



Reports of Cases

JUDGMENT OF THE GENERAL COURT (First Chamber)

18 November 2015 *

(Dumping — Imports of certain compressors originating in China — Partial refusal to refund the anti-dumping duties paid — Determination of the export price — Deduction of anti-dumping duties — Adjustment of the temporal effects of an annulment)

In Case T-74/12,

Mecafer SA, established in Valence (France), represented by R. MacLean, Solicitor, and A. Bochon, lawyer,

applicant,

v

European Commission, represented by A. Stobiecka-Kuik, K. Talabér-Ritz and T. Maxian Rusche, acting as Agents,

defendant,

ACTION for the partial annulment of Commission Decision C(2011) 8804 final of 6 December 2011 concerning applications for a refund of anti-dumping duties paid on imports of certain compressors originating in the People's Republic of China, and, in the event that the General Court should annul that decision, for the maintenance in force of the effects of that decision until the Commission has adopted the measures necessary to comply with the judgment of the General Court in this case,

THE GENERAL COURT (First Chamber),

composed of H. Kanninen, President, I. Pelikánová and E. Buttigieg (Rapporteur), Judges,

Registrar: I. Dragan, Administrator,

having regard to the written procedure and further to the hearing on 12 December 2014,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

- 1 The applicant, Mecafer, imports into the European Union air compressors manufactured by Nu Air (Shanghai) Compressors and Tools Co. Ltd ('Nu Air Shanghai' or 'the exporting producer'), a company established in China. The applicant also distributes and sells air compressors manufactured by Nu Air Compressors and Tools SpA, an Italian company that is the ultimate parent company of the Nu Air group, to which the exporting producer belongs. At the material time in the present case, the applicant was part of the Nu Air group and was therefore related to the exporting producer.
- 2 By Regulation (EC) No 261/2008 of 17 March 2008, the Council of the European Union imposed a definitive anti-dumping duty on imports of certain compressors originating in the People's Republic of China (OJ 2008 L 81, p. 1). Compressors manufactured by Nu Air Shanghai and covered by Regulation No 261/2008 ('the product concerned') were made subject to an anti-dumping duty of 13.7%.
- 3 Between June 2009 and July 2010, the applicant filed, in accordance with Article 11(8) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended (replaced by 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'), five applications for a refund of definitive anti-dumping duties imposed by Regulation No 261/2008, which it had paid on imports of compressors manufactured by Nu Air Shanghai, for a total amount of EUR 576 474.76. Those applications were submitted to the European Commission via the competent national authorities in France.
- 4 The Commission opened an investigation covering the period between 1 September 2008 and 31 December 2009 ('the refund investigation period').
- 5 On 6 April 2011, the Commission sent to the applicant an information document containing the essential facts and considerations on the basis of which it proposed to set the revised dumping margin for Nu Air Shanghai at 11.2% and to grant a partial refund to the applicant.
- 6 On the same day, the Commission sent a document to Nu Air Shanghai and its related companies explaining the calculation method used to determine the revised dumping margin for Nu Air Shanghai.
- 7 On 26 April 2011, the applicant sent the Commission its comments on the method used to calculate the dumping margin. In particular, it invoked Article 11(10) of the basic regulation in order to challenge the deduction of the anti-dumping duties from the calculation of the export price. Finally, the applicant requested the Commission to allow it to set out its views on those issues at a formal hearing.
- 8 That hearing took place on 31 May 2011.
- 9 By e-mail of 26 July 2011, the applicant asked the Commission to disclose to it the calculations on which the Commission had relied in order to deduct the anti-dumping duties from the export price constructed on the basis of Article 2(9) of the basic regulation. The Commission sent those calculations to the applicant by e-mail of the same day.
- 10 On 28 July 2011, the applicant sent the Commission an e-mail seeking an explanation as to how the Commission had interpreted the results of the above calculations, to which the Commission responded by e-mail of the same day.

- 11 On 17 October 2011, the Commission sent to the applicant the final information document containing the essential facts and considerations on the basis of which the Commission intended to revise the dumping margin applicable to the product concerned and to grant the applicant a partial refund of the anti-dumping duties paid.
- 12 By e-mails of 20 and 21 October 2011, the applicant requested the Commission to provide further explanations concerning the method used by the Commission for assessing whether the anti-dumping duties were reflected in the resale prices of the product concerned to the first independent buyer established in the European Union. The Commission refused to accede to that request and referred the applicant to the explanations set out in its previous e-mail of 28 July 2011.
- 13 On 31 October 2011, the applicant submitted comments on the final information document.
- 14 On 6 December 2011, the Commission adopted Decision C(2011) 8804 final ('the contested decision'), in which, on the one hand, it set the revised dumping margin for Nu Air Shanghai at 10.7% and, on the other hand, it granted the applicant a partial refund of the anti-dumping duties unduly paid on the basis of the difference between the original dumping margin (13.7%) and the revised dumping margin (10.7%).
- 15 In order to calculate the revised dumping margin, the normal value of the product concerned was constructed pursuant to Article 2(3) of the basic regulation.
- 16 Moreover, for export sales to the European Union made directly to independent buyers or through a related company established outside the European Union, the export price was determined on the basis of the prices actually paid or payable for the product concerned, in accordance with Article 2(8) of the basic regulation.
- 17 For export sales to the European Union made through the related companies established in the European Union, which performed all import functions for the product concerned, such as the importer related to the exporting producer, the export price was established, in accordance with Article 2(9) of the basic regulation, on the basis of the prices at which the imported products were first resold to an independent buyer established in the European Union. In order to obtain a reliable export price, adjustments were made to take account of all costs incurred between importation and resale, and for profits accruing.
- 18 In particular, in accordance with Article 11(10) of the basic regulation, the anti-dumping duties paid were deducted from the constructed export price, on the ground that the applicant had failed to show that these had been duly reflected in all resale prices. In addition, the applicant's argument that its total turnover relating to the resale of the product concerned had increased by an amount which was greater than the total amount of duties paid on imports of that product was rejected because it did not call into question the finding that the anti-dumping duty had not been duly reflected in the resale price of a large number of types of the product concerned and, accordingly, that the pricing policy had not been altered in such a way as to reflect the anti-dumping duties paid.
- 19 Finally, the dumping margin of 10.70% was calculated by comparing the average normal value by product type with the weighted average export price of the corresponding type of the product concerned.
- 20 In conclusion, in Decision C(2011) 8804 final, the Commission granted the application for a refund made by the applicant in the amount of EUR 126 235.35 and rejected it as to the remainder, that is to say, in respect of the sum of EUR 450 239.41.

Procedure and forms of order sought

- 21 By application lodged at the Registry of the General Court on 16 February 2012, the applicant brought the present action.
- 22 On hearing the report of the Judge-Rapporteur, the Court (First Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure provided for under Article 64 of its Rules of Procedure of 2 May 1991, put questions to the parties in writing and requested them to lodge certain documents. The parties complied with those measures of organisation of procedure within the prescribed periods.
- 23 By order of the President of the First Chamber of the Court of 11 November 2014, the present case was joined for the purposes of the oral procedure with Cases T-75/12 (*Nu Air Polska v Commission*) and T-76/12 (*Nu Air Compressors and Tools v Commission*), in accordance with Article 50 of the Rules of Procedure of 2 May 1991.
- 24 By letter of 27 November 2014, the applicant, on the one hand, applied for leave to use certain technical facilities at the hearing and, on the other, offered further evidence. The letter of 27 November 2014 and the further evidence appended thereto were added to the file by decision of the President of the First Chamber of the Court of 5 December 2014.
- 25 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 12 December 2014.
- 26 The applicant claims that the Court should:
- declare the action admissible;
 - annul Article 1 of the contested decision insofar as that article grants the applicant only a partial refund of the anti-dumping duties which it had paid;
 - order that the effects of the contested decision be maintained in force until the Commission has adopted the measures necessary to comply with the judgment of the Court in this case;
 - order the Commission to pay the costs.
- 27 The Commission contends that the Court should:
- dismiss the action as unfounded;
 - order the applicant to pay the costs.

Law

Admissibility

Admissibility of the evidence offered by the applicant on 27 November 2014

- 28 Pursuant to Article 48(1) of the Rules of Procedure of 2 May 1991:

‘In reply or rejoinder a party may offer further evidence. The party must, however, give reasons for the delay in offering it.’

- 29 That article makes it possible to adduce evidence outside, in particular, the situation referred to in Article 46(1) of the Rules of Procedure of 2 May 1991. By analogy, the Court allows some evidence to be lodged after the rejoinder if the person offering the evidence was unable, before the end of the written phase of the procedure, to obtain possession of the evidence in question, or if evidence produced belatedly by the other party justifies completing the file so as to ensure observance of the rule that both parties should be heard (judgment of 14 April 2005 in *Gaki-Kakouri v Court of Justice*, C-243/04 P, EU:C:2005:238, paragraph 32).
- 30 Since it is an exception to the rules governing the submission of offers of evidence, Article 48(1) of the Rules of Procedure of 2 May 1991 requires parties to give reasons for the delay in offering their evidence. That obligation implies that the Court has jurisdiction to review the merits of the grounds given for the delay in producing the evidence offered and, where appropriate, the content thereof, and, where the application is not substantiated to the requisite legal standard, the power to reject the evidence. The same applies, *a fortiori*, to offers of evidence made after the rejoinder has been submitted (judgment in *Gaki-Kakouri v Court of Justice*, cited in paragraph 29 above, EU:C:2005:238, paragraph 33).
- 31 In the present case, the applicant produced, by way of annex to the letter of 27 November 2014, nine decisions taken by the Commission in the context of other procedures for the refund of anti-dumping duties, eight of which were adopted before the end of the written part of the procedure and, in the case of the ninth, after the closure thereof. In order to justify the delay in producing the evidence offered, the applicant indicated inter alia that the above decisions had not been published and that it had therefore been obliged to make several requests to the Commission for access to those documents, to which the Commission acceded after the date on which the reply had been filed.
- 32 The Commission raised no objection in that regard.
- 33 In those circumstances, the evidence submitted by the applicant by way of annex to the letter of 27 November 2014 must be declared admissible.
- Admissibility of both the electronic and paper versions of the PowerPoint presentation made by the applicant at the hearing
- 34 By letter of 27 November 2014, the applicant also requested permission from the Court to make a PowerPoint presentation at the hearing, stating that this would be limited to a description of the product concerned.
- 35 The Court acceded to that request and, at the hearing of 12 December 2014, the applicant, on the one hand, made the PowerPoint presentation referred to in paragraph 34 above and, on the other, at the Court's request, submitted a paper copy of that presentation.
- 36 The Commission raised an objection with respect to the applicant's PowerPoint presentation on the ground that, in essence, its content went beyond a simple description of the product concerned and therefore did not correspond to the content referred to in the request for authorisation sent to the Court by letter of 27 November 2014.
- 37 In that regard, it must be stated that the Commission's criticisms are justified only with respect to the last two slides of the applicant's PowerPoint presentation. However, the aforementioned slides merely recall the arguments relied on by the applicant in its pleadings before the Court or reproduce extracts from the tables that it had already produced in Annex C.12 to the reply.
- 38 In those circumstances, the applicant's PowerPoint presentation, which does not constitute late evidence, is admissible both in its electronic version and in its paper version.

Admissibility of the document produced by the Commission at the hearing

- 39 At the hearing, the Commission produced two slides from an internal PowerPoint presentation connected with the present case. According to the Commission, the submission of the document in question was justified, essentially, by the need to respond to the applicant's PowerPoint presentation, the content of which went beyond a simple description of the product concerned and, accordingly, in order to ensure the principle of equality of arms between the parties.
- 40 It should be recalled that, in the PowerPoint presentation made at the hearing, the applicant not only presented the product concerned and the manner in which the Commission conducted a classification thereof under different product control numbers ('the PCNs'), but also explained, in essence, why it was of the opinion that the method used by the Commission for the purpose of ascertaining whether the applicant and the other importing companies related to the exporting producer which were established in the European Union (collectively 'the related importers') had reflected the anti-dumping duties in the resale price of the product concerned to the first independent buyer established in the European Union, would adversely affect the unique nature of the product concerned and would, in this case, lead to an erroneous revised dumping margin.
- 41 In this regard, it should be noted, on the one hand, that the above arguments were not new, as they had already been invoked by the applicant both in the application and in the reply (paragraph 37 above) and, on the other, that the Commission had had the opportunity to respond thereto and to submit supporting evidence as part of the written procedure before the Court.
- 42 In that context, the Commission cannot rely on the principle of respect for equality of arms in order to justify the production, at the hearing, of the two slides referred to in paragraph 39 above, which constitute late evidence.
- 43 Furthermore, it should be noted that the Commission did not indicate to the Court why it was unable to produce the above evidence before the end of the written procedure, it being specified, in that regard, that that evidence consists of a graph and a table prepared on the basis of data known to the Commission since the time of the refund investigation.
- 44 In view of the foregoing, pursuant to the case-law cited in paragraphs 29 and 30 above, the evidence submitted by the Commission at the hearing must be declared inadmissible.

Substance

- 45 The applicant seeks, first, the partial annulment of the contested decision on the basis of Article 263 TFEU and, secondly, the provisional maintenance of the effects of that decision on the basis of Article 264 TFEU.

The first head of claim, seeking partial annulment of the contested decision

- 46 As part of the first head of claim, the applicant seeks, in essence, the partial annulment of the contested decision insofar as the Commission only partially upheld its applications for a refund of anti-dumping duties and, accordingly, did not grant it a refund beyond the amounts referred to in Article 1 of that decision.
- 47 In support of its first head of claim, the applicant relies on three pleas in law. In the first plea, it complains that the Commission made manifest errors of assessment in the choice of the profit margin deducted from the export price constructed pursuant to Article 2(9) of the basic regulation and infringed Article 2(9) and Article 18(3) of the basic regulation. In the second plea, it complains that the Commission, in essence, committed a manifest error of assessment by deducting the amount of the

anti-dumping duties paid by the related importers from the constructed export price and, accordingly, failed to establish a reliable export price and dumping margin, in breach of Article 2(9) and (11) and Article 11(10) of the basic regulation. In the third plea, it alleges breach of its rights of defence and infringement of the principle of sound administration.

- 48 The Court considers it appropriate to examine first the second plea in law raised in support of the first head of claim, before turning to the first and third pleas.
- 49 In putting forward its second plea, the applicant divides it into five parts, alleging, respectively, first, an error by the Commission in the interpretation of Article 11(10) of the basic regulation, in that it found that the passing-on of the anti-dumping duties should be established for each type of air compressor; secondly, the harmful nature of that approach for the purposes of establishing a reliable export price and weighted average dumping margin; thirdly, breach of the case-law of the World Trade Organisation (WTO) Appellate Body and of the Court of Justice; fourthly, the excessive importance attached to that approach in the context of the analysis of the resale prices; and, finally, fifthly, the arbitrary nature of that analysis.
- 50 The Court considers it appropriate to examine first of all the first part of the second plea in law and then the third, fourth, fifth and second parts.

– The first part of the second plea in law

- 51 The applicant submits, in essence, that the Commission made a manifest error of assessment and errors of law in that, in order to assess whether the anti-dumping duties had been reflected in the resale price to the first independent buyer established in the European Union, it applied a PCN-by-PCN method of analysis ('the PCN-by-PCN method'), which has no basis in either the basic regulation or the case-law. In the applicant's view, that method is contrary to a literal and purposive interpretation of Article 11(10) of the basic regulation, according to which the question whether anti-dumping duties have been passed on should be assessed on the basis of the same rules and methods as those referred to in Article 2 of the basic regulation, to which Article 11(10) of that regulation refers expressly, and, therefore, in the aggregate, that is to say for the product concerned, and not for each of the PCNs of which it is composed. The applicant further states that the PCN-by-PCN method introduces an additional obstacle to non-deduction of the anti-dumping duties when calculating the export price and is therefore contrary to Article 11(10) of the basic regulation, as interpreted in the light of Article 9.3.3 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade of 1994 (GATT) (OJ 1994 L 336, p. 103; 'the Anti-Dumping Agreement') contained in Annex 1A to the Agreement establishing the WTO (OJ 1994 L 336, p. 3), which it transposes.
- 52 The Commission disputes the merits of those arguments.
- 53 As a preliminary observation, on the one hand, it is apparent from the case-law that, in the field of measures to protect trade, the Council and the Commission ('the institutions') enjoy broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (judgments of 17 July 1998 in *Thai Bicycle v Council*, T-118/96, ECR, EU:T:1998:184, paragraph 32, and 25 October 2011 in *CHEMK and KF v Council*, T-190/08, ECR, EU:T:2011:618, paragraph 38). It follows that the review of the exercise of that discretion by the European Union Courts must be confined to ascertaining whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of the facts or a misuse of powers (judgments of 14 March 1990 in *Gestetner Holdings v Council and Commission*, C-156/87, ECR, EU:C:1990:116, paragraph 63; in *Thai Bicycle v Council*, cited above, EU:T:1998:184, paragraph 33; and 7 February 2013 in *EuroChem MCC v Council*, T-84/07, ECR, EU:T:2013:64, paragraph 32).

- 54 On the other hand, first of all, it should be recalled that Article 2(8) of the basic regulation provides that the export price is the price actually paid or payable for the product when sold for export to the European Union. However, the first subparagraph of Article 2(9) of the basic regulation provides that, in cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any other reasonable basis (judgment in *CHEMK and KF v Council*, cited in paragraph 53 above, EU:T:2011:618, paragraph 25).
- 55 It is therefore apparent from Article 2(9) of the basic regulation that the institutions may treat the export price as unreliable in two cases, namely where there is an association between the exporter and the importer or a third party or a compensatory arrangement between the exporter and the importer or a third party. In any other case, where an export price exists, the institutions are required to base their determination of dumping on that price (judgment in *CHEMK and KF v Council*, cited in paragraph 53 above, EU:T:2011:618, paragraph 26).
- 56 Secondly, it should be noted that, under the second subparagraph of Article 2(9) of the basic regulation, where the export price is constructed on the basis of the price at which the imported products are first resold to an independent buyer, or on any other reasonable basis, adjustment for all costs incurred between importation and resale, including all duties and taxes, and for profits accruing is to be made so as to establish a reliable export price, at the European Union frontier level. The third subparagraph of Article 2(9) of the basic regulation provides that the items for which adjustment is to be made are to include a reasonable margin for selling, general and administrative costs and profit (judgment in *CHEMK and KF v Council*, cited in paragraph 53 above, EU:T:2011:618, paragraph 27).
- 57 It is important to add that the adjustments provided for in the second and third subparagraphs of Article 2(9) of the basic regulation are made automatically by the institutions (see, by analogy, judgments of 7 May 1987 in *Nachi Fujikoshi v Council*, 255/84, ECR, EU:C:1987:203, paragraph 33; 7 May 1987 in *Minebea v Council*, 260/84, ECR, EU:C:1987:206, paragraph 43; and 14 September 1995 in *Descom Scales v Council*, T-171/94, ECR, EU:T:1995:164, paragraph 66).
- 58 Thirdly, it is apparent from Article 11(10) of the basic regulation that, in a procedure for review or for a refund of anti-dumping duties, if it is decided to construct the export price in accordance with Article 2(9) of the basic regulation, the Commission must calculate it with no deduction for the amount of anti-dumping duties paid when conclusive evidence is provided that the duty is duly reflected in resale prices and the subsequent selling prices in the European Union.
- 59 In the present case, it should be recalled that the applicant complains, in essence, that the Commission assessed whether the anti-dumping duties had been passed on by using a PCN-by-PCN method instead of on the basis of an assessment conducted in the aggregate, that is, by taking into consideration the increase in the turnover, attributable to the sales of all the models of the product concerned carried out by the related importers, which was observed between the original investigation period and the refund investigation period. According to the applicant, if the Commission had carried out that analysis, it would have found that the turnover, as previously defined, had increased by an amount greater than that of the anti-dumping duties paid on imports of that product, expressed as a percentage of the price, cost, insurance and freight value of the imports made during the refund investigation period.
- 60 It is in the light of those considerations that the merits of the arguments raised by the applicant in support of the first part of the second plea must be examined.

- 61 First, the applicant relies on a textual argument in support of the method described in paragraph 59 above to the effect that, in essence, it is apparent from the expression ‘duly reflected’, used in Article 11(10) of the basic regulation, that the passing-on of the anti-dumping duties must be assessed according to what is required or appropriate, that is to say, according to the applicant, by applying the rules and methods referred to in Article 2 of the basic regulation, which seek to establish an individual and unique dumping margin for each exporting producer, regardless of whether or not several models of the product concerned exist.
- 62 The Commission disputes the merits of that argument.
- 63 In that regard, firstly, it should be noted that, notwithstanding the dual reference to Article 2 of the basic regulation made by Article 11(10) of that regulation, the adverb ‘duly’ does not refer to a method of examination or a rule referred to in Article 2 of the basic regulation, but to the purpose of reflecting the anti-dumping duties in the resale prices charged by the companies related to the exporting producer to the first independent buyer in the European Union, which is to change the conduct of those companies as a result of the imposition of anti-dumping duties, or, in other words, ultimately, to eliminate the dumping margin initially noted (see, to that effect, judgment of 5 June 1996 in *NMB France and Others v Commission*, T-162/94, ECR, EU:T:1996:71, paragraphs 76 to 81).
- 64 Furthermore, Article 11(10) of the basic regulation does not set out a method by which to determine whether the evidence produced by the importers claiming repayment of the anti-dumping duties is ‘conclusive’ and whether the anti-dumping duty was duly reflected in the selling price to the first independent buyer in the European Union.
- 65 Therefore, it must be held that not one, but several methods exist by which to determine whether the requirements laid down in Article 11(10) of the basic regulation are met.
- 66 It is apparent from the case-law that the choice between different methods of calculation requires an appraisal of complex economic situations, which means that the review of that appraisal by the EU Courts is correspondingly limited (see, by analogy, judgments of 7 May 1987 in *NTN Toyo Bearing and Others v Council*, 240/84, ECR, EU:C:1987:202, paragraph 19; *Nachi Fujikoshi v Council*, cited in paragraph 57 above, EU:C:1987:203, paragraph 21; and *NMB France and Others v Commission*, cited in paragraph 63 above, EU:T:1996:71, paragraph 72).
- 67 In view of the foregoing, it must be held that the Commission has a broad discretion when choosing the method by which to ascertain whether the requirements set out in Article 11(10) of the basic regulation are met, with the result that the Court is required to carry out, in this field, only a limited judicial review (paragraph 53 above).
- 68 Thus, contrary to what the applicant submits, it cannot be inferred from the wording of Article 11(10) of the basic regulation that the question whether the anti-dumping duties were passed on should be assessed by conducting an assessment in the aggregate.
- 69 Accordingly, the applicant’s argument must be rejected.
- 70 Secondly, the applicant argues, in essence, that the method of review based on the overall increase in turnover was justified by the fact that there is only one product concerned, which must be considered as a whole. In the present case, despite the existence of several models of air compressors subject to the anti-dumping duty in force, recital 19 in the preamble to Regulation No 261/2008 expressly states that those air compressors constitute a single product for the purpose of the original anti-dumping investigation. The unitary character of the product concerned is, moreover, confirmed, according to the applicant, by recital 20 in the preamble to the basic regulation and by the judgment of 21 March 2012 in *Marine Harvest Norway and Alsaker Fjordbruk v Council* (T-113/06, EU:T:2012:135).

- 71 The Commission disputes the merits of that argument.
- 72 In that regard, it must be noted, first, that the assessment, by way of a PCN-by-PCN method, as to whether the anti-dumping duties were passed on does not affect the uniqueness of the product concerned since the Commission has not defined a dumping margin per PCN, but rather a single dumping margin for the product concerned.
- 73 Next, it is common ground that, in this case, the product concerned is a complex product, the different models of which have different technical characteristics and prices which can vary significantly. Consequently, the PCN-by-PCN method, which aims to compare PCNs whose characteristics and resale prices are similar, appears to be more appropriate for the purposes of examining the evolution of the resale prices of the product concerned between the original investigation period and the refund investigation period, this being a matter which the applicant itself, moreover, conceded during the refund investigation, in the letter that it sent to the Commission on 29 July 2011.
- 74 Furthermore, as correctly noted by the Commission at the hearing, the total turnover resulting from the sale of all the models of the product concerned does not give a precise indication of the unitary resale price of the different models of that product. Accordingly, it should be noted that the method of analysis based on the overall increase in turnover does not make it possible to establish whether the related importers actually changed their conduct in the market or whether, on the contrary, they implemented a pricing policy allowing them to offset the least-sold with the most-sold models, thereby affecting the margins earned.
- 75 Moreover, recital 20 in the preamble to the basic regulation provides, in particular, that ‘in any recalculation of dumping which necessitates a reconstruction of export prices, duties are not to be treated as a cost incurred between importation and resale where the said duty is being reflected in the prices of the products subject to measures in the [European Union]’.
- 76 Contrary to what the applicant claims, it cannot be inferred from the term ‘products subject to measures’, used in recital 20 in the preamble to the basic regulation, that the question whether the anti-dumping duties had been passed on must be assessed for the product concerned considered as a whole. Recital 20 in the preamble to the basic regulation and Article 11(10) of that regulation refer to ‘resale prices’, ‘subsequent selling prices’ and ‘prices of the products subject to measures in the [European Union]’ in the plural. Thus, according to a literal interpretation of the above provisions, it is appropriate to examine whether the anti-dumping duties were reflected in each selling price and, therefore, rather on the basis of a transaction-by-transaction method or even, where appropriate, on the basis of a model-by-model or PCN-by-PCN method.
- 77 Finally, the reference made by the applicant to the judgment in *Marine Harvest Norway and Alsaker Fjordbruk v Council*, cited in paragraph 70 above (EU:T:2012:135), is not relevant in the present case since the dispute which was before the Court in the case giving rise to that judgment did not concern the determination of the export price.
- 78 In view of the foregoing, it must be held that the Commission did not commit a manifest error of assessment in finding that, in the present case, it was more appropriate to conduct a review of whether the anti-dumping duties had been passed on by way of a PCN-by-PCN method, rather than by way of an overall method based on the increase in turnover between the original investigation and the refund investigation.
- 79 Accordingly, the applicant’s argument must be rejected.
- 80 Thirdly, the applicant argues, in essence, that the PCN-by-PCN method adopted by the Commission is contrary to the objective of Article 11(10) of the basic regulation, as interpreted in the light of Article 9.3.3 of the Anti-Dumping Agreement.

- 81 As a preliminary point, it is apparent from the case-law that the provisions of the basic regulation must, so far as is possible, be interpreted in the light of the corresponding provisions of the Anti-Dumping Agreement (see, to that effect, judgments of 9 January 2003 in *Petrotub and Republica v Council*, C-76/00 P, ECR, EU:C:2003:4, paragraph 57, and 22 May 2014 in *Guangdong Kito Ceramics and Others v Council*, T-633/11, EU:T:2014:271, paragraph 38).
- 82 The European Union adopted the basic regulation in order to meet its international obligations arising from the Anti-Dumping Agreement (judgment in *Petrotub and Republica v Council*, cited in paragraph 81 above, EU:C:2003:4, paragraph 56). Furthermore, by means of Article 11(10) of the basic regulation, the European Union intended to implement the particular obligations laid down by Article 9.3.3 of the Anti-Dumping Agreement. Article 11(10) of the basic regulation must therefore be interpreted in the light of that provision.
- 83 In that regard, it should be recalled that Article 9.3.3 of the Anti-Dumping Agreement provides that, ‘[i]n determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2 [of the Anti-Dumping Agreement], authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided’.
- 84 Moreover, Article 2.3 of the Anti-Dumping Agreement provides that, ‘[in] cases where there is no export price or where it appears to the authorities concerned that the export price is unreliable because of association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine’.
- 85 Finally, the fourth sentence of Article 2.4 of the Anti-Dumping Agreement states that ‘[i]n the cases referred to in paragraph 3, allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made ...’.
- 86 It follows from the foregoing that, like the second subparagraph of Article 2(9) of the basic regulation, the fourth sentence of Article 2.4 of the Anti-Dumping Agreement establishes the principle of ‘duty as a cost’, according to which duties and taxes incurred between importation and resale, including the anti-dumping duties paid, are costs to be deducted when constructing the export price (judgment in *NMB France and Others v Commission*, cited in paragraph 63 above, EU:T:1996:71, paragraph 104).
- 87 In that context, it must be held that the non-deduction of the anti-dumping duties pursuant to Article 9.3.3 of the Anti-Dumping Agreement is an exception to the rule of ‘duty as a cost’, laid down in the fourth sentence of Article 2.4 of that agreement. Similarly, the non-deduction of the anti-dumping duties, laid down in Article 11(10) of the basic regulation, is an exception to the rule of ‘duty as a cost’, set out in the second subparagraph of Article 2(9) of that regulation.
- 88 Like any exception to a general rule, the non-deduction of anti-dumping duties from the constructed export price must be interpreted strictly (see, by analogy, judgment of 18 March 2009 in *Shanghai Excell M&E Enterprise and Shanghai Adepteck Precision v Council*, T-299/05, ECR, EU:T:2009:72, paragraph 82 and the case-law cited).

- 89 In the present case, it should be noted that the method based on the increase in turnover, advocated by the applicant, would lead to the finding that the anti-dumping duties were in the aggregate passed on to the related importers' customers. However, under the PCN-by-PCN method, the Commission was able to demonstrate that the anti-dumping duties were not passed on in relation to several models of the product concerned.
- 90 Thus, the PCN-by-PCN method, which leads, in a case such as the one at hand, to a stricter assessment of whether the anti-dumping duties had been passed on, is more consistent with a literal and purposive interpretation of Article 11(10) of the basic regulation and, accordingly, must be preferred to an approach based on the overall increase in turnover between the original investigation period and the refund investigation period.
- 91 The arguments put forward by the applicant cannot invalidate that finding.
- 92 First of all, the applicant claims that it is to be inferred from the use of the singular in the phrase 'any movement in the resale price', which appears in Article 9.3.3 of the Anti-Dumping Agreement, that the question whether the anti-dumping duties had been passed on must be examined overall.
- 93 The phrase 'any movement in the resale price' is, however, immediately followed by the use of the plural in the phrase 'duly reflected in subsequent selling prices'. Moreover, the phrases 'any change' and 'any movement', used in Article 9.3.3 of the Anti-Dumping Agreement, are inherently indeterminate.
- 94 Next, the applicant argues, in essence, that the PCN-by-PCN method runs counter to the objective of Article 9.3.3 of the Anti-Dumping Agreement, which is to reduce barriers to the non-deduction of anti-dumping duties. That method, it submits, strengthens the 'double jump' obstacle, under which a related importer can obtain a full refund of the anti-dumping duties paid only if it demonstrates that it has increased the resale prices in the European Union in an amount equal to twice the dumping margin, or is an attempt to legitimise a new, 'triple jump', obstacle.
- 95 In that regard, first, it is apparent from paragraphs 86 to 88 above that, in the case of the sales made through a related importer, the export price must be calculated by deducting the anti-dumping duties paid, pursuant to the 'duty as a cost' rule. In addition, the non-deduction of the anti-dumping duties, under Article 11(10) of the basic regulation, constitutes an exception to that rule of principle and must therefore be interpreted strictly (paragraph 88 above). Thus, the 'double jump' obstacle, mentioned by the applicant, is the inevitable consequence of non-fulfilment of the requirements laid down in Article 11(10) of the basic regulation and, therefore, of the application of the 'duty as a cost' rule.
- 96 Furthermore, it should be noted that recourse to the PCN-by-PCN method, as long as it is consistently applied at all stages of the examination of the application for a refund, does not imply that additional requirements are being laid down for the full refund of the anti-dumping duties paid, but only that compliance with the requirements laid down in Article 11(10) of the basic regulation is verified at the level of the individual PCNs, rather than at the level of the product concerned as a whole.
- 97 In those circumstances, the applicant errs in submitting that the PCN-by-PCN method reinforces the 'double jump' obstacle or even that it is an attempt to legitimise a new obstacle to non-deduction of the anti-dumping duties.
- 98 Accordingly, it must be held that the PCN-by-PCN method is not contrary to a literal and purposive interpretation of Article 11(10) of the basic regulation.
- 99 The applicant's argument must therefore be rejected.

- 100 In view of the foregoing, the Commission did not err, on the one hand, in finding that, in the present case, the method based on the overall increase in turnover, defended by the applicant, did not make it possible to establish conclusively that the related importers had duly passed on the anti-dumping duties to their own customers established in the European Union and, on the other hand, in holding that the PCN-by-PCN method was the most appropriate in the light of the circumstances of the case and, in particular, of the complex nature of the product concerned.
- 101 The first part of the second plea in law must therefore be rejected.
- The third part of the second plea in law
- 102 The applicant claims that the PCN-by-PCN review of whether the anti-dumping duties had been passed on is very similar to the practice of ‘zeroing’ and, accordingly, that it is contrary to the report of the Appellate Body of the WTO entitled ‘European Communities — Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India’ (WT/DS141/AB/R), adopted on 1 March 2001, and to the judgment of 27 September 2007 in *Ikea Wholesale* (C-351/04, ECR, EU:C:2007:547).
- 103 The Commission disputes the merits of those arguments.
- 104 As a preliminary point, it should be noted that the practice of ‘zeroing’, sanctioned by the WTO Appellate Body and by the Court of Justice, was used by the Commission only for the purposes of calculating the overall dumping margin. In a case in which the product concerned included several models, that practice consisted, in essence, on the one hand, in adding together only the amounts of the dumping for all the models in respect of which the existence of a positive dumping margin had been established, and on the other, in reducing to zero all the negative dumping margins. The overall amount of the dumping thus calculated was then expressed as a percentage of the cumulative value of all the export transactions relating to all the models, irrespective of whether they had or had not been the subject of dumping.
- 105 In that regard, firstly, it should be noted that, in the present case, the applicant does not challenge the method for calculating the dumping margin, but rather the method applied by the Commission in order to establish whether the conditions for non-deduction of the anti-dumping duties from the export price constructed pursuant to Article 2(9) of the basic regulation had been met. However, the use of the PCN-by-PCN method, challenged by the applicant, occurs upstream from the calculation of the dumping margin and has a different purpose.
- 106 Furthermore, the applicant has not produced any evidence in support of its claim that the practice of ‘zeroing’ and the PCN-by-PCN method are similar.
- 107 Consequently, the applicant has not established that there is a similarity between the practice of ‘zeroing’ and the PCN-by-PCN method.
- 108 Finally, in response to a question put by the Court at the hearing, the applicant clarified its line of argument by stating, in essence, that it is the consequence of the practice of ‘zeroing’ — which is to change the export price and, accordingly, the dumping margin — that, in its view, is similar to that of the PCN-by-PCN method.
- 109 It has, however, previously been stated that the Commission did not err in using the PCN-by-PCN method in order to assess whether the anti-dumping duties were passed on; having regard to the circumstances of the present case, that method afforded the most accuracy in examining whether the requirements set out in Article 11(10) of the basic regulation had been met (paragraphs 73, 89 and 90 above).

110 Consequently, the applicant is not justified in claiming that the PCN-by-PCN method used by the Commission had the effect of distorting the export prices and, ultimately, Nu Air Shanghai's revised dumping margin.

111 In the light of the foregoing, the third part of the second plea in law must be rejected.

– The fourth part of the second plea in law

112 The applicant submits that the use of a PCN-by-PCN method has no legal basis.

113 The Commission disputes the merits of that argument.

114 The fact that the PCN-by-PCN method is nowhere mentioned in the basic regulation does not demonstrate that it is illegal or manifestly incorrect.

115 In that regard, it should be noted that, in the application, the applicant itself acknowledged that the PCN-by-PCN analysis is an administrative technique that is justified in the context of the calculation of the weighted average dumping margin pursuant to Article 2(12) of the basic regulation, since it allows a fair comparison between the different models or types of goods which are the subject of an investigation and which have different characteristics.

116 However, the applicant fails to explain what would make it possible to consider the PCN-by-PCN or model-by-model approach appropriate in the context of the calculation of the dumping margin, but not for the purposes of the examination of whether the anti-dumping duties had been passed on.

117 In any event, contrary to what the applicant claims, in practice, the use of the above method by the institutions is not restricted to the calculation of the dumping margin. The Court of Justice has, inter alia, approved the model-by-model method for the purposes of calculating the threshold below which sales of the like product intended for domestic consumption in the exporting country should be disregarded (see, to that effect, judgment of 5 October 1988 in *Canon and Others v Council*, 277/85 and 300/85, ECR, EU:C:1988:467, paragraph 14).

118 In the light of the foregoing, the fourth part of the second plea in law must be rejected.

– The fifth part of the second plea in law

119 The applicant submits that the PCN-by-PCN method adopted by the Commission is arbitrary since, in other cases, by agreeing to take account of the weighted average resale prices in the European Union, or further by accepting a lower standard of proof than that required in the present case, the Commission considered that the requirements of Article 11(10) of the basic regulation had been met.

120 The Commission disputes the merits of that argument.

121 First, it should be recalled that, in the context of a refund procedure, the Commission has a broad discretion for the purposes of determining whether the requirements for the non-deduction of anti-dumping duties from the constructed export price have been met (paragraph 67 above). That discretion must be exercised on a case-by-case basis, with reference to all the relevant facts (see, by analogy, judgment in *Gestetner Holdings v Council and Commission*, cited in paragraph 53 above, EU:C:1990:116, paragraph 43).

- 122 Secondly, the conditions governing non-deduction of the anti-dumping duties from the calculation of the export price must be assessed in the light, on the one hand, of the evidence produced by the importers seeking the non-deduction of the anti-dumping duties and, on the other, of the factual circumstances of each case.
- 123 Consequently, the applicant's argument, alleging that the nature of the approach adopted by the Commission in the contested decision is arbitrary in comparison with its previous, or later, practice cannot be upheld (see, by analogy, judgments of 7 May 1991 in *Nakajima v Council*, C-69/89, ECR, EU:C:1991:186, paragraph 119; 17 December 2010 in *EWRIA and Others v Commission*, T-369/08, ECR, EU:T:2010:549, paragraph 93; and 10 October 2012 in *Ningbo Yonghong Fasteners v Council*, T-150/09, EU:T:2012:529, paragraphs 119 and 120).
- 124 In any event, it must be held that the applicant has not shown that the circumstances at issue in this case were strictly identical to those at issue in the other procedures for a refund of anti-dumping duties or for review which it raised in support of its argument alleging that the PCN-by-PCN method was arbitrary in nature.
- 125 In particular, it should be noted that the circumstances involved in this case differ from those at issue in the cases which gave rise to Council Implementing Regulation (EU) No 60/2012 of 16 January 2012 terminating the partial interim review pursuant to Article 11(3) of Regulation (EC) No 1225/2009 of the anti-dumping measures applicable to imports of ferro-silicon originating, inter alia, in Russia (OJ 2012 L 22, p. 1), produced by the applicant by way of annex to the application, and the decisions of the Commission of 10 August 2012 concerning applications for a refund of anti-dumping duties paid on imports of ferro-silicon originating in Russia, produced by the applicant by way of annex to the letter of 24 November 2014 ('the cases concerning ferro-silicon originating in Russia'). In the rejoinder and at the hearing, the Commission explained that, in the cases concerning ferro-silicon originating in Russia, it had aggregated the product concerned into four PCNs and, accordingly, examined whether the requirements laid down in Article 11(10) of the basic regulation had been met for each PCN. Moreover, the Commission had found that the anti-dumping duties had indeed been passed on in the case of one of the four PCNs, which represented more than 80% of the transactions at issue, which was sufficient, according to the Commission, to grant the application for non-deduction of the anti-dumping duties from the export price constructed pursuant to Article 2(9) of the basic regulation.
- 126 By contrast, in the present case, it is common ground that, with respect to 5 of the 10 most widely sold PCNs, the applicant has not shown that the anti-dumping duties had been passed on to the customers of the related importers.
- 127 In those circumstances, the applicant cannot criticise the Commission for not having, in any event, adopted the same solution as in the cases concerning ferro-silicon originating in Russia.
- 128 The fifth part of the second plea in law must therefore be rejected.
- The second part of the second plea in law
- 129 The applicant argues, in essence, that the full deduction of the anti-dumping duties from the calculation of the export price is disproportionate since it includes the duties paid on the models or PCNs in respect of which the anti-dumping duties had been reflected in the subsequent resale prices. In so doing, it contends, the Commission therefore failed to establish a reliable export price and a reliable weighted average dumping margin.
- 130 The Commission disputes the merits of those arguments.

- 131 As a preliminary point, it should be recalled that Article 11(10) of the basic regulation is an exception to the rule of 'duty as a cost', laid down in the second subparagraph of Article 2(9) of that regulation. The option not to deduct the anti-dumping duties from the constructed export price must therefore be interpreted strictly (paragraphs 87 and 88 above).
- 132 Moreover, following the PCN-by-PCN review as to whether the anti-dumping duties had been passed on, the Commission found that, for many PCNs, it had not been shown that the anti-dumping duties were reflected in the resale prices and selling prices in the European Union.
- 133 However, the PCN-by-PCN analysis carried out by the Commission also revealed that, for 5 of the 10 most widely sold PCNs, the resale prices charged by the related importers to independent buyers established in the European Union reflected the anti-dumping duties paid. As is apparent from the spreadsheet prepared by the Commission, which is annexed to its e-mail of 26 July 2011 and was produced by the applicant in Annex A. 14 to the application, the five PCNs referred to above correspond, on the one hand, to a volume of 119 523 air compressors sold out of a total volume of 229 239 air compressors sold during the refund investigation period by the related importers, and, on the other hand, to more than 50% of the total price, cost, insurance and freight value of those sales.
- 134 It is in the light of those reminders and clarifications that it is appropriate to examine whether, in deducting the anti-dumping duties paid from the constructed export price, even though those duties had indeed been passed on for some of those PCNs, the Commission committed a manifest error of assessment and thus infringed Article 2(9) and (11) and Article 11(10) of the basic regulation.
- 135 As a preliminary point, it should be noted, as the applicant correctly points out, that there is an undeniable link between Article 2(9) and Article 11(10) of the basic regulation.
- 136 On the one hand, Article 11(10) of the basic regulation expressly makes a double reference to Article 2 and to Article 2(9) of that regulation.
- 137 On the other hand, as part of a procedure for review or refund of anti-dumping duties, the examination as to whether the anti-dumping duties were passed on to customers of a related importer, provided for under Article 11(10) of the basic regulation, is a stage in the calculation of the export price constructed on the basis of Article 2(9) of that regulation. In step with the result obtained at the conclusion of that review, the anti-dumping duties are to be deducted from the constructed export price and, accordingly, will have a direct impact on the amount of that constructed export price, in that it will necessarily be less than if the anti-dumping duties had not been deducted.
- 138 Moreover, it should be noted that, the lower the export price, the greater will be the difference with the normal value and the higher the revised dumping margin.
- 139 Article 11(10) of the basic regulation therefore contributes to the construction of the export price and, indirectly, to the calculation of the revised dumping margin.
- 140 In that context, the Commission must be consistent in the methods which it adopts for the purposes of the application of Article 2(9) and (11) and Article 11(10) of the basic regulation.
- 141 In this regard, it should be recalled that, for the purposes of calculating the export price when the product concerned was sold in the European Union through the related importers, the Commission considered it more appropriate, having particular regard to the nature of the product concerned, to ascertain whether the anti-dumping duties had been passed on for each PCN.

- 142 Furthermore, the Commission continued with that PCN-by-PCN analysis, on the one hand, by calculating a single weighted average export price and a single weighted average normal value for each PCN and, on the other hand, by calculating a dumping margin for each PCN prior to calculating the single dumping margin for the product concerned.
- 143 However, the Commission did not draw all the consequences of the PCN-by-PCN method which it had itself decided to apply, in that it refused non-deduction of the anti-dumping duties from the export prices of the PCNs for which the anti-dumping duties had nevertheless been reflected in the resale prices and the subsequent selling prices in the European Union. Consequently, it deducted all of the anti-dumping duties paid from the export price constructed pursuant to Article 2(9) of the basic regulation, thereby artificially reducing the single weighted average export price per PCN and, consequently, increasing the rate of Nu Air Shanghai's revised dumping margin.
- 144 In the light of that finding, it must be held that the Commission made a manifest error of assessment affecting the rate of the revised dumping margin and, accordingly, the amount of the anti-dumping duties to be repaid to the applicant, bearing in mind that that amount is the result of the difference between the initial dumping margin and the revised dumping margin (paragraph 14 above).
- 145 The arguments raised by the Commission cannot affect the foregoing conclusion.
- 146 First, the Commission claims, in essence, that, according to a strict interpretation of Article 11(10) of the basic regulation, it is not possible to deduct the anti-dumping duties paid solely for certain transactions, models or PCNs and not for others, as doing so would not make it possible to avoid the risk of the law being circumvented and prices manipulated and would therefore be contrary to the objective of Article 11(10) of the basic regulation, which is to exclude any possibility of resale prices and subsequent selling prices being distorted as a result of dumping. If the partial non-deduction of anti-dumping duties were accepted, the related importer could set up internal compensatory mechanisms, for example by passing on the anti-dumping duties to the prices of PCNs for which demand is relatively inelastic, but not to the prices of other PCNs for which demand is very elastic.
- 147 In this regard, on the one hand, it should be recalled that Article 11(10) of the basic regulation does not prescribe a method for determining whether the anti-dumping duties were duly reflected in the resale prices and subsequent selling prices in the European Union and, accordingly, that the Commission enjoys, in this area, a broad discretion (paragraphs 64 to 67 above). Similarly, contrary to what the Commission, in essence, submits, Article 11(10) of the basic regulation does not require it systematically to deduct all the anti-dumping duties paid in a case such as the present one, in which the examination, by way of a PCN-by-PCN method, of whether the anti-dumping duties had been passed on has not made it possible to conclude that the anti-dumping duties had been passed on for all PCNs, but only for some of them.
- 148 Moreover, the Commission has not shown that, in the present case, the related importer had circumvented the law by introducing compensatory mechanisms between the most-sold and the least-sold PCNs, or between PCNs for which demand is relatively inelastic and those for which it is highly elastic.
- 149 Accordingly, the Commission's argument must be rejected.
- 150 Secondly, the Commission submits that the partial non-deduction of the anti-dumping duties should be excluded because, in practice, it is inapplicable in regard to new products. In the absence of comparable products sold during the original investigation, it is, the Commission submits, impossible to verify whether their resale prices have increased to a degree making it possible to reflect the anti-dumping duties paid.

- 151 However, the only requirement laid down in Article 11(10) of the basic regulation is that the related importer must adduce conclusive evidence that the anti-dumping duties have been reflected in the resale prices and the subsequent selling prices in the European Union.
- 152 In that context, provided that it is ‘conclusive’, evidence that the anti-dumping duties have been reflected in the resale prices and subsequent selling prices in the European Union may be adduced by any means and not only by a comparison between the selling prices charged before the institution of the anti-dumping duties and those charged subsequently.
- 153 Accordingly, the Commission’s argument must be rejected.
- 154 Thirdly, the Commission disputes the applicant’s claim that, if the anti-dumping duty had not been deducted from the export price constructed for the five PCNs for which the PCN-by-PCN method had made it possible to establish that the anti-dumping duty had been reflected in the resale prices and subsequent selling prices, the revised dumping margin would be 4.28% instead of 10.7%. In this regard, the Commission notes that the dumping margin calculated in relation to two of the five aforementioned PCNs was, in fact, higher than the overall dumping margin established both during the initial investigation and during the refund investigation. It accordingly submits that it would be unfair to allow the benefit of the non-deduction of the anti-dumping duties for those sales in respect of which there had been above-average dumping.
- 155 However, as correctly noted by the applicant, it is because the anti-dumping duties were deducted from the constructed export price for the transactions relating to the two PCNs referred to in paragraph 154 above that the dumping margin of those PCNs is above average.
- 156 Accordingly, the Commission’s argument must be rejected.
- 157 In view of the foregoing, the Commission committed a manifest error of assessment by deducting the anti-dumping duties in the aggregate and not solely from the export prices of the PCNs for which it had found, following a PCN-by-PCN analysis, that the duties had not been reflected in the resale prices and the subsequent selling prices in the European Union and, therefore, it infringed Article 2(9) and (11) and Article 11(10) of the basic regulation.
- 158 It is not disputed that, had the Commission not erred, the amount of the anti-dumping duties to be refunded to the applicant would have been greater than that mentioned in Article 1 of the contested decision.
- 159 Consequently, the second part of the second plea in law must be upheld, and therefore also the first head of claim, by partial annulment of the contested decision, in so far as the Commission did not grant the applicant a refund of the anti-dumping duties unduly paid beyond the amounts referred to in Article 1 of that decision, without it being necessary to examine the first and third pleas in law relied on in support of the first head of claim.

The second head of claim, seeking the provisional maintenance of the effects of the contested decision, on the basis of Article 264 TFEU

- 160 In essence, the applicant requests the Court, in the event that it upholds the first head of claim, to exercise the powers conferred upon it under Article 264 TFEU and, accordingly, to order the maintenance in force of the effects of the contested decision until the Commission has adopted the measures necessary to comply with the judgment of the Court in this case. In that regard, first, the applicant submits that annulment of the contested decision would make it necessary for it to repay to

the competent authorities the entirety of the amounts which were refunded to it on the basis of that decision. Secondly, the applicant states that it seeks only the rectification of the contested decision and not its annulment in all respects, since that decision is, in part, favourable to it.

161 The Commission raises no objection to the second head of claim.

162 In that regard, it should be recalled that the contested decision must be annulled in so far as the Commission partially refused to grant the applicant's applications for a refund of the anti-dumping duties and, accordingly, did not grant it a refund beyond the amounts mentioned in Article 1 of that decision, for which it is up to the Commission to calculate the exact amount.

163 In those circumstances, the partial annulment of the contested decision does not mean that the applicant is required to repay to the competent authorities the amounts that were refunded to it on the basis of that decision.

164 In view of the foregoing, the applicant's arguments must be rejected as ineffective and, accordingly, the second head of claim must be rejected.

Costs

165 Under Article 134(1) of the Rules of Procedure of the General Court, 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 Commission has essentially been unsuccessful, it must be ordered to pay the costs, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (First Chamber)

hereby:

- 1. Annuls Article 1 of Commission Decision C(2011) 8804 final of 6 December 2011 concerning applications for a refund of anti-dumping duties paid on imports of certain compressors originating in the People's Republic of China in so far as that article does not grant Mecafer SA a refund of the anti-dumping duties unduly paid beyond the amounts referred to therein;**
- 2. Dismisses the action as to the remainder;**
- 3. Orders the European Commission to pay the costs.**

Kanninen

Pelikánová

Buttigieg

Delivered in open court in Luxembourg on 18 November 2015.

[Signatures]