Reports of Cases

OPINION OF ADVOCATE GENERAL
HOGAN
delivered on 26 November 2020[1]

Case C-572/18 P

thyssenkrupp Electrical Steel GmbH,
thyssenkrupp Electrical Steel Ugo
v

European Commission

(Appeal – Customs union – Conclusions of the customs expert group – Regulation (EU) No 952/2013 – Article 211(6) – Authorisation for inward processing of certain grain-oriented electrical steel – Examination of the economic conditions – Binding nature of the conclusions of the customs expert group – Act not open to challenge)

I. Introduction

1. By this appeal, the appellants request the Court to set aside the order of 2 July 2018, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission*[2] ('order under appeal'), by which the General Court dismissed as inadmissible the appellants' action. This action was directed against what is termed a 'conclusion' reached by the Commission.

2. At the heart of this dispute lies the question of whether the conclusion reached by the Commission that 'the economic conditions are fulfilled'[3] in a customs procedure dealing with the authorisation for the use of what is termed 'inward processing' constitutes an act intended to produce legal effects which is open to challenge for the purposes of Article 263(1) TFEU.

3. The 'inward processing procedure' is dealt with in Articles 256 to 258 of the Customs Code and it involves a procedure that allows for the suspension of import duty, VAT and other charges or commercial policy measures upon import of goods into the EU from third countries. The products resulting from this form of processing are either then re-exported or released to free circulation within the EU, in the latter case with charges paid on the originally imported raw materials or on the processed products. The application of this regime is subject to an authorisation by the customs authorities.

1 Original language: English.

2 T-577/17, not published, EU:T:2018:411.

3 See Article 211(4)(b) and (6) of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1) ('Customs Code').

4. An application for authorisation of inward processing had been made in the present proceedings for certain types of grain-oriented electrical steel ('GOES') of Japanese origin that were subject to anti-dumping measures imposed by the European Commission.[4] The anti-dumping measures were directed at the import of those materials at a price below the minimum import price that had been set. The effect of the grant of authorisation for inward processing in the present case was that it meant that the importer would not have had to pay anti-dumping duties or provide any evidence that dumping had been eliminated.

5. It is, perhaps, therefore not altogether surprising that the grant of such an authorisation was strenuously objected to by European competitors producing GOES. They maintain that such an authorisation would amount to the circumvention of the procedures set out in the implementing regulation providing for those anti-dumping measures. The question in the present appeal, however, is whether these competitors can maintain a challenge to the validity of the abovementioned conclusion of the Commission in these proceedings or whether they are instead limited to attacking the inward processing authorisation granted by the national customs authority before their own national courts.[5] This depends on whether the Commission's conclusion was intended to produce legal effects and, if that is the case, there is the further question of whether the appellants were directly and individually concerned by the measure for the purposes of Article 263(1) TFEU.

6. The criteria to be applied in order to determine whether an act is intended to produce legal effects are by no means new and are set out in paragraph 28 of the order under appeal. Nevertheless, and in spite of the fact that the Court in its judgment in *Friesland Coberco Dairy Foods*,[6] interpreted a provision[7] that is nearly identical to Article 259(5) of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015,[8] the provision that is at issue here, doubts remain as to whether a conclusion reached regarding the economic conditions constitutes a binding legal act, not least because of an administrative practice adopted by the Commission and the Member States which lays down the exact opposite of the position that the Commission now takes. Here it may be noted that in *Friesland Coberco* the Court held that a phrase which required the national customs authorities 'to take into account' the conclusions of the Customs Code Committee meant that the latter's conclusions were not binding on the national customs authorities.[9] A very similar issue of legislative interpretation arises in the present case.

7. In effect, therefore, this present appeal will provide the Court with the opportunity of considering once again its position in respect of what constitutes binding acts for the purposes of any challenge brought by reference to Article 263 TFEU. Before, however, we can proceed to a consideration of these questions, it is first necessary to set out the relevant legal provisions. As the appellants rely on the change in legislation since *Friesland Coberco*, it is necessary to refer to the legal framework which was in place at the time that case was decided as well as to subsequent developments which are relevant as far as the present case is concerned.

4 Commission Implementing Regulation (EU) 2015/1953 of 29 October 2015 imposing a definitive anti-dumping duty on imports of certain grain-oriented flat-rolled products of silicon-electrical steel originating in the People's Republic of China, Japan, the Republic of Korea, the Russian Federation and the United States of America (OJ 2015 L 284, p. 109).

5 According to the appellants' application for authorisation to produce a reply, the appellants did file appeals with the Rechtbank Noord-Holland (District Court of North Holland, Netherlands) challenging the denial of their objections to the granting of the inward processing authorisation by the Dutch customs authority.

6 Paragraphs 25 to 33 of the judgment of 11 May 2006, *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312) ('*Friesland Coberco*'). The judgment deals with a case of processing under customs control rather than inward processing. The merger of these procedures had already been initiated under Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1), see recital 33 of that Regulation. This was continued again under the Customs Code, see recital 50 of that code.

7 Article 504(4) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 1993 L 253, p. 1).

8 Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ 2015 L 343, p. 558).

9 *Friesland Coberco*, paragraphs 26 to 27.

II. Legal framework

A. EU law

1. Law in force at the time Friesland Coberco was decided

(a) Regulation No 2913/92

8. Article 130 of Regulation No 2913/92[10] described the procedure for processing under customs control, which allowed products resulting from such processing operations to be released for free circulation at the rate of import duty appropriate to them. According to Article 132, an authorisation had to be sought.

9. Article 133 of Regulation No 2913/92[11] set out the conditions for such an authorisation to be granted:

'Authorisation shall be granted only:

…

(e) where the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled. The cases in which the economic conditions are deemed to have been fulfilled may be determined in accordance with the committee procedure.'

10. Articles 247 to 249 of Regulation No 2913/92 described the role of the Customs Code Committee in assisting the Commission in accordance with the terms of the regulation. Article 249 of Regulation No 2913/92 provides:

'The Committee may examine any question concerning customs legislation which is raised by its chairman, either on his own initiative or at the request of a Member State's representative.'

(b) Regulation No 2454/93

11. Article 502 and Article 504 of Regulation No 2454/93[12] belonged to the section 'Economic conditions'. They both referred to the role of the national customs authorities when the Customs Code Committee conducted an examination of the economic conditions. Article 502(1) of Regulation No 2454/93 provided:

'Except where the economic conditions are deemed to be fulfilled pursuant to Chapters 3, 4 or 6, the authorisation shall not be granted without examination of the economic conditions by the customs authorities.'

10 Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1) was finally repealed by Regulation No 952/2013. The Modernised Customs Code according to Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1) which was intended to take its place, was replaced by the Union Customs Code according to Regulation No 952/2013 even before the Modernised Customs Code had fully entered into force.

11 As amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 amending Council Regulation (EEC) No 2913/92 establishing the Community Customs Code (OJ 2000 L 311, p. 17).

12 OJ 1993 L 253, p. 1, implicitly repealed by Commission Implementing Regulation (EU) 2016/481 of 1 April 2016 repealing Commission Regulation (EEC) No 2454/93 laying down provisions for the implementation of Council Regulation (EEC) No 2913/92 establishing the Community Customs Code, OJ 2016 L 87, p. 24.

12. Article 504(1) and (4) of Regulation No 2454/93 provided:

'1. Where an examination in accordance with Article 503 is initiated, the case shall be sent to the Commission. It shall contain the results of the examination already undertaken.

…

4. The Committee's conclusion shall be taken into account by the customs authorities concerned and by any other customs authorities dealing with similar authorisations or applications.

…'

2. Law applicable to the present case

(a) The Customs Code

13. It is next necessary to consider the provisions of the recast version of the Customs Code. According to Article 210 of the Customs Code, goods may be placed under special procedures including the inward processing procedure.

14. Article 211 of the Customs Code lists in paragraph 1 procedures that require an authorisation, and paragraphs 4 to 6 deal with additional conditions which have to be fulfilled for, amongst others, the grant of an inward processing authorisation. Those provisions read as follows:

'1. An authorisation from the customs authorities shall be required for the following:

(a) the use of the inward or outward processing procedure, the temporary admission procedure or the end-use procedure;

…

4. Except where otherwise provided and in addition to paragraph 3, the authorisation referred to in paragraph 1 shall be granted only where all of the following conditions are fulfilled:

(a) the customs authorities are able to exercise customs supervision without having to introduce administrative arrangements disproportionate to the economic needs involved;

(b) the essential interests of Union producers would not be adversely affected by an authorisation for a processing procedure (economic conditions).

5. The essential interests of Union producers shall be deemed not to be adversely affected, as referred to in point (b) of paragraph 4, except where evidence to the contrary exists or where the economic conditions are deemed to be fulfilled.

6. Where evidence exists that the essential interests of Union producers are likely to be adversely affected, an examination of the economic conditions shall take place at Union level.'

15. Article 212 of the Customs Code, titled 'Delegation of power', provides:

'The Commission shall be empowered to adopt delegated acts, in accordance with Article 284, in order to determine:

(a) the conditions for granting the authorisation for the procedures referred to in Article 211(1);

(b) the exceptions to the conditions referred to in Article 211(3) and (4);

(c) the cases in which the economic conditions are deemed to be fulfilled as referred to in Article 211(5).'

16. Article 213 of the Customs Code bears the title 'Conferral of implementing powers' and has the following wording:

'The Commission shall specify, by means of implementing acts, the procedural rules for examining the economic conditions referred to in Article 211(6).

Those implementing acts shall be adopted in accordance with the examination procedure referred to in Article 285(4).'

(b) Commission Delegated Regulation 2015/2446

17. Article 166(1) of Commission Delegated Regulation (EU) 2015/2446 ('the delegated regulation')[13] lays down the general rule that conditions provided for in Article 211(4)(b) of the Customs Code shall not apply to authorisations for inward processing and sets out three exceptions to that rule.

18. Article 167 of the delegated regulation sets out 19 cases in which the economic conditions for inward processing according to Article 211(5) of the Customs Code are deemed to be fulfilled.

(c) Commission Implementing Regulation 2015/2447

19. Article 259(1), (4), (5) and (6) of Commission Implementing Regulation (EU) 2015/2447 ('the implementing regulation')[14] dealing with the examination of the economic conditions as per Article 211(6) of the Customs Code have the following wording:

'1. Where following an application for an authorisation as referred to in Article 211(1)(a) of the Code an examination of the economic conditions is required in accordance with Article 211(6) of the Code, the customs administration of the customs authority competent for taking a decision on the application shall transmit the file to the Commission without delay requesting such examination.

…

4. The Commission shall establish an expert group, composed of the representatives of the Member States, which shall advise the Commission on whether the economic conditions are fulfilled or not.

5. The conclusion reached on the economic conditions shall be taken into account by the customs authority concerned and by any other customs authority dealing with similar applications or authorisations.

It may be specified in the conclusions reached on the economic conditions that the case under examination is unique and therefore cannot serve as a precedent for other applications or authorisations.

13 Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1).

14 Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ 2015 L 343, p. 558).

6. Where it has been concluded that the economic conditions are no longer fulfilled, the competent customs authority shall revoke the relevant authorisation. The revocation shall take effect no later than 1 year after the day following the date on which the decision on the revocation is received by the holder of the authorisation.'

(d) Other rules relating to expert groups

20. Article 3(1)(c) of the Commission decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups[15] linked to the communication to the Commission framework for Commission expert groups: Horizontal rules and public register[16] ('horizontal rules') provides that expert groups provide advice and expertise to the Commission. According to Article 5 of that decision, their mandates and tasks must be defined clearly.

21. The Customs Expert Group is set up under the Terms of Reference of the Customs Expert Group.[17] It is subject to the horizontal rules for Commission expert groups and, according to Article 2(g) of the terms of reference, it is to provide advice in relation to the examination of whether the economic conditions are fulfilled.

22. According to Article 1(1) of the Rules of Procedure of the Customs Expert Group,[18] each Member State shall be considered to be one member of the Customs Expert Group and decide on the composition of its delegation. Article 8 of those rules of procedure describes the procedure to be followed by the Customs Expert Group when giving advice to the Commission on the fulfilment of the economic conditions. It provides that a vote shall be taken if the group cannot reach consensus. Members voting against a confirmation that the economic conditions exist shall give the reasons for their position according to Article 8(e) of those rules of procedure.

III. Background to the proceedings[19]

23. On 21 February 2017, Euro-Mit Staal BV ('EMS') submitted an application for authorisation for the inward processing of certain types of GOES of Japanese origin to the Dutch customs authorities. That application was made on the basis of Article 211(1)(a) of the Customs Code.

24. On 27 February 2017, the Dutch customs authorities, acting pursuant to Article 259(1) of the implementing regulation, transmitted the file to the Commission by which they requested an examination of the economic conditions in accordance with Article 211(6) of the Customs Code and 'to conclude that [they were] met and [that] the authorisation [could] be granted'.[20]

25. The matter was dealt with in the sixth meeting of the Customs Expert Group Section 'Special Procedures other than transit' of 2 May 2017, where a vote by the members on the request to advise the Commission on whether the economic conditions were fulfilled or not led to a favourable result. The Commission, on that basis, concluded that the economic conditions were fulfilled. This result was set out in the minutes of that meeting ('challenged conclusion').

15 C(2016) 3301.

16 C(2016) 3300.

17 Note to the Commission Expert Group Registry, Ref. Ares (2016) 2109319 of 3 May 2016.

18 Ref. Ares (2016) 2616740 of 6 June 2016.

19 Paragraphs 1 to 8 of the order under appeal.

20 Paragraph 2 of the order under appeal.

26. On the same day, the Dutch customs authority issued the authorisation for inward processing to EMS for the period from 2 May 2017 to 1 May 2020. On 12 July 2017, the appellants submitted notices of opposition to the granting of that authorisation to EMS to the Dutch customs authority. In its preliminary decisions of 11 December 2017 on those oppositions, the Dutch customs authority declared that it was 'obliged' ('verplicht') to grant the authorisations requested, because it had to 'take account of the conclusion reached about the economic conditions'. [21]

IV. Proceedings before the General Court and the order under appeal

27. By application lodged at the Registry of the General Court on 25 August 2017, the appellants sought the annulment of the challenged conclusion.

28. The Commission raised a plea of inadmissibility [22] based on the absence of an act against which an action for annulment can be brought under Article 263 TFEU and, in the alternative, on the absence of a direct and individual concern on the part of the appellants required under the fourth paragraph of Article 263 TFEU. EMS requested leave to intervene in support of the form of order sought by the Commission.

29. The General Court dismissed the appellants' action on the ground that the challenged conclusion does not have the character of a challengeable act, [23] without it being necessary to examine the second objection to admissibility raised by the Commission and without going to the substance of the case. However, under Article 135(1) of the Rules of Procedure of the General Court, the Commission was ordered to pay its own costs as well as those incurred by the appellants. As the appellants' action was dismissed as inadmissible, there was no need to adjudicate on the application for leave to intervene by EMS.

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

30. On 13 September 2018, the appellants lodged an appeal against the order under appeal. The appellants request that the Court set aside the order under appeal, rule itself on the admissibility, including on the second objection of admissibility raised by the Commission, refer the case back to the General Court for that court to rule on the substance of the applications, and order the Commission to pay the costs.

31. The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs.

32. By document lodged at the Court Registry on 27 December 2018, EMS applied for leave to intervene in the present case in support of the order sought by the Commission. [24] This was rejected by an order of the President of the Court of 7 March 2019, [25] as EMS had not established an interest in the result of the case.

21 As the appellants point out in their appeal, the final decision of the Dutch customs authority of 8 January 2018 denied the objections on the ground that the Union producers were not directly and individually concerned by the authorisation under Article 44 of the Customs Code and only referred to what it considered an obligation to grant the requested authorisation as a further argument for refusal.

22 Under Article 130 of the Rules of Procedure of the General Court.

23 Paragraph 70 of the order under appeal.

24 Under Article 40 of the Statue of the Court of Justice of the European Union.

25 *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo* v *Commission* (C-572/18 P, not published, EU:C:2019:188).

VI. Appeal

33. The appellants rely on five pleas in law. First, they claim that the General Court erred when it held that the Customs Code and related delegated and implementing regulations do not confer on the Commission the power to adopt decisions that are binding on the national customs authorities in the examination of the economic conditions. Second, they claim that the General Court erred in holding that the role of the Commission during the examination of economic conditions is purely procedural in nature. Third, they consider that the General Court erred in treating *Friesland Coberco* as a binding legal authority regarding the interpretation of Article 259(5) of the implementing regulation. Fourth, in the appellants' opinion, the General Court erred in failing to consider the 'Administrative practice regarding the examination of the economic conditions in accordance with Article 211(6) UCC and 259 IA UCC'[26] ('administrative practice'), applicable from the 1 September 2016, as evidence of the binding nature of the challenged conclusions on the economic conditions. Fifth and last, the appellants claim that the General Court erred in failing to consider that the appellants were directly and individually concerned by the challenged conclusion.

34. The first four of these pleas are directed at errors in law that the General Court is alleged to have made in its assessment on whether the challenged conclusion constitutes a challengeable act. Although only the third plea focuses on the differences to the provisions considered by the Court in *Friesland Coberco*, it is clear from the appeal that most of the arguments supporting the first three pleas rely on the difference between the legal framework before and after the entry into force of the Customs Code. It is thus appropriate to consider the first three pleas together. Whether the fourth plea, that raises the question of the legal effects of an administrative practice for the purposes of deciding whether the challenged conclusion constitutes a challengeable act must be considered depends on the answer to the first three pleas, whereas the fifth plea might only become relevant if an error of law by the General Court has been established.

A. Legal interest in bringing proceedings

35. As a preliminary remark, the Commission pointed out that the Union Courts may examine *ex officio* whether an action has become devoid of purpose so that there is no longer any need to adjudicate on it[27] at any point in time during the proceedings. According to the Court's settled case-law, an action for annulment brought by a natural or legal person is indeed only admissible in so far as that person has an interest in having the contested act annulled. Such an interest requires that the annulment of that act must be capable, in itself, of having legal consequences and that the action may therefore, through its outcome, procure an advantage to the party which brought it.[28] This might not have been the case if the appellants had not initiated legal proceedings against the Dutch customs authority's rejection of their objections to the authorisation for inward processing granted to EMS and had thus allowed that authorisation to become a binding decision.[29] Given that the appellants have brought such proceedings – a fact that is accepted by the Commission – there is no doubt here as to the continued interest of the appellants in bringing proceedings.

26 Ref. Ares (2016) 4155451 – 05/08/2016.

27 Article 149 of the Rules of Procedure.

28 See to that effect, judgment of 17 September 2015, *Mory and Others* v *Commission* (C-33/14 P, EU:C:2015:609, paragraph 55).

29 See, by analogy, the Opinion of Advocate General Sharpston in *Gul Ahmed Textile Mills* v *Council* (C-100/17 P, EU:C:2018:214, point 99) dealing with the question whether there was 'continuing interest' when a claim for repayment which might lie if an action for annulment were successful has not been made in time.

B. The first three pleas relating to the existence of a challengeable act for the purposes of Article 263 TFEU

1. Arguments of the parties

36. By their first plea, the appellants submit that the General Court erred in law when it found at paragraph 48 of the order under appeal that neither the Customs Code, nor the delegated regulation, nor the implementing regulation confer on the Commission the power to adopt decisions that are binding on the national authorities in a procedure for the grant of an authorisation for inward processing. The appellants infer this from the fact that, under its implementing powers, the Commission has established a procedure in which the question whether the economic conditions are fulfilled must be examined at Union level whereas, and in this respect it sees a difference in comparison to the former version of the customs code [30] which was in force and considered in *Friesland Coberco*, the national authorities have not been granted any power of examination of the economic conditions.

37. By their second plea, the appellants argue that the General Court has committed an error in law when, at paragraph 49 of the order under appeal, it characterised the Commission's role when carrying out the examination of the economic conditions as a purely procedural one. They state that nothing in the Customs Code or the delegated and implementing regulations limits the role of the Commission to the taking of the votes of the representatives of the Member States in the Customs Expert Group and counting the votes cast. Because the Commission is not obliged to follow the advice of the Customs Expert Group, the appellants advance the view that the Commission must be 'legally responsible for reaching the conclusion on economic conditions'.

38. By their third plea, the appellants object to the General Court's statements in paragraphs 60 and 61 of the order under appeal. There, the General Court held that the Court's interpretation of Article 504(4) of Regulation No 2454/93 in *Friesland Coberco* is also valid for Article 295(5) of the implementing regulation, which is applicable here. It contests the General Court's finding that those two provisions 'may be regarded as equivalent'.

39. In support of their plea, the appellants rely on changes in the legislation, for example, that the definition of 'economic conditions' has changed and that the Customs Code Committee no longer plays any role in the examination of economic conditions; facts on which, according to the appellants, the Court had relied strongly in its reasoning in *Friesland Coberco*. Furthermore, the appellants point to the difference in wording between Article 502(1) of Regulation No 2454/93 on the one hand, and Articles 211(6) of the Customs Code and Article 259(1) of the implementing regulation on the other hand, which shifts the focus from an examination by the customs authorities to an examination at EU level.

40. The Commission disagrees with the appellants' arguments and points to the fact that institutions can only adopt binding acts if there is a clear legal basis to do so. This, according to the Commission, is not the case here. It further submits that the right to judicial protection of the appellants is ensured sufficiently, even if they cannot appeal the challenged conclusion because it is open to the national jurisdiction to request a preliminary ruling in the proceedings brought by the appellants against the decision of the Dutch customs authority. The Commission also submits that the judgment in *Friesland Coberco* remains good law. In its opinion, the fact that the underlying legislative provisions were recast in 2013 does not affect the legal nature and the legal effects of the conclusion nor the relevance of the reasoning in that case.

30 Regulation No 2913/92.

2. Assessment

41. A 'conclusion' is not one of the types of measures listed in Article 288 TFEU by which the institutions exercise their competences and for which it is clearly stated whether they have binding force or not.[31] As the General Court set out in paragraph 24 of the order under appeal, it is the settled case-law of the Court that any measures adopted by the institutions of the European Union, whatever their form, which are intended to have binding legal effects, are regarded as challengeable measures within the meaning of Article 263 TFEU.[32] As the General Court correctly pointed out in paragraph 28 of the order under appeal, whether the measure produces those effects has to be decided by examining its substance. It must be assessed in accordance with objective criteria, such as its content, taking into account the context in which it was adopted and the powers of the institutions which adopted it.[33]

42. The emphasis of the appellants' pleas is on the Commission's power to adopt a binding measure. However, according to the principles set out in the last point, the decision on whether a measure is of a binding nature has to be taken in light of all the criteria, rather than focusing on just one.[34] Therefore, although the appellants have principally aimed their attack on the General Court's finding that the Commission did not have the power to adopt binding measures – taking into account the Commission's position in that context – the General Court's assessment must nonetheless be considered in light of all aspects.

(a) Content of the measure and context of its adoption

43. The content of the challenged conclusion is limited to the statement 'COM concluded that the economic conditions are fulfilled'. This can only be understood in its proper context. The legal and factual context of the decision has been described by the General Court in paragraphs 31 to 43 of the order under appeal. I will shortly recapitulate this in order to assess the General Court's findings.

44. The challenged conclusion was reached within the ambit of a procedure initiated by EMS whereby EMS sought an authorisation for the use of the inward processing procedure. This authorisation is required according to Article 211(1)(a) of the Customs Code when goods are placed under the inward processing procedure according to Article 210(d) of the Customs Code. The competent authorities for the grant of such an authorisation are the customs authorities of the Member State.[35] Article 211(3) and (4) of the Customs Code lists the requirements that have to be fulfilled in order for such an authorisation to be granted. Whereas paragraph (3) deals with personal requirements that the applicant has to fulfil, paragraph (4) sets out two more criteria, first, one of proportionality with

31 Even in that category, there are exceptions, though, namely, in case a measure that according to its denomination is non-binding, by reason of its content does not constitute a genuinely non-binding act. See, to that effect, judgment of 20 February 2018, *Belgium* v *Commission* (C-16/16 P, EU:C:2018:79, paragraph 29 with respect to a recommendation).

32 Judgments of 13 February 2014, *Hungary* v *Commission* (C-31/13 P, EU:C:2014:70, paragraph 54 and the case-law cited) and of 25 October 2017, *Romania* v *Commission* (C-599/15 P, EU:C:2017:801, paragraph 47). See also, however, the analysis of Advocate General Bobek in his Opinion in *Belgium* v *Commission* (C-16/16 P, EU:C:2017:959), showing that there has been a development in the case-law from requiring measures to merely have 'legal effect', to requiring them to have 'binding legal effect' and his critique of this development and proposal to return to the first criterion.

33 Judgments of 13 February 2014, *Hungary* v *Commission* (C-31/13 P, EU:C:2014:70, paragraph 55 and the case-law cited), and of 25 October 2017, *Romania* v *Commission* (C-599/15 P, EU:C:2017:801, paragraph 48 and the case-law cited). This is confirmed by the cases in which the Court had to consider the nature of 'conclusions' in the past. The Court did not make any inferences from the title chosen for the measure. In the judgment of 25 October 2017, *Commission* v *Council (WRC-15)* (C-687/15, EU:C:2017:803), the Court, in paragraph 45, describes the uncertainty created by the adoption of a 'conclusion' with respect to the legal nature and scope of that act 'in this case'. The Court found that the Council, in the given circumstances, ought to have adopted an act that was clearly binding, namely a decision. In *Friesland Coberco*, a judgment to which I will return, the Court came to the conclusion, after looking at all those criteria, that the conclusion at issue was not binding.

34 See to that effect, judgment of 25 October 2017, *Romania* v *Commission* (C-599/15 P, EU:C:2017:801), as well as Opinion of Advocate General Kokott in *Slovakia* v *Commission and Romania* v *Commission* (C-593/15 P and C-599/15 P, EU:C:2017:441, point 46).

35 Article 211(1). Article 22(1) of the Customs Code defines the competent customs authority.

regard to the supervision of the regime by the customs authorities and, second, that the economic conditions have to be fulfilled. The latter criterion, contained in Article 211(4)(b) of the Customs Code, states that 'the essential interests of Union producers would not be adversely affected by an authorisation'.

45. By reason, however, of a rather complex set of further conditions and legal fictions, the cases in which this requirement actually has to be examined are in fact quite limited.[36] In those rare, remaining cases, Article 211(6) of the Customs Code requires a test to be carried out in two steps. First, it has to be ascertained that 'evidence exists that the essential interests of Union producers are likely to be adversely affected'.[37] Any examination of this nature will be carried out by the national customs authority. Only once this further threshold has been crossed does a detailed examination of the economic conditions take place. Article 211(6) of the Customs Code then specifies that that examination *shall take place at Union level*.

(b) Does the Commission have the power to draw a conclusion in respect of the issue of economic conditions that is binding on the national customs authorities?

46. Article 259 of the implementing regulation has been adopted pursuant to the Commission's general implementing powers contained in Article 213 of the Customs Code.[38] As the General Court points out in paragraph 36 of the order under appeal, Article 259(1) of the implementing regulation provides that 'the customs administration of the customs authority competent for taking a decision on the application shall transmit the file to the Commission without delay requesting such examination.' Article 259(4) of the implementing regulation then states that the expert group that the Commission established shall *advise* the Commission on whether the economic conditions are fulfilled or not. The merely advisory nature of this role is underlined by Articles 3 and 5(1) of the horizontal rules under which the Customs Expert Group was established, as well as section 2(g) of the Terms of Reference of the Customs Expert Group.[39] As the General Court pointed out in paragraph 38 of the order under appeal, 'in accordance with the horizontal rules on expert groups, the role of those groups is to advise the Commission, in particular on the application of EU laws, policies and programmes, on coordination and cooperation with the Member States'.

47. The General Court then described, in paragraph 39, the role of the Commission, which, according to the second paragraph of Article 3 of the abovementioned terms of reference of the Customs Expert Group and Article 3 of its rules of procedure,[40] calls and chairs the meetings of the 'Special Procedures other than Transit' section when that section examines the economic conditions. However, if no agreement can be reached, the vote–– and decision on the economic conditions within that section is taken by the representatives of the Member States.[41] While the rules of procedure remain silent as to what happens once agreement has been reached or a vote has been taken, it is apparent from the minutes containing the challenged conclusion that the Commission took that result and documented it in the minutes of the meeting as the conclusion in respect of the economic conditions. Thus, the General Court has correctly stated in paragraph 50 of the order under appeal that it is not apparent

36 According to Article 166(1) of the delegated regulation, the economic conditions will in fact only be examined in three cases. Furthermore, the economic conditions for inward processing are already deemed to be accepted for 19 operations that are listed in Article 167 of the delegated regulation.

37 According to some language versions, it must even be established that there is such a likelihood. See the French language version of Article 211(6) of the Customs Code: 'Lorsqu'il est prouvé que les intérêts essentiels des producteurs de l'Union risquent d'être affectés négativement …'.

38 According to recital 49 of that regulation, this has been done with a view to establishing clear and simple rules for a proper examination at Union level where evidence exists that the essential interests of Union producers are likely to be adversely affected. Although this does not appear decisive to me, I would like to point out that no special mention is made as to the uniform application of the rules. Recital 49 of the delegated regulation only states that 'Legal certainty and equal treatment between economic operators require *the indication of the cases* in which an examination of the economic conditions for inward and outward processing is required.' (emphasis added).

39 Terms of Reference of the Customs Expert Group, Ref. Ares (2016) 2109319 – 03/05/2016.

40 Rules of Procedure of the Customs Expert Group, Ref. Ares (2016)2616740 – 06/06/2016.

41 Article 8 of the Rules of Procedure of the Expert Group.

from the examination procedure put in place under the Commission's implementing powers, pursuant to Article 213 of the Customs Code, whether, in addition to taking and counting the votes of the representatives of the Member States in the Customs Expert Group, the Commission must express its own opinion or has itself the power to assess the question of whether the economic conditions are fulfilled.

48. The appellants do not attack any of these findings. Nor do they attack paragraph 46 of the order under appeal where the General Court invokes the principle that powers of EU institutions require a specific legal basis circumscribing their exact extent as the institutions are only entitled to act within those limits.[42] The General Court relied on the conclusion from that assessment, namely, that a power cannot merely be implied.

49. The appellants do not identify any provision that confers the power on the Commission to adopt decisions that are binding on the national authorities regarding the fulfilment of the economic conditions and, as is clear from the procedure described above, the General Court did not commit any error in law when it found that there is no such provision.

50. This is not called into question by the appellants' arguments. Their argument is instead grounded on the basis of the changes in the legislation that have occurred since the entry into force of the Customs Code and the accompanying implementing regulation. Whereas Article 502(1) of Regulation No 2454/93 provided that 'the authorisation shall not be granted without examination of the economic conditions *by the customs authorities*',[43] the implementing regulation contains no comparable provision. The appellants argue by a process of elimination. They claim that if neither the national authorities nor the Customs Expert Group is specifically empowered to take binding decisions on the economic conditions question, the Commission must necessarily be empowered to do so. To this argument I would respond as follows.

51. First, it is not quite correct to say that the national authorities have no authority at all to examine the economic conditions. As has been described in point 41 of this Opinion, the national authorities must, under Article 211(5) of the Customs Code, verify whether evidence exists that essential interests of Union producers are likely to be adversely affected. In order to verify whether such evidence exists, the national authorities will certainly have to make a rather thorough examination, particularly as the whole structure of the provisions tends to militate against a finding of such evidence.

52. Second, it is important to stress that there is nothing in the actual text of Article 259 of the implementing regulation which indicates that the Commission's conclusion, which it reached in respect of the issue of the economic conditions, should be regarded as binding. Article 259(5) simply states that the Commission's conclusion on the economic conditions 'shall be taken into account by the customs authority concerned', wording which – as this Court pointed out in *Friesland Coberco* in respect of similar language contained in an earlier version of this provision – in terms suggests that the ultimate decision rests with the competent customs authority concerned.[44]

53. This is underscored by the provisions of Article 259(6) of the implementing regulation, which states that where the Commission reaches the conclusion that the economic conditions are no longer fulfilled, the 'competent customs authority *shall revoke* the relevant authorisation.' The words which I have taken the liberty of highlighting ('shall revoke') plainly oblige the competent customs authority to revoke the authorisation where the Commission has reached a negative conclusion. The contrast between the wording of Article 259(5) ('…shall be taken into account …) and Article 259(6) ('…shall be revoked …') of the implementing regulation is, in itself, sufficient to illustrate the point that while the

42 See also judgments of 14 June 2016, *Commission* v *McBride and Others* (C-361/14 P, EU:C:2016:434, paragraph 36), and of 12 September 2017, *Anagnostakis* v *Commission* (C-589/15 P, EU:C:2017:663, paragraph 98).

43 Emphasis added.

44 *Friesland Coberco*, paragraph 27.

Commission's conclusions made pursuant to Article 259(6) of that regulation are binding, the converse is not true so far as its powers under Article 259(5) of the implementing regulation are concerned. To repeat, therefore, in the latter case the ultimate decision rests with the competent customs authority, albeit that it must have regard to the Commission's conclusions. They may depart from that conclusion 'provided that they give reasons for their decision in that respect.'[45]

54. In this context, it should also be recalled that, if no such power has been conferred on a Union institution – even in areas that are within the exclusive competence of the EU, like the customs policy – the Member States remain competent to implement that policy.[46] Thus, while the absence of a legislative provision empowering the Commission to take a binding decision regarding the economic conditions prevents the Commission from doing so, national authorities do not require a separate competence to verify the conditions spelled out in the law when applying it.

55. The appellants further argue that the few cases in which the economic conditions actually have to be examined in detail all concern situations involving the uniform application of the Union's common commercial policy, which is an area of exclusive jurisdiction of the Union. For the reasons set out above, this cannot, however, overcome the Commission's lack of power to take such decisions.

56. Indeed, it is for that very reason that the appellants' arguments based on the wording of the second subparagraph of Article 259(5) and of Article 259(6) of the implementing regulation cannot succeed. While the second subparagraph of Article 259(5) of the implementing regulation states that a conclusion may specify that the case under examination is unique – and therefore cannot serve as a precedent for other applications or authorisations – this in itself does not demonstrate that such a conclusion is binding in the sense that I have described.

57. Article 259(6) of the implementing regulation provides – in admittedly mandatory language ('shall revoke') – that the competent customs authority is obliged to revoke an authorisation if it has been concluded that the economic conditions are no longer fulfilled and even sets a date for when the revocation must take place at the latest, the provision is nonetheless limited to that set of circumstances.

58. Nevertheless, the argument based on the wording of Article 211(6) of the Customs Code to the effect that, if there is such evidence, the examination of the economic conditions *shall take place at Union level*, certainly carries weight. However, as the General Court points out in paragraph 34 of the order under appeal, while Article 211(6) of the Customs Code states that an examination of the economic conditions must take place at Union level, it does not indicate what objective is being pursued by establishing the examination at that level, nor does the provision contain any clear indication on what the role of the Commission during that examination actually is. By contrast, Article 211(4) of the Customs Code states unequivocally that the national authorities shall grant an authorisation when the conditions set out in that provision are fulfilled. That provision clearly indicates who the authority taking the decision is. It is perhaps unfortunate that the requisite degree of clarity in respect of this important point is absent from Article 211(6) of the Customs Code.

59. The appellants further rely on the change of the identity of the party responsible for the conclusion. In contrast to the position in regards to Article 504(4) of Regulation No 2454/93, the entity responsible for reaching the conclusions regarding the economic conditions is now the Commission. This is clear from the merely advisory function of the Customs Expert Group described above and acknowledged by the General Court in paragraph 54 of the order under appeal. Under the

45 *Friesland Coberco*, paragraph 27.

46 See Article 2(1) TFEU.

previous legislation, it was the Customs Code Committee which reached this conclusion by virtue of Article 504(4) of Regulation No 2454/93. However, the fact that the Commission is now designated as the author of the challenged conclusion does not in itself mean that the conclusion which it reaches constitutes an act that binds the national customs authority.

60. The appellants also argue that, while the examination of the economic conditions was not mandatory under the previous legislation,[47] it is now so, by virtue of Article 211(6) of the Customs Code ('shall take place at Union level').[48] While this is true, it does not necessarily imply that the conclusion drawn is binding on the national customs authorities. This is confirmed by the judgment of the Court in *Friesland Coberco*. Although the case concerned a set of circumstances in which the consultation with the Customs Code Committee was compulsory, the Court held, as we have already seen, that a duty to consult that committee could not be treated as a duty to adopt its conclusion.[49] In the absence of a clear provision providing otherwise, the same might be said about a duty to have the economic conditions examined at Union level. This does not necessarily lead to the result of that examination having to be accepted and endorsed by the national customs authority.

61. This is not altered by the fact that the Dutch customs authority acted upon the basis that it was obliged to follow the conclusion at issue. The findings of the Court in its judgments in *Bock* v *Commission*,[50] *Piraiki-Patraiki and Others* v *Commission*[51] and *Dreyfus* v *Commission*,[52] on which the appellants rely, deal with the separate question of whether acts that are undoubtedly challengeable for the purposes of Article 263 TFEU directly affect the applicants. The existence of a challengeable act is a necessary requirement for an action under Article 263. The fact that a Member State decides to adhere by a measure that is not in fact binding does not make it binding, nor does the fact that a non-binding measure directly concerns a claimant turn that measure into a challengeable act.

(c) Binding force of the conclusion: 'shall be taken into account by the customs authority concerned'

62. Article 259(5) of the implementing regulation contains the provision describing how the national customs authority is to deal with the conclusion. As I have already pointed out, Article 259(5) of the implementing regulation simply provides that 'The conclusion reached on the economic conditions shall be taken into account by the customs authority concerned …'. As mentioned above, in *Friesland Coberco* the Court was required to interpret a nearly identical provision, namely, Article 504 of Regulation No 2454/93. The only difference is that that provision refers to '(t)he Committee's conclusion' and does not refer as such to the 'economic conditions'. It is, however, clear and undisputed that under the second of those provisions, it is also the 'economic conditions' that have to be taken into account. In *Friesland Coberco* the Court interpreted the words 'shall be taken into account' as meaning that 'The national customs authorities may disregard the conclusion adopted by the Committee provided that they give reasons for their decision in that respect.'[53]

63. In paragraph 60 of the order under appeal the General Court relies on paragraph 45 of the Court's judgment in *Nogueira and Others*,[54] according to which the interpretation given by the Court in respect of a provision in a legislative instrument is also valid for the provisions of legislation replacing such a legislative instrument, provided the provisions may be regarded as equivalent. The appellants do not attack that principle but rather dispute whether Article 259(5) of the implementing regulation may be regarded as equivalent to that of Article 504 of Regulation No 2454/93.

47 See the wording of Article 503 of Regulation No 2454/93 to which the appellants refer.

48 As described above, however, the cases to which this applies are very limited.

49 *Friesland Coberco*, paragraph 31.

50 Judgment of 23 November 1971, (62/70, EU:C:1971:108, paragraphs 6 to 8).

51 Judgment of 17 January 1985, (11/82, EU:C:1985:18, paragraphs 8 and 9).

52 Judgment of 5 May 1998 (C-386/96 P, EU:C:1998:193, paragraphs 43 to 56).

53 *Friesland Coberco*, paragraph 27.

54 Judgment of 14 September 2017 (C-168/16 and C-169/16, EU:C:2017:688, and the case-law cited).

64. The General Court relies in paragraph 58 of the order under appeal on the fact that the wording of the first subparagraph of Article 259(5) of the implementing regulation reproduces verbatim that of Article 504(4) of Regulation No 2454/93. This conclusion has not been challenged on appeal. Nor did the appellants contest the General Court's finding in paragraph 54 of the order under appeal that only the author of the conclusion had changed, with the result that the objective pursued by that examination remains identical.

65. Even looking beyond these doubts of whether the third plea is effective, this plea cannot succeed. The appellants argue that the Court's finding in *Friesland Coberco* 'was based specifically upon the function of the Customs Code Committee'. However, the part of the judgment that the appellants rely on for their argument, namely, paragraph 37 of *Friesland Coberco*, deals with the question whether the conclusion constituted an act of an institution for the purposes of an examination under Article 234 EC (now Article 267 TFEU). The Court found in that context that the Custom Code Committee's conclusion could not be considered to be an act of the Commission. There is no relation to the Court's finding in paragraph 33 of the same judgment that the conclusion was not binding on national customs authorities.

66. Neither can I accept the appellants' argument that the two situations are not equivalent. The appellants argue, in particular, that while it was the function of the Customs Code Committee to ensure 'close and effective cooperation between the Member States and the Commission',[55] it is the role of the Commission under the Customs Code to 'ensure uniform conditions'[56] for the implementation of the Customs Code. The General Court considered this argument in paragraph 52 of the order under appeal. It did not err when it pointed out that the provision of Article 213 of the Customs Code is limited to conferring implementing powers on the Commission in order to specify *uniform conditions with regard to the procedural rules*, as envisaged in recital 5 of the Customs Code.

67. The General Court further found, when comparing the necessity to carry out an examination of the economic conditions under both versions of the Customs Code that examinations were necessary for applications for similar authorisations. The appellants do not explain how the slightly different definitions of 'economic conditions' for processing under customs control according to Article 133(e) of Regulation No 2913/92 and for inward and outward processing and the operation of storage facilities for the customs warehousing of goods according to Article 211(4)(b) of the Customs Code differ so significantly that they should not be considered as equivalent for this purpose. The General Court was thus correct in concluding, in paragraph 53 of the order under appeal, that the cases dealt with under Regulation No 2913/92 and the implementing regulations in force at the time *Friesland Coberco* was decided and those at issue here are both forms of close and effective cooperation between the Member States and the Commission, which are certainly intended to inform the customs authorities as to the economic conditions.

68. None of the changes in legislation relied on by the appellants refer to the term 'shall be taken into account'. If the Commission were empowered to draw a conclusion which was then binding on the national customs authority, this would certainly also have shown in the wording of the implementing regulation. The General Court held, correctly, in paragraph 63 of the order under appeal, that if the new customs legislation had designed a system in which the national customs authorities were to be bound by the conclusions on the economic conditions made at EU level, the implementing regulation would have made express provision for this. The fact that it adhered to the wording that had been interpreted in *Friesland Coberco* to mean that it does not bind the national authorities is itself a strong argument against such a change in interpretation.

55 *Friesland Coberco*, paragraph 40.

56 Recital 5 of the Customs Code.

69. The General Court has thus not committed any error in law when it found that the Court's interpretation of Article 504(4) of Regulation No 2454/93 in *Friesland Coberco* is also valid for Article 259(5) of the implementing regulation, as the provisions in question are, to my mind, sufficiently similar for this purpose. It must be assumed that the Union legislature was fully aware of the decision in *Friesland Coberco* and that had it intended to change the position so as to render the Commission's conclusion as one which bound the national authorities, it could easily have done so.

(d) Additional remarks:

70. One might add in this context that a conclusion drawn under the rules of Article 259 of the implementing regulation obviously has 'legal effect'. In application of the Court's ruling in *Friesland Coberco* the national customs authorities will have to give 'adequate reasons for their decision' if they adopt a position different from that of the conclusion. This certainly constitutes a legal effect. The difficulty here from the appellants' perspective – and it is a decisive consideration for the purposes of any Article 263 TFEU analysis – is that the customs authorities are not bound to follow this conclusion.

71. One might further observe that there is no question here of the appellants not enjoying effective legal protection because they are not able to challenge the conclusion under Article 263 TFEU. In fairness to the appellants, this has not even been argued. But it is worth pointing out that the appellants are able to (and have in fact) challenged the decision of the Dutch customs authorities. They have subsequently filed appeals with the competent court challenging the denial of their objections to the granting of the inward processing authorisation to EMS by the Dutch customs authorities. In those proceedings, the question whether the economic conditions are fulfilled can be considered. [57]

72. In these circumstances, the first to third pleas must therefore be rejected as unfounded.

C. The fourth plea relating to the administrative practice

1. Arguments of the parties

73. The appellants argue that the General Court erred in failing to consider the administrative practice as evidence of the binding nature of the Commission's conclusions on the economic conditions. The wording of the first paragraph of point 3 of that administrative practice is the following: 'The Commission's conclusion shall be taken into account by the customs authority concerned and by any other customs authorities dealing with similar authorisations or applications (Article 259(5) [of the implementing regulation]). The Customs decision will be in line with the conclusion. *This means that the Commission's conclusion is binding on the competent customs authorities* and therefore they cannot derogate from it. …' [58]

74. The Commission points out that it is unclear whether, under its fourth plea, the appellants make a procedural claim, relying on a distortion of evidence or whether it is a substantive claim in that it criticises that the administrative practice was not treated as a source of law. In either case, it considers that the appellants' claim is unfounded.

57 See, in contrast, Advocate General Bobek's comments in his Opinion in *Belgium* v *Commission* (C-16/16 P, EU:C:2017:959, points 161 to 163) with regard to the different situation of a Member State to which a measure that does not qualify as an act for the purposes of Article 263 TFEU is addressed. However, see also judgment of 25 October 2017, *Slovakia* v *Commission* (C-593/15 P and C-594/15 P, EU:C:2017:800, paragraph 66) in which the Court rejected the idea of a broader interpretation of 'actionable measure' under such circumstances.

58 Emphasis added.

2. Assessment

75. The appellants' attack is aimed at paragraph 66 of the order under appeal in which the General Court found that the administrative practice merely replaced an earlier administrative arrangement regarding the application of the relevant provisions under Regulation No 2913/92. In so far as that earlier administrative arrangement did not follow what this Court had said in *Friesland Coberco*, it could not serve as a valid basis for the interpretation contained in the new administrative practice. The appellants do not attack the General Court's finding in paragraph 67 of the order under appeal. There, in a sentence beginning with the word 'Furthermore', the General Court held that while an administrative practice may be regarded as a valid aid to interpret the nature of the conclusions made on economic conditions, they do not have legally binding force and therefore, they will have to be in accordance with the actual provisions of the implementing regulation. It also held that they do not alter the scope of the implementing regulation. [59]

76. The General Court held, correctly, in my view, in paragraph 68 of the order under appeal that the interpretation contained in the new administrative practice is not in accordance with the actual provisions of the implementing regulation. The General Court's reasoning relies on several arguments and the arguments set out in paragraphs 67 and 68 of the order under appeal are sufficient in themselves to uphold the General Court's reasoning. It follows, therefore, that the appellants' fourth plea is ineffective and cannot proceed.

77. It is true that the administrative practice gave – or, at the very least, tended to give – an erroneous impression of whether the Commission's conclusions regarding the issue of 'economic conditions' were binding. The Rules of Procedure of the Court, as well as those of the General Court, give those courts the option to take cognisance of such facts by allowing them to make an order for costs in favour of the appellants, as the General Court did in this case. [60]

D. The fifth plea concerning the further requirements under paragraph 4 of Article 263 TFEU

78. Under its fifth plea the appellants claim that they fulfil the further requirements under the fourth paragraph of Article 263 TFEU, namely that they are directly and individually concerned.

79. Given, however, that the General Court was correct in upholding the Commission's plea of inadmissibility in light of the absence of a challengeable act, it did not commit any error in law in not considering the question, whether the appellants were directly and individually concerned. The finding that there was no challengeable act for the purposes of Article 263 TFEU was sufficient to dismiss the action.

VII. Costs

80. In accordance with Article 184(2) of the Rules of Procedure, where the appeal is unfounded, the Court is to make a decision as to the costs. Under Article 138(1) of those rules, applicable to the procedure on an appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

59 In this respect, the General Court correctly relies, by analogy, on the judgment of 15 February 1977, *Dittmeyer* (69/76 and 70/76, EU:C:1977:25, paragraph 4). Also, by analogy, one might also rely on a line of case-law of which the judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission* (C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraph 209) forms part and in which the Court held that, though internal measures adopted by the administration form rules of practice from which the administration may not depart in an individual case without giving reasons that are compatible with the principle of equal treatment, such internal measures are not themselves rules of law and can thus not amend or supplement the legally binding instruments adopted by the Union institution under the rules and procedures provided by the Treaty.

60 Paragraphs 72 to 75 of the order under appeal.

81. Since the Commission has applied for costs and the appellants have been unsuccessful in their appeal, the appellants should be ordered to bear their own costs and to pay those incurred by the Commission. Considerations as those set out in paragraphs 72 to 75 of the order under appeal, allowing for an order of the Commission to bear the costs according to Article 139 of the Rules of Procedure of the Court of Justice, cannot apply to this appeal.

VIII. Conclusion

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

(1) dismiss the appeal; and

(2) order thyssenkrupp Electrical Steel GmbH and thyssenkrupp Electrical Steel Ugo to pay the costs.