Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 8 July 2021 [1]

Joined Cases C-884/19 P and C-888/19 P

European Commission
v
Xinyi PV Products (Anhui) Holdings Ltd (C-884/19 P)
and
GMB Glasmanufaktur Brandenburg GmbH
v
Xinyi PV Products (Anhui) Holdings Ltd,

European Commission (C-888/19 P)

(Appeal – Referral back to the General Court – Dumping – Implementing Regulation (EU) No 470/2014 – Imports of solar glass originating in China – Third indent of Article 2(7)(c) of Regulation (EC) No 1225/2009 – Concept of 'significant distortion in the production costs and financial situation of firms' – Preferential tax regimes)

1. When, in an anti-dumping procedure, an exporting producer in a non-market-economy country which is a member of the World Trade Organisation (WTO) claims market economy treatment ('MET'), what is the scope of the condition that the producer must demonstrate that its financial situation is not subject to significant distortions carried over from the former non-market-economy system? More specifically, how must the European Commission address measures, such as preferential tax regimes, which give rise to distortions in the financial situation of the firm, but do not, however, relate specifically to the manufacture and sale of the like product?

2. That, in essence, is the fundamental issue which arises in these joined cases, which are two appeals by which the European Commission and GMB Glasmanufaktur Brandenburg GmbH ('GMB'), respectively, ask the Court of Justice to set aside the judgment of the General Court of the European Union of 24 September 2019, *Xinyi PV Products (Anhui) Holdings* v *Commission* ('the judgment under appeal'). [2] By the judgment under appeal, delivered after the case had been referred back to the General Court by the Court of Justice in its judgment of 28 February 2018, *Commission* v *Xinyi PV Products (Anhui) Holdings* (C-301/16 P, EU:C:2018:132, 'the appeal judgment, *Commission* v *Xinyi*'), the General Court annulled for a second time Commission

[1] Original language: Italian.

[2] T-586/14 RENV, EU:T:2019:668.

Implementing Regulation (EU) No 470/2014 of 13 May 2014 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of solar glass originating in the People's Republic of China ('the regulation at issue'). [3]

I. Legal context

3. At the time of the facts underlying the dispute, the provisions which governed the adoption of anti-dumping measures by the European Union were laid down in Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ('the Basic Regulation'). [4]

4. Article 2 of the Basic Regulation, headed 'Determination of dumping', provided as follows in paragraph 7 thereof:

'(a) In the case of imports from non-market economy countries … normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin. …

(b) In anti-dumping investigations concerning imports from the People's Republic of China, … and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, normal value shall be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c), that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

(c) A claim under subparagraph (b) must … contain sufficient evidence that the producer operates under market economy conditions, that is if:

– decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

– firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

– the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

[3] OJ 2014 L 142, p. 1.

[4] OJ 2009 L 343, p. 51, and corrigendum in OJ 2010 L 7, p. 22. That regulation was repealed and replaced by Regulation (EU) No 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21).

– the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

– exchange rate conversions are carried out at the market rate.

…'

II. The facts and the regulation at issue

5. The facts are set out in paragraphs 1 to 14 of the judgment under appeal, to which I would refer for further details. For the purposes of the present appeals, I would confine myself to the observations set out as follows. On 28 February 2013, the Commission initiated an anti-dumping investigation into imports of certain solar glass products originating in the People's Republic of China.

6. On 21 May 2013, Xinyi PV Products (Anhui) Holdings Ltd ('Xinyi'), a company established in China which produces solar glass and exports it to the European Union, submitted an application to the Commission for the purpose of claiming MET, in accordance with Article 2(7)(b) of the Basic Regulation; this was so that the normal value would be determined, in so far as it was concerned, in accordance with Article 2(1) to (6) of the Basic Regulation, rather than using the 'analogue country' method contemplated by the rules set out in Article 2(7)(a) of that regulation.

7. By letters of 22 August and 13 September 2013, the Commission informed Xinyi that, notwithstanding the observations which the latter had submitted, it could not grant its application, since the Commission considered that it did not fulfil the criterion laid down in the third indent of Article 2(7)(c) of the Basic Regulation.

8. It is apparent from the file that the Commission rejected Xinyi's application on the ground that it had failed to demonstrate that its production costs and financial situation were not subject to significant distortions carried over from the former non-market-economy system, as required by the third indent of Article 2(7)(c) of the Basic Regulation. More specifically, according to the Commission, Xinyi had benefited from various income tax breaks. First, it had benefited from the '2 Free 3 Half' programme, under which foreign invested companies benefited from a two-year income tax holiday (0%) followed by three years of income tax levied at the 12.5% rate instead of the normal 25% rate. Secondly, it had benefited from the high-tech enterprises tax regime, under which the company had been taxed at the reduced rate of 15% instead of the normal 25% rate.

9. On 13 May 2014, the Commission adopted the regulation at issue, in which it confirmed that all MET claims, including that submitted by Xinyi, were to be rejected, and imposed a definitive anti-dumping duty of 36.1% on imports of certain solar glass products manufactured by Xinyi. In recital 33 of the regulation at issue, the Commission in particular rejected the argument by which Xinyi had claimed that the benefits derived from the preferential tax regimes and grants did not represent a significant proportion of its turnover. In that recital, the Commission specifically stated: 'this argument, along with other arguments, was already addressed in the Commission's letter to the exporter dated 13 September 2013 in which the Commission notified the party with regard to its MET determination. In particular, it was stressed that due to the nature of this advantage, the absolute benefit received during the [investigation period] is irrelevant for assessing whether the distortion is "significant"'.

III. The procedures before the General Court and the Court of Justice and the judgment under appeal

10. By an originating application lodged at the General Court Registry on 7 August 2014, Xinyi sought the annulment of the regulation at issue, putting forward four pleas in law in support of its action. By its first plea, which was divided into two parts, Xinyi alleged infringement of the third indent of Article 2(7)(c) of the Basic Regulation.

11. By judgment of 16 March 2016,[5] the General Court upheld the first part of the first plea, by which Xinyi had argued that the Commission had made a manifest error of assessment in taking the view that the tax breaks from which it had benefited constituted distortions 'carried over from the former non-market economy system', as contemplated by the third indent of Article 2(7)(c) of the Basic Regulation.

12. Following the appeal which the Commission lodged against that judgment, the Court of Justice, by the appeal judgment, *Commission* v *Xinyi*, set aside the General Court's judgment, holding that it had made various errors of law in its interpretation of the condition relating to the existence of distortion 'carried over from the former non-market economy system'. The Court of Justice therefore referred the case back to the General Court and reserved the costs.

13. Following the referral back effected by the appeal judgment, *Commission* v *Xinyi*, the General Court resumed the proceedings and, on 24 September 2019, delivered the judgment under appeal.

IV. The judgment under appeal

14. In the judgment under appeal the General Court examined the second part of the first plea in the application, by which Xinyi argued that the Commission had erred in finding that the distortions resulting from the preferential tax regimes in question were significant in relation to Xinyi's production costs and financial situation, within the meaning of the third indent of Article 2(7)(c) of the Basic Regulation.

15. In the first place, after summarising the case-law principles relating to the operation of Article 2(7) of the Basic Regulation, the General Court interpreted, in paragraphs 55 to 61 of the judgment under appeal, the provision in the third indent of Article 2(7)(c) of that regulation.

16. It held that it was clear from Article 2(7)(b) of the Basic Regulation that the criteria against which the merits of a claim for MET must be examined – including those laid down in the third indent of Article 2(7)(c) – are meant to determine whether market economy conditions prevail 'in respect of the manufacture and sale of the like product concerned' and express the EU legislature's intention to verify that any exporting producer making such a claim operates, as regards the manufacture and sale of the like product concerned, in a manner consistent with the principles which enable normal value to be calculated.

17. The General Court pointed out that, in that context, the provision in the third indent of Article 2(7)(c) of the Basic Regulation refers to an undertaking's production costs and financial situation from the point of view of parameters having a direct link with the methods for calculating normal value laid down in Article 2(1) to (6) of the Basic Regulation, that is, the depreciation of assets, other write-offs, barter trade and payment via compensation of debts. The

[5] *Xinyi PV Products (Anhui) Holdings* v *Commission* (T-586/14, EU:T:2016:154).

General Court held that, while that list of parameters was indicative, as was demonstrated by the use of the adverbial clause 'in particular',[6] that wording did not enable the Commission to reject a claim for MET on the basis of circumstances which, even if linked to the applicant's financial situation in the broad sense, did not automatically entail 'significant' distortion of one or more factors determining the elements relating to the manufacture and sale of the like product concerned. In support of that position, the General Court referred, by analogy, to the judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, 'the judgment in *Zhejiang Xinan*').

18. The General Court inferred from this that, in the case of measures which concern an undertaking's financial situation generally, the Commission must assess, in the light of the evidence submitted during the administrative procedure, whether those measures actually do give rise to significant distortion of the undertaking's financial situation as regards the manufacture and sale of the like product concerned. According to the General Court, first, the third indent of Article 2(7)(c) of the Basic Regulation refers to actual distortions, not merely potential distortions of the production costs and financial situation. Secondly, whether or not the distortion in question is 'significant' has to be assessed in relation to the purpose of that provision, which is to ensure that the elements relating to an undertaking's production costs and financial situation are not distorted to the point that any application of Article 2(1) to (6) of the Basic Regulation would give rise to artificial results calling into question the objectives of an anti-dumping investigation.

19. In the second place, on the basis of that interpretation, the General Court applied the provision in question to the case at hand, in paragraphs 62 to 73 of the judgment under appeal. In particular, it held that, since the Commission had relied, in its letters of 22 August and 13 September 2013, on the 'overall impact' of the measure in question, which was that it helped to '[attract] capital at discounted rates', in order to justify its refusal of Xinyi's MET claim, the Commission had relied on grounds relating to the undertaking's financial situation from an eminently abstract point of view unconnected with the elements relating to the manufacture and sale of the like product concerned. According to the General Court, first of all, a corporation tax regime concerns the tax treatment of profits generated in the course of a given financial year, and neither its object nor effect is to influence the amount or the rate of those profits, or other factors, as components of the normal value which the Commission is required to calculate in accordance with Article 2(1) to (6) of the Basic Regulation. Secondly, the mere possibility that a preferential tax regime might attract investors in an undertaking's capital is not sufficient to support the finding that its financial situation is in fact significantly distorted.

20. The General Court then held that an undertaking's turnover is a relevant indicator of its economic and financial power from which it generates its profits and that, consequently, in stating that the distortions at issue represented 1.14% of its turnover, Xinyi did put forward a factor which was, as a matter of principle, reliable and relevant in relation to the overall impact on its financial situation of the tax measure examined. According to the General Court, in those circumstances, it was for the Commission, at the very least, to make clear the link between the choice to invest in the applicant's capital, motivated as the case may be by an advantageous tax

[6] '*Particularmente*' in the Spanish-language version, '*insbesondere*' in the German, '*notamment*' in the French, '*in het bijzonder*' in the Dutch and '*nomeadamente*' in the Portuguese. The Italian version of the provision seems to contain an error in that the word '*anche*' relates only to the first parameter laid down by that provision, the 'depreciation of assets', whereas, in the other language versions I have mentioned, the adverbs or adverbial clauses I have referred to are placed before the whole list of parameters, and thus unequivocally specify that the list is merely indicative. The indicative nature of the list is not, in any event, disputed.

regime, on the one hand, and the distortion of the applicant's financial situation, on the other, not in a general and theoretical manner, but in terms of the objective pursued by the third indent of Article 2(7)(c) of the Basic Regulation.

21. On the basis of those considerations, the General Court concluded that the grounds relied on by the Commission in order to reject the applicant's MET claim were vitiated by a manifest error of assessment, and it therefore upheld the second part of the first plea in the application and annulled the regulation at issue.

V. Forms of order sought

22. By their appeals,[7] both the Commission and GMB claim that the Court of Justice should set aside the judgment under appeal, dismiss as unfounded the second part of the first plea in the application at first instance, refer the case back to the General Court for it to rule on the remaining pleas in the application at first instance and reserve the costs of the present proceedings and of the earlier related proceedings.

23. In both cases, Xinyi contends that the Court of Justice should dismiss the appeals and order the Commission and GMB to pay the costs.

VI. Analysis of the appeals

24. In support of their appeals, the Commission and GMB each put forward three grounds of appeal which are, in many respects, similar. By their first ground of appeal, the Commission and GMB take issue with the General Court's interpretation of the third indent of Article 2(7)(c) of the Basic Regulation. By their second ground of appeal, the Commission and GMB allege errors of law in the application of that provision to the present case. By their third ground of appeal, the appellants allege procedural irregularities.

A. The ground of appeal alleging errors of law in the interpretation of the third indent of Article 2(7)(c) of the Basic Regulation

1. Arguments of the parties

25. By their first ground of appeal, which challenges paragraphs 55 to 61 of the judgment under appeal, the Commission and GMB take issue with the General Court's interpretation of the provisions in the third indent of Article 2(7)(c) of the Basic Regulation.[8] They submit, in essence, that the General Court erred in finding that those provisions permit an MET claim to be rejected only where the application of Article 2(1) to (6) of the Basic Regulation would give rise to artificial results, which amounts to saying that the Commission is required to demonstrate the precise effect on the prices and costs of the exporting producer in question of the distortion in its financial situation that has been established.

[7] By decision of the President of the Court of 11 March 2020, Cases C-884/19 P and C-888/18 P were joined for the purposes of the oral part of the procedure and of the judgment.

[8] The Commission also alleges infringement of Article 2(7)(b) of the Basic Regulation. GMB's first ground of appeal challenges paragraphs 59, 60, 61 and 68 of the judgment under appeal alone.

26. In the first place, the Commission submits that the provisions of Article 2(1) to (6) of the Basic Regulation are not relevant to the interpretation of Article 2(7)(b) and the third indent of Article 2(7)(c) thereof. It is, the Commission submits, clear from the case-law that Article 2(7) of the Basic Regulation reflects an approach specific to the EU legal order, and so no correlation can be established between the rules contained in Article 2(7) of the Basic Regulation and those in Article 2 of the WTO Anti-Dumping Agreement which has been transposed in the EU legal order by Article 2(1) to (6) of the Basic Regulation.[9] It is only with regard to the criterion mentioned in the first part of the first indent of Article 2(7)(c) of the Basic Regulation that the EU legislature decided to require the demonstration of an actual effect on prices and costs, that is, on the elements which are relevant to the analysis under Article 2(1) to (6) of the Basic Regulation.

27. In the second place, the Commission and GMB submit that the link which the General Court made between the third indent of Article 2(7)(c) of the Basic Regulation and the elements to be taken into account in the calculation under Article 2(1) to (6) of that regulation is erroneous. First, the third indent of Article 2(7)(c) does not specify any requirement to connect the distortions found in the financial situation of the exporting producer in question with any of the elements relating to the manufacture and sale of the like product concerned. Secondly, the list set out in the third indent of Article 2(7)(c) is merely indicative, and three of the four factors mentioned in that list are not even mentioned in Article 2(1) to (6) of the Basic Regulation.

28. In the third place, the Commission and GMB submit that the conclusions which the Court of Justice drew in its judgment in *Zhejiang Xinan* regarding the provision in the first indent of Article 2(7)(c) of the Basic Regulation, on which the General Court relied, are not applicable to the provision in the third indent of Article 2(7)(c).

29. In the fourth place, the Commission and GMB argue that the General Court's interpretation of the third indent of Article 2(7)(c) of the Basic Regulation deprives the expression 'financial situation' of independent meaning and therefore of effectiveness. According to that interpretation, a distortion of the financial situation could be recognised only if the Commission showed that, at the same time, that distortion also distorts production costs. That is contrary to the legislature's intention to lay down two alternatives in the third indent of Article 2(7)(c).

30. In the fifth place, the Commission submits that the erroneous nature of the link which the General Court made between Article 2(1) to (6) and Article 2(7) of the Basic Regulation is also confirmed, from a systemic point of view, by the fact that the last two indents of Article 2(7)(c) are macro-economic points and bear no relation to Article 2(1) to (6). GMB submits that the very structure of the provisions of Article 2(7)(b) and (c) of the Basic Regulation indicates that there is no additional test for a connection between the financial situation and the manufacture and sale of the like product concerned. That structure indicates that the financial situation is already considered in the Basic Regulation as a factor having an impact on the manufacture and sale of the like product.

31. In the second part of its first ground of appeal, GMB submits that the General Court misinterpreted the third indent of Article 2(7)(c) of the Basic Regulation, in paragraphs 68, 69 and 72 of the judgment under appeal, by reversing the burden of proof, relieving the exporting producer claiming MET of that burden and placing it on the Commission. However, it is

[9] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103).

unequivocally clear from Article 2(7)(b) of the Basic Regulation and from the case-law that it is for the exporting producer to prove that market economy conditions prevail in respect of the manufacture and sale of the like product concerned.

32. Xinyi disputes the arguments put forward by the Commission and GMB and contends that the General Court's reading of the third indent of Article 2(7)(c) of the Basic Regulation is accurate and in line with the EU legislature's intention and the case-law of the Court.

33. In the first place, the Commission's argument that the words 'in respect of the manufacture and sale of the like product concerned' in Article 2(7)(b) of the Basic Regulation refer solely to the first part of the first indent of Article 2(7)(c) of that regulation is inconsistent with the very wording of the third indent of Article 2(7)(c) of that regulation, from which it is clear that the MET criterion stated therein also relates to the production costs of the like product. In addition, the Commission has failed to explain what the purpose of the other four MET criteria could be, if not to permit the use of the Chinese domestic costs and sale prices over the investigation period in cases where those costs and sale prices are suitable for use in the calculation of the normal value. The Commission's interpretation of those other criteria is detached from the purpose of Article 2(7)(b) and (c) of the Basic Regulation.

34. In the second place, Xinyi contends that the General Court was right to apply the judgment in *Zhejiang Xinan* by analogy. Indeed, in both that case and the present case the EU institutions had refused to review the evidence provided in support of an MET claim on the ground that it could automatically be rejected. The General Court did not attempt to transpose for the purposes of the analysis of the third MET criterion the considerations expressed by the Court of Justice in relation to the first MET criterion, but merely drew a parallel between two situations that were similar. Moreover, just as it must when applying the first indent of Article 2(7)(c) of the Basic Regulation, the Commission must also, in its analysis of the condition laid down in the third indent of Article 2(7)(c), assess the impact of the distortion on the prices or costs of the producer, and not merely in abstract fashion. The other judgments which the Commission cites in support of its position are not decisive.

35. In the third place, as regards the Commission's argument concerning the effectiveness of the words 'financial situation', Xinyi contends that, if a significant distortion of the financial situation of a company affects its prices rather than its costs, the interpretation adopted by the General Court would not deprive those words of their effectiveness.

36. In the fourth place, Xinyi contests the systemic interpretation relating to the fourth and fifth indents of Article 2(7)(c) of the Basic Regulation. According to Xinyi, first, it is obvious that the fact of not being subject to bankruptcy proceedings – relevant under the fourth indent – will distort a company's costs and prices. Secondly, and similarly, a company that benefits from exchange rates that are more favourable than market rates when buying or selling foreign currencies – relevant under the fifth indent – will find its costs and prices respectively being affected.

2. Assessment

(a) Preliminary observations

37. By their first ground of appeal, the Commission and GMB dispute the General Court's interpretation in the judgment under appeal of the provision in the third indent of Article 2(7)(c) of the Basic Regulation.

38. In that connection, it must be borne in mind, as a preliminary point, that, by means of Article 2(7) of the Basic Regulation, the EU legislature chose to adopt a special regime laying down detailed rules for the calculation of normal value for imports from non-market-economy countries. [10]

39. In accordance with Article 2(7)(a) of the Basic Regulation, in the case of imports from non-market-economy countries, in derogation from the rules set out in Article 2(1) to (6) of that regulation, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country. The aim of that provision is thus to prevent account being taken of prices and costs in non-market-economy countries which are not the normal result of market forces. [11]

40. However, pursuant to Article 2(7)(b) of the Basic Regulation, in anti-dumping investigations concerning imports from, inter alia, China, normal value is to be determined in accordance with Article 2(1) to (6) of the Basic Regulation if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in Article 2(7)(c) of that regulation, that market economy conditions prevail for that producer or those producers in respect of the manufacture and sale of the like product concerned. [12]

41. It is for the Council and the Commission to assess whether the evidence supplied by the producer concerned is sufficient to show that the criteria laid down in Article 2(7)(c) of the Basic Regulation are fulfilled in order to grant it MET and it is for the EU judicature to examine whether that assessment is vitiated by a manifest error. [13]

42. The Court has also acknowledged that the provisions in Article (7)(b) and (c) of the Basic Regulation constitute an exception and must therefore be interpreted strictly, albeit that cannot enable the EU institutions to interpret and apply those provisions in a manner inconsistent with their wording and purpose. [14]

[10] Judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraph 47). For further details on the inclusion of Article 2(7) of the Basic Regulation, see point 53 et seq. of the Opinion of Advocate General Mengozzi in *Commission* v *Xinyi PV Products (Anhui) Holdings* (C-301/16 P, EU:C:2017:938).

[11] Judgment in *Zhejiang Xinan*, paragraph 66, and the appeal judgment, *Commission* v *Xinyi*, paragraph 64.

[12] Judgment in *Zhejiang Xinan*, paragraph 67, and the appeal judgment, *Commission* v *Xinyi*, paragraph 65. As for the reasons which led to the introduction of those provisions, with reference to the People's Republic of China specifically, see paragraphs 68 and 69 and paragraphs 75 and 76 of those two judgments respectively.

[13] Judgment of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53, paragraph 32) and the appeal judgment, *Commission* v *Xinyi*, paragraph 70.

[14] Judgment in *Zhejiang Xinan*, paragraph 93.

43. In the present case it is common ground that Xinyi's MET claim was rejected solely on the ground that that company had not established that it satisfied the criterion laid down in the third indent of Article 2(7)(c) of the Basic Regulation, the Commission having found the other four criteria to be satisfied. [15]

44. Under that provision, the producer concerned must provide sufficient evidence to establish that its production costs and financial situation are not subject to significant distortions carried over from the former non-market-economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts. [16]

45. It follows from the wording of that provision that it imposes two cumulative conditions, relating, first, to the existence of a significant distortion in production costs and in the financial situation of the firm in question and, secondly, to the fact that the distortion proves to have been carried over from the former non-market-economy system. [17]

46. The judgment under appeal relates solely to the first of those two conditions. The determination of the scope of the second of the two conditions was indeed addressed in the appeal judgment, *Commission* v *Xinyi*, [18] in which the Court clarified the scope of the concept of distortion 'carried over from the former non-market economy system'.

(b) The interpretation of the first condition imposed by the third indent of Article 2(7)(c) of the Basic Regulation

47. It is in the context which I have set out in the preceding section that I must analyse the first ground of appeal raised by the Commission and GMB, by which they take issue with the General Court's interpretation of the first of the two cumulative conditions imposed by the provision in the third indent of Article 2(7)(c) of the Basic Regulation, which I mentioned in point 44 above.

48. In the judgment under appeal, the General Court started from the premiss that, since Article 2(7)(b) of the Basic Regulation provides that, in order for MET to be granted, market economy conditions must be shown to prevail for the producer claiming MET '*in respect of the manufacture and sale of the like product concerned*', then the criteria laid down in the five indents of Article 2(7)(c), in the light of which the Commission is required to evaluate MET claims, must relate to '*the manufacture and sale of the like product concerned*'. [19]

49. Consequently, according to the General Court, the condition laid down in the third indent, and specifically the existence of significant distortions in the financial situation of the undertaking claiming MET, must relate specifically to the manufacture and sale of the like product. It follows that, in the case of measures affecting an undertaking's financial situation generally – and not, therefore, specific to the manufacture and sale of the like product – the Commission is required to assess, in the light of the evidence submitted during the administrative procedure, whether or not those measures do actually give rise to distortion as regards the manufacture and sale of the like product. [20]

15 See the appeal judgment, *Commission* v *Xinyi*, paragraph 68.

16 The appeal judgment, *Commission* v *Xinyi*, paragraph 70.

17 The appeal judgment, *Commission* v *Xinyi*, paragraph 70.

18 See points 13 and 14 above.

19 See paragraphs 54 and 55 of the judgment under appeal.

20 See paragraphs 59 and 60 of the judgment under appeal, as well as paragraph 67 et seq. of that judgment, in which that principle is applied.

50. The General Court based that narrow interpretation of the criterion in question on the 'direct link' which it found to exist, from a literal and from a purposive point of view, between that criterion and the calculation of normal value under Article 2(1) to (6) of the Basic Regulation. [21]

51. It is, therefore, necessary to determine, in the light of the arguments raised by the Commission and GMB, whether that interpretation of the provision in question is correct.

52. First of all, I would observe that, since Article 2(7) of the Basic Regulation is the expression of the EU legislature's intention to adopt an approach specific to the EU legal order, and not to implement particular obligations created by the Anti-Dumping Agreement, [22] it is in the light of EU law alone that that provision must be interpreted.

53. That being so, it is clear from settled case-law that, for the purposes of interpreting a provision of EU law, it is necessary to consider its wording as well as the context in which it occurs and the objectives pursued by the rules of which it is part. [23]

54. In so far as concerns the literal interpretation of the third indent of Article 2(7)(c) of the Basic Regulation, I must first of all point out that it is clear from the very wording of that provision that the first of the two cumulative conditions which I mentioned in point 45 above contemplates two alternative situations that may lead to the rejection of an MET claim: the existence of significant distortion in the production costs of the undertaking concerned and the existence of significant distortion in its financial situation.

55. According to settled case-law, where a provision of EU law is open to several interpretations, preference must be given to the interpretation which ensures that the provision retains its effectiveness, [24] and does so in its entirety. It follows that the provision here in question must be interpreted in such a way that both the alternatives retain their effectiveness.

56. It follows from the foregoing that the concept of 'significant distortion in the financial situation', contemplated by the provision in question, must be treated as an autonomous concept defined by the context and in the light of the objective of the provision. Its definition cannot, therefore, be made dependent on the first option contemplated by the provision, namely the existence of a significant distortion in the production costs. Consequently, a finding of a significant distortion in the financial situation of the undertaking claiming MET, carried over from the former non-market-economy system, is in itself sufficient in order for such a claim to be rejected.

57. Still from a literal viewpoint, it must be noted that the expression 'financial situation' is not accompanied by any specification such as might restrict its scope in any way. Accordingly, the expression must, in my view, be interpreted broadly, so as to bring within the scope of the provision – subject to the limits set out in greater detail in the points which follow – any factor that causes a significant distortion in the undertaking's financial situation that is carried over from the former non-market-economy system.

[21] See, respectively, the first sentence of paragraph 59 and the last sentence of paragraph 61 of the judgment under appeal.

[22] See the judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraphs 48 and 50).

[23] See, inter alia, the judgment of 12 October 2017, *Tigers* (C-156/16, EU:C:2017:754, paragraph 21 and the case-law cited).

[24] See, inter alia, the judgment of 21 March 2019, *Falck Rettungsdienste and Falck* (C-465/17, EU:C:2019:234, paragraph 32 and the case-law cited).

58. Contrary to the General Court's finding in paragraph 59 of the judgment under appeal, I consider that the wording of the provision in question indicates no direct link between, on the one hand, the existence of a significant distortion of the financial situation and, on the other, the calculation of normal value under Article 2(1) to (6) of the Basic Regulation. More specifically, no direct link of that kind can, in my view, be inferred from the parameters mentioned in the second part of the third indent of Article 2(7)(c) of the Basic Regulation. I would point out in that connection that it is common ground that that list of parameters is merely indicative and that the matters mentioned are, therefore, merely examples of the factors which could give rise to distortions falling with the scope of that provision. By contrast, there is nothing to indicate that that illustrative list is intended to create a link between the provision in the third indent of Article 2(7)(c) of the Basic Regulation and the calculation of normal value described in Article 2(1) to (6) thereof.

59. Moreover, the fact that there is no direct link between the analysis to be carried out in accordance with Article 2(7) and the analysis to be carried out in accordance with Article 2(1) to (6) of the Basic Regulation – in the sense that, as the General Court appears to suggest, the former must necessarily be carried out in the light of the latter [25] – appears to find confirmation from a systemic viewpoint.

60. Indeed, while there is a relationship between the provisions of Article 2(1) to (6) of the Basic Regulation and the methods of calculating normal value provided for in Article 2 of the Anti-Dumping Agreement, that is not the case for Article 2(7) of that regulation. Indeed, as follows from the case-law I mentioned in points 38 and 52 above, by means of Article 2(7) of the Basic Regulation, the EU legislature chose to adopt a special regime, specific to EU law, for the calculation of normal value for imports from non-market-economy countries, one which is *not* intended to implement particular obligations arising from the Anti-Dumping Agreement.

61. Within that special regime, the rule is that, pursuant to Article 2(7)(a), in the case of imports from non-market-economy countries, normal value is to be calculated using the 'analogue country' method. By way of exception, under Article 2(7)(b), the EU legislature wished to open the possibility for Chinese producers, in particular, to be recognised as acting under market economy conditions and thus to have their normal value determined on the basis of their real prices and costs, in a case-by-case analysis, but solely if they show that they fulfil the five conditions laid down in Article 2(7)(c) of the Basic Regulation and that they may therefore be regarded as operating under market economy conditions. If that is not the case, the analogue country method is applied 'by default'. [26]

62. It follows from the foregoing that, contrary to the General Court's finding, the applicability of the special regime provided for in Article 2(7) in no way calls for an analysis at the level of the undertaking which leads to the conclusion that the application of the rules in Article 2(1) to (6) would give rise to artificial results. To make the application of the special regime under Article 2(7) of the Basic Regulation dependent upon an analysis of the possible outcome of the application of the general regime is, in my view, clearly contrary to the structure of the provisions in question. [27]

[25] See the last sentence of paragraph 61 and paragraph 68 of the judgment under appeal.

[26] See, to that effect, the Opinion of Advocate General Mengozzi in *Commission* v *Xinyi PV Products (Anhui) Holdings* (C-301/16 P, EU:C:2017:938, point 63).

[27] I would also point out in that connection that the reference made, by analogy, in paragraph 61 of the judgment under appeal, to paragraph 82 of the judgment in *Zhejiang Xinan* does not seem relevant to demonstrating the existence of a direct link between Article 2(1) to (6) and Article 2(7) of the Basic Regulation.

63. Still from a systemic viewpoint, I must nevertheless point out that, as the General Court observed, Article 2(7)(b) of the Basic Regulation provides that an exporting producer claiming MET must show that market economy conditions prevail 'in respect of the manufacture and sale of the like product concerned'.

64. However, that does not necessarily mean, in my view, that, in order to fall within the scope of the conditions laid down in the five indents of Article 2(7)(c), in the light of which the Commission is required to evaluate MET claims, a measure that is capable of altering the parameters of a market economy must specifically relate to '*the manufacture and sale of the like product concerned*'.

65. In so far as specifically concerns the second alternative under the first condition laid down in the third indent of Article 2(7)(c), I do not consider that it can be inferred from the provision in Article 2(7)(b), mentioned in point 63 above, that that condition must be interpreted restrictively, in the sense that only significant distortions in the financial situation that relate specifically to the '*manufacture and sale of the like product concerned*' can justify the refusal of an MET claim and that therefore, in the case of measures which cause significant distortions in the financial situation of the undertaking claiming MET, carried over from the former non-market-economy system, but not specific to the like product concerned, the Commission is required to prove the existence of a connection between the measure itself and the '*manufacture and sale of the like product concerned*'.

66. Such a narrow reading of the provision in the third indent seems to me contrary not only to its wording, which makes no such distinction between measures that may affect the financial situation of the undertaking in question, but also to the structure and purpose of that provision, as well as to the burden of proof which obtains under Article 2(7)(b) of the Basic Regulation.

67. Indeed, from a systemic viewpoint, as the Commission rightly points out and as Xinyi itself acknowledges, moreover, the conditions laid down in the fourth and fifth indents of Article 2(7)(c) of the Basic Regulation – concerning the fact of being subject to bankruptcy and property laws and concerning exchange rate conversions respectively – relate to parameters which, by definition, have no direct bearing on the '*manufacture and sale of the like product concerned*'. Those conditions relate to the alteration of parameters of a market economy which are indirectly capable of distorting the costs and prices of an undertaking. It seems obvious that, in the case of measures which alter those parameters, the Commission will not be required to prove the existence of a connection between the measures and the manufacture and sale of the product under consideration.

68. A similar approach should, in my view, be taken in the case of measures carried over from the former non-market-economy system which cause significant distortions in the financial situation of an undertaking claiming MET, such as preferential tax regimes. In the absence of proof to the contrary, which it is for the undertaking concerned to provide, the Commission may presume that measures of that type are capable of distorting the costs and prices of the undertaking and therefore, indirectly, the '*manufacture and sale of the like product concerned*'.

69. That less narrow interpretation of the provision in the third indent is consistent with the general objectives of the special regime introduced by Article 2(7) of the Basic Regulation, which, as I noted in points 39 and 40 above, is intended to prevent account being taken of prices and costs

in non-market-economy countries which are not the normal result of market forces, regardless of whether the consequences for the prices and costs of the like product concerned wrought by measures which alter the parameters of a market economy are direct or indirect.

70. That less narrow interpretation is also consistent with the specific purpose of the condition laid down in the third indent of Article 2(7)(c) of the Basic Regulation, which, expressly distinguishing between distortions of the production costs and distortions of the 'financial situation', considered generally and without further specification, is intended to bring within its scope not only direct alterations of the production costs, but also other distortions, including indirect distortions not necessarily confined to the production costs, which have an effect on the financial situation of an undertaking claiming MET.

71. Furthermore, I consider that, as GMB submits in the second part of its first ground of appeal, the General Court's narrow interpretation of the condition laid down in the third indent of Article 2(7)(c) of the Basic Regulation – according to which, in the case of significant distortions in the financial situation of the undertaking claiming MET carried over from the former non-market-economy system, but not specifically relating to the like product, the Commission is required to prove the existence of a connection between the measure itself and the manufacture and sale of the like product concerned – runs counter to the allocation of the burden of proof that obtains under Article 2(7)(b) of that regulation, read in the light of the case-law.

72. Indeed, it is clear from settled case-law that the burden of proof lies with the producer wishing to claim MET under Article 2(7)(b) of the Basic Regulation and that, to that end, the claim submitted by such a producer must contain sufficient evidence, as laid down in Article 2(7)(c), that it operates under market economy conditions. Accordingly, there is no obligation on the EU institutions to prove that the producer does not satisfy the conditions laid down for the recognition of such status. [28]

73. It follows, in my view, that, contrary to the General Court's finding in paragraph 60 of the judgment under appeal, in the case of measures which cause significant distortions in the financial situation of an undertaking claiming MET, carried over from the former non-market-economy system, which do not specifically relate to the like product, the Commission is not required to prove the existence of a connection between the measure itself and the manufacture and sale of the like product, and that it is instead for the undertaking claiming MET to prove that, notwithstanding the distortive measures, it operates under market economy conditions as regards the manufacture and sale of the like product concerned.

74. Lastly, I do not consider that the foregoing considerations are in any way called into question by the judgment in *Zhejiang Xinan*, to which the General Court referred, by analogy, in support of its narrow interpretation of the provision in the third indent of Article 2(7)(c) of the Basic Regulation. Indeed, first, that judgment concerns the interpretation of the condition laid down in the first indent of Article 2(7)(c) of the Basic Regulation, the express wording of which explicitly presupposes actual interference regarding prices, costs and inputs. [29] Given the wording of the provision in the third indent, which refers to the 'financial situation' in general, I doubt whether the Court's findings in paragraphs 78 to 82 of the judgment in *Zhejiang Xinan* in relation to the

[28] Judgment of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53, paragraph 32).

[29] See the judgment in *Zhejiang Xinan*, paragraphs 79 and 80.

interpretation of the condition laid down in the first indent are, as the General Court concluded in paragraphs 59 to 61 of the judgment under appeal, automatically applicable when interpreting the condition laid down in the third indent. [30]

75. Secondly, I would point out that, in the judgment *Zhejiang Xinan*, the Court of Justice (like the General Court) found that the Commission had completely disregarded the evidence provided by the undertaking in question, rather than assessing whether it was sufficient to show that the undertaking satisfied the twofold condition laid down in the first indent of Article 2(7)(c) of the Basic Regulation. [31] In the present case, as is clear from points 7 and 9 of this Opinion, and as was explained in greater detail in paragraphs 63 to 65 of the judgment under appeal, the Commission did not disregard the evidence adduced by Xinyi, but assessed it and rejected it.

76. It follows from all the foregoing considerations that, in my view, the General Court's interpretation of Article 2(7)(c) of the Basic Regulation in paragraphs 55 to 61 of the judgment under appeal is vitiated by various errors of law, and that the first ground of appeal put forward by the Commission and by GMB should, therefore, be upheld. That conclusion is sufficient in order for the judgment under appeal to be set aside. Accordingly, it is only for the sake of completeness that I shall briefly analyse the other grounds of appeal raised by the Commission and by GMB.

B. The ground of appeal alleging errors of law in the application of the third indent of Article 2(7)(c) of the Basic Regulation

1. Arguments of the parties

77. By their second ground of appeal, the Commission and GMB maintain that, in any event, the General Court made several errors of law in paragraphs 62 to 73 of the judgment under appeal in applying the third indent of Article 2(7)(c) of the Basic Regulation.

78. In the first place, according to the Commission, contrary to the General Court's finding, the cost of capital for a company is a factor, just like the cost of labour, which has a direct effect on production costs, in that it increases the amount of earnings before interest, depreciation, tax and amortisation (EBITDA) to be achieved. In the second place, according to the Commission, in paragraphs 70 and 71 of the judgment under appeal, the General Court called into question the 'significance' of the distortion. However, it failed to engage with arguments put forward by the Commission, failed to provide sufficient reasoning and made errors in the legal characterisation of the facts. First, it failed to consider arguments relating to the open-ended nature of the tax breaks in question and to the fact that duties are imposed in a prospective manner, for a period of five years, which can be extended. Secondly, the General Court failed to consider the Commission's arguments relating to State aid law. In the third place, both the Commission and GMB argue that the General Court failed to have regard to the discretion which the Commission enjoys in the sphere of measures to protect trade, and that it substituted its own assessment for that of the Commission.

[30] For a case in which the Court of Justice held a reference to the judgment in *Zhejiang Xinan* to be irrelevant, see the judgment of 11 September 2014, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (C-602/12 P, not published, EU:C:2014:2203, paragraph 56).

[31] See the judgment in *Zhejiang Xinan*, paragraphs 85 to 87.

79. Xinyi replies, first of all, that, contrary to the Commission's assertions, the significance of the distortions was not examined in detail in the regulation at issue or during the course of the investigation. The Commission mistakenly took the view that it could reject its MET claim without reviewing and responding to the evidence and arguments which it put forward, which showed that the distortions were not significant, in that the tax benefits in question represented only 1.34% of its total costs and 1.14% of its total turnover. The General Court therefore criticised the Commission for failing adequately to examine the evidence which Xinyi had produced.

80. By arguing before the General Court that the tax benefits were considerable, the Commission contradicted the position which it had taken during the investigation, when it did not dispute Xinyi's argument that they were not considerable in relative or absolute terms. In addition, in the course of the investigation, the Commission acknowledged that the tax breaks were limited in time. Xinyi adds that, in a parallel anti-subsidy investigation, the Commission set the value of the benefit conferred by both of the tax regimes in question at 0%, which calls into question the supposed significance of the alleged benefits. Furthermore, the reasoning provided by the General Court in the judgment under appeal is sufficient. Moreover, the Commission's assertion that whether or not a company is entitled to MET cannot depend on its performance in a given year is incorrect. The Commission does review the MET status of Chinese exporting producers, pursuant to Article 11(3) of the Basic Regulation, when it has evidence that justifies such a review. Lastly, the references to EU State aid law are irrelevant.

2. Assessment

81. As I mentioned in point 76 above, it is merely for the sake of completeness that I shall analyse the arguments raised in the present grounds of appeal. [32]

82. In the first place, it is clear from paragraphs 66 and 67, as well as paragraphs 68, 69 and 72 of the judgment under appeal that – in applying the interpretation which it had developed of the third indent of Article 2(7)(c) of the Basic Regulation, which I regard as being incorrect – the General Court in the present case fundamentally criticised the Commission for having relied, in order to reject Xinyi's MET claim, on the financial advantage generally provided by the preferential tax regimes in question; further, the Commission failed to identify a link with any factor relating to the manufacture or sale of the like product under consideration and, more specifically, failed to clarify the connection between the benefit of being able to attract capital at reduced rates, which it had identified, and the manufacture or sale of the like product.

83. It follows from this that, contrary to Xinyi's contention, the General Court criticised the Commission for applying an incorrect method in its application of the third indent of Article 2(7)(c) of the Basic Regulation, and for not having carried out a supplemental analysis to demonstrate the existence of a link between the supposed distortion caused by the tax regimes in question and the manufacture and sale of the like product concerned.

84. In the second place, I agree with the Commission's argument that capital constitutes a factor of production and, therefore, that measures which affect the cost of capital, for example, facilitating access to less costly financing by means of preferential tax regimes based on measures carried over from the former non-market-economy system, can undoubtedly create a distortion in

[32] The Commission puts forward its second ground of appeal only in the alternative, in the event that its first ground of appeal is not upheld.

the financial situation that may fall within the scope of the third indent of Article 2(7)(c). It follows that the General Court's reasoning in paragraphs 68 and 69 of the judgment under appeal, in addition to resting on an incorrect interpretation of the relevant provision, is, in my view, misconceived from this perspective also.

85. In the third place, contrary to the Commission's assertion, I do not consider that, in paragraphs 70 and 71 of the judgment under appeal, the General Court called into question the 'significance' of the distortion in the financial situation resulting from the preferential tax regimes in question. Those paragraphs seem instead to indicate that, in the General Court's view, the supplemental analysis to which I referred in point 83 above, which the Commission should, in that court's view, have carried out, was 'all the more' necessary in light of the evidence presented by Xinyi. Those paragraphs seem, therefore, to underscore the reasoning developed in the preceding paragraphs of the judgment under appeal.

86. In the fourth place, concerning the argument, raised by the Commission and GMB, that the General Court failed to have regard to the discretion which the Commission enjoys in the sphere of trade protection, I would refer, for a detailed analysis of the relevant case-law, to my recent Opinion in *Commission* v *Hubei Xinyegang Special Tube*.[33] In short, since the Commission enjoys a broad discretion in the analysis under Article 2(7) of the Basic Regulation, by reason of the complexity of the economic and political situations addressed,[34] judicial review in that sphere is limited.

87. In the present case, paragraphs 66 to 73 of the judgment under appeal demonstrate a rather significant degree of intervention on the General Court's part in the analysis which the Commission carried out concerning the existence in this case of a significant distortion of the financial situation, one which is, in my view, hard to reconcile with the limited intensity of judicial review prescribed by the case-law in cases of this sort. While, in paragraphs 66 to 68 of the judgment under appeal, applying an interpretation of the third indent of Article 2(7)(c) of the Basic Regulation which I regard as incorrect, the General Court criticised the Commission for having made errors of law in its analysis, in paragraphs 69 to 71 it went as far as to assess the effect of the tax regimes in question on an undertaking's ability to attract investors in the light of its turnover and the absolute value of the advantages resulting from those regimes. By so doing, the General Court, in my view, overstepped the bounds of limited judicial review and substituted its own assessment for that of the Commission.

88. It follows from the foregoing that, in my view, the second ground of appeal raised by the Commission and by GMB must also be upheld.

C. The ground of appeal alleging procedural irregularities

1. Arguments of the parties

89. By their third ground of appeal, the Commission and GMB submit that the General Court committed procedural irregularities.

[33] Opinion of 1 July 2021 (Case C-891/19 P, EU:C:2021:533), point 29 and, by analogy, point 160 et seq. and the case-law cited.

[34] See, with reference to the case-law cited in the footnote 33, the judgment in *Zhejiang Xinan*, paragraph 86.

90. The Commission submits, first of all, that the General Court ruled *ultra petita*. In its view, in the application at first instance Xinyi did not develop any of the legal arguments set out in paragraphs 55 to 61 of the judgment under appeal. Further, and in any event, the General Court did not give the Commission an opportunity to present its view on those key arguments. By so doing, the General Court infringed its right to a fair hearing, which, according to the Court's case-law, requires that the parties be apprised of, and be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings.

91. GMB also submits that the General Court ruled *ultra petita*, since it is clear from point 1 of the operative part of the judgment under appeal that it annulled the regulation at issue in its entirety, whereas, in its application at first instance, Xinyi had merely sought the annulment of that regulation in so far as concerned it.

92. Xinyi disputes those arguments. As regards the Commission's arguments, Xinyi maintains that it did argue, in the second part of its first plea in the application, that the Commission had not found that any distortion was 'significant', inasmuch as the financial impact of the two preferential tax regimes in question was less than 1.5% of the production costs and of turnover during the investigation period. Xinyi contends that it had also argued, in paragraph 29 of its reply, that reference had to be made to its financial situation during the investigation period, since Article 2(7)(c) of the Basic Regulation concerns the calculation of dumping and the calculation of dumping concerns sales and costs during the investigation period. The Commission had the opportunity to comment in its rejoinder in the proceedings at first instance and at the two hearings before the General Court. In the judgment under appeal, the General Court merely confirmed the approach taken by Xinyi. As regards GMB's argument, Xinyi contends that it is clear that the General Court meant to annul the regulation at issue only in so far as concerned it, and that it merely made a typographical error that can be corrected.

2. Assessment

93. In the first place, as regards GMB's third ground of appeal, by which it submits that the General Court ruled *ultra petita*, I would observe that it is clear from reading point 1 of the operative part of the judgment under appeal, in conjunction with paragraph 74 of that judgment, that the General Court annulled the regulation at issue in its entirety, whereas paragraph 31 of that judgment expressly states that Xinyi sought the regulation's annulment only is so far as concerned that undertaking. The General Court did therefore rule *ultra petita*.[35] GMB's third ground of appeal should therefore, in my view, be upheld and the judgment under appeal should be set aside, in that it annulled the regulation at issue *erga omnes* and not only with regard to Xinyi.

94. In the second place, in so far as concerns the Commission's complaint that the General Court ruled *ultra petita* in that it gave an interpretation of the third indent of Article 2(7)(c) of the Basic Regulation that had not been invoked by Xinyi at first instance, I do not consider that that complaint should be upheld. Indeed, it is clear from the case-law that, although the EU judicature must rule only on the heads of claim put forward by the parties, whose role it is to define the framework of the dispute, it cannot confine itself to the arguments put forward by the parties in support of their claims, or it might be forced, in some circumstances, to base its

[35] See, with specific reference to dumping, the judgment of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 24 *in fine* and the case-law cited).

decisions on erroneous legal considerations.[36] The freedom to interpret the provision which it must apply to the facts of the case is integral to the Court's duties and cannot result in a ruling *ultra petita*.

95. In the third place, regarding the Commission's complaint that its right to a fair hearing was infringed, it follows from the case-law that, in order to satisfy the requirements associated with that right, it is important that the parties be apprised of, and be able to debate and be heard on, the matters of fact and of law which will determine the outcome of the proceedings.[37] In this instance, the proceedings before the General Court concerned the scope and application *in concreto* of the condition laid down in the third indent of Article 2(7)(c) of the Basic Regulation. Those were issues addressed in the second part of Xinyi's first plea in law and the Commission was given an opportunity to express its position with regard to them during both the first and the second set of proceedings before the General Court.[38] It follows that that complaint of the Commission's must also, in my view, be rejected and that the Commission's third ground of appeal must, therefore, be dismissed in its entirety.

96. In conclusion, it follows from all the foregoing that, in my view, the first and second grounds of appeal raised by the Commission and GMB and the third ground of appeal raised by GMB should be upheld and the judgment under appeal consequently set aside.

VII. The action before the General Court

97. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court of Justice quashes the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

98. I consider that that is the case in so far as concerns the second part of the first plea raised by Xinyi before the General Court, which is summarised in paragraphs 37 and 38 of the judgment under appeal. In that connection, I would observe that it is clear from recital 33 of the regulation at issue and from the Commission's letters of 22 August and 13 September 2013, summarised in paragraphs 63 to 65 of the judgment under appeal, that the Commission rejected Xinyi's MET claim on account of the significant financial benefits which resulted from the combined effect of the preferential tax regimes mentioned in point 8 of this Opinion, which were considered to be capable of affecting the company's overall financial and economic situation, in that they could serve the purpose of attracting capital at discounted rates. The Commission also concluded that the absolute benefit received during the investigation period is not necessarily a decisive criterion for assessing whether the distortion was significant, since that assessment has to address the overall effect of the measure on the undertaking's economic and financial situation.

[36] See, most recently, the judgment of 20 January 2021, *Commission* v *Printeos* (C-301/19 P, EU:C:2021:39, paragraph 58 and the case-law cited).

[37] Judgment of 2 December 2009, *Commission* v *Ireland and Others* (C-89/08 P, EU:C:2009:742, paragraph 56).

[38] See, on that point, the Opinion of Advocate General Mengozzi in *Commission* v *Siemens Österreich and Others* and *Siemens Transmission & Distribution and Others* v *Commission* (C-231/11 P and C-233/11 P, EU:C:2013:578, point 116 and the case-law cited) and the Opinion of Advocate General Sharpston in *Deltafina* v *Commission* (C-578/11 P, EU:C:2014:199, points 98 to 100). In so far as concerns points of law, it seems that the precedent mentioned in footnote 37 applies where the Court intends to raise of its own motion new points of law which will determine the outcome of the proceedings, as a new ground raised of the Court's own motion (see the judgment in *Commission* v *Ireland and Others*, cited in footnote 37) or where it characterises of its own motion a contractual term as unfair (see the judgment of 21 February 2013, *Banif Plus Bank* (C-472/11, EU:C:2013:88, paragraphs 30 and 31).

99. I do not consider that those findings are vitiated by any manifest error of assessment. Indeed, it follows from the interpretation of the third indent of Article 2(7)(c) of the Basic Regulation outlined in points 56, 57, 62, 65, 68 to 70 and 73 above that, as I observed in point 84 of this Opinion, measures such as preferential tax regimes, carried over from the former non-market-economy system, which affect the cost of capital, for example, facilitating access to less costly financing by virtue of the tax benefits they confer, can create significant distortions in an undertaking's financial situation that may fall within the scope of that provision.

100. It must be borne in mind in that connection that, as I mentioned in point 72 above, the burden of proof lies with the producer wishing to claim MET, which must show that, notwithstanding the preferential tax regimes, it operated under market economy conditions. To that end, Xinyi submitted that those regimes had a financial impact of less than 1.5% of the production costs and of turnover, without however explaining why those matters (production costs or turnover) should constitute the framework of reference for the analysis, or why the examination of the effects of the distortion created by those tax regimes should be confined to the investigation period, while the temporal scope of the tax benefits was not. Nor has Xinyi provided any information about the impact of those measures on its overall financial situation, or about the effect of those tax benefits on its costs of raising capital. In those circumstances, the second part of the first plea in law should, in my view, be dismissed.

101. On the other hand, I do not consider that the state of the proceedings permits the Court to rule on the remaining pleas in the application which were not analysed by the General Court in the judgment under appeal and in relation to which further procedural steps might need to be taken. In the circumstances, I consider that the case should be referred back to the General Court so that it may rule on the remainder of the pleas in the action.

VIII. Costs

102. In accordance with Article 184(2) of the Rules of Procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs. Since that is not the case in this instance, the decision on costs should be reserved.

IX. Conclusion

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

– set aside the judgment of the General Court of the European Union of 24 September 2019, *Xinyi PV Products (Anhui) Holdings* v *Commission* (T-586/14 RENV, EU:T:2019:668);

– dismiss the second part of the first plea in the action raised by Xinyi PV Products (Anhui) Holdings;

– refer the case back to the General Court for it to determine the remainder of the pleas;

– reserve the decision on costs.