Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber)

1 June 2017*

(Dumping — Imports of tartaric acid originating in China — Modification of the definitive anti-dumping duty — Partial interim review — Market economy treatment — Costs of major inputs substantially reflecting market values — Change in circumstances — Obligation to state reasons — Period for adopting a decision on market economy treatment — Rights of the defence — Article 20(2) of Regulation (EC) No 1225/2009)

In Case T-442/12,

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

applicant,

v

Council of the European Union, represented by S. Boelaert, acting as Agent, assisted initially by G. Berrisch, lawyer, and N. Chesaites, Barrister, and subsequently by G. Berrisch and B. Byrne, Solicitor, and lastly 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

Distillerie Bonollo SpA, established in Formigine (Italy),

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

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

Caviro Distillerie Srl, established in Faenza (Italy),

and

Comercial Química Sarasa, SL, established in Madrid (Spain), represented by R. MacLean, Solicitor,

interveners,

* Language of the case: English.

APPLICATION under Article 263 TFEU for the annulment of Council Implementing Regulation (EU) No 626/2012 of 26 June 2012 amending 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), in so far as it applies to the applicant,

THE GENERAL COURT (Eighth Chamber),

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

Registrar: C. Heeren, Administrator,

having regard to the written part of the procedure and further to the hearing on 15 December 2016,

gives the following

Judgment

Background to the dispute

1 Tartaric acid is used in the production of wine and other beverages, as a food additive and as a retardant in plaster and other products. In the European Union, as well as in Argentina, L+ tartaric acid is produced from the by-products of winemaking, known as wine lees, which are transformed into calcium tartrate and subsequently into tartaric acid. In the People's Republic of 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 via chemical synthesis has the same physical and chemical characteristics and the same basic uses as that produced from the by-products of winemaking. In response to a question put by the Court at the hearing, the parties confirmed that DL tartaric acid was produced solely in China.

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

3 On 30 October 2004, the Commission published in the *Official Journal of the European Union* the 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 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).

5 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).

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

7 On 26 January 2011, the Commission published in the *Official Journal of the European Union* the 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 Article 11(2) of 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').

8 On 9 June 2011, the five companies mentioned in paragraph 6 above lodged a request for partial interim review in respect of two exporting producers, one of which was the applicant, Changmao Biochemical Engineering Co. Ltd, pursuant to Article 11(3) of the basic regulation.

9 On 29 July 2011, the Commission published in the *Official Journal of the European Union* the notice of initiation of the partial interim review procedure 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.

10 On 1 August 2011, the Commission sent a questionnaire and a claim form for market economy treatment ('MET') to the applicant. The applicant sent its claim to the Commission on 26 August 2011 and the duly completed questionnaire on 1 September 2011.

11 On 3 October 2011, the Commission sent a request for information to the applicant. In particular, it asked the applicant to provide evidence that the prices of its raw materials reflected market values, given that the source of the raw material at issue was petroleum, a commodity marketed globally.

12 On 17 October, the applicant responded to the Commission's request, clarifying that the benzene which it used was derived from coke, not petroleum, and providing a chart showing the prices which it had paid for benzene produced from coke and a chart showing the price of benzene from coke in the north of the People's Republic of China. It added that its benzene purchase price reflected Chinese market values.

13 On 14 and 15 November 2011, the Commission carried out a verification visit at the applicant's premises.

14 On 1 February 2012, the Commission sent its MET disclosure to the applicant, informing the latter that that claim had been refused and stating the essential facts and considerations upon which that refusal was founded. In particular, the disclosure stated that, according to the applicant, the benzene that it used was produced from coke and not from petroleum. The disclosure also pointed out that benzene accounted for the vast majority of the cost of the raw materials, which in turn represented almost half of the production cost of tartaric acid. Therefore, according to the disclosure, any distortion in the price of benzene had a significant impact on the production cost of tartaric acid in the People's Republic of China. Lastly, the disclosure stated that the price of benzene in the People's Republic of China was between 19% and 51% lower than in Europe and the United States.

15 On 13 February 2012, the applicant sent to the Commission its comments on the disclosure mentioned in paragraph 14 above, claiming inter alia that the 40% duty levied on benzene exports had been replaced by a temporary duty of 0%. Furthermore, the applicant stressed that the benzene that it used was produced from coke and that, therefore, the Commission's comparison of benzene prices was incorrect, since benzene was produced from petroleum in Europe and the United States.

16 On 11 April 2012, the Commission sent to the applicant the final disclosure document containing the essential facts and considerations on the basis of which it intended to recommend that the anti-dumping measures in force be modified, in accordance with Article 20 of the basic regulation, as well as a document giving details on the calculation of the applicant's dumping margin. In particular, the disclosure document stated that the 40% duty on benzene exports had been replaced by a

temporary duty of 0%. However, it concluded that the applicant had been unable to explain the low price of benzene on the Chinese market. In that regard, the final disclosure document noted that there was a difference of between 19% and 51% in the price of benzene between the People's Republic of China and other market economy countries, as well as the absence of a refund of the 17% Value Added Tax (VAT) on benzene exports.

17 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).

18 On 25 April 2012, the applicant sent its comments on the final disclosure document to the Commission, requesting in particular that the latter provide additional information as regards the methodology used to construct the normal value. Furthermore, on the same day, the applicant sent an offer of a price undertaking intended to eliminate dumping, in accordance with Article 8 of the basic regulation.

19 Following the partial interim review procedure concerning the applicant and one other exporting producer, 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').

20 In essence, the contested regulation refuses to grant MET to the applicant and, having constructed the normal value on the basis of information provided by a cooperating producer in the analogue country, increases from 10.1% to 13.1% the anti-dumping duty applicable to the applicant's products. Furthermore, the contested regulation rejects the applicant's price undertaking offer.

Procedure and forms of order sought

21 By application lodged at the Registry of the General Court on 5 October 2012, the applicant brought the present action.

22 By documents lodged at the Court Registry on 4 and 31 January 2013, Caviro Distillerie, Comercial Química Sarasa, Distillerie Bonollo, Distillerie Mazzari and Industria Chimica Valenzana ('the intervening companies'), on the one hand, and the Commission, on the other hand, sought leave to intervene in the present proceedings in support of the form of order sought by the Council.

23 By order of 12 March 2013, the President of the First Chamber granted leave to intervene to the Commission, stating that, since the Commission's application to intervene had been made after expiry of the time limit referred to in Article 116(6) of the Rules of Procedure of the General Court of 2 May 1991, the Commission was authorised to submit its observations, on the basis of the report for the hearing to be communicated to it, during the oral procedure.

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

25 By order of 18 May 2015, the President of the Eighth Chamber granted the intervening companies leave to intervene.

26 The intervening companies lodged their statement in intervention on 4 August 2015. The main parties submitted their observations on that statement within the prescribed time limits.

27 The applicant claims that the Court should:

— annul the contested regulation in so far as it applies to the applicant;

— order the Council to pay the costs.

28 The Council contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

29 The intervening companies contend that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs incurred by them.

Law

30 In support of its action, the applicant raises five pleas in law, alleging (i) infringement of the first indent of Article 2(7)(c) of the basic regulation, (ii) infringement of Article 11(3) of the basic regulation, (iii) infringement of the obligation to state reasons, (iv) infringement of the second subparagraph of Article 2(7)(c) of the basic regulation and (v) infringement of Article 20(2) of the basic regulation and the rights of the defence.

The first plea, alleging infringement of the first indent of Article 2(7)(c) of the basic regulation

Arguments of the parties

31 The applicant submits that the contested regulation infringes the first indent of Article 2(7)(c) of the basic regulation in so far as it found that market economy conditions did not apply to it. The applicant claims that it provided sufficient evidence that its business decisions had been taken on the basis of market signals reflecting supply and demand and without significant State interference and that the costs of major inputs substantially reflected market values. In particular, it showed that its decisions on purchasing raw materials had been taken without any State interference as regards quantities and prices. It adds that, according to the contested regulation, it complied with the requirements laid down in the second to fifth indents of Article 2(7)(c) of the basic regulation.

32 It is apparent from recital 18 of the contested regulation that the Council based its refusal on the fact that the price of certain raw materials was distorted, in particular the price of benzene and maleic anhydride.

33 The applicant states from the outset that it does not buy maleic anhydride but itself produces it from benzene from coke. Therefore, the findings of distortions in the price of that raw material are irrelevant.

34 As regards the price of benzene, the applicant notes that the Council based its finding on three arguments, namely the existence of an unexplained difference ranging from 19% to 51% between domestic prices in China and prices in other market economy countries, the existence of a 40% export duty on benzene and the absence of a refund of the 17% VAT on benzene exports.

35 First, the applicant submits that the Council disregarded the fact that the difference in price ranging from 19% to 51% resulted from the fact that the cost of coal, the raw material used to produce benzene from coke in China, was lower than that of petroleum, the raw material used in Europe and the United States, as it had claimed during the administrative procedure. The contested regulation assumed, wrongly, that the raw material for the benzene purchased by the applicant was petroleum, as is apparent, in particular, from the Commission's request for clarification of 3 October 2011.

36 Moreover, in the reply, the applicant claims that the Council's argument that an arbitrage process should have eliminated the price differences was put forward for the first time in the defence and appears neither in the contested regulation nor in the documents of the investigation.

37 Second, the applicant notes that the contested regulation states, wrongly, that there were duties of 40% on imports of benzene, whilst that duty applied to exports. In any event, the applicant showed that the alleged export tax was not in force during the review investigation period as a result of the parallel existence of a temporary tax of 0%, as the contested regulation itself acknowledges.

38 Third, the applicant submits that the absence of a refund of the 17% VAT on benzene exports does not constitute significant State interference, as provided for in the basic regulation. According to the case-law, the basic regulation requires that State interference be significant, actual and direct. That therefore allows for a certain degree of State interference. It adds that those requirements were not met in the present case since it remained free to purchase imported benzene from different suppliers and at prices negotiated without State interference. In any event, the absence of a refund of VAT on benzene exports could justify an adjustment of the normal value, as took place during the initial investigation and in other anti-dumping procedures, instead of leading to the denial of MET.

39 In the reply, the applicant notes that, in the MET disclosure of 1 February 2012, the Commission stated that it did not meet the criteria at issue on account of 'significant State interference' in the benzene market. Therefore, the Commission and the Council (together, 'the institutions') relied on the criterion laid down in the first part of the first indent of Article 2(7)(c) of the basic regulation and not on that laid down in the second part of that provision. Accordingly, the case-law cited by the Council regarding that issue is irrelevant.

40 The Council disputes the applicant's arguments.

Findings of the Court

41 It should be noted, first of all, that Article 2(7)(a) of the basic regulation provides that, in the case of imports from non-market economy countries, in derogation from the rules set out in paragraphs 1 to 6 of that Article 2, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country. The aim of that provision is to prevent account being taken of prices and costs in non-market economy countries which are not the normal result of market forces (judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 66).

42 However, pursuant to Article 2(7)(b), in anti-dumping investigations concerning imports from any non-market economy country which is a member of the World Trade Organisation (WTO), including the People's Republic of China, normal value is to be determined in accordance with Article 2(1) to (6) of the basic regulation, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in Article 2(7)(c), that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned.

43 Moreover, the method of determining the normal value of a product set out in Article 2(7)(b) of the basic regulation is an exception to the specific rule laid down for that purpose in Article 2(7)(a) of that regulation, which is, in principle, applicable to imports from non-market economy countries. According to well-established case-law, any derogation from or exception to a general rule must be interpreted strictly (judgments of 28 October 2004, *Shanghai Teraoka Electronic* v *Council*, T-35/01, EU:T:2004:317, paragraph 50, and of 10 October 2012, *Shanghai Biaowu High-Tensile Fastener and Shanghai Prime Machinery* v *Council*, T-170/09, not published, EU:T:2012:531, paragraph 76).

44 It is, in accordance with Article 2(7)(c), for each producer wishing to benefit from those rules to produce sufficient evidence, as mentioned in that provision, that it operates under market economy conditions.

45 In that regard, it must be pointed out that the burden of proof lies with the exporting producer wishing to claim MET (judgment of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 83). It is for the Council and the Commission to assess whether the evidence supplied by the exporting producer concerned is sufficient to show that the criteria laid down in Article 2(7)(c) are fulfilled in order to grant it MET.

46 It must be observed that, according to settled case-law, in the sphere of the common commercial policy, and most particularly in the realm of measures to protect trade, the EU institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine. The judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (judgments of 16 February 2012, *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 63, and of 11 September 2014, *Gem-Year Industrial and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, C-602/12 P, not published, EU:C:2014:2203, paragraph 48).

47 It is not in dispute, in the present case, that the applicant was refused MET solely on the ground that it had not proved that it had met the criteria set out in the first indent of Article 2(7)(c) of the basic regulation, the view having been taken that the other criteria had been met.

48 In accordance with the first indent of Article 2(7)(c), a producer must produce sufficient evidence to show that its decisions regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are taken in response to market signals reflecting supply and demand, and without significant State interference in that regard, and that costs of major inputs substantially reflect market values.

49 That provision thereby lays down a twofold criterion with regard to certain commercial decisions of the producer and a criterion with regard to the costs of major inputs (judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 73). The first of those conditions is intended to determine whether the relevant decisions of the exporting producers concerned are based on purely commercial considerations, appropriate for an undertaking operating under market economy conditions, or whether they are distorted by other considerations, appropriate to State-run economies (judgment of 17 June 2009, *Zhejiang Xinan Chemical Industrial Group* v *Council*, T-498/04, EU:T:2009:205, paragraph 88). As regards the criterion relating to the fact that costs of major inputs substantially reflect market values, the case-law has established that that criterion should be understood as referring to a market in which the determination of prices was not distorted by State interference (see, to that effect, judgments of 11 September 2014, *Gem-Year Industrial and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, C-602/12 P, not published, EU:C:2014:2203, paragraph 52; of 10 October 2012, *Shanghai Biaowu High-Tensile Fastener and Shanghai Prime*

Machinery v *Council*, T-170/09, not published, EU:T:2012:531, paragraphs 74 and 77; and of 10 October 2012, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, T-172/09, not published, EU:T:2012:532, paragraphs 119 and 120).

50 In the present case, as the applicant submits without being contradicted by the Council, the finding relating to the price of maleic anhydride concerns solely the other exporting producer to which the interim review procedure relates and not the applicant. Accordingly, it must be stated that the refusal to grant MET to the applicant was not based on that consideration.

51 It is apparent from recital 18 of the contested regulation that the applicant was denied MET on the basis of evidence that the price of the basic raw material, benzene, was distorted. In that regard, first, the contested regulation states that a comparison of domestic prices in the People's Republic of China, using the purchase prices of one cooperating producer as a source, against prices in other market economy countries showed a price difference of between 19% and 51% during the investigation period. Second, the contested regulation states that the People's Republic of China imposed an import tariff on benzene of 40%, but that this was not in fact in force during the review investigation period. However, it must be stated that the reference to an import duty constitutes a clerical mistake, as the parties acknowledge, which appeared for the first time in the documents in the administrative file and, more specifically, in the final disclosure document and which is moreover repeated by the applicants in its comments on that document of 25 April 2012. Third, the contested regulation finds that the People's Republic of China did not refund the 17%VAT levied on the export of benzene.

52 In that regard, it should be noted that, as the Council itself submits, in the contested regulation, it based its refusal on the criterion relating to the costs of major inputs, laid down in the second part of the first indent of Article 2(7)(c) of the basic regulation, and not on that relating to the decisions of firms, laid down in the first part of that provision. That is apparent from a reading of the contested regulation in its context, in the light of the nature of the circumstances identified for refusing MET, the scheme of the first indent of Article 2(7)(c) of the basic regulation and all the documents of which the administrative file is composed. Even though the MET disclosure refers to significant State interference, it adds that the price of benzene did not substantially reflect market values. Moreover, the Commission's final disclosure document found the existence of distortions in the purchase price of the raw materials, in particular benzene.

53 In the light of the foregoing, it must be stated that the contested regulation found not that the State had interfered significantly in the applicant's decisions regarding its inputs, within the meaning of the first part of the first indent of Article 2(7)(c) of the basic regulation, but that the costs of the applicant's major inputs did not substantially reflect market values for the purposes of the second part of that article because the market was distorted.

54 Accordingly, the applicant's arguments, as well as the case-law cited in support thereof, seeking to demonstrate that its commercial decisions with regard to the purchase of raw materials had been adopted without significant, actual and direct State interference must be rejected as ineffective.

55 As regards the matters raised in recital 18 of the contested regulation in the context of the assessment of the criterion relating to the costs of inputs, namely the criterion which was actually applied, first, it must be held that, in the absence of any justification, the difference of between 19% to 51% in the price of the basic raw material, namely benzene, is capable of constituting an important indicator that that condition is not fulfilled.

56 The applicant explains that price difference by the fact that benzene produced from coke is cheaper than benzene produced from petroleum. It adds that the contested regulation merely ignored that explanation.

57 In that regard, it should be observed that the MET disclosure of 1 February 2012 states expressly that the institutions took note of that argument. In that context, recital 20 of the contested regulation claims that the applicant could not explain the low price of benzene on the market of the People's Republic of China in relation to that price in other market economy countries. Read in that context, the contested regulation must be interpreted as finding that the factual elements put forward by the applicant did not suffice to explain the price difference in question.

58 In addition, in the context of this action, the Council, supported by the intervening companies, added that benzene was a homogenous commodity product, that benzene from petroleum and that from coke were not of a different quality which might have justified a price difference and that, on an undistorted market, arbitrage should have led to an equilibrium between prices in the People's Republic of China and those of other market economy countries. Contrary to the applicant's submission, there is no reason to reject the argument regarding the process of price arbitrage as submitted too late, since it was implicit in the reasoning in the contested regulation, which is based on the existence of price differences between different regions of the world which the applicant had not justified.

59 It should be recalled that, as was stated in paragraphs 44 and 45 above, the burden of proof lies with the exporting producer wishing to claim MET. Accordingly, it was for the applicant to prove conclusively that benzene from petroleum and that from coke had different characteristics and properties justifying a price difference or that there were other reasons justifying the price difference between those regions. Instead, it must be stated that the applicant merely relied on the difference of the raw material used to produce benzene, a commodity product whose characteristics do not vary according to the material used to produce it, without providing the justification and proof required to demonstrate that it could claim MET.

60 Accordingly, the applicant's arguments regarding the difference in the price of benzene identified by the contested regulation must be rejected.

61 Second, as regards the duty on exports, it is sufficient to note that the contested regulation finds that the duty of 40% had been temporarily suspended. Accordingly, irrespective of whether the existence of a duty which has been temporarily suspended is a factor capable in itself of having a deterrent effect on exports, as the intervening companies submit, it must be pointed out that the contested regulation did not rely on that factor precisely because the duty was suspended.

62 Third, it was legitimate for the view to be taken in the contested regulation, without any error being committed, that the absence of a refund of the 17% VAT on benzene exports was a factor capable of contributing to distorting the price of benzene in the People's Republic of China. It is clear that that State interference results in the export of benzene from the People's Republic of China being less attractive, and, accordingly, in contributing to artificially reducing the purchase price of benzene on the Chinese market.

63 Moreover, for the reasons set out in paragraphs 52 to 54 above, the applicant's arguments regarding the alleged requirement of significant, actual and direct State interference must be rejected as ineffective. Furthermore, and contrary to the applicant's submission, it must be stated that the absence of a refund of the 17% VAT on exports cannot be regarded as insignificant State interference in the purchase price of benzene in the People's Republic of China.

64 In the light of the foregoing, the first plea must be rejected as unfounded.

The second plea, alleging infringement of Article 11(3) of the basic regulation

Arguments of the parties

65 By its second plea, the applicant claims that the contested regulation infringes Article 11(3) of the basic regulation, in so far as there had not been a significant and lasting change in circumstances between the initial investigation, which resulted in MET being granted, and the interim review, following which MET was denied.

66 Referring to recital 34 of the contested regulation, the applicant submits that the argument relating to distortions in the price of benzene was misconceived, since the Council had wrongly disregarded the fact that the benzene purchased by the applicant was produced from coke, and not from petroleum. Moreover, it states that, in any event, the 40% export duty on benzene was replaced by a 0% duty between 2007 and 2011, thus during the period of the review investigation.

67 The Council, supported by the intervening companies, contests the applicant's arguments.

Findings of the Court

68 As provided in Article 11(3) of the basic regulation, the need for the continued imposition of measures may be reviewed, where warranted, on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter or importer or by the EU producers which contains sufficient evidence substantiating the need for such an interim review.

69 An interim review is to be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping causing injury.

70 In carrying out investigations in the context of an interim review, the Commission may, inter alia, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established under Article 3 of the basic regulation. In these respects, account is to be taken in the final determination of all relevant and duly documented evidence.

71 In the present case, point C7 of the contested regulation, regarding dumping, is entitled 'Lasting nature of changed circumstances'. More specifically, recital 34 of the contested regulation states that, given the reasons for denial of MET it could be considered that the conclusions of the review were of a lasting nature. That recital adds that evidence showed that the distortion in the price of benzene in the People's Republic of China was in existence prior to the review period and there was no evidence to show that the government of that state would remove such distortions.

72 It should be pointed out, as a preliminary point, that the applicant appears to claim that the errors of law raised in the context of the first plea consequently constitute an infringement of Article 11(3) of the basic regulation. In so far as there was no significant and lasting change in its circumstances, it ought to have been granted MET. On that reading, the second plea should be dealt with in exactly the same manner as the first plea.

73 However, the second plea raises a separate question, namely whether, in the context of an interim review, the institutions must establish an objective change in the factual circumstances or whether they are entitled to carry out a different assessment on the basis of pre-existing circumstances in the light of new arguments and evidence adduced by the parties.

74 Despite the fact that the heading of point C7 of the contested regulation refers to changed circumstances, it is apparent from recital 34 thereof and the Council's pleadings in these proceedings that, in essence, it is the institutions' assessment which changed rather than the objective circumstances on which that assessment was based. That recital acknowledges that the distortion in the price of benzene was in existence prior to the review investigation period. Moreover, nothing in the contested regulation suggests that the policy of not refunding VAT on the export of benzene was introduced after the initial investigation period. In addition, irrespective of the relevance for these purposes of the 40% duty on the export of benzene, which the Council disputes, the applicant, without being contradicted in that regard, observes that that duty had been suspended since 2007.

75 Accordingly, the Council appears to have changed its assessment even though the underlying circumstances had not necessarily changed. The contested regulation takes the view that the circumstances relating to the distortion in the price of benzene are of a lasting nature, which would justify modification of the measures in force. The Court must decide whether, in the light of that, the contested regulation infringed Article 11(3) of the basic regulation.

76 For the purposes of that assessment, it should be observed that the provisions of the basic regulation and of the regulations having a similar object adopted before the basic regulation were significantly amended as regards in particular the review procedure. For example, according to Article 14(1) of Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1979 L 339, p. 1), the regulations imposing anti-dumping duties 'shall be subject to review where warranted'. As provided in paragraph 3 of that provision, where warranted by the review, the measures are to be amended, repealed or annulled. However, that provision does not specify the circumstances under which such an amendment is required.

77 Subsequently, Article 14(1) of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1) stated that a review may be held at the request of a Member State or on the initiative of the Commission. A review is also to be held where an interested party so requests, provided that it 'submits evidence of changed circumstances sufficient to justify the need for such review' and that at least one year has elapsed since the conclusion of the investigation. Paragraph 3 of that article merely stated that the measures are to be amended where warranted by the review, without providing further clarification.

78 In order for Article 14 of Regulation No 2176/84 to apply, the case-law has stated that the review procedure applied in the event of a change in the data (see, to that effect, judgment of 24 February 1987, *Continentale Produkten Gesellschaft Erhardt-Renken* v *Commission*, 312/84, EU:C:1987:94, paragraph 11) or a change in circumstances, where the review is held at the request of an interested party (see, to that effect, judgment of 11 July 1990, *Sermes*, C-323/88, EU:C:1990:299, paragraphs 16 and 17). On the basis of that same provision, it has been held that the review procedure could be justified only by changed circumstances, where the review follows a request by an interested party (judgment of 1 April 1993, *Findling Wälzlager*, C-136/91, EU:C:1993:133, paragraph 15), as is apparent from the wording of the provision in question.

79 Article 11(3) 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) inserted a provision whose wording is identical to the current Article 11(3) of the basic regulation.

80 It is by reference to the case-law cited in paragraph 78 above, even though the case in question related to the interpretation of Article 11(3) of Regulation No 384/96, whose wording is different from that of Article 14 of Regulation No 2176/84, that it was held that the purpose of the review procedure was to adapt the duties imposed to take account of an evolution in the factors which gave rise to them and the procedure therefore presupposed that those factors had altered (judgment of 29 June 2000, *Medici*

Grimm v *Council*, T-7/99, EU:T:2000:175, paragraph 82). That is explained by the specificities of the factual context of the case in question. In that case, only six weeks after publication of the original regulation imposing an anti-dumping duty, the Commission published a notice inviting exporting producers to submit evidence warranting, exceptionally, the initiation of an early interim review. The Commission then sent out questionnaires relating to the same period as the original investigation. In those circumstances, the Court sought to establish whether there had been a change in circumstances which could have provided a reason for a review by the institutions. It found that the purpose of that procedure was merely to enable those companies which did not participate in the original procedure to obtain individual treatment (judgment of 29 June 2000, *Medici Grimm* v *Council*, T-7/99, EU:T:2000:175, paragraph 83). Accordingly, in the case in point, there was no review of the measures in force but a reopening of the original procedure (judgment of 29 June 2000, *Medici Grimm* v *Council*, T-7/99, EU:T:2000:175, paragraph 85).

81 It should be noted that the subsequent case-law regarding Article 11(3) of Regulation No 384/96 and Article 11(3) of the basic regulation related to whether or not there had been a significant change in circumstances, adding that such a change had to be of a lasting nature (see, to that effect, judgments of 17 November 2009, *MTZ Polyfilms* v *Council*, T-143/06, EU:T:2009:441, paragraph 41; of 17 December 2010, *EWRIA and Others* v *Commission*, T-369/08, EU:T:2010:549, paragraphs 81 and 94; and of 28 April 2015, *CHEMK and KF* v *Council*, T-169/12, EU:T:2015:231, paragraph 48, upheld on appeal by order of 9 June 2016, *CHEMK and KF* v *Council*, C-345/15 P, not published, EU:C:2016:433, paragraphs 29 to 32).

82 Moreover, according to the case-law, in the context of the review procedure, the institutions must carry out not only a retrospective analysis of the development of the situation under consideration, as from the imposition of the original definitive measure, in order to assess the need for the continued imposition of or an amendment to that measure to counteract the dumping which is causing injury, but also a prospective analysis of the probable development of the situation, as from the adoption of the review measure, in order to assess the likely effect of its removal or amendment (judgment of 18 September 2014, *Valimar*, C-374/12, EU:C:2014:2231, paragraph 55, and order of 9 June 2016, *CHEMK and KF* v *Council*, C-345/15 P, not published, EU:C:2016:433, paragraph 31).

83 In the light of the foregoing, the institutions, in the context of the retrospective and prospective analysis which they must carry out for the purposes of the review, may change their assessment of the circumstances. It should be pointed out, in particular, that Article 11(3) of the basic regulation states that the institutions may, 'inter alia', consider not only whether the circumstances have changed significantly, but also whether existing measures are achieving the intended results in removing the injury previously established. It follows that that provision recognises expressly that the institutions may reach the conclusion that the measures initially adopted were insufficient to counteract the dumping which was causing injury, contrary to the view that they had initially taken, and that, accordingly, those measures must be amended. Moreover, the expression 'inter alia' shows that Article 11(3) of the basic regulation does not list exhaustively the matters which may be examined in the context of an interim review, beyond the significant change in circumstances and the achievement of the results intended by the measures. Moreover, Article 11(3) of the basic regulation adds that, '[i]n these respects, account shall be taken in the final determination of all relevant and duly documented evidence'. Consequently, the institutions may take account of any evidence provided subsequently, even if it relates to objective circumstances which have not changed since the initial investigation.

84 It would be illogical if the institutions were required to apply Article 2(7)(c) of the basic regulation in a manner which proved to be incorrect in the light of the evidence adduced in the context of the interim review on the sole ground that such an application had been effected during the initial investigation. Such a conclusion would be even more illogical given that, as provided in Article 11(6) of the basic regulation, only an interim review permits measures to be amended, whereas a review of expiring measures may lead solely to their repeal or maintenance.

85 In the present case, the assessment carried out in the contested regulation was based on factual circumstances of a lasting and non-temporary nature, in particular the distortion in the price of benzene and the absence of a refund of 17% VAT on the export of benzene. As the Council rightly contends, it could legitimately regard the distortion of the price of benzene in the People's Republic of China as lasting, since there was no evidence that it would be removed. In addition, it is necessary to reject the applicant's argument regarding the different raw materials used to produce benzene in the People's Republic of China, namely coke rather than petroleum, since it has failed to demonstrate that benzene from petroleum and benzene from coke have different properties justifying that price difference, as stated in paragraphs 58 and 59, above. As regards the 40% duty on the export of benzene, it is sufficient to observe that the contested regulation merely notes that it had been replaced by a duty of 0% during the period in question. In the light of the foregoing, it must be held that the contested regulation is not contrary to Article 11(3) of the basic regulation.

86 Accordingly, the second plea must be rejected as unfounded.

The third plea, alleging infringement of the obligation to state reasons

Arguments of the parties

87 In the context of its third plea, the applicant claims that the contested regulation infringes the obligation to state reasons arising from Article 296 TFEU as well as Article 6(7), Article 11(3), Article 14(2) and Article 18(4) of the basic regulation. It submits in essence that the contested regulation failed to take into consideration some of its arguments or, at the very least, did not state the reasons for rejecting those arguments.

88 The Council, supported by the intervening companies, disputes the applicant's arguments.

Findings of the Court

89 According to settled case-law, the statement of reasons required under Article 296 TFEU must be appropriate to the measure in question and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted that measure, in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent court to carry out its review. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see judgment of 30 September 2003, *Eurocoton and Others* v *Council*, C-76/01 P, EU:C:2003:511, paragraph 88 and the case-law cited).

90 Moreover, it has been held that the Council is not required to give specific reasons, in the regulation imposing a definitive anti-dumping duty, explaining why it did not take account of the various arguments put forward by the parties in the course of the administrative procedure. It is sufficient for that regulation to contain a clear explanation of the main factors considered, in this case, in its analysis of whether the costs of major inputs substantially reflected market values, provided that that justification is capable of casting light on the reasons why the Council rejected the relevant arguments raised in that regard by the parties during the administrative procedure (see, to that effect, judgment of 15 December 1999, *Petrotub and Republica* v *Council*, T-33/98 and T-34/98, EU:T:1999:330, paragraph 151).

91 However, the reasons for a measure must appear in the actual body of the measure and may not, save in exceptional circumstances, be stated in written or oral explanations given subsequently when the measure is already the subject of proceedings brought before the European Union Courts (judgment of 20 May 2015, *Yuanping Changyuan Chemicals* v *Council*, T-310/12, not published, EU:T:2015:295, paragraph 174).

92 In the present case, it is apparent from recital 18 of the contested regulation that the applicant's MET claim was denied because the price of its benzene purchases was distorted and did not substantially reflect market values. In the context of that assessment, the contested regulation drew attention to three factors, as is apparent from paragraph 51 above, namely the existence of a considerable difference in the price of benzene in the People's Republic of China and in other market economy countries, the existence of a duty on benzene exports, even if it was suspended, and the absence of a VAT refund on benzene exports. Recital 20 of the contested regulation adds that, even though the applicant disputed the Commission's findings, it could not explain the low price of benzene in the People's Republic of China.

93 It follows that the contested regulation complies with the requirements of the obligation to state reasons, as that obligation has been interpreted by the case-law cited in paragraphs 89 to 91 above. The contested regulation sets out the essential considerations on which its findings were based, even though it does not contain a specific statement of reasons on all the arguments put forward by the applicant during the administrative procedure, in particular in relation to the three factors mentioned above.

94 First, in the contested regulation, the Council concluded that the applicant had not reasonably explained the difference in the prices of benzene found in the People's Republic of China and in other market economy countries, in particular in Europe and the United States, despite the explanation provided that its benzene was produced from coke rather than from petroleum.

95 In the light of the context and the scheme of the contested regulation, that implies that, according to that regulation, the applicant failed to prove that benzene produced from petroleum and benzene produced from coke were not comparable products or that there were other reasons explaining the price difference between those two products in the People's Republic of China and in other market economy countries. Accordingly, as the Council rightly contends, the objection relating to price arbitrage was implicit in the reasoning set out in the contested regulation.

96 Second, the contested regulation merely finds the existence of a duty on benzene exports which was suspended during the review investigation period, as the applicant claims, without however drawing any specific conclusions therefrom. Accordingly, the contested regulation cannot be criticised for a lack of reasoning or for an alleged contradiction in that regard.

97 Third, the applicant's argument that the absence of a VAT refund on benzene exports did not constitute significant State interference is ineffective, as is apparent from paragraphs 52 to 54 and 63 above, so that the Council cannot be criticised for not having set out, in the contested regulation, the reasons rejecting that argument.

98 Accordingly, the complaint alleging the existence of an infringement of the obligation to state reasons must be rejected. The statement of reasons provided in the contested regulation enables the Court to fully assess the merits of that statement, as is apparent from the analysis of the first plea.

99 Since, in the context of the third plea, the applicant also claims infringement of Article 6(7), of Article 11(3), of Article 14(2) and of Article 18(4) of the basic regulation, without however providing sufficiently clear and precise arguments in support of that claim, the question of the admissibility of that claim arises in the light of Article 76(d) of the Rules of Procedure, as interpreted by the case-law (judgment of 28 January 2009, *Centro Studi Manieri* v *Council*, T-125/06, EU:T:2009:19, paragraph 71).

100 In any event, on the assumption that those complaints must be considered admissible, as regards the alleged infringement of Article 6(7) of the basic regulation, it should be pointed out that that provision obliges the institutions to take into consideration the comments of an exporting producer, wherever they are sufficiently substantiated. That provision does not imply, however, that the institutions must find that those comments are well founded. In the present case, the contested regulation notes, in recital 20 thereof, that the applicant disputed the Commission's findings. Moreover, it is apparent in particular from the MET disclosure that the Commission specifically took account of the fact that the benzene that the applicant used was produced from coke rather than from petroleum. Despite that, the contested regulation finds that the applicant could not explain the low price of benzene on the market of the People's Republic of China. Accordingly, the complaint alleging infringement of Article 6(7) of the basic regulation cannot be upheld.

101 The same is true of the alleged infringement of Article 11(3) of the basic regulation. In so far as the applicant's complaint could be interpreted as alleging that the contested regulation did not take account of all relevant and duly documented evidence in the context of the interim review, it is sufficient to refer by analogy to the considerations set out in paragraph 100 above in order to reject that complaint. Taking into account all relevant evidence does not necessarily entail upholding a party's claims on the basis of the evidence it adduced.

102 With respect to the alleged infringement of Article 14(2) of the basic regulation, it is sufficient to note that the contested regulation contains a summary of the facts and the essential considerations regarding the determination of the dumping, in particular in recitals 15 to 35 thereof. That complaint must therefore be rejected.

103 Lastly, as regards the alleged infringement of Article 18(4) of the basic regulation, it should be recalled that, according to recital 20 of the contested regulation, as well as the MET disclosure and the final disclosure document, the reason that the evidence and arguments provided by the applicant were rejected was that, despite that evidence and those arguments, the applicant had been unable to explain the low price of benzene on the market of the People's Republic of China. Accordingly, the complaint alleging infringement of Article 18(4) of the basic regulation must also be rejected.

104 In the light of the foregoing, the third plea must therefore be rejected as unfounded.

The fourth plea, alleging infringement of the second subparagraph of Article 2(7)(c) of the basic regulation

Arguments of the parties

105 By its fourth plea, the applicant alleges infringement of the second subparagraph of Article 2(7)(c) of the basic regulation. It claims that, while a determination whether it meets the criteria for MET must be made within three months of the initiation of the investigation, in the present case this took six months.

106 It submits that if that question had been determined within the three-month time limit, the contested regulation and the anti-dumping duties could have been different. In that regard, it states that the Commission based its decision refusing MET on information obtained during the on-site verifications which took place after expiry of the three-month period, in particular as regards the purchase price of benzene. Therefore, it takes the view that had the decision been adopted within the prescribed period, the outcome would have been to grant MET to it, since at that time the institutions did not have information regarding the purchase price of benzene, which was fundamental to the refusal to grant it that treatment.

107 Furthermore, it notes that the questions relating to the alleged export duty on benzene and the absence of refund of VAT were raised after the expiry of the three-month period, as is apparent from the administrative file.

108 In the reply, the applicant states that had the dumping margin been calculated on the basis of the information that it provided, it would have been significantly lower than that set by the contested regulation.

109 Moreover, according to the case-law, the three-month period is intended to ensure that the question whether an exporting producer satisfies the MET criteria is not decided on the basis of its effect on the calculation of the anti-dumping duties, which was not complied with in the present case.

110 The Council, supported by the intervening companies, disputes the applicant's arguments.

Findings of the Court

111 As provided in the second subparagraph of Article 2(7)(c) of the basic regulation, in the version in force at the material time, a determination whether the producer meets the criteria referred to in the first subparagraph of that provision is to be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Union industry has been given an opportunity to comment. This determination is to remain in force throughout the investigation.

112 On 29 July 2011, the Commission published the notice of initiation of the partial interim review procedure, under Article 11(3) of the basic regulation. Accordingly, the three-month period expired on 29 October 2011. However, the Commission sent the applicant its MET disclosure on 1 February 2012.

113 As a preliminary point, it must be made clear that the second subparagraph of Article 2(7)(c) of the basic regulation does not contain any indication as regards the consequences of the Commission's failure to comply with the three-month period. According to the case-law, any failure to comply with that period does not automatically entail the annulment of the regulation adopted subsequently (see, to that effect, judgments of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraphs 115 and 116, and of 10 October 2012, *Ningbo Yonghong Fasteners* v *Council*, T-150/09, not published, EU:T:2012:529, paragraph 53).

114 Moreover, as Article 2(7)(b) of the basic regulation provides for an exception to the method of determining normal value referred to in Article 2(7)(a), that exception must be interpreted strictly. It cannot, therefore, automatically apply where the Commission exceeds the three-month period, in the absence of a provision to that effect (judgment of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 121).

115 It has been held that an irregularity such as the failure to comply with the three-month period cannot affect the lawfulness of the contested regulation unless the applicant shows that, if the answer to the MET claim had been provided within the time limits, it could have been different, and more favourable to the interests of that party (judgment of 25 October 2011, *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council*, T-192/08, EU:T:2011:619, paragraph 303; see also, to that effect, judgments of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 138, and of 18 September 2012, *Since Hardware (Guangzhou)* v *Council*, T-156/11, EU:T:2012:431, paragraph 160).

116 In the present case, the applicant submits that, had the decision been adopted within the prescribed period, it would have been favourable, since at that time the institutions did not have information regarding the purchase price of benzene, which was decisive for refusing it MET. That line of argument cannot be accepted.

117 First, it should be recalled that, as was stated in paragraph 45 above, the burden of proof that it complies with the conditions set out in Article 2(7)(c) of the basic regulation lies with the applicant.

118 Second, it should be pointed out that, according to the notice of initiation of the partial interim review procedure, the companies supporting that request had provided prima facie evidence showing that the applicant derived benefits from certain State measures which distorted the actual cost base of its production. Thus, the institutions had certain doubts that the applicant could still be granted MET, in the light in particular of the claim that it was buying benzene at distorted prices.

119 Third, despite that, in its MET claim, the applicant did not provide any data regarding the price of its benzene purchases. Accordingly, in its request for information of 3 October 2011, the Commission expressly requested the applicant to provide evidence that the price of its benzene purchases reflected market values. In reply to that request, on 17 October 2011, namely before the expiry of the three-month period, the applicant specified that its benzene was produced from coke, rather than from petroleum, and provided data relating to its purchase price in the form of a chart. The Commission checked that data during a verification visit of 14 and 15 November 2011, namely after the expiry of the period in question.

120 In the light of the foregoing, it must be held that, at the time the three-month period expired, the applicant had failed to produce sufficient evidence that it complied in particular with the condition laid down in the second part of the first indent of Article 2(7)(c) of the basic regulation. In actual fact, at that time, the institutions had strong indications that the applicant did not satisfy that condition.

121 None of the applicant's arguments is such as to invalidate that conclusion.

122 In the first place, the findings relating to the alleged duty on the export of benzene and to the absence of the VAT refund on the export also relate to the question whether the price of the applicant's benzene purchases substantially reflected market values, which had been called into question before the expiry of the three-month period.

123 In the second place, as the Council rightly observes, the calculations of the dumping margins provided by the applicant in the reply are merely its own calculations. That does not show that, if the MET decision had been adopted within the prescribed period, the Council would have had to accept those calculations or even make similar calculations. Moreover, those calculations appear to be based on the premiss that the applicant ought to have been granted MET since they appear to carry out a comparison between the sale price on the Chinese domestic market and the export sale price. In the light of the foregoing, that premiss is incorrect.

124 In the third place, contrary to what the applicant appears to suggest, the case-law that it cites does not lead to the conclusion that the contested regulation must be annulled on account of the fact that, where the MET decision was adopted after the expiry of the three-month period, the Commission had all the information necessary to calculate what its dumping margin would be if MET was granted (judgments of 14 November 2006, *Nanjing Metalink* v *Council*, T-138/02, EU:T:2006:343, paragraph 44; of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 127; and of 10 October 2012, *Shanghai Biaowu High-Tensile Fastener and Shanghai Prime Machinery* v *Council*, T-170/09, not published, EU:T:2012:531, paragraph 50).

125 In actual fact, that case-law establishes that the last sentence of Article 2(7)(c) of the basic regulation prohibits the institutions, after they have adopted an MET decision, from then altering that original decision on the basis of its effect on the calculation of the dumping margin. However, the institutions may alter that original decision if new evidence is adduced or even in the absence of new evidence in certain situations in the light of the principles of compliance with the law and sound administration (see, to that effect, judgments of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 127, and of 8 November 2011, *Zhejiang Harmonic Hardware Products* v *Council*, T-274/07, not published, EU:T:2011:639, paragraphs 37 to 39). In any event, it is sufficient to note that, in the present case, the institutions did not alter the MET decision since that treatment was never granted during the partial interim review investigation.

126 In the light of the foregoing, the fourth plea must be rejected as unfounded.

The fifth plea, alleging infringement of Article 20(2) of the basic regulation and of the rights of the defence

Arguments of the parties

127 By its fifth plea, the applicant alleges infringement of Article 20(2) of the basic regulation and of the rights of the defence.

128 In particular, it notes that, in the final disclosure document of 11 April 2012, the Commission stated that normal value was established on the basis of the information received from the cooperating producer in the analogue country, namely Argentina. Although that producer sold the product concerned on its domestic market, given the differences in the production method between Argentina and the People's Republic of China, it was decided to construct normal value, rather than use the sales prices on the domestic market. Accordingly, normal value for L+ tartaric acid, which was produced by the Argentinian producer, was constructed from the cost of production in Argentina, taking into account the differences in production method. Given that the Argentinian producer did not manufacture DL tartaric acid, the normal value of that acid was constructed using the difference in price found between the two product types. The disclosure document stated that, for confidentiality reasons, it was not possible to give more detailed information regarding the normal value as only one Argentinian producer cooperated fully in the proceeding.

129 The applicant adds that, in its comments of 25 April 2012 on the final disclosure document, it stated that the Commission had not provided meaningful information on the method used for calculating normal value for DL tartaric acid, in particular as to the source of the prices of L+ tartaric acid and DL tartaric acid and the factors affecting the price comparison.

130 The applicant submits that the rejection, in recital 38 of the contested regulation, of its request relating to the construction of the normal value of DL tartaric acid, on the ground that it would be impossible to provide such information without disclosing the methods and costs of production of the Argentinian producer concerned, constitutes an infringement of the rights of the defence and of Article 20(2) of the basic regulation.

131 In that regard, the applicant states that, since the producer in the analogue country did not produce DL tartaric acid, it would appear that, in order to calculate a normal value for DL tartaric acid, the institutions, first, compared certain prices of L+ tartaric acid and DL tartaric acid and, second, applied that difference to the normal value calculated for L+ tartaric acid in the analogue country. It was not in a position to make known its position as regards the accuracy of the price comparison made in the contested regulation between L+ tartaric acid and DL tartaric acid. Furthermore, according to the applicant, the data concerning DL tartaric acid could not constitute confidential information of the

producer in the analogue country since it did not produce that product. In any event, it would have been possible to send the confidential information in summarised form or by indicating the order of magnitude rather than precise figures.

132 The Council contends that that claim is vague and unfounded. The Council disclosed the methodology and explained which factors were adjusted. In particular, the contested regulation explained that the institutions used the L+ tartaric acid production costs of the producer in the analogue country, replaced the cost of the raw material in Argentina with an average market price for benzene and adjusted the selling, general and administrative expenses in the analogue country. For DL tartaric acid, the contested regulation took account of the price difference between L+ tartaric acid and DL tartaric acid to construct the normal value. The Council maintains that it could not provide the data used in the calculations of the normal value for L+ tartaric acid without revealing confidential commercial information relating to the analogue country producer.

133 In the rejoinder, the Council adds that it was obvious that the institutions relied on the export price from the People's Republic of China in order to calculate the price difference between L+ tartaric acid and DL tartaric acid.

134 In reply to the questions put by the Court at the hearing, the Council and the Commission specified that they had relied on the prices charged by the applicant and the other cooperating Chinese exporting producer in order to calculate the price difference between L+ tartaric acid and DL tartaric acid. Given that the applicant's prices were one of two components for calculating that difference, if the institutions had provided that data, the applicant would have been able to deduce its competitor's prices, which constituted sensitive commercial information.

135 The intervening companies submit that the institutions could legitimately refuse to communicate sensitive commercial information relating to a competitor's production costs.

136 In its observations on the statement in intervention, the applicant states that it did not request information regarding the analogue country producer.

Findings of the Court

137 By its fifth plea, the applicant pleads infringement of the rights of the defence and of Article 20(2) of the basic regulation in so far as the institutions had not provided meaningful information on the method used for calculating normal value for DL tartaric acid, in particular as to the source of the prices of L+ tartaric acid and DL tartaric acid and the factors affecting the price comparison.

138 As provided in Article 20(2) of the basic regulation, the parties may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures.

139 According to settled case-law, respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the proceedings in question (see judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598, paragraph 83 and the case-law cited). Respect for that principle is of crucial importance in anti-dumping investigations (see judgment of 16 February 2012, *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 77 and the case-law cited).

140 In accordance with that principle, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury (judgment of 16 February 2012, *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 76).

141 In addition, according to the case-law in performing their duty to provide information, the EU institutions must act with all due diligence by seeking to provide the undertakings concerned, as far as is compatible with the obligation not to disclose business secrets, with information relevant to the defence of their interests, choosing, if necessary on their own initiative, the appropriate means of providing such information (see, to that effect, judgments of 20 March 1985, *Timex* v *Council and Commission*, 264/82, EU:C:1985:119, paragraph 30; of 27 June 1991, *Al-Jubail Fertilizer* v *Council*, C-49/88, EU:C:1991:276, paragraph 17; and of 3 October 2000, *Industrie des poudres sphériques* v *Council*, C-458/98 P, EU:C:2000:531, paragraph 99).

142 The obligation to provide information which is incumbent on the EU institutions in anti-dumping matters must be reconciled with the obligation to respect confidential information (see, to that effect, judgments of 25 September 1997, *Shanghai Bicycle* v *Council*, T-170/94, EU:T:1997:134, paragraph 121, and of 18 December 1997, *Ajinomoto and NutraSweet* v *Council*, T-159/94 and T-160/94, EU:T:1997:209, paragraph 83). However, the obligation to respect confidential information cannot deprive the applicant's rights of defence of their substance (see, to that effect, judgment of 20 March 1985, *Timex* v *Council and Commission*, 264/82, EU:C:1985:119, paragraph 29).

143 It is also apparent from the case-law that the sufficiency of the information provided by the EU institutions must be assessed in relation to how specific the request for information was (judgment of 18 December 1997, *Ajinomoto and NutraSweet* v *Council*, T-159/94 and T-160/94, EU:T:1997:209, paragraph 93).

144 It must be recalled that the applicant cannot be required to demonstrate that the institutions' decision would have been different, but simply that such a possibility cannot be totally ruled out since it would have been better able to defend itself if there had been no procedural error thus in fact affecting the rights of the defence (judgment of 16 February 2012, *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 78 and 79).

145 On the other hand, it is for the applicant to establish specifically how it would have been better able to ensure its defence in the absence of such an irregularity, without merely pleading that it was impossible for it to provide comments on hypothetical situations (see, to that effect, judgment of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council*, T-276/13, EU:T:2016:340, paragraph 264).

146 In the present case, it must be pointed out that, according to the final disclosure document, given that the Argentinian producer did not manufacture DL tartaric acid, normal value was constructed using the difference in price found between the two product types. In its comments on the final disclosure document, the applicant specifically requested information on the method of calculating normal value for DL tartaric acid, in particular as to the source of the prices of L+ tartaric acid and DL tartaric acid and the factors affecting the price comparison. Notwithstanding that request, as in the final disclosure document, recital 29 of the contested regulation states that, given that the Argentinian producer did not manufacture DL tartaric acid, normal value was constructed using the difference in price found between the two product types. In addition, according to recital 38 of the contested regulation, the further information requested by the applicant had to be rejected as it would be impossible to do so without disclosing the production methods and costs of the Argentinian producer.

147 It is apparent from paragraph 61 of the reply that the applicant understood that, in order to calculate a normal value for DL tartaric acid, the institutions had, first, compared certain prices of L+ tartaric acid and DL tartaric acid and had, second, applied that difference to the normal value calculated for L+ tartaric acid in the analogue country.

148 However, the institutions did not inform the applicant of the origin of the prices of L+ tartaric acid and of DL tartaric acid used to calculate the price difference which served to calculate the normal value of DL tartaric acid. It was only at the stage of the rejoinder that the Council stated that it was obvious that the institutions had relied on the export price from the People's Republic of China in order to calculate the price difference between L+ tartaric acid and DL tartaric acid. In reply to the Court's questions, the institutions specified for the first time at the hearing that the prices used for the comparison originated from the applicant itself and from the other exporting producer concerned in the People's Republic of China, that is the only two exporting producers concerned which cooperated during the investigation. It is clear that that information had not been provided to the applicant in due time during the administrative procedure.

149 Moreover, the institutions never communicated to the applicant the price difference between L+ tartaric acid and DL tartaric acid.

150 It is common ground between the parties that DL tartaric acid is produced solely in the People's Republic of China. Contrary to what the Council contended in the rejoinder, it cannot necessarily be inferred from the final disclosure document, or from the contested regulation, that the prices used to calculate the price difference between L+ tartaric acid and DL tartaric acid originated from producers established in that country. In principle, nothing would prevent the Commission from calculating that difference on the basis of the prices of DL tartaric acid in the People's Republic of China and of L+ tartaric acid elsewhere in the world.

151 It is apparent from paragraph 28 of the rejoinder that the explanation given by the Council that it could not provide the applicant with confidential information concerning the Argentinian producer related to the construction of the normal value of L+ tartaric acid and not to the comparison of the prices of DL tartaric acid and L+ tartaric acid.

152 At the hearing, the institutions contended that the refusal to communicate the information relating to the price differences between DL tartaric acid and L+ tartaric acid was founded on the fact that, on the basis of that information, the applicant would have been capable of obtaining the prices of its competitor, namely the other exporting producer, which constituted sensitive commercial information.

153 According to the case-law, the legality of an EU measure must be assessed on the basis of the facts and the law as they stood at the time when the measure was adopted, with the result that the General Court cannot substitute other grounds relied on for the first time before it for the grounds relied on during the investigation procedure (see, to that effect, judgment of 30 June 2016, *Jinan Meide Casting* v *Council*, T-424/13, EU:T:2016:378, paragraph 150). Accordingly, the refusal to disclose the information in question cannot be justified by a ground relied on during the oral procedure before the Court, namely the protection of the commercial interests of a competitor of the applicant, as the applicant rightly asserted at the hearing.

154 Accordingly, it must be concluded that the contested regulation makes no reference to any valid justification warranting the refusal to communicate the information relating to the price difference between DL tartaric acid and L+ tartaric acid.

155 It should be noted that the price difference between L+ tartaric acid and DL tartaric acid is one of the fundamental elements of the calculation of the normal value of DL acid, the other being the value of L+ tartaric acid constructed on the basis of the information provided by the Argentinian producer. The applicant claimed that, if it had received the information relating to the price difference, it would

have been able to compare that information with its own data in order to ensure that the price difference was at least consistent with those data, which would have enabled it to rule out the existence of significant errors.

156 In that regard, it is useful to recall that, according to the case-law, the fact of having the detailed calculations made by the Commission available to it and the data used for those calculations, is, in general, capable of enabling the interested parties to make observations that are more useful for their defence. They can then verify exactly how the Commission used those data and compare them with their own calculations, which would enable them to identify possible errors made by the Commission which would otherwise be undetectable. Moreover, the institutions' practice shows that they themselves consider that, for the interested parties, having available to them the detailed calculations as regards the determination of the dumping margin can enable them usefully to exercise their rights of defence (judgment of 30 June 2016, *Jinan Meide Casting* v *Council*, T-424/13, EU:T:2016:378, paragraph 208).

157 In addition, according to the case-law cited in paragraph 144 above, the applicant cannot be required to demonstrate that the institutions' decision would have been different, but simply that such a possibility cannot be totally ruled out since it would have been better able to defend itself if there had been no procedural error thus in fact affecting the rights of the defence.

158 Those requirements are fulfilled in the present case, since the institutions refused to supply the information relating to the price difference between DL tartaric acid and L+ tartaric acid without providing any valid justification in due time. It is common ground that that difference was fundamental to the calculation of the normal value of DL tartaric acid. In addition, the applicant submits that the fact of having that information would have enabled it, inter alia, to rule out the existence of manifest errors. Accordingly, the applicant would have been better able to defend itself in the absence of that procedural error.

159 Lastly, in the context of an anti-dumping investigation procedure, the institutions cannot be placed under an absolute obligation to refuse to disclose information covered by business secrecy, without assessing the specific circumstances of the case (see, to that effect, judgment of 30 June 2016, *Jinan Meide Casting* v *Council*, T-424/13, EU:T:2016:378, paragraphs 165 and 199). Accordingly, the General Court cannot prejudge the result at which the institutions would arrive in the context of a review of the request for information relating to the price difference, in the light of the considerations that the institutions might reasonably take into account.

160 Consequently, pursuant to Article 20(2) of the basic regulation and of the rights of the defence, the institutions should in principle have granted the applicant access to the information requested on the price difference between DL tartaric acid and L+ tartaric acid, given that they had not identified a valid reason justifying that refusal in due time.

161 In the light of the foregoing, the fifth plea must be upheld.

Costs

162 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. However, according to Article 135(1) of the Rules of Procedure if equity so requires, the General Court may decide that an unsuccessful party is to pay only a proportion of the costs of the other party in addition to bearing his own costs, or even that he is not to be ordered to pay any costs.

163 Since the action has been upheld only in part, it is fair in the circumstances of the case that the applicant bear half of its costs. The Council is to bear its own costs and pay half of the costs incurred by the applicant.

164 According to 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 will bear its own costs.

165 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 his own costs. In the circumstances of this dispute, it is appropriate that the intervening companies bear their own costs.

On those grounds,

THE GENERAL COURT (Eighth Chamber)

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 in so far as that regulation applies to Changmao Biochemical Engineering Co. Ltd.;**

2. **Orders the Council of the European Union to pay half of the costs incurred by Changmao Biochemical Engineering and to bear its own costs;**

3. **Orders Changmao Biochemical Engineering to bear half of its own costs;**

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

5. **Orders Distillerie Bonollo SpA, Industria Chimica Valenzana SpA, Distillerie Mazzari SpA, Caviro Distillerie Srl and Comercial Química Sarasa, SL to bear their own costs.**

Collins Kancheva Barents

Delivered in open court in Luxembourg on 1 June 2017.

E. Coulon
Registrar

A.M. Collins
President