Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber, Extended Composition)

3 May 2018 *

(Dumping — Imports of tartaric acid originating in China — Modification of the definitive anti-dumping duty — Partial interim review — Action for annulment — Direct and individual concern — Admissibility — Determination of the normal value — Constructed normal value — Change in methodology — Individual treatment — Article 2(7)(a) and Article 11(9) of Regulation (EC) No 1225/2009 (now Article 2(7)(a) and Article 11(9) of Regulation (EU) 2016/1036) — Temporal adjustment of effects of annulment)

In Case T-431/12,

Distillerie Bonollo SpA, established in Formigine (Italy),

Industria Chimica Valenzana (ICV) SpA, established in Borgoricco (Italy),

Distillerie Mazzari SpA, established in Sant'Agata sul Santerno (Italy),

Caviro Distillerie Srl, established in Faenza (Italy),

Comercial Química Sarasa, SL, established in Madrid (Spain),

represented by R. MacLean, Solicitor, and A. Bochon, lawyer,

applicants,

v

Council of the European Union, represented by S. Boelaert and B. Driessen, acting as Agents, and initially by G. Berrisch, lawyer, and N. Chesaites, Barrister, subsequently by G. Berrisch, and finally by N. Tuominen, lawyer,

defendant,

supported by

European Commission, represented initially by M. França and A. Stobiecka-Kuik, and subsequently by M. França and J.-F. Brakeland, acting as Agents,

and by

* Language of the case: English.

Changmao Biochemical Engineering Co. Ltd, established in Changzhou (China), represented by E. Vermulst, S. Van Cutsem, F. Graafsma and J. Cornelis, lawyers,

interveners,

APPLICATION under Article 263 TFEU seeking annulment of Council Implementing Regulation (EU) No 626/2012 of 26 June 2012 amending Council Implementing Regulation (EU) No 349/2012 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China (OJ 2012 L 182, p. 1),

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed of A.M. Collins (Rapporteur), President, M. Kancheva, E. Bieliūnas, R. Barents and J. Passer, Judges,

Registrar: C. Heeren, Administrator,

having regard to the written part of the procedure and further to the hearing on 17 October 2017,

gives the following

Judgment

Background to the dispute

1 Tartaric acid is used, inter alia, in the production of wine and other beverages, as a food additive, and as a retardant in plaster. In both the European Union and Argentina, L+ tartaric acid is produced from by-products of winemaking, known as wine lees, which are transformed into calcium tartrate and subsequently into tartaric acid. In China, L+ tartaric acid and DL tartaric acid are produced from benzene, which is transformed into maleic anhydride, then into maleic acid and finally into tartaric acid. The tartaric acid produced by chemical synthesis has the same physical and chemical characteristics and the same basic uses as that produced from by-products of winemaking.

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

3 On 30 October 2004 the Commission published in the *Official Journal of the European Union* a notice of initiation of an anti-dumping proceeding concerning imports of tartaric acid originating in the People's Republic of China (OJ 2004 C 267, p. 4).

4 The complainant producers made their views known.

5 The Commission carried out verification visits at the premises of a range of EU producers, including the three companies referred to in paragraph 2 above and Distillerie Bonollo SpA.

6 On 27 July 2005 the Commission adopted Regulation (EC) No 1259/2005 imposing a provisional anti-dumping duty on imports of tartaric acid originating in the People's Republic of China (OJ 2005 L 200, p. 73) ('the provisional regulation').

7 On 23 January 2006 the Council of the European Union adopted Regulation (EC) No 130/2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of tartaric acid originating in the People's Republic of China (OJ 2006 L 23, p. 1) ('the definitive regulation').

8 Following the publication on 4 August 2010 of a notice of the impending expiry of certain anti-dumping measures (OJ 2010 C 211, p. 11), on 27 October 2010 the Commission received a request for an expiry review of those measures, lodged by the applicants Caviro Distillerie Srl, Comercial Química Sarasa, Distillerie Bonollo, Distillerie Mazzari and Industria Chimica Valenzana.

9 On 26 January 2011 the Commission published in the *Official Journal of the European Union* a notice of initiation of an expiry review and a review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China (OJ 2011 C 24, p. 14), pursuant to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51) ('the basic regulation') (replaced by Regulation (EU) 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)) and, more specifically, Article 11(2) of the basic regulation (now Article 11(2) of Regulation 2016/1036).

10 On 9 June 2011 the applicants submitted a request for a partial interim review concerning Changmao Biochemical Engineering Co. Ltd and Ninghai Organic Chemical Factory ('the two Chinese exporting producers'), pursuant to Article 11(3) of the basic regulation (now Article 11(3) of Regulation 2016/1036).

11 On 29 July 2011 the Commission published in the *Official Journal of the European Union* a notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China (OJ 2011 C 223, p. 16), in accordance with Article 11(3) of the basic regulation.

12 On 16 April 2012 the Council adopted Implementing Regulation (EU) No 349/2012 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of the basic regulation (OJ 2012 L 110, p. 3).

13 On the same date, the Commission sent the applicants the final disclosure document containing the essential facts and considerations on the basis of which it intended to recommend amending the anti-dumping measures in force.

14 On the same day, the applicants asked the Commission for clarification concerning the calculation of the normal value.

15 On 19 April 2012 the Commission sent its reply to the applicants.

16 On 25 April 2012 the applicants sent the Commission their observations on the final disclosure document, criticising in particular an alleged change in the methodology used to calculate the normal value. The applicants also requested a hearing with the Commission's representatives.

17 On 10 May 2012, at the hearing with the Commission's representatives, the applicants set out their objections to the position taken by that institution. They also submitted additional written observations on 16 May and 7 June 2012.

18 At the end of the partial interim review procedure concerning the two Chinese exporting producers, on 26 June 2012 the Council adopted Implementing Regulation (EU) No 626/2012 amending Implementing Regulation No 349/2012 (OJ 2012 L 182, p. 1) ('the contested regulation').

19 In essence, the contested regulation denies the two Chinese exporting producers market economy treatment ('MET') and, having constructed the normal value on the basis of information provided by a cooperating producer in the analogue country, namely Argentina, increases the anti-dumping duty applicable to the goods produced by the two Chinese exporting producers from 10.1% to 13.1% and from 4.7% to 8.3% respectively.

Procedure and forms of order sought

20 By application lodged at the Court Registry on 28 September 2012, the applicants brought the present action.

21 By letter lodged at the Court Registry on 5 December 2012, the applicants requested a stay of proceedings. By letter lodged at the Court Registry on 7 December 2012, the Council also requested a stay of proceedings.

22 On 13 December 2012 the President of the First Chamber of the General Court granted a stay of proceedings for a period of two years, pursuant to Article 77(c) of the Rules of Procedure of the General Court of 2 May 1991.

23 By documents lodged at the Court Registry on 31 January and 16 May 2013 respectively, the Commission and Changmao Biochemical Engineering sought leave to intervene in the present proceedings in support of the form of order sought by the Council.

24 By letter lodged at the Court Registry on 13 November 2014, the applicants requested that the stay on the proceedings continue. By letter lodged at the Court Registry on 19 November 2014, the Council expressed its agreement with that request.

25 On 27 January 2015 the General Court granted a stay of proceedings until 13 April 2015, pursuant to Article 77(c) of the Rules of Procedure of 2 May 1991.

26 By letter lodged at the Court Registry on 18 May 2015, the applicants requested an additional stay of proceedings. However, the Council having opposed that request by letter lodged at the Court Registry on 5 June 2015, the case could not be suspended on the basis of Article 77(c) of the Rules of Procedure of 2 May 1991.

27 By separate document lodged at the Court Registry on 29 June 2015, the Council raised a plea of inadmissibility in accordance with Article 114(1) of the Rules of Procedure of 2 May 1991.

28 On 22 April 2016, in accordance with Article 27(3) of the Rules of Procedure of the General Court, the present case was assigned to a new Judge-Rapporteur, attached to the Sixth Chamber, which, by order of 20 July 2016, joined the plea of inadmissibility to the substance and reserved the costs.

29 By decision of 9 September 2016, and by order of 15 September 2016, the President of the Sixth Chamber of the General Court granted the Commission and Changmao Biochemical Engineering leave to intervene, stating that, their applications to intervene having been lodged after the expiry of the period referred to in Article 116(6) of the Rules of Procedure of 2 May 1991, they were authorised to submit their observations during the oral procedure, on the basis of the report for the hearing which would have been communicated to them.

30 Following a change in the composition of the chambers of the General Court pursuant to Article 27(5) of the Rules of Procedure, the Judge-Rapporteur was assigned to the Eighth Chamber, to which the present case was consequently allocated.

31 Acting on a proposal from the Eighth Chamber, the General Court decided, pursuant to Article 28 of the Rules of Procedure, to refer the case to a chamber sitting in extended composition.

32 The applicants claim, in essence, that the Court should:

– declare the action admissible;

– annul the contested regulation, while maintaining its effects until the Council has adopted the measures necessary to comply with the Court's judgment;

– order the Council and any interveners to pay the costs.

33 The Council contends that the Court should:

– dismiss the action as inadmissible;

– in the alternative, dismiss the action as unfounded;

– order the applicants to pay the costs.

34 Acting on a proposal from the Judge-Rapporteur, the General Court (Eighth Chamber, Extended Composition) decided to open the oral procedure and, by way of measures of organisation of procedure as provided for under Article 89(3)(a) of the Rules of Procedure, requested the parties to answer certain written questions. The parties answered those questions within the prescribed period.

35 The parties presented oral argument and replied to the oral questions put by the Court at the hearing on 17 October 2017.

Law

Admissibility

36 The plea of inadmissibility raised by the Council is based on the applicants' lack of *locus standi* on the one hand, and their lack of interest in bringing proceedings on the other.

Locus standi

– *Arguments of the parties*

37 The Council contends that the contested regulation does no more than slightly increase the anti-dumping duty on imports of tartaric acid produced by the two Chinese exporting producers, without altering the other findings of Implementing Regulation No 349/2012, such as the dumping practised by any other Chinese exporting producer, the material injury to the Union industry, the causal link between the dumping and the injury, and the Union's interest in maintaining the measures. The Council adds that the contested regulation is a hybrid legal instrument. According to the Council, while it contains individual decisions for the two Chinese exporting producers, for the applicants it is a measure of general application. For the purposes of the admissibility of the action, the situation of exporting producers is therefore fundamentally different from that of EU producers, such as the applicants.

38 In that regard, the Council considers that the fact that the applicants triggered the adoption of the contested regulation by requesting a partial interim review is not decisive. According to the Council, if their request for a review had been rejected, the applicants could have challenged that decision. Since the partial interim review procedure was initiated at the applicants' request, the resulting contested regulation is a measure of general application for them, which they cannot challenge for various reasons.

39 First, according to the Council, the applicants are not directly concerned by the contested regulation, which merely establishes a revised anti-dumping duty for the two Chinese exporting producers. In that regard, the Council adds that the modification of the rate of anti-dumping duty applicable to imports from the two Chinese exporting producers is incapable of producing legal effects vis-à-vis the applicants because they do not pay any anti-dumping duty. Even if the revision of the rate in question were capable of having an economic impact on EU producers, including the applicants, that would not establish the legal effect required.

40 The applicants do not have a subjective right to have a certain level of anti-dumping duties imposed on their competitors. On the one hand, the imposition of anti-dumping duties has to be in the Union's interest. On the other hand, the Union industry has no subjective right to set a precise level of duty, since the level of the duty is dependent on confidential data from other parties and is based on an assessment of complex economic, political and legal situations.

41 Second, the Council argues that the applicants are not individually concerned by the contested regulation. The applicants' situation, as producers of tartaric acid, is similar to that of any entity operating on the EU tartaric acid market. In that regard, reference should be made by analogy to the case-law concerning State aid, which requires the applicants to demonstrate that their market position would be substantially affected by the modification of the anti-dumping duties introduced by the contested regulation. The mere fact that a measure may have some influence on the competitive relationships existing on the relevant market and that the applicants are in some sort of competitive relationship with an addressee of that measure is insufficient for them to be regarded as individually concerned.

42 Having regard to the profit margin of the Union industry during the review investigation period, the Council rejects as unsubstantiated the applicants' claim that the EU tartaric acid industry could easily disappear.

43 Furthermore, the Council maintains that the fact that the applicants actively participated in the administrative procedure is not sufficient for them to be regarded as being individually concerned. Moreover, the level of the anti-dumping duties is not based on data provided by the applicants but on data provided by the two Chinese exporting producers and by the cooperating producer in the analogue country or publicly available data.

44 In that context, the Council considers that the fact that the contested regulation explicitly refers to the applicants is irrelevant.

45 At the hearing, the Commission indicated that it supported the Council's objections concerning the applicants' lack of *locus standi*. However, in response to the questions put by the Court, it stated that the fact that the applicants do not pay any anti-dumping duty is only one element among others to be taken into consideration, and is not in itself a decisive factor in determining whether they are directly concerned by the contested regulation.

46 The applicants contest the Council's objections concerning their *locus standi* and maintain that they are directly and individually concerned by the contested regulation.

– *Findings of the Court*

47 Under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

48 As the contested regulation is not addressed to the applicants, it is necessary to begin by examining whether they are directly and individually concerned by it.

49 As regards whether the applicants are directly concerned, that condition requires, according to a formula often used in case-law, that the contested European Union measure must directly affect the legal situation of the applicant on the one hand, and there must be no discretion left to the addressees of that measure who are responsible for its implementation, on the other, that implementation being purely automatic and resulting from EU rules alone without the application of other intermediate rules (orders of 6 September 2011, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council*, T-18/10, EU:T:2011:419, paragraph 71, and of 14 January 2015, *SolarWorld and Others* v *Commission*, T-507/13, EU:T:2015:23, paragraph 40).

50 Given that the Member States, who were responsible for implementing the contested regulation, had no discretion as regards the rate of anti-dumping duty and the imposition of that duty on the goods concerned (see, to that effect, judgment of 12 December 2014, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council*, T-643/11, EU:T:2014:1076, paragraph 28 (not published)), the second requirement set out in paragraph 49 above has been met.

51 As regards the first of those requirements, contrary to the Council and the Commission's assertions, a restrictive interpretation of the requirement that the applicants' legal situation must be directly affected cannot be accepted.

52 In that regard, it is necessary to recall the Opinion of Advocate General Kokott in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:21, point 71), which points out that, in the case-law, actions for annulment brought by individuals against European Union acts have, perfectly correctly, repeatedly been admitted when the effects of those acts on the respective applicants are not legal, but primarily factual, in particular because the applicants are directly affected in their capacity as market participants in competition with other market participants.

53 Were the position championed by the Council and the Commission in the present case regarding the concept of direct concern correct, any action brought by an EU producer against a regulation imposing anti-dumping duties would have to be declared automatically inadmissible, as would any action brought by a competitor of the beneficiary of aid declared compatible with the internal market by the Commission at the end of the formal investigation procedure, as well as any action brought by a competitor against a decision declaring a concentration compatible with the internal market.

54 However, the case-law has declared these types of action admissible on many occasions.

55 First, in the sphere of anti-dumping, in the case which gave rise to the judgment of 20 March 1985, *Timex* v *Council and Commission* (264/82, EU:C:1985:119, paragraphs 12 to 16), which concerned a situation extremely similar to the present case, the Court explicitly ruled that the regulation in question was of direct concern to the applicant, an EU producer and competitor, which considered that the anti-dumping duties imposed were not sufficiently high. Furthermore, in the cases giving rise to the judgments of 8 July 1998, *CECOM* v *Council* (T-232/95, EU:T:1998:158), and of 28 October 1999, *EFMA* v *Council* (T-210/95, EU:T:1999:273), no plea of inadmissibility was raised either by the defendant or *ex officio* in respect of the actions brought by EU producers' associations against regulations imposing anti-dumping duties which those producers considered to be unsatisfactory.

56 Even if case-law has held that the action brought by a certain number of EU producers belonging to an association which had brought an anti-dumping complaint against the Commission's decision to accept undertakings by exporting producers in the context of an anti-dumping proceeding was inadmissible, that finding was based on the fact that that decision had been regarded as not directly affecting the applicants, as any effects would have stemmed from the anti-dumping regulation implementing those undertakings (see, to that effect, order of 14 January 2015, *SolarWorld and Others* v *Commission*, T-507/13, EU:T:2015:23, paragraphs 48, 52 and 58, confirmed by order of 10 March 2016, *SolarWorld* v *Commission*, C-142/15 P, not published, EU:C:2016:163, paragraphs 24 to 28). That is a very different situation from the present case.

57 Second, in the sphere of State aid, it has very often been held that competitors of aid beneficiaries were directly concerned by the Commission's decision declaring the aid in question compatible with the internal market (see, to that effect, judgments of 28 January 1986, *Cofaz and Others* v *Commission*, 169/84, EU:C:1986:42, paragraph 30; of 27 April 1995, *ASPEC and Others* v *Commission*, T-435/93, EU:T:1995:79, paragraphs 60 and 61; and of 22 October 1996, *Skibsværftsforeningen and Others* v *Commission*, T-266/94, EU:T:1996:153, paragraph 49). In that regard, it should be specified that the situation of a competitor of an aid beneficiary and that of a competitor of an exporting producer whose goods are subject to allegedly insufficient anti-dumping duties are in essence comparable for the purposes of analysing the condition of direct concern in the context of examining the admissibility of the action.

58 Third, there are numerous examples in the case-law of actions brought by competitors against decisions declaring concentrations compatible with the internal market in which it was held that the condition of direct concern had been satisfied (judgments of 19 May 1994, *Air France* v *Commission*, T-2/93, EU:T:1994:55, paragraph 41; of 3 April 2003, *BaByliss* v *Commission*, T-114/02, EU:T:2003:100, paragraph 89; and of 30 September 2003, *ARD* v *Commission*, T-158/00, EU:T:2003:246, paragraph 60). In particular, it is apparent from those cases that the applicants were recognised as being directly concerned, although they were not parties to the concentrations. Because the decisions at issue in those cases enabled the concentrations to be put into effect immediately, they were capable of bringing about an immediate change in the situation of the relevant markets. In addition, the General Court held that, as the intention of the parties to the concentration to bring about such a change was not in doubt, the undertakings operating on the relevant markets could, on the date of the contested decision, be certain of an immediate or imminent change in the state of the market (judgment of 4 July 2006, *easyJet* v *Commission*, T-177/04, EU:T:2006:187, paragraphs 31 and 32).

59 Having regard to the foregoing, it should be observed that the contested regulation terminates the partial interim review procedure, initiated at the applicants' request, by modifying the anti-dumping duties applicable to imports from the two Chinese exporting producers. In submitting their request for a partial interim review pursuant to Article 11(3) of the basic regulation, the applicants wanted the Commission and the Council to adopt suitable measures to offset the dumping that had caused them injury. In so far as the applicants triggered the partial interim review procedure, and as the measures adopted at the end of that procedure were intended to offset the dumping that caused the injury they have suffered as competing producers operating on the same market, they are directly concerned by the contested regulation.

60 The arguments put forward by the Council and the Commission cannot invalidate that conclusion.

61 First, the Council's argument relating to the fact that the modification of the anti-dumping duties applicable is incapable of producing legal effects vis-à-vis the applicants because they do not pay any anti-dumping duty must be rejected. That fact is not, in itself, decisive (see, to that effect, the case-law cited in paragraph 55 above), as moreover the Commission acknowledged at the hearing.

62 Moreover, it should be borne in mind that, as the applicants have correctly observed, the two Chinese exporting producers are not required to pay such duties either. Indeed, those duties are paid by importers in the European Union. In addition, Article 12 of the basic regulation (now Article 12 of Regulation 2016/1036), read in the light of recitals 16 and 18 thereof (now recitals 17 and 19 of Regulation 2016/1036), precludes the taking up or 'absorption' of anti-dumping duties by exporting producers.

63 Second, the Council's argument, supported by the Commission at the hearing, that the applicants have no subjective right to have a certain level of anti-dumping duties imposed on their competitors must be rejected. On the one hand, for the purposes of assessing the admissibility of the action, it is sufficient to examine whether the contested regulation directly affects the applicants, which is the case here, for the reasons set out above. On the other hand, it should be borne in mind that, as can be seen from the application, the applicants do not claim they have a subjective right to have a specific level of anti-dumping duties imposed, but confine themselves to criticising the Council and the Commission for breaching the rules laid down by the basic regulation in calculating the normal value.

64 Third, the Council's argument, supported by the Commission at the hearing, that once the Council and the Commission have agreed to initiate the partial interim review procedure, the applicants cannot dispute the outcome of that procedure must also be rejected. It is apparent, in particular from paragraph 16 of the plea of inadmissibility and paragraph 23 of the rejoinder, that that argument seems to be based on two considerations, namely that (i) the outcome of that procedure cannot lead to a result that is less favourable for the Union industry, because the anti-dumping duties will be either increased or maintained at their existing level, and (ii) the measure adopted at the end of that procedure is a measure of general application for the applicants.

65 The second aspect of that argument will be examined in the assessment of the condition relating to individual concern at paragraphs 74 to 91 below. The first aspect of the argument cannot be accepted for two reasons. First, the Council refers to no rule of law that would prevent it and the Commission from deciding to impose lower anti-dumping duties at the end of the interim review procedure, in which, moreover, the exporting producers concerned may take part. Indeed, the findings of the review investigation are not to be prejudged, for that could lead to the use of a different method were there to be a change in circumstances within the meaning of Article 11(9) of the basic regulation (now Article 11(9) of Regulation 2016/1036) or if the method initially used were found to be contrary to Article 2 of that regulation (now Article 2 of Regulation 2016/1036) (see, to that effect, judgment of 8 July 2008, *Huvis* v *Council*, T-221/05, not published, EU:T:2008:258, paragraphs 41 and 42). Second, were the Council and the Commission's position to be accepted, they would be able de facto to avoid judicial review by doing no more than slightly increasing anti-dumping duties following any request for an interim review from the Union industry, even if the proper application of the basic regulation should have given rise to a significantly higher increase. Such a possibility cannot be accepted.

66 Fourth, the arguments put forward by the Council on the basis of case-law in order to dispute whether the applicants are directly affected must be rejected.

67 First of all, the Council cites paragraph 75 of the order of 6 September 2011, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (T-18/10, EU:T:2011:419), according to which, while it cannot be precluded that the general prohibition of placing on the market provided for by the regulation in question may have consequences for the business activities of persons intervening upstream or downstream of that placing on the market, the fact remains that such consequences cannot be regarded as stemming directly from that regulation. That paragraph also states that, 'as regards the possible economic consequences of that prohibition, it must be borne in mind that, according [to] case-law, those consequences do not affect the applicants' legal situation, but only their factual situation'.

68 In that regard, it is apparent from reading paragraph 75 of the order of 6 September 2011, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (T-18/10, EU:T:2011:419), in its entirety that that paragraph concerned the question whether a regulation regarding the placing on the market of seal products directly affected only the situation of those who were active on that market or whether it also directly affected the situation of persons operating upstream, such as hunters; the General Court ruled out the latter possibility, considering that any effects would be indirect. That interpretation is also borne out by points 73 to 75 of Advocate General Kokott's Opinion in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:21). Accordingly, the Council may not invoke the order of 6 September 2011, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (T-18/10, EU:T:2011:419), the circumstances and issues of which are fundamentally different from those of the present case, in support of its line of argument.

69 The Council also refers to paragraph 40 of the order of 7 July 2014, *Group'Hygiène* v *Commission* (T-202/13, EU:T:2014:664), concerning an action for annulment of a directive. It can be seen from paragraphs 36 to 40 of that order that it is the national measures transposing the directive, and not the directive itself, that are liable to produce legal effects on the applicant's situation. Against that background, the General Court held that the applicant could not rely on the alleged financial repercussions of the directive in order to establish that it was directly concerned by it.

70 It must be pointed out that the circumstances and the issues of the order of 7 July 2014, *Group'Hygiène* v *Commission* (T-202/13, EU:T:2014:664), are not comparable to those of the present case. In the present case, the applicants do not contest a directive and there is no national implementing measure capable of affecting them directly. In fact, as the Council acknowledged in its response to the written questions put by the Court and at the hearing, the contested regulation contains no national implementing measure concerning the applicants. Although the Council invokes the findings set out, for the sake of completeness, in paragraph 40 of the order of 7 July 2014, *Group'Hygiène* v *Commission* (T-202/13, EU:T:2014:664), relating to the fact that the applicant's legal situation is not directly affected, the fact remains that the particular situation of the applicant in that case does not appear to be germane to the present dispute while, as recalled in paragraph 52 above, case-law allows for the admissibility of actions for annulment brought against European Union acts where the effects of those acts on the respective applicants are primarily factual.

71 Lastly, the Council cites paragraphs 78, 79 and 87 of the judgment of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council* (T-276/13, currently under appeal, EU:T:2016:340), in support of its arguments that the applicants are not directly affected.

72 It should be noted that paragraphs 75 to 87 of the judgment of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council* (T-276/13, currently under appeal, EU:T:2016:340), concerned a different issue from the present case. In particular, they examined the standing of the applicants, two associations of US producers whose goods had been subjected to anti-dumping duties, to bring proceedings in their own right and thus independently of their standing to bring proceedings as representatives of their members. Against that background, the General Court found that the applicant associations were not themselves affected by the anti-dumping regulation targeting their members' goods, except with regard to a plea relating to the protection of their procedural rights because of their participation in the anti-dumping proceeding. It follows that paragraphs 78, 79 and 87 of the judgment of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council* (T-276/13, currently under appeal, EU:T:2016:340), cannot be used to support the Council's line of argument.

73 Having regard to the foregoing, it must be held that the applicants are directly concerned by the contested regulation.

74 As regards the question whether the applicants are individually concerned, it is apparent from case-law that persons other than those to whom a measure is addressed may claim to be concerned within the meaning of the fourth paragraph of Article 263 TFEU only if that measure affects them by reason of certain attributes which are peculiar to them or by reason of circumstances in which they are differentiated from all other persons and by virtue of these factors distinguishes them individually just as in the case of the person addressed (judgment of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17, p. 223).

75 Regarding, more specifically, the sphere of anti-dumping, while it is true that, in the light of the criteria laid down in the fourth paragraph of Article 263 TFEU, regulations imposing anti-dumping duties are legislative in their nature and scope, inasmuch as they are of general application for the traders concerned, it is nonetheless not inconceivable that some of the provisions of those regulations may be of individual concern to certain traders (see, to that effect, judgment of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 19).

76 It follows that measures imposing anti-dumping duties may, without losing their character as regulations, be of individual concern in certain circumstances to certain traders which therefore have standing to bring an action for their annulment (judgment of 16 May 1991, *Extramet Industrie* v *Council*, C-358/89, EU:C:1991:214, paragraph 14).

77 Recognition of the right of certain categories of traders to bring an action for annulment of an anti-dumping regulation cannot, however, prevent other traders from being able to claim that they are individually concerned by such a regulation (judgments of 16 May 1991, *Extramet Industrie* v *Council*, C-358/89, EU:C:1991:214, paragraph 16, and of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 22). In that regard, it should be emphasised that there is no finite list of possible criteria to which the applicants' situation should correspond, so that the applicants may refer to the existence of a set of factors constituting such a situation (see, to that effect, judgment of 16 May 1991, *Extramet Industrie* v *Council*, C-358/89, EU:C:1991:214, paragraph 17).

78 For the purposes of that analysis, it is necessary to examine, first, the role played by the applicants in the anti-dumping proceeding and, second, their position on the market concerned by the contested regulation (see, to that effect, judgments of 20 March 1985, *Timex* v *Council and Commission*, 264/82, EU:C:1985:119, paragraphs 12 to 15; of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council*, T-276/13, currently under appeal, EU:T:2016:340, paragraph 122; and of 9 June 2016, *Marquis Energy* v *Council*, T-277/13, not published, currently under appeal, EU:T:2016:343, paragraph 84).

79 First, it is apparent from case-law that the active participation of an applicant in the administrative procedure, for example by way of a complaint, the communication of data, the filing of written observations or taking part in a hearing, is a relevant factor for establishing whether that applicant is individually concerned (see, to that effect, judgments of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraphs 24 to 26, and of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council*, T-276/13, currently under appeal, EU:T:2016:340, paragraphs 123 to 127).

80 Second, in order to assess whether an applicant's market position has been affected, the EU judicature relies on a series of factors such as whether the structure of the market is concentrated or fragmented, the market position of the applicant and the competitor in question in absolute and relative terms, and the extent of the contested measure's impact on the applicant's activities (see, to that effect, judgments of 20 March 1985, *Timex* v *Council and Commission*, 264/82, EU:C:1985:119, paragraph 15; of 16 May 1991, *Extramet Industrie* v *Council*, C-358/89, EU:C:1991:214, paragraph 17; of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council*, T-276/13, currently under appeal, EU:T:2016:340, paragraph 128; and of 9 June 2016, *Marquis Energy* v *Council*, T-277/13, not published, currently under appeal, EU:T:2016:343, paragraph 90).

81 It may be deduced from the EU judicature's assessment of this range of factors that the closer the competitive relationship between the applicant and the competitor in question, either because there is a reduced number of active operators on the market, or because the undertaking in question is the applicant's main competitor, and the more significant the negative consequences are for the applicant, the more appropriate it is to conclude that it is individually concerned by the contested measure.

82 It is in the light of those considerations that it is necessary to examine the applicants' situation in order to determine whether they are individually concerned by the contested regulation.

83 In the first place, regarding their participation in the administrative procedure, a criterion which is neither indispensable nor sufficient *per se*, but is nonetheless relevant, it is apparent from recital 2 of the contested regulation that the applicants triggered the partial interim review procedure by their request submitted on 9 June 2011 pursuant to Article 11(3) of the basic regulation. Moreover, it is also apparent from recital 2 of the contested regulation that the applicants are identified therein by name, which, contrary to the Council's assertions, is a relevant factor, together with other factors, for assessing whether they are individually concerned. Furthermore, they submitted written observations on at least five occasions during the interim review procedure, concerning the fact that the two Chinese exporting producers had been denied MET and the methodology for calculating the normal value applied by the Commission. They also took part in a meeting with the Commission's representatives on 10 May 2012. In addition, it is apparent from, in particular, recitals 39 and 41 of the contested regulation that that regulation explicitly refutes certain arguments put forward by the applicants during the review procedure.

84 It follows that the applicants actively participated in the administrative procedure and contributed significantly to the conduct and outcome thereof.

85 In the second place, regarding the criterion relating to the applicants' position on the market being affected, although the traditional case-law on anti-dumping does not generally reproduce the requirement that the effect on the applicant's position on the market concerned must be substantial, as in the case of State aid, the reasoning applied is essentially identical. Moreover, the applicants put forward no reason of principle that would, as they claim, justify the application of less stringent criteria for admissibility in the sphere of anti-dumping. Furthermore, the most recent case-law of the General Court refers to the requirement that the market position must be substantially affected (see, to that effect, judgments of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council*, T-276/13, currently under appeal, EU:T:2016:340, paragraphs 122 and 128, and of 9 June 2016, *Marquis Energy* v *Council*, T-277/13, not published, currently under appeal, EU:T:2016:343, paragraphs 84 and 90). Accordingly, the Council's argument that it is for the applicants to show that their position on the market has been substantially affected is well founded.

86 Concerning the requirement that the applicants' position on the market must be substantially affected having regard to the particular circumstances of the present case, it should first of all be noted that the Council itself concedes that the contested regulation does not call in question the findings of Implementing Regulation No 349/2012 concerning the existence of material injury to the Union industry and the existence of a causal link between the imports from China, including those from the two Chinese exporting producers, and that injury. Those findings, which, moreover, are not contested by the parties, are important for establishing whether the applicants were individually concerned by the contested regulation, which sought to adopt appropriate anti-dumping measures.

87 More specifically, the applicants submit, without being contradicted on that point by the Council or the Commission, that their production represents 73% of the production of tartaric acid by the Union industry. At the hearing, the Commission noted that the Union industry had a market share of 44% in 2012. The applicants also argued at the hearing, without being challenged by the Council or the Commission, that they included the main Union industry producers, including the largest producer,

namely Distillerie Mazzari. Moreover, it is apparent from the applicants' written pleadings and from recital 58 of Implementing Regulation No 349/2012 that the market in question is characterised by a small number of EU producers and that it is therefore relatively concentrated.

88 In addition, the applicants submit that, as competitors of the two Chinese exporting producers, they have experienced the serious adverse effects of dumping, in particular, loss of market shares and job losses of 28%, and that such practices may force them out of the market. Although the Council disputes the alleged risk of the applicants being forced out of the market, it must be pointed out that recitals 75 and 77 of Implementing Regulation No 349/2012, adopted only two months before the contested regulation, report a decrease in the EU producers' market share of more than 7 points between 2007 and 2010 and a 28% decrease in the level of employment over the same period. Furthermore, recital 80 of Implementing Regulation No 349/2012 indicates that the Union industry remained vulnerable to the injurious effects of dumping. Accordingly, it cannot be denied that the applicants experienced the serious adverse effects of the dumping that the contested regulation sought to eliminate. Moreover, according to recital 62 of Implementing Regulation No 349/2012, the volume of imports into the European Union of the product in question from Chinese exporting producers subject to anti-dumping measures reached a market share of over 12% in 2010, which is substantial.

89 At the hearing, the Commission argued that the findings relating to Changmao Biochemical Engineering — represented at the hearing — cannot be taken into account in order to examine whether the applicants' market position was substantially affected. That argument cannot be accepted, for several reasons. First of all, it should be borne in mind that the contested regulation sought to adopt appropriate anti-dumping duties to offset the dumping connected with imports of goods from Changmao Biochemical Engineering and Ninghai Organic Chemical Factory. Indeed, goods were in fact imported from Changmao Biochemical Engineering. Furthermore, at the time the action was brought, there was nothing to prevent the findings relating to Changmao Biochemical Engineering from being taken into account in order to establish whether the applicants were individually concerned. In addition, it should be noted that the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372), annulled the contested regulation only in so far as it infringed Changmao Biochemical Engineering's rights of defence. Lastly, as indicated in paragraphs 105 to 113 below, the applicants also retain an interest in bringing proceedings in order to avoid the illegalities complained of from recurring in the future, in particular in the context of the planned retention of the anti-dumping duties.

90 In that regard, it should be noted that, on 19 April 2017, the Commission published in the *Official Journal of the European Union* a notice of initiation of an expiry review of the anti-dumping measures applicable to imports of tartaric acid originating in the People's Republic of China (OJ 2017 C 122, p. 8), pursuant to Article 11(2) of the basic regulation. It can be seen from that notice that the Council and the Commission plan to maintain the anti-dumping duties concerning the goods from all the exporting producers involved, including Changmao Biochemical Engineering.

91 Having regard to the foregoing, it must be concluded that the applicants display attributes peculiar to them as competitors of the two Chinese exporting producers and find themselves in circumstances which differentiate and distinguish them individually just as in the case of the addressees of the contested regulation.

92 In addition, unlike in the case of an exporting producer or an importer of goods subject to anti-dumping duties, the contested regulation is, in principle, incapable of laying down national implementing measures concerning the applicants, given that it does not impose anti-dumping duties on their goods (see, to that effect, order of 21 January 2014, *Bricmate* v *Council*, T-596/11, not published, EU:T:2014:53, paragraphs 71 to 73). It follows that the applicants do not, in principle, have any alternative national legal remedies to challenge the unlawfulness of the contested regulation.

93 Even though that fact cannot have the effect of setting aside the condition relating to individual concern, which is expressly laid down by the Treaty on the Functioning of the European Union, it should be borne in mind that the condition that a person can bring an action challenging a regulation only if he is concerned both directly and individually must be interpreted in the light of the right to effective judicial protection, taking account of the various circumstances that may distinguish an applicant individually (see, to that effect, judgments of 25 July 2002, *Unión de Pequeños Agricultores* v *Council*, C-50/00 P, EU:C:2002:462, paragraph 44; of 1 April 2004, *Commission* v *Jégo-Quéré*, C-263/02 P, EU:C:2004:210, paragraph 36; and of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission*, C-456/13 P, EU:C:2015:284, paragraph 44).

94 In the light of all of the foregoing, it must be held that the applicants are directly and individually concerned by the contested regulation within the meaning of the second part of the fourth paragraph of Article 263 TFEU.

95 In view of that conclusion, there is no need for the Court to give a ruling on the applicants' *locus standi* under the third part of the fourth paragraph of Article 263 TFEU, concerning the admissibility of an action brought against a regulatory act which is of direct concern to the applicant and does not entail implementing measures, issues which were commented on by the parties in response to the written questions put by the Court and at the hearing.

Interest in bringing proceedings

– *Arguments of the parties*

96 The Council contends that the applicants have no interest in annulment of the contested regulation because that annulment would mean that the anti-dumping duties set by Implementing Regulation No 349/2012, which are lower, would apply with retroactive effect as from the date of entry into force of the contested regulation.

97 It adds that the conditions for maintaining the effects of the contested regulation pursuant to the second paragraph of Article 264 TFEU are not satisfied. In particular, it is essential to take into account the interest of importers that would have to pay illegal anti-dumping duties pending the adoption of a new regulation.

98 In response to the written questions put by the Court concerning the consequences of the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372), the Council maintains that the present dispute has become devoid of purpose as regards the anti-dumping duties imposed on Changmao Biochemical Engineering's goods. Accordingly, the subject matter of the present dispute is confined to the anti-dumping duties imposed on Ninghai Organic Chemical Factory's goods.

99 Concerning the issue of the applicants' interest in bringing proceedings, the Commission argued at the hearing that the nature of the illegalities complained of was not such that they were liable to recur in the future independently of the particular circumstances of the present case within the meaning of the judgment of 15 December 2016, *Gul Ahmed Textile Mills* v *Council* (T-199/04 RENV, not published, currently under appeal, EU:T:2016:740). In fact, the illegalities complained of are closely linked to the particular circumstances of the case.

100 The applicants contest the objections to their interest in bringing proceedings.

– *Findings of the Court*

101 It is settled case-law that an action for annulment brought by a natural or legal person is inadmissible unless the applicant has an interest in seeing the contested measure annulled (see judgment of 20 June 2001, *Euroalliages* v *Commission*, T-188/99, EU:T:2001:166, paragraph 26 and the case-law cited). This supposes that the action must be capable, if successful, of procuring an advantage to the party bringing it (see judgment of 17 April 2008, *Flaherty and Others* v *Commission*, C-373/06 P, C-379/06 P and C-382/06 P, EU:C:2008:230, paragraph 25 and the case-law cited).

102 In the present case, the applicants do not request that higher anti-dumping duties be imposed with retroactive effect but that the duties resulting from the contested regulation be replaced from the date on which the Council adopts a new regulation. Therefore, contrary to the Council's assertions, it cannot be inferred that the applicants' claim disregards overriding considerations of legal certainty involving all the interests, public as well as private, at stake (see, to that effect, judgment of 8 September 2010, *Winner Wetten*, C-409/06, EU:C:2010:503, paragraph 66).

103 In that regard, it should be borne in mind that, where the aim of an action is not to annul the effects of the contested measure but to replace them by a more stringent measure imposing a higher anti-dumping duty, the EU judicature may exercise the power conferred on it by the second paragraph of Article 264 TFEU in order to maintain the anti-dumping duty imposed by the regulation that is being contested until the competent institutions have adopted the measures needed to comply with the judgment (judgment of 20 March 1985, *Timex* v *Council and Commission*, 264/82, EU:C:1985:119, paragraph 32; see also, by analogy, judgment of 29 June 2000, *Medici Grimm* v *Council*, T-7/99, EU:T:2000:175, paragraph 55).

104 In those circumstances, the applicants have an interest in seeking annulment of the contested regulation, which is capable of procuring them an advantage. Accordingly, the Council's argument must be rejected.

105 Regarding the issue of the effects of the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372), as is apparent from the responses to the written questions put by the Court, the parties agree that the present dispute has not become entirely devoid of purpose as a result of that judgment, in so far as the Council does not deny that the present dispute retains its purpose at least as regards the application of the contested regulation to Ninghai Organic Chemical Factory's goods.

106 Indeed, the contested regulation has been annulled only in so far as it concerns Changmao Biochemical Engineering and thus remains fully in force in so far as it concerns the goods from the other exporting producer involved, namely Ninghai Organic Chemical Factory. Furthermore, it was annulled in so far as it infringed the rights of the defence.

107 According to case-law, in the context of the annulment of a measure for infringement of essential procedural requirements, the procedure for replacing such a measure may, in principle, be resumed at the very point at which the illegality occurred (see, to that effect, judgment of 15 October 2002, *Limburgse Vinyl Matschappij and Others* v *Commission*, C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P, EU:C:2002:582, paragraphs 45 and 73).

108 It is also apparent from case-law that an applicant may retain an interest in seeking the annulment of an act of an EU institution in order to prevent its alleged unlawfulness from recurring in the future (judgments of 7 June 2007, *Wunenburger* v *Commission*, C-362/05 P, EU:C:2007:322, paragraph 50, and of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 48).

109 In that regard, it should be noted that, in the present action, the applicants contest in several respects the method chosen by the Council and the Commission in the contested regulation to calculate the normal value and hence the dumping margin, a method which is liable to be reused in the future, in particular as regards imports of tartaric acid originating in China.

110 In addition, the Commission's argument, based on the judgment of 15 December 2016, *Gul Ahmed Textile Mills* v *Council* (T-199/04 RENV, not published, currently under appeal, EU:T:2016:740), that the irregularities complained of in the present case are closely linked to the particular circumstances of that case and cannot recur independently thereof must be rejected. First, the use of an incorrect method to calculate normal value is liable to recur in the future independently of the particular circumstances of the present case. Second, the decisive element referred to in the judgment of 15 December 2016, *Gul Ahmed Textile Mills* v *Council* (T-199/04 RENV, not published, currently under appeal, EU:T:2016:740), is the fact that the irregularities are liable to recur in the future, even if the contested measure has ceased to have effect, and not that there is a possibility of their doing so independently of the particular circumstances of the case.

111 Moreover, as indicated in paragraph 90 above, on 19 April 2017 the Commission published a notice of initiation of an expiry review of the anti-dumping measures applicable to imports of tartaric acid originating in China.

112 It can be seen from that notice that the Commission currently plans to maintain the measures stemming from the contested regulation that remain in force as regards Ninghai Organic Chemical Factory's goods, without prejudice to the possibility of taking appropriate measures to correct the infringement of essential procedural requirements established in respect of Changmao Biochemical Engineering in the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372).

113 Having regard to all of the foregoing, the applicants retain an interest in bringing proceedings. The action must therefore be declared admissible.

Substance

114 In support of their action, the applicants put forward five pleas in law, alleging (i) infringement of Article 11(9) of the basic regulation owing to the change in the methodology used to calculate the normal value, (ii) infringement of Article 2(7)(a) of the basic regulation (now Article 2(7)(a) of Regulation 2016/1036), read in conjunction with Article 2(1), (2) and (3) of that regulation (now Article 2(1), (2) and (3) of Regulation 2016/1036), by using a constructed normal value rather than the actual domestic sales prices in the analogue country, (iii) infringement of Article 2(3) of the basic regulation by constructing the normal value on the basis of the costs in a country other than the analogue country, (iv) infringement of Article 2(3) of the basic regulation by constructing the normal value using a raw material which was not equivalent, and (v) infringement of the rights of the defence and failure to state reasons.

First plea in law: infringement of Article 11(9) of the basic regulation

– *Arguments of the parties*

115 By the first plea, the applicants submit that the contested regulation infringes Article 11(9) of the basic regulation in so far as the Council changed the methodology used to calculate the normal value, when this was not justified by a change in circumstances. In particular, they criticise the contested regulation for constructing the normal value rather than using actual domestic sales prices.

116 Although the applicants acknowledge that it was inevitable that the methodology applied to the two Chinese exporting producers, which were no longer eligible for MET, would be changed by using an analogue country, they consider that the Council should have used the actual domestic sales prices in the analogue country, as it had done when conducting the initial investigation for exporting producers that had not requested MET.

117 The Council, supported by the Commission as regards that plea, rejects the applicants' arguments.

118 More specifically, the Council remarks that, during the initial investigation, the two Chinese exporting producers were granted MET and their normal value was therefore established on the basis of their actual domestic sales prices, pursuant to Article 2(7)(b) of the basic regulation (now Article 2(7)(b) of Regulation 2016/1036). According to the Council, because the contested regulation concluded that the conditions for granting them MET were no longer satisfied, the method used during the initial investigation for the two Chinese exporting producers could no longer be used and the normal value had to be calculated in accordance with Article 2(7)(a) of the basic regulation. Accordingly, Article 11(9) of the basic regulation is not applicable in the present case.

119 The Council considers that the applicants in fact claim that the contested regulation should have applied the same method to the two Chinese exporting producers as that used during the initial investigation vis-à-vis the other, non-cooperating exporting producers. In its view, that argument must be rejected, because Article 11(9) of the basic regulation concerns the application of the same method to the same economic entity during both the initial investigation and the review investigation. Therefore, the Council rejects the argument that a single investigation is carried out in respect of all exports from China of the product concerned. In fact, many methodologies are applied at the same time during an investigation depending on the specific situation of each exporting producer, sampled or not sampled, cooperating or non-cooperating.

120 In addition, the applicants' interpretation would remove any distinction between cooperating exporting producers and non-cooperating exporting producers, which would be contrary to the principle of non-discrimination.

121 Furthermore, the Council notes that, during the initial investigation, the dumping margins of the two Chinese exporting producers were calculated using data relating to the synthetic production process. The applicants' interpretation would entail basing the calculation of the normal value on data relating to the natural production process for the first time, whereas the export price would still be calculated using data relating to the synthetic production process, which would distort the comparison.

122 Lastly, the Council refers to the obligation to make a fair comparison, arising from Article 11(9) of the basic regulation, read in conjunction with Article 2(10) and (11) thereof (now Article 2(10) and (11) of Regulation 2016/1036). Although it acknowledges that Article 2(10) of the basic regulation deals with the comparison between the normal value and the export price, that provision also means that the Council must ensure that the normal value is calculated in such a way as to guarantee that the subsequent comparison is fair. In the present case, in view of the differences between the production processes in Argentina and China, it would have been unfair to have relied upon the Argentinian producer's actual domestic sales prices.

– *Findings of the Court*

123 By the first plea in law, the applicants, in essence, criticise the Council for constructing the normal value used to calculate the dumping margin of the two Chinese exporting producers, rather than using the actual domestic sales prices in the analogue country, as it had done for producers not granted MET during the initial investigation. According to the applicants, that approach is contrary to Article 11(9) of the basic regulation.

124 In that regard, it should be borne in mind that the rules for calculating normal value are set out in Article 2(1) to (7) of the basic regulation (now Article 2(1) to (7) of Regulation 2016/1036). For imports from a non-market economy country which is a member of the World Trade Organisation (WTO) at the date of the initiation of the investigation, normal value is to be determined, in principle, using the specific method laid down in Article 2(7)(a) of the basic regulation. According to that method, normal value is to be determined, inter alia, on the basis of the price or constructed value in a market economy third country — the analogue country.

125 By way of exception, under Article 2(7)(b) of the basic regulation, as regards imports from non-market economy countries, normal value is to be determined in accordance with Article 2(1) to (6) of that regulation where it is shown that market economy conditions prevail for the producer or producers concerned (see, to that effect, judgments of 28 October 2004, *Shanghai Teraoka Electronic* v *Council*, T-35/01, EU:T:2004:317, paragraph 50, and of 26 September 2012, *LIS* v *Commission*, T-269/10, not published, EU:T:2012:474, paragraph 39). It should be borne in mind that Article 2(1) to (6) of the basic regulation contains the rules to be applied when determining normal value for imports from market economy countries.

126 Furthermore, under Article 11(9) of the basic regulation, in all review investigations, the Commission, provided that circumstances have not changed, is to apply the same methodology as in the investigation which led to the duty being imposed, with due account being taken of Article 2 of that regulation.

127 It is apparent from Article 11(9) of the basic regulation that, as a general rule, in the context of a review, the EU institutions are required to apply the same method, including when comparing the export price and the normal value, as the method used in the initial investigation which led to the duty being imposed. That provision provides for an exception allowing the institutions to apply a different method from that used in the initial investigation insofar as circumstances have changed. It follows from that same provision that the method applied must be consistent with Article 2 of the basic regulation (judgment of 8 July 2008, *Huvis* v *Council*, T-221/05, not published, EU:T:2008:258, paragraphs 41 and 42).

128 It is in the light of those principles that the present case must be examined.

129 It is apparent from recitals 18 to 28 of the provisional regulation and recital 13 of the definitive regulation that, during the initial investigation, as regards the two Chinese exporting producers, which had shown that market economy conditions prevailed for them and which had accordingly been granted MET, the Commission calculated the normal value by applying the rules laid down in Article 2(1) to (6) of the basic regulation, in particular on the basis of the actual domestic sales price charged by each exporting producer. As regards the exporting producers not granted MET during the initial investigation, it can be seen from recitals 29 to 34 of the provisional regulation and recital 13 of the definitive regulation that the normal value was established on the basis of information received from the producer in the analogue country, in particular, the prices paid on the Argentinian domestic market, applying the rules laid down in Article 2(7)(a) of the basic regulation.

130 According to recitals 15 to 21 of the contested regulation, the two Chinese exporting producers were denied MET during the review investigation. For that reason, the normal value could no longer be established on the basis of the actual domestic sales price charged by each of the two Chinese exporting producers, applying the rules laid down in Article 2(1) to (6) of the basic regulation. As the applicants acknowledge, this does not in itself constitute a change in methodology contrary to Article 11(9) of the basic regulation.

131 However, it is apparent from recitals 27 to 29 of the contested regulation that, for the two Chinese exporting producers, during the review investigation, the normal value was constructed, in essence, on the basis of the costs of production in Argentina and not using that country's domestic sales prices.

132 Contrary to the Council's assertions, this constitutes a change in methodology within the meaning of Article 11(9) of the basic regulation. According to that provision, in all review investigations, the Commission is to apply 'the same methodology as in the investigation which led to the duty'. In the present case, the normal value for exporting producers not granted MET had been calculated on the basis of the Argentinian domestic sales prices during the initial investigation, whereas it was constructed, in essence, on the basis of the costs of production in Argentina during the review investigation of the two Chinese exporting producers that were no longer eligible for MET. In that regard, it should be emphasised that the text of Article 11(9) of the basic regulation refers to applying the same method in the initial investigation and in the review investigation. Accordingly, contrary to the Council's assertions, that provision does not confine itself to merely requiring the same method to be applied to the same economic entity.

133 It is clear that different methodologies may be applied in order to calculate the normal value for exporting producers that, being in different situations, are subject to different provisions of the basic regulation. This is the case, for example, for exporting producers granted MET and those not granted MET. However, in principle, under Article 11(9) of the basic regulation, the EU institutions are required to apply the same method in order to calculate the normal value for exporting producers not granted MET during the initial investigation and the review investigation, subject to a change in circumstances or the fact that the method initially used has been found to be contrary to Article 2 of that regulation.

134 In the present case, the contested regulation does not refer to a change in circumstances. Although recital 27 of the contested regulation states that the choice of methodology applied stems from the differences between the processes for producing tartaric acid in Argentina and China, respectively the natural process and the synthetic process, those differences existed and were already known about at the initial investigation stage, as the applicants correctly assert.

135 It should be noted that the Council contends in its written pleadings that a comparison between the normal value calculated using domestic sales prices in Argentina, and thus based on data relating to the natural production process, on the one hand, and the two Chinese exporting producers' export prices, relating to the synthetic production process, on the other, would be distorted and even unfair. When questioned on the implications of that argument at the hearing, the Council argued that such a method of calculating anti-dumping duties would be contrary to Article 2 of the basic regulation.

136 In that regard, it should be noted that the contested regulation does not state that the initial method has been found to be contrary to Article 2 of the basic regulation, which is also confirmed by the fact that the anti-dumping duty in force for the other exporting producers is still based on the normal value determined using the initial method. Were the Council's argument to be accepted, the result would be that the application of that method to the other exporting producers, whose duties are still set on the basis of that method, would be unlawful. However, it must be pointed out that the Council and the Commission have not modified the anti-dumping duty applicable to the other exporting producers in any way since the adoption of the provisional regulation.

137 Furthermore, that argument must be rejected on the merits, in view of the fact that the tartaric acid produced by chemical synthesis has the same characteristics and the same basic uses as that produced from by-products of winemaking, as indicated in paragraph 1 above. Accordingly, a comparison between the normal value calculated using the data relating to the natural production process and the export prices based on data relating to the synthetic production process does not appear to be contrary to Article 2 of the basic regulation.

138 It should be added that the Council cannot justify the change in methodology merely by considering that the method used by the contested regulation is more appropriate. Indeed, according to case-law, it is not sufficient that a new method be more appropriate than the former method, where that former method is consistent with Article 2 of the basic regulation (judgment of 8 July 2008, *Huvis* v *Council*, T-221/05, not published, EU:T:2008:258, paragraph 50).

139 Lastly, the argument, put forward by the Council, that the applicants' interpretation would remove any distinction between cooperating and non-cooperating exporting producers, must be rejected. It is apparent from recital 22 of the contested regulation that the two Chinese exporting producers cooperating with the investigation, which satisfy the conditions laid down in Article 9(5) of the basic regulation (now Article 9(5) of Regulation 2016/1036), were granted individual treatment. Therefore, unlike the other, non-cooperating exporting producers, they were granted an individual anti-dumping duty based on their respective export prices.

140 Moreover, it is apparent from the case-law that, under Article 9(5) of the basic regulation, an individual anti-dumping duty is usually calculated by comparing the normal value applicable to all the exporting producers with the individual export prices of the producer in question (see, to that effect, judgments of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74, paragraph 130, and of 26 November 2015, *Giant (China)* v *Council*, T-425/13, not published, EU:T:2015:896, paragraph 47). Therefore, the argument put forward by the Council and the Commission at the hearing, seeking to set aside the first plea in law on the basis of Article 9(5) of the basic regulation, must be rejected.

141 It should be noted that it is logical that, where several exporting producers are granted MET, the normal value will be different for each, given that it is calculated on the basis of their respective data. By contrast, there is no reason for the normal value to differ in the case of several exporting producers that are denied MET, given that, in that situation, the calculations of the normal value are carried out on the basis of data from an analogue country and thus irrespective of their respective data. In that second situation, an exporting producer may always apply for individual treatment, which means that an individual dumping margin will be calculated by comparing the normal value, which is the same for all, with its own export prices, instead of comparing the normal value with the industry's export prices.

142 In the light of the foregoing, the first plea in law must be upheld. The contested regulation must therefore be annulled.

143 Accordingly, there is no need for the Court to examine the other pleas in law raised by the applicants.

Request for the effects of the contested regulation to be maintained

– *Arguments of the parties*

144 In the event of the action for annulment being upheld, the applicants claim that the Court should maintain the effects of the contested regulation in force until the Council has adopted appropriate measures to comply with the judgment of the Court, in accordance with the second paragraph of Article 264 TFEU. In that regard, the applicants claim that merely annulling the contested regulation would have the effect of placing them in an even more difficult situation, as they would be exposed to dumping on the part of the two Chinese exporting producers pending the adoption of implementing measures by the Council. They state that the purpose of their action is not to secure the annulment of all the effects of the contested regulation, but rather to have that regulation corrected. Therefore, it is inappropriate to confer an unjustified advantage on the two Chinese exporting producers.

145 According to the Council, the applicants have not shown that the conditions for applying the second paragraph of Article 264 TFEU were satisfied in the present case. In particular, the Council notes that all of the interests at stake must be taken into account, especially those of the importers that will have to pay illegal anti-dumping duties pending action by the institutions. Moreover, the applicants have not established that there are important grounds of legal certainty for maintaining the effects of the contested regulation.

– *Findings of the Court*

146 In view of the annulment effected by the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372), the applicants' request cannot be upheld as regards Changmao Biochemical Engineering. However, it can be as regards Ninghai Organic Chemical Factory.

147 In that regard, it should be noted that the action does not seek to have the anti-dumping duty resulting from the contested regulation declared void, but to have it replaced by a more stringent measure imposing a higher anti-dumping duty by applying a different calculation method. Furthermore, since the consequences of merely annulling the contested regulation could undermine the general interest of the European Union's anti-dumping policy, it is necessary, in order to ensure that such measures are effective and contrary to the Council's objections, to maintain the anti-dumping duty resulting from the contested regulation until the institutions have adopted the measures needed to comply with this judgment, in accordance with the second paragraph of Article 264 TFEU (judgment of 20 March 1985, *Timex* v *Council and Commission*, 264/82, EU:C:1985:119, paragraph 32).

148 In addition, reference should be made to paragraphs 101 to 113 above as regards the applicants' interest in bringing proceedings despite the annulment of the contested regulation.

149 Therefore, it is necessary to grant the request for the effects of the contested regulation to be maintained in so far as it has not been annulled by the judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372).

Costs

150 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicants.

151 In accordance with Article 138(1) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. Consequently, the Commission is to bear its own costs.

152 Under Article 138(3) of the Rules of Procedure, the Court may order an intervener other than those referred to in Article 138(1) and (2) to bear its own costs. In the circumstances of the present case, it is appropriate to order Changmao Biochemical Engineering to bear its own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **Annuls Council Implementing Regulation (EU) No 626/2012 of 26 June 2012 amending Council Implementing Regulation (EU) No 349/2012 imposing a definitive anti-dumping duty on imports of tartaric acid originating in the People's Republic of China;**

2. **Maintains the anti-dumping duty imposed by Implementing Regulation No 626/2012 as regards Ninghai Organic Chemical Factory's goods until the European Commission and the Council of the European Union have adopted the measures necessary to comply with this judgment;**

3. **Orders the Council to bear its own costs and to pay those incurred by Distillerie Bonollo SpA, Industria Chimica Valenzana (ICV) SpA, Distillerie Mazzari SpA, Caviro Distillerie Srl and Comercial Química Sarasa, SL;**

4. **Orders the Commission to bear its own costs;**

5. **Orders Changmao Biochemical Engineering Co. Ltd to bear its own costs.**

Collins Kancheva Bieliūnas

Barents Passer

Delivered in open court in Luxembourg on 3 May 2018.

E. Coulon
Registrar

S. Frimodt Nielsen
President