where an exporting producer is granted individual treatment under Article 9(5) of the basic regulation, the country-wide normal value applicable to all exporting producers not granted MET applies, although an individual anti-dumping margin is calculated on the basis of that exporting producer's actual export prices. However, the question under examination in paragraphs 139 to 141 of the judgment under appeal is not whether the same normal value applies to all exporting producers not granted MET, whether or not they cooperated. It does, and this is acknowledged by the General Court. The question is whether, *although the same normal value applies*, individual treatment allows nonetheless a distinction to be made between cooperating and non-cooperating exporting producers.

208. In so far as Changmao Biochemical Engineering argues that the same normal value does not apply to all cooperating exporting producers not granted MET *where they have different production processes and costs*, that argument is also ineffective, for the same reason.

209. I conclude that the first part of the single ground of appeal must be upheld. The judgment under appeal must therefore be set aside on that ground.

210. I do not take the view that the Court is in a position to give final judgment in the matter under Article 61 of the Statute. The resolution of the dispute entails a new assessment of the circumstances of the case, in view of the considerations set out in points 185 to 198 above, an assessment which the General Court is better placed to carry out.

211. The present case must, therefore, be referred back to the General Court so that it may examine whether applying, in the review investigation, the methodology used in the original investigation would be contrary to Article 2 of the basic regulation. Next, should it find that that was the case and that, consequently, the Council could apply a new methodology in the review investigation without infringing Article 11(9) of that regulation, the General Court would have to examine the other pleas raised before it.

VII. Costs

212. As my proposal is that the case be referred back to the General Court, the costs relating to the main appeal would have to be reserved.

213. The Court would, however, have to make a decision as to the costs of the cross-appeal.

214. Under Article 138(3) of the Rules of Procedure, which is applicable to appeal proceedings by virtue of Article 184(1) of those rules, where each party succeeds on some and fails on other heads, the parties are to bear their own costs. However, if it appears justified in the circumstances of the case, the Court may order that one party, in addition to bearing its own costs, pay a proportion of the costs of the other party.

215. In the present case, the Commission has been unsuccessful in so far as it asked the Court to set aside the judgment under appeal on the ground that the General Court erred in finding that Distillerie Bonollo was directly concerned by the regulation at issue, but successful in so far as it asked the Court to set aside the second paragraph of the operative part of the judgment under appeal to the extent that it provides for the Council to take the necessary measures to implement that judgment. As Distillerie Bonollo has applied for costs, the Commission should be ordered to bear its own costs and to pay four-fifths of the costs incurred by Distillerie Bonollo, while Distillerie Bonollo should bear one-fifth of its own costs.

216. In accordance with Article 140(1) of the Rules of Procedure, which also applies to the procedure on appeal by virtue of Article 184(1) thereof, the Council, which intervened in the proceedings relating to the cross-appeal, should bear its own costs relating to the cross-appeal.

217. Under Article 184(4) of the Rules of Procedure, where an intervener at first instance takes part in the appeal proceedings, the Court may decide that he or she is to bear his or her own costs. As Changmao Biochemical Engineering took part in the cross-appeal, it should bear its own costs in the cross-appeal.

VIII. Conclusion

218. I therefore propose that the Court should:

– set aside the judgment of 3 May 2018, *Distillerie Bonollo and Others* v *Council* (T-431/12, EU:T:2018:251);

– refer the case back to the General Court of the European Union;

– reserve the costs relating to the main appeal;

– uphold the cross-appeal in so far as it seeks to have the second paragraph of the operative part of the judgment of 3 May 2018, *Distillerie Bonollo and Others* v *Council* (T-431/12, EU:T:2018:251) set aside to the extent that it provides for the Council of the European Union to take the measures necessary to comply with that judgment;

– dismiss the cross-appeal as to the remainder;

– order the European Commission to bear its own costs relating to the cross-appeal and to pay four-fifths of the costs incurred by Distillerie Bonollo SpA, Industria Chimica Valenzana (ICV) SpA, Distillerie Mazzari SpA and Caviro Distillerie Srl relating to the cross-appeal;

– order Distillerie Bonollo SpA, Industria Chimica Valenzana (ICV) SpA, Distillerie Mazzari SpA and Caviro Distillerie Srl to bear one-fifth of their own costs relating to the cross-appeal; and

– order the Council of the European Union and Changmao Biochemical Engineering Co. Ltd to bear their own costs relating to the cross-appeal.