Reports of Cases

OPINION OF ADVOCATE GENERAL
CAMPOS SÁNCHEZ-BORDONA
delivered on 9 July 2020[1]

Case C-56/19 P

RFA International, LP
v

European Commission

(Appeal — Dumping — Imports of ferro-silicon originating in Russia — Regulation (EC) No 1225/2009 — Article 11(9) and (10) — Rejection of applications for a refund of anti-dumping duties paid — Method of investigation — Change of circumstances since the original investigation or since intervening interim refund and review investigations — Constructed export price — Deduction of anti-dumping duties paid — Conclusive evidence)

1. In 2008, the Council adopted Regulation (EC) No 172/2008[2] imposing a definitive anti-dumping duty on imports of ferro-silicon (an alloy used in the manufacture of iron and steel) originating, inter alia, in Russia.[3]

2. That regulation set an anti-dumping duty (22.7%) applicable to the net, free-at-Union-frontier price, before customs clearance, for the products manufactured by two companies established in Russia[4] and related to RFA International, LP ('RFA').[5]

3. The companies subject to the anti-dumping measures under the initial regulation brought a series of applications for partial annulment or for review of the regulation or for a refund of the anti-dumping duties already paid.

4. RFA, in particular, applied for a refund in respect of amounts paid by way of anti-dumping duties between 1 October 2010 and 31 December 2012.

5. On 18 December 2014, the Commission refused that refund application by Decisions C(2014) 9805 final, C(2014) 9806 final, C(2014) 9807 final, C(2014) 9808 final, C(2014) 9811 final, C(2014) 9812 final and C(2014) 9816 final ('the decisions at issue').

1 Original language: Spanish.

2 Council Regulation of 25 February 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ferro-silicon originating in the People's Republic of China, Egypt, Kazakhstan, the former Yugoslav Republic of Macedonia and Russia (OJ 2008 L 55, p. 6) ('the initial regulation').

3 The proceedings originated in a complaint lodged by the Comité de liaison des industries de ferroalliages (Liaison committee of the ferro-alloy industry) (Eurofalliages) on 25 February 2008.

4 These were the companies Chelyabinsk electrometallurgical integrated plant OAO ('CHEMK') and Kuzneckie Ferrsplavy OAO ('KF').

5 RFA has a branch in Switzerland which is responsible for the export sales of CHEMK and KF, particularly in the European Union.

6. On 4 March 2015, RFA brought an action before the General Court seeking annulment of those decisions, claiming that they infringed various provisions of Regulation (EC) No 1225/2009.[6]

7. The General Court dismissed RFA's action by judgment of 15 November 2018,[7] the judgment which is now under appeal.

I. Legal context. Regulation No 1225/2009

8. According to Article 11 of Regulation No 1225/2009:

'…

8. Notwithstanding paragraph 2, an importer may request reimbursement of duties collected where it is shown that the dumping margin, on the basis of which duties were paid, has been eliminated, or reduced to a level which is below the level of the duty in force.

In requesting a refund of anti-dumping duties, the importer shall submit an application to the Commission. The application shall be submitted via the Member State of the territory in which the products were released for free circulation, within six months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty. Member States shall forward the request to the Commission forthwith.

An application for refund shall only be considered to be duly supported by evidence where it contains precise information on the amount of refund of anti-dumping duties claimed and all customs documentation relating to the calculation and payment of such amount. It shall also include evidence, for a representative period, of normal values and export prices to the Community for the exporter or producer to which the duty applies. In cases where the importer is not associated with the exporter or producer concerned and such information is not immediately available, or where the exporter or producer is unwilling to release it to the importer, the application shall contain a statement from the exporter or producer that the dumping margin has been reduced or eliminated, as specified in this Article, and that the relevant supporting evidence will be provided to the Commission. Where such evidence is not forthcoming from the exporter or producer within a reasonable period of time the application shall be rejected.

The Commission shall, after consultation of the Advisory Committee, decide whether and to what extent the application should be granted, or it may decide at any time to initiate an interim review, whereupon the information and findings from such review carried out in accordance with the provisions applicable for such reviews, shall be used to determine whether and to what extent a refund is justified. …

9. 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.

6 Council Regulation of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51; 'the basic regulation').

7 *RFA International* v *Commission* (T-113/15, not published, EU:T:2018:783; 'the judgment under appeal').

10. In any investigation carried out pursuant to this Article, the Commission shall examine the reliability of export prices in accordance with Article 2. However, where it is decided to construct the export price in accordance with Article 2(9), it shall calculate it with no deduction for the amount of anti-dumping duties paid when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Community.'

II. Background to the dispute

9. In order to have a better understanding of the sequence of events, it is worth recalling the procedural course of the claims made by RFA (and the companies related to it) in connection with those anti-dumping duties, to which both the General Court and the Court of Justice have had to respond.

A. The (first) action for annulment

10. Following the approval of the initial regulation in 2008, CHEMK and KF brought an action before the General Court seeking partial annulment of that regulation.

11. The General Court dismissed that action by judgment of 25 October 2011,[8] against which the applicant companies brought an appeal.

12. The Court of Justice dismissed the appeal by judgment of 28 November 2013.[9]

B. First review proceedings and (second) action for annulment

13. On 30 November 2009, CHEMK and KF sought an interim review of the initial regulation.

14. Those proceedings culminated in the adoption of Implementing Regulation (EU) No 60/2012,[10] which confirmed the original anti-dumping measure.

15. CHEMK and KF brought an action before the General Court seeking a declaration partially annulling Implementing Regulation No 60/2012.

16. The General Court dismissed that action by judgment of 28 April 2015,[11] against which the applicant companies brought an appeal.

17. The Court of Justice dismissed that appeal by order of 9 June 2016.[12]

8 *CHEMK and KF* v *Council* (T-190/08, EU:T:2011:618).

9 *CHEMK and KF* v *Council* (C-13/12 P, not published, EU:C:2013:780).

10 Council Implementing Regulation of 16 January 2012 terminating the partial interim review pursuant to Article 11(3) of Regulation No 1225/2009 of the anti-dumping measures applicable to imports of ferro-silicon originating, inter alia, in Russia (OJ 2012 L 22, p. 1).

11 *CHEMK and KF* v *Council* (T-169/12, EU:T:2015:231).

12 *CHEMK and KF* v *Council* (C-345/15 P, not published, EU:C:2016:433).

C. Subsequent refund proceedings

1. First and second refund investigation periods and (third) action for annulment

18. Between 30 July 2009 and 10 December 2010, CHEMK and KF submitted a number of applications for a refund of the anti-dumping duties paid between 7 January 2009 and 10 December 2010.

19. The refund investigation concentrated on the period between 1 October 2008 and 30 September 2010, which the Commission divided into two sub-periods: 'the first refund investigation period', from 1 October 2008 to 30 September 2009, and 'the second refund investigation period', from 1 October 2009 to 30 September 2010.

20. On 10 August 2012, the Commission issued Decisions C(2012) 5577 final, C(2012) 5585 final, C(2012) 5588 final, C(2012) 5595 final, C(2012) 5596 final, C(2012) 5598 final and C(2012) 5611 final, in which it upheld the refund applications in relation to the first refund investigation period and rejected those relating to the second period.

21. RFA challenged those decisions before the General Court, which dismissed its action by judgment of 17 March 2015.[13]

22. RFA brought an appeal against the General Court's judgment of 17 March 2015. The Court of Justice dismissed the appeal by judgment of 4 May 2017.[14]

2. Third and fourth refund investigation periods and (fourth) action for annulment

23. Between 1 March 2011 and 26 June 2013, RFA filed further applications for the refund of anti-dumping duties, this time for the period between 1 October 2010 and 31 December 2012.

24. In the decisions at issue, after identifying two sub-periods ('the third refund investigation period', from 1 October 2010 to 31 December 2011, and 'the fourth refund investigation period', from 1 January 2012 to 31 December 2012), the Commission rejected RFA's applications.

25. On 4 March 2015, RFA lodged a (fourth) action for annulment before the General Court, contesting those decisions. The General Court dismissed its claims by judgment of 15 November 2018, against which RFA has brought this appeal.

D. Second review proceedings and (fifth) action for annulment

26. On expiry of the anti-dumping measures laid down in the initial regulation, the Commission commenced an expiry review which concluded with Commission Implementing Regulation (EU) No 360/2014,[15] which retained the 22.7% anti-dumping duty set by the initial regulation.

27. CHEMK and KF brought an action challenging Implementing Regulation No 360/2014 before the General Court, which dismissed their action by judgment of 15 November 2018.[16] That judgment has become final.

13 *RFA International* v *Commission* (T-466/12, EU:T:2015:151).

14 *RFA International* v *Commission* (C-239/15 P, not published, EU:C:2017:337)

15 Commission Implementing Regulation of 9 April 2014 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in the People's Republic of China and Russia, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009 (OJ 2014 L 107, p. 13).

16 *CHEMK and KF* v *Commission* (T-487/14, EU:T:2018:792).

III. Proceedings before the General Court

28. The action for annulment of the decisions at issue lodged by RFA on 4 March 2015 contained three pleas in law, only the second of which is relevant here, alleging as it does that those decisions infringed Article 11(9) and (10) of the basic regulation.

29. As regards the arguments of RFA and the Commission on that plea, I refer to paragraphs 58 to 68 of the judgment under appeal, in which the General Court summarised each party's arguments.

30. I will therefore confine myself to reproducing paragraphs 69 to 75 and 77 to 79 of the judgment under appeal, in which the General Court set out its reasons for rejecting that plea for annulment. It did so as follows:

'69 In that regard, it must, first of all, be stated that, as regards the application of Article 11(10) of the basic regulation, it is justified, where the production costs of the products concerned have varied significantly between the investigation period previously taken into consideration and the new investigation period, for the Commission to take into account, in order to ascertain whether the anti-dumping duties are duly reflected in the resale prices of those products in the European Union during that latter period, not the resale prices established during the first of those periods, but the costs recorded during the new investigation period. Those considerations are valid even if it may be considered that there has been a change in methodology in relation to what was done in the context of an earlier investigation, as is true in the present case contrary to what the Commission principally claimed in the contested decisions and as set out in paragraph 22 above.

70 Such a practice seeks to ensure solid analysis in the comparison of complex economic situations in order not only to justify the merits of the measures adopted under the anti-dumping legislation, but also to ensure, between the operators likely to be the subject of those measures, compliance with the general EU law principle of equal treatment. While ensuring the solidity, in the economic analysis, of the comparison of the situation between two periods justifies, as a rule, the application of the same methodology, that is not the case if the relevant parameters have sufficiently changed to render the application of the methodology previously used inappropriate for the purpose of giving a reliable result, in this case in order to assess whether or not the anti-dumping duties were duly reflected in the resale prices and subsequent selling prices in the European Union (see, to that effect and by analogy, judgment of 18 September 2014, *Valimar*, C-374/12, EU:C:2014:2231, paragraphs 50 and 59). As the Commission contends, if the production costs have significantly increased between the two periods compared, an increase in the resale prices in the European Union, even if considerable, does not necessarily guarantee that the anti-dumping duties have been duly reflected, that is to say fully reflected, in the establishment of those prices. Production costs may have increased more than prices. In that case, even if the new prices are higher than the former prices plus anti-dumping duties, the interested parties do not duly incorporate the anti-dumping duties given the change in their production costs.

71 The arguments put forward by the applicant in the present case do not call into question that analysis. First of all, contrary to what the applicant essentially claims, Article 11(10) of the basic regulation in no way implies, in so far as it relates to the issue of whether "the duty is duly reflected in resale prices", that only the equivalent of the anti-dumping duty should be incorporated into the new resale price over and above the resale price previously charged in order to benefit from a positive response. An additional duty in relation to the costs normally incurred is "duly reflected" only if it is added to those other costs. If those other costs increase, but the resale price increases by a lesser amount, the duty is in fact only partially added to those costs or not at all, even if the equivalent of the duty has been added to the resale price previously charged. The extract from the Commission Notice concerning the reimbursement of anti-dumping duties, highlighted by the applicant and cited in paragraph 58 above, in no way contradicts that analysis. The same is true of the judgment of 18 November 2015, *Einhell Germany and Others* v

Commission (T-73/12, EU:T:2015:865), relied on by the applicant. In particular, paragraph 155 of that judgment states, read in context, that a methodology other than the comparison of resale prices in the European Union charged before the institution of the anti-dumping duties and those charged subsequently may be appropriate to determine whether or not those duties are reflected in the new resale prices in the European Union.

72 As regards the actual facts of the present case, as far as the fourth refund investigation period is concerned, which corresponds to the year 2012, it must be pointed out that, in the contested decisions, for example in recital 85 of Decision C(2014) 9805 final, the Commission found that the production costs had increased significantly compared with the initial investigation period, by 109%, without being disproved as to the substance by the applicant, in particular in the present action. In those circumstances, in order to determine whether the anti-dumping duties were duly reflected in the resale prices in the European Union charged by the applicant on behalf of CHEMK and KF during the fourth refund investigation period, the Commission was justified in taking into account not the resale prices during the initial period, but rather the production costs recorded in 2012.

73 In a situation where, as the Commission noted in the contested decisions, for example in recital 84 of Decision C(2014) 9805 final, only in 1% of cases [do] the resale prices in the European Union cover the cost of the products, inclusive of the anti-dumping duty, it is far from proven that those duties are in fact duly reflected in those prices.

74 Even the increase in the resale prices between the initial investigation period and the fourth refund investigation period of over 100%, put forward by the applicant, is insufficient in that context to show that the anti-dumping duties were fully reflected during the second of those periods. It is sufficient, as indicated in essence in paragraph 70 above, if the production costs have increased more than the prices charged in order for those prices not to reflect the anti-dumping duties duly, given the change in production costs. That is a priori proven by the fact, found by the Commission, that in 99% of cases the cost of the products, inclusive of anti-dumping duty, was not covered by the resale prices in the European Union in 2012.

75 The Commission was, therefore, right in deducting the anti-dumping duty from the resale price of the first independent buyer in the European Union in order to calculate the constructed export price for the fourth refund investigation period, since it was not proven that the anti-dumping duty was duly reflected in the first of those prices.

…

77 However, the Commission correctly contends, as it set out in the contested decisions, for example in recital 78 of Decision C(2014) 9805 final, that the analysis of the resale prices in the European Union in order to ascertain to what extent they reflect the anti-dumping duties must be carried out at the level of trade subsequent to the payment of those duties, that is to say, by definition, at a level of trade where the price takes into account additional costs compared with those selected at the "ex works" or CIF [Cost, Insurance and Freight] stage. It must be pointed out in that regard that while it is provided for in the basic regulation that certain prices may be adjusted at a level of trade different from that at which they are normally charged, this is to ensure a fair comparison of the prices which do not necessarily reflect the same services. Accordingly, Article 2(10)(d) of the basic regulation (now Article 2(10(d) of Regulation 2016/1036)[17] provides that a fair comparison between the export price and the normal value may require adjustments in order to take into account the differences in the levels of trade at which those prices are charged. That is not the case, however, in order to assess only the resale prices in the European Union in

17 Regulation of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21).

the context of Article 11(10) of the basic regulation, which does not provide for such adjustments. Moreover, inasmuch as the Commission is justified, in order to apply that provision, in certain situations such as the present case, in analysing the resale prices taking into account all the costs incurred before that resale, as noted in paragraph 69 above, an analysis of prices established at the "ex works" or CIF stage, even artificially adding anti-dumping duties thereto as the applicant maintains was done — that is to say not taking into account some of the costs borne before that resale — would not be coherent. In addition, in those situations, there is no need to carry out a comparison of the resale prices in the European Union between two successive periods; such a comparison may be affected, as in the present case, by the differences in time of the levels of trade at which the importers of the products concerned invoiced them in respect of the first independent buyers in the European Union. It is, on the other hand, essential to verify whether the evidence put forward by the importer concerned proves that the price actually paid by those buyers during the period under examination duly reflects the anti-dumping duties. In that regard, it was found in the contested decisions, which is not disputed by the applicant, that it then for the most part sold the products there on the basis of the "delivered duty paid" price, that is to say encompassing all the costs prior to delivery, which was such as to facilitate that verification.

78 Consequently, the applicant could not rely on the change in the prices brought back to the "ex works" or CIF stage, even increased by the anti-dumping duties, in order to show that it reflected, during the third refund investigation period, the anti-dumping duties in its resale prices in the European Union. It ought to have adduced evidence showing that its "delivered duty paid" prices charged during that period covered all the costs incurred at that stage for the products at issue, anti-dumping duties included, which it was unable to do. The Commission was, therefore, fully entitled to deduct the anti-dumping duty from the resale price to the first independent buyer in the European Union in order to calculate the constructed export price for the third refund investigation period, since it was not shown that the anti-dumping duty was duly reflected in the first of those prices. There is, consequently, no need to examine the arguments exchanged between the parties as to the reliability or method of calculation of those "ex works" and CIF prices. As regards the applicant's assertion in the reply that even the comparison of the resale prices at the "delivered duty paid" stage would give a result that must lead to a partial refund of duties, it is not, in any event, sufficiently substantiated in order to be able to be taken into consideration in the context of the review of the lawfulness of the contested decisions (see, to that effect, judgment of 17 March 2015, *RFA International* v *Commission*, T-466/12, EU:T:2015:151, paragraph 44 and the case-law cited).

79 It follows from the foregoing that the applicant's second plea in law, alleging an infringement of Article 11(9) and (10) of the basic regulation in the construction of the export price, is also unfounded.'

IV. The procedure before the Court of Justice and the forms of order sought

31. The appeal was lodged at the Registry of the Court of Justice on 25 January 2019.

32. RFA asks the Court to set aside the judgment under appeal and to give a final judgment in the matter, if the state of the proceedings so permits. In the alternative, it requests that the case be referred back to the General Court. In any event, RFA claims that the Commission should be ordered to pay the costs.

33. The Commission asks the Court to dismiss the appeal and to order RFA to pay the costs.

34. The hearing set for 25 March 2020 was replaced by questions put by the Court to the parties, to be answered in writing.

V. Analysis of the appeal

A. Preliminary considerations

35. It emerges from reading the background to the dispute that, since the time when the initial regulation imposed the anti-dumping duties, the dispute has followed an eventful course that must be borne in mind when deciding on this appeal (applications for annulment, applications for refunds of duties paid and interim as well as expiry review investigations).

36. It is therefore worth calling to mind, before embarking on examination of the grounds of appeal, how, in abstract terms, once anti-dumping duties have been approved, they can be either reviewed or an application can be made for them to be refunded, as laid down in the basic regulation.

37. As regards *review*, for its part, the Court of Justice held as follows in its judgment of 18 September 2014:[18] '… an expiry review pursuant to Article 11(2) of the basic regulation is essentially a matter of assessing whether the expiry of the original anti-dumping measure would be likely to result in a continuation or recurrence of dumping and injury. … as regards an interim review pursuant to Article 11(3) of that regulation, the Commission may, in order to propose repealing, amending or maintaining the anti-dumping duty established as a result of the original investigation, inter alia, consider whether the circumstances with regard to dumping and injury have changed significantly or whether existing measures are achieving the intended results in removing the injury previously established'.

38. The *refund* procedure, in turn, although similar to the interim review procedure (indeed, under the fourth subparagraph of Article 11(8) of the basic regulation, the two procedures can take place cumulatively), allows the Commission to analyse only the actual dumping margin but not to re-examine the overall question of injury.

39. The factors common to the review and the refund of duties paid procedures are contained in Article 11(9) and (10) of the basic regulation, which are precisely the provisions that RFA claims were infringed by the General Court:

– Article 11(9) concerns the method to be used in review and refund investigations. The rule is that, in those investigations, the Commission is to use the same methodology 'as in the investigation which led to the duty', unless circumstances have changed.

– Article 11(10) deals with the constructed export price. In so far as is relevant here, it provides that the constructed export price can be calculated 'with no deduction for the amount of anti-dumping duties paid', subject to the provisos to which I will refer below.

B. Grounds of appeal

40. RFA states that its appeal 'is limited to challenging the General Court's findings on the Appellant's second plea at first instance, more specifically paragraphs 69-75 and 77-79 of the Contested Judgment'.[19]

18 *Valimar* (C-374/12, EU:C:2014:2231; '*Valimar*'), paragraphs 52 and 55. As regards the appraisal performed by the Commission in relation to the interim review, the Court added that it may 'carry out not only a "retrospective analysis" of the developing situation from the imposition of the original definitive measure in order to assess the need for its continuance or amendment to counteract the dumping which is causing injury, but also a "prospective analysis" of the probable development of the situation from the adoption of the review measure in order to assess the likely effect of removing or varying the definitive measure'.

19 Appeal, paragraph 16.

1. First ground of appeal: 'the General Court misinterpreted Article 11(9) of the Basic Regulation and the relevant case-law, and made substantially incorrect findings of fact'

41. That ground of appeal is divided into two parts.

(a) First part: failure to state reasons

(1) Arguments put forward by the appellant and the Commission

42. RFA's argument in relation to the alleged failure to state reasons is put succinctly. It amounts only to stating that 'the General Court fails to address the Appellant's argument on the lack of a change of circumstances'. [20]

43. According to the Commission, the General Court is not obliged to reply exhaustively to each and every one of the appellant's allegations, and a statement of reasons implied in the grounds of its decision is sufficient.

(2) Assessment

44. It is hard to understand RFA's criticism on this point, given that it acknowledged that 'the General Court ruled that the production cost increases constituted a change of circumstances justifying a change in methodology to calculate the export price under Article 11(9)'. [21]

45. The General Court did in fact, in the grounds of the judgment under appeal, explain why, in its view, there were sufficient reasons to justify the Commission changing its calculation methodology.

46. Specifically, it emphasised in paragraph 70 of that judgment that the need to use the same method can be set aside 'if the relevant parameters have sufficiently changed to render the application of the methodology previously used inappropriate for the purpose of giving a reliable result'.

47. On that premiss, the General Court stated that, in this case, those parameters, in particular, the production costs, had changed. Admittedly (and potentially thereby causing a degree of confusion), that variation in production costs is also a factor in assessing whether, by virtue of Article 11(10) of the basic regulation, the anti-dumping duties should be disregarded when constructing the export price. However, that does not mean, in substantive terms in the General Court's reasoning, that the same increase in production costs cannot also be regarded as a decisive factor in the *change in circumstances* that justified *changing the methodology* used.

48. That being so, there was no failure to state reasons by the General Court such as to justify setting aside the judgment under appeal. The reasons it set out, even if they were incorrect, exist and are sufficient to enable the appellant to understand their import, which it disputes on the substance.

49. It must also be borne in mind that, in the decisions at issue, the Commission highlighted a series of factual changes and significant variations that occurred during the ongoing investigation, compared with the situation at the time of the original investigation, which justified changing the methodology.

20 Ibid., paragraph 28.

21 Ibid., paragraph 22.

50. Of those changes, the General Court dwelt on the increase in the production costs, which makes sense since RFA also alluded to that factor in its application, even though others were also present.[22]

51. Lastly, as the Court of Justice had the opportunity to set out in its judgment of 4 May 2017,[23] in response to a similar argument put forward by RFA, it is sufficient to note that, in the context of an appeal, the purpose of review by the Court of Justice is, inter alia, to consider whether the General Court responded to the requisite legal standard to *all* the arguments raised by the appellant. It has done so in this case.

52. I would add, in any event, that, although one or two passages in paragraphs 69 and 78 of the judgment under appeal might suggest at first glance that the General Court's reasoning goes beyond the arguments put forward by the Commission, that does not mean that it has substituted the reasons given in the decisions at issue, but that it has merely supplemented those reasons. That is why RFA, quite correctly, does not allege any such apparent substitution of grounds in its first ground of appeal.

(b) Second part: alleged errors in law and substantially incorrect findings of fact

(1) Arguments put forward by the appellant and the Commission

53. RFA summarises its arguments as follows: 'when assessing whether the anti-dumping duties had been reflected in the resale prices, the Commission did not do so on the basis of the resale prices identified in the investigation leading to the initial regulation, but on the basis of current production costs in Russia. This constitutes a change in methodology within the meaning of Article 11(9) of the Basic Regulation. The Commission observed that … the circumstances had significantly changed since the initial investigation and in particular, the Russian exporters' production costs had increased by around 100%. However, costs increases existed and were already known during the 2008-2010 refund investigation periods'.

54. The Commission relies on the wording of Article 11(9) to argue that the only valid benchmark is that used in the initial regulation, since that was the regulation that 'led to the duty'.

(2) Assessment

55. As already indicated, Article 11(9) of the basic regulation refers, on the one hand, to 'the investigation that led to the duty' and, on the other, to the review or refund investigations. The same method must be used in the review and refund investigations as in the investigation that led to the duty, unless circumstances have changed.

22 Recital 19 in conjunction with recital 21 of Decision C(2014) 9805 final (the decision that the General Court took as a model in the judgment under appeal) states that the costs of the two Russian exporting producers increased significantly (by some 100%) in comparison with the original investigation, and that (i) the domestic sales structure of the group was revised shortly after the original investigation was concluded; (ii) the export trade flows of the Russian exporting producers were modified; (iii) during the original investigation, the exporting producer was mainly exporting the product concerned FOB [Free On Board: the seller delivers the product on board a ship at the port of shipment and the purchaser bears all the risks and costs from that time] and DDP [Delivery Duty Paid: includes all costs up to delivery of the goods to the purchaser at the agreed place in the country of import]. After the original investigation, they began selling EXW [Ex-Works: the goods are delivered at the transferor's premises and the purchaser bears all the risks (and costs) up to the destination]; (iv) during the original investigation, sales of the product to Union customers were EXW, CIF: the transferor bears the cost of insurance and freight and the purchaser has to be responsible for the goods on board the ship at the port of destination and bears the risks (and costs) from that time] and DDP. After the original investigation, resales were primarily DDP; (v) the applicant and Am General LLC — Mishawaka, USA ('AMG') were established after the original investigation. The applicant became the sole purchaser of the product and exported it in particular to the European Union. AMG provided the applicant with administrative services such as processing of purchases and sales orders, including the logistics of deliveries, warehousing administration and invoicing. In particular, the applicant engaged it to provide those tasks in the context of the export activity of the group; and (vi) the market conditions that prevailed during the original investigation also changed significantly.

23 *RFA International* v *Commission* (C-239/15 P, EU:C:2017:337), paragraph 27.

56. The article it is alleged has been infringed therefore only requires the Commission to use subsequently 'the same methodology as in the investigation which led to the duty'. Since, in this case, the anti-dumping duty was established by the initial regulation, the wording of the article means that the benchmark to be used must be the method used in the initial investigation rather than the method used at any other time.

57. Having set down that premiss (which, as the Commission notes in its rejoinder, RFA accepts, belatedly, in paragraph 9 of its reply, in contrast to what appeared to emerge from paragraph 25 of its appeal), the second part of the first ground of appeal should not be upheld.

58. In its appeal, RFA asserts that the Commission should have used the same methodology as in subsequent investigations *other than* the investigation that led to imposition of the anti-dumping duties in 2008. Specifically, it criticises the Commission (and the General Court, because it endorsed the Commission's thesis) for not adopting the method it had already used when it ruled on the *refund* of anti-dumping duties corresponding to other earlier periods. [24]

59. There may conceivably be a legal basis for RFA's thesis other than the one it has chosen (infringement of Article 11(9) of the basic regulation). However, in the appeal, the only legal provision that it claims has been infringed and to which the Court of Justice must have regard, is indeed Article 11(9) of the basic regulation, which RFA claims has been misinterpreted by the General Court.

60. That being so, the first ground of appeal cannot succeed since, I reiterate, the interpretation that RFA is proposing, to counter that of the General Court, conflicts with the wording of that article.

61. In any event, as the General Court noted, the Commission would be justified in using a new method, other than that used in earlier investigations, if there were found to have been a *change in circumstances*. Paragraph 70 of the judgment under appeal refers to that contingency: 'while ensuring the solidity, in the economic analysis, of the comparison of the situation between two periods justifies, as a rule, the application of the same methodology, that is not the case if the relevant parameters have sufficiently changed to render the application of the methodology previously used inappropriate for the purpose of giving a reliable result'. In that passage the General Court confirms what the Court of Justice had already held in *Valimar*.

62. However, determining whether or not there was, de facto, a change of circumstances involves an appraisal that, in common with all the other alleged 'substantially incorrect findings of fact' which RFA levels against the General Court, cannot serve as the basis for an appeal of this kind, which is limited to questions of law and not questions of fact.

63. There is indeed established case-law to the effect that the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. [25] The factual findings in the judgment under appeal therefore cannot be challenged on appeal, unless it is argued that it is obvious from the documents in the case file that the evidence has been distorted, which is not the case here.

24 In the (now final) judgment of 15 November 2018, *CHEMK and KF* v *Commission* (T-487/14, EU:T:2018:792), delivered on the same date as the judgment under appeal, the General Court rejected a similar claim made by CHEMK and KF against the final decision in the expiry review proceedings relating to those anti-dumping duties. According to paragraph 61 of that judgment: 'in the present case, the applicants *do not, however, claim that for the expiry review investigation the same methodology should be applied as in the initial investigation, but rather the same methodology as in the review investigation that led to the interim regulation*. The question is whether the anti-dumping duties, which by definition were not in force during the initial investigation period, have been reflected in the resale price' (emphasis added).

25 See, for example, judgment of 27 February 2020, *Republic of Lithuania* v *Commission* (C-79/19 P, EU:C:2020:129): 'it follows from the second subparagraph of Article 256(1) TFEU and from the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that that evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced before it. That appraisal therefore does not, save where that evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of Justice.'

64. In any event, since the dispute centres on whether or not the anti-dumping duties were subsequently passed on (which is the true nub of the dispute), Article 11(9) of the basic regulation is not the provision best suited to resolving it. In the initial investigation, it is not possible to talk of a *methodology* capable of clarifying whether anti-dumping duties were passed on or otherwise: that information is necessarily absent from any initial investigation, whose purpose is, precisely, to establish the anti-dumping duty.

65. Accordingly, by definition there can be no *single methodology* that is common to the initial investigation and subsequent refund investigations, as regards whether or not the anti-dumping duties were reflected in the resale prices of the products in the European Union. By the same token, it is impossible to speak of a *change in methodology*, since, I repeat, in the original investigations there is by definition no methodology whatsoever for verifying whether a hitherto non-existent anti-dumping duty is reflected in the resale prices.

66. The requirement that the methodology must not change (unless there is a change in circumstances), established in Article 11(9) of the basic regulation, accordingly does not apply in such situations.

2. Second ground of appeal

67. RFA summarises its second ground of appeal as follows: 'the General Court wrongly interpreted Article 11(10) of the Basic Regulation by applying an erroneous legal test. The legal test designed by the General Court requires that evidence of incorporation of the anti-dumping duties in the export prices could only be made through DDP pricing data and by showing that not only the anti-dumping duties were captured in the new prices but also the entirety of any production costs incurred. Neither Article 11(10) of the Basic Regulation, nor the Commission Notice concerning the reimbursement of anti-dumping duties [26] contain such a requirement.'

(a) First part: whether construction of the export price should include production costs as well as the anti-dumping duties

(1) Arguments put forward by the appellant and the Commission

68. RFA takes issue with paragraphs 72 to 75 of the judgment under appeal, contending that Article 11(10) of the basic regulation only requires the producer to submit conclusive evidence that the duty has been duly reflected in the selling prices in the European Union.

69. According to RFA, it is enough that the resale prices have increased sufficiently compared with the prices apparent in the course of the initial investigation. Were it relevant to consider the production costs for that purpose, the Commission should have expanded point 4.1(b) of its Notice concerning the reimbursement of anti-dumping duties [27] in order to include those costs.

70. The Commission maintains that the applicant is required to prove not only that there has been an increase in the resale prices, but that the duty 'is duly reflected in' those prices.

26 OJ 2014 C 164, p. 9.

27 Point 4.1(b) ('Implementation of Article 11(10) of the basic Regulation') of the Commission Notice concerning the reimbursement of anti-dumping duties reads as follows: 'Where the export price is constructed under Article 2(9) of the basic Regulation, the Commission shall calculate it with no deduction for the amount of anti-dumping duties paid when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Union. The Commission will examine whether an increase in selling prices to independent Union customers between the original and the refund investigation period incorporates the anti-dumping duties.'

(2) Assessment

71. Under the first subparagraph of Article 11(8) of the basic regulation, refund proceedings are predicated on the importer showing that the dumping margin on the basis of which duties were paid has been eliminated or reduced to a level which is below the level of the duty in force.

72. Under Article 11(10) of the basic regulation, it is permissible not to deduct the anti-dumping duties paid, when constructing the export price (in accordance with Article 2(9)). However, that option is only available 'when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the Community'.

73. The appeal singles out, in that article, a question that, given its potential implications for other situations, needs to be analysed in general terms before specific attention is given to the circumstances of this case.

(i) Setting the resale price: is it only possible to examine whether the anti-dumping duties were passed on?

74. RFA's line of argument, which it repeats more than once, is that during examination, following the provision of conclusive evidence, of whether the anti-dumping duties have been incorporated (or reflected) in the resale prices, it is not appropriate to assess the influence of other factors, as allowed by the General Court, following the line taken by the Commission. Accordingly, it is sufficient that the new prices are higher than the former prices plus anti-dumping duties for it to be found that those duties have been incorporated.

75. I do not share that view. To my mind, it makes more sense (and better meets the needs of a comprehensive interpretation of the provision concerned) to hold that an increase in the resale prices in the European Union, compared with the original resale prices, does not automatically imply that the anti-dumping duties have been duly and fully reflected in those final prices.

76. Indeed, it can be inferred that the new prices, even if they are higher than the former prices, do not duly reflect (that is to say, do not incorporate) the anti-dumping duties if: a) the production costs have increased significantly in the intervening period; and b) the new resale prices do not reflect that cost increase.

77. That reasoning, which I have no doubt is correct, is, in essence, the reasoning used by the General Court: 'Article 11(10) of the basic regulation in no way implies, in so far as it relates to the issue of whether "the duty is duly reflected in resale prices", that only the equivalent of the anti-dumping duty should be incorporated into the new resale price over and above the resale price previously charged in order to benefit from a positive response. An additional duty in relation to the costs normally incurred is "duly reflected" only if it is added to those other costs. If those other costs increase, but the resale price increases by a lesser amount, the duty is in fact only partially added to those costs or not at all, even if the equivalent of the duty has been added to the resale price previously charged.'[28]

78. I would add that, in any event, as the Commission correctly states, the Commission's administrative practice cannot amend binding legal provisions adopted by the EU institutions.

28 Paragraph 71 of the judgment under appeal. That paragraph is virtually identical to paragraph 64 of the, now final, judgment of 15 November 2018, *CHEMK and KF* v *Commission* (T-487/14, EU:T:2018:792).

(ii) Application of the test in the judgment under appeal

79. The General Court explained why the appellant's reliance on the fact that the resale prices had increased by more than 100% between the original investigation period and the fourth refund investigation was insufficient to demonstrate that the anti-dumping duties were fully reflected in those prices.

80. According to the General Court, 'it is sufficient … if the production costs have increased more than the prices charged in order for those prices not to reflect the anti-dumping duties duly, given the change in production costs. That is a priori proven by the fact, found by the Commission, that in 99% of cases the cost of the products, inclusive of anti-dumping duty, was not covered by the resale prices in the European Union in 2012.' [29]

81. The General Court rejected the claim that RFA had provided 'conclusive evidence' that the anti-dumping duty was reflected in the resale price with the result that the anti-dumping duties paid should not be deducted. As I will discuss more fully below, it is common ground that the burden of proving that the deduction should not be made lies with the economic operator and not with the Commission, whose function is to assess whether or not the evidence presented by the economic operator is *conclusive*.

82. Once again, I must emphasise that the General Court's findings on the factual evidence cannot be reviewed on appeal, except via the limited remedies referred to above. [30] In this case, furthermore, the appellant was required to provide a particularly high level of proof since it had to furnish evidence that *conclusively* demonstrated the fact at issue.

83. If, in the light of that requirement, the General Court has indicated, stating reasons, why RFA has not in its view succeeded in demonstrating that fact, it will be very hard for the Court of Justice to review that finding on appeal. None of the exceptional grounds (manifest distortion of the facts, obvious from documents in the case file that prove such distortion) is present in this case.

84. It must also be recalled that, when examining the factors which the Commission took into account, the General Court must bear in mind that 'in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the Community institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine'. [31]

85. As applied to the present case, that principle suggests that the Commission's stance should be upheld and imposes an even greater burden of proof on the applicant if it is to discredit the grounds of the decisions at issue. [32]

86. Lastly, it should be recalled that the fourth refund investigation period is the same time period as that used in the expiry review investigation which gave rise to Implementing Regulation No 360/2014. As I have indicated, the action brought against that regulation, by CHEMK and KF (undertakings related to RFA), was dismissed by the General Court in its judgment of 15 November 2018, [33] which is now final.

29 Ibid., paragraph 74.

30 See point 63 and the Court of Justice case-law cited.

31 *Valimar*, paragraph 51, citing judgments of 27 September 2007, *Ikea Wholesale* (C-351/04, EU:C:2007:547, paragraphs 40 and 41), and of 16 February 2012, *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 63).

32 *Valimar* limits the scope of the judicial review of appraisals carried out by the institutions 'to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers' (paragraph 51).

33 *CHEMK and KF* v *Commission* (T-487/14, EU:T:2018:792).

87. That action also analysed the change in methodology from that used in the interim review investigation and looked at the increase in the production costs as a decisive factor in whether the anti-dumping duties should be deducted when constructing the export price, reaching the same conclusions as the judgment now under appeal. The similarity with this case is very striking and the outcome decided upon by the General Court concurs with my reply to this part of the second ground of appeal.

(b) Second part: only DDP pricing data were accepted as proof that the anti-dumping duties were included in the export prices

(1) Arguments put forward by the appellant and the Commission

88. RFA criticises the General Court, in paragraphs 77 and 78 of the judgment under appeal, for allowing only the option of providing DDP prices as evidence that the anti-dumping duties had been included in the resale price.

89. It relies here on point 4.1(b) of the Commission Notice concerning the reimbursement of anti-dumping duties and adds that no applicable legal provision prescribes whether it is necessary to provide DDP prices or to refer to EXW or CIF prices that include the anti-dumping duties.

90. To counter that proposition, the Commission argues that, under Article 11(10) of the basic regulation, the rule is that the duty is deducted when constructing export prices, and, if it is not to be deducted, there must be conclusive proof that it has been incorporated in the resale prices.

91. According to the Commission, the General Court did not narrow down the types of evidence available to the appellant, but used the evidence that the appellant provided. Furthermore, it reiterates that it is not sufficient that the resale prices fluctuate; it must be proven that the anti-dumping duty is reflected in the resale prices.

(2) Assessment

92. In contrast to RFA's assertion, in the judgment under appeal the General Court did not restrict the scope of the types of evidence available to the appellant. It did, on the contrary, have regard to the principle already established in *Einhell Germany and Others* v *Commission*: 'provided that it is "conclusive", evidence that the anti-dumping duties have been reflected in the resale prices and subsequent selling prices in the European Union may be adduced by any means'. [34]

93. The judgment under appeal, I would emphasise, did not place a limit on the evidence that RFA had to provide. It merely explained why the evidence that it did submit was not appropriate, in this case, to satisfy the requirement for *conclusive* evidence that the anti-dumping duty was reflected in the resale prices.

94. This is a factual situation that must be analysed on a case-by-case basis. The Commission explained how in the earlier investigations it was able to draw conclusions from the evidence gathered, including an analysis of changes in the resale prices, and immediately examined in greater depth certain data which caused it to believe that the facts provided were not reliable.

95. The fact that a particular solution is arrived at in a given context does not mean that a different context must lead to the same outcome. Accordingly, it was necessary to focus, as in fact occurred, on the circumstances relating to the new refund investigation periods.

34 Judgment of 18 November 2015 (T-73/12, EU:T:2015:865, paragraph 155).

96. RFA submitted as evidence a table showing how its average weighted EXW and CIF prices had evolved, from the initial investigation up to the fourth investigation period, attempting thereby to demonstrate that its resale prices included the anti-dumping duty.

97. The decisions at issue contained various submissions in which the Commission set out why that data, furnished by RFA, was unreliable. In the action for annulment, the applicant sought to have the General Court accept its statements without their being tested further, which the Commission refused to do.

98. The General Court, when it verified the evidence (which it had to appraise on the terms referred to above), endorsed the assessment of the evidence carried out by the Commission, and that finding in the judgment under appeal, as I have already indicated, cannot be challenged on appeal, save by way of the limited remedy available where the facts considered to have been proven were distorted, which has not occurred here.

(3) Assessment in the alternative

99. In contrast to its claims before the General Court,[35] RFA has not brought over to the appeal the criticism that, if the Commission took the view that some cost information was unreliable, it should have reported this to RFA during the verification visits, or as soon as possible, so that RFA could rectify that information.

100. Since that claim has been excluded from the appeal, the Court of Justice is of course not required to examine it.

101. Nevertheless, to dispel any doubt in that regard, it may be worth recalling that, in the context of Article 11(10) of the basic regulation, the Commission is not obliged to act of its own initiative, but rather only to assess any *conclusive evidence* provided to it by the party requesting the refund investigation.[36] It is the requesting party, not the Commission, that has the burden of proving, to the high standard that the adjective '*conclusive*' implies, that the duty is duly reflected in the resale prices.

102. Accordingly, the second ground of appeal cannot succeed, and that circumstance, added to the dismissal of the first ground, means that the appeal should be dismissed in its entirety.

103. Under Article 138(1) of the Rules of Procedure of the Court of Justice, RFA should be ordered to pay the costs.

VI. Conclusion

104. Having regard to the foregoing, I propose that the Court of Justice should:

(1) Dismiss the appeal;

(2) Order RFA International, LP to pay the costs.

35 Paragraph 94 of the application.

36 In its judgment of 22 March 2012, *GLS* (C-338/10, EU:C:2012:158), paragraph 32, the Court of Justice held that 'the Commission has an obligation to consider on its own initiative all the information available, since in an anti-dumping investigation, it does not act as an arbitrator whose remit is limited to making an award solely on the basis of the information and the evidence provided by the parties to the investigation'. That finding was made in a different context, since the dispute in question concerned the determination of normal value during an original investigation.