Reports of Cases

JUDGMENT OF THE GENERAL COURT (Second Chamber)

23 September 2015*

(Non-contractual liability — Dumping — Imports of certain prepared or preserved citrus fruits originating in China — Regulation (EC) No 1355/2008 declared by the Court of Justice to be invalid — Loss allegedly suffered by the applicant following the adoption of the regulation — Action for compensation — Exhaustion of domestic remedies — Admissibility — Sufficiently serious infringement of a rule of law conferring rights on individuals — Article 2(7)(a) of Regulation (EC) No 384/96 (now Article 2(7)(a) of Regulation (EC) No 1225/2009) — Duty of care — Causal link)

In Case T-205/14,

I. Schroeder KG (GmbH & Co.), established in Hamburg (Germany), represented by K. Landry, lawyer,

applicant,

v

Council of the European Union, represented by J.-P. Hix, acting as Agent, and initially by D. Geradin and N. Tuominen, and subsequently by N. Tuominen, lawyers,

and

European Commission, represented by T. Maxian Rusche and R. Sauer, acting as Agents,

defendants,

ACTION for compensation for the damage which the applicant claims to have suffered following the adoption of Council Regulation (EC) No 1355/2008 of 18 December 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2008 L 350, p. 35), declared invalid by the judgment of 22 March 2012 in *GLS* (C-338/10, ECR, EU:C:2012:158),

THE GENERAL COURT (Second Chamber),

composed of M.E. Martins Ribeiro, President, S. Gervasoni (Rapporteur) and L. Madise, Judges,

Registrar: C. Heeren, Administrator,

Having regard to the written part of the procedure and further to the hearing on 17 March 2015,

gives the following

* Language of the case: German.

Judgment

Legal context

1 Article 2(7)(a) 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 ('the Basic Regulation') (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, corrigendum OJ 2010 L 7, p. 22)), provides as follows:

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

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.'

Background to the dispute

2 On 20 October 2007, the Commission of the European Communities published Notice of initiation of an anti-dumping proceeding concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2007 C 246, p. 15).

3 On 2 November 2007, the applicant, I. Schroeder KG (GmbH & Co.), applied to the Commission to form part of the sample of independent importers envisaged in the Notice of initiation.

4 On 4 July 2008 the Commission adopted Regulation (EC) No 642/2008 imposing a provisional anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2008 L 178, p. 19).

5 On 18 December 2008, the Council of the European Union adopted Council Regulation (EC) No 1355/2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2008 L 350, p. 35).

6 The applicant paid the anti-dumping duties established by that regulation in respect of its own imports of the product concerned and confirms that it also paid them in respect of imports made through the intermediary of four other importers ('the other four companies').

7 By judgment of 22 March 2012 in *GLS* (C-338/10, ECR, EU:C:2012:158, paragraph 36), the Court of Justice declared Regulation No 1355/2008 to be invalid, on the ground that the Commission and the Council had infringed the requirements of Article 2(7)(a) of the Basic Regulation (replaced by Article 2(7)(a) of Regulation No 1225/2009) in determining the normal value of the product

concerned on the basis of the prices actually paid or payable in the European Union for a like product without taking all due care to determine that value on the basis of the prices paid for that same product in a market economy third country.

8 Following the judgment in *GLS*, cited in paragraph 7 above (EU:C:2012:158), the applicant and the other four companies applied for repayment of the duties paid under Regulation No 1355/2008. The main German customs offices repaid the duties that had been wrongly collected.

9 The applicant and the other four companies also applied to the main customs offices in Hamburg-Stadt, Duisburg and Krefeld (Germany) for payment of interest at the rate of 0.5% per month on the anti-dumping duties paid for the period from the date of payment of the duties until the date of repayment. Those applications, dated 6 and 7 November 2012, were rejected by decisions of the customs offices in question dated 8 and 23 November and 18 December 2012 and 3 April 2013. The applicant and the other four companies submitted objections to those rejections. At the hearing, in response to a question raised by the Court, the applicant explained that all of those proceedings had been suspended pending a decision of the Finanzgericht Hamburg (Finance Court, Hamburg) in proceedings between Hüpeden & Co. (GmbH & Co.) KG and the customs authorities.

10 The applicant also applied to the Council and the Commission, in letters dated 10 December 2013, for compensation in the sum of EUR 345 644, being the amount of the interest it had paid on the bank loans it claimed it had been compelled to take out as a result of Regulation No 1355/2008. Those applications were rejected by a letter from the Council dated 31 January 2014 and a letter from the Commission dated 14 February 2014.

11 Following the judgment in *GLS*, cited in paragraph 7 above (EU:C:2012:158), the Commission decided to reinitiate the anti-dumping proceeding, solely in connection with the implementation of the findings contained in that judgment. At the conclusion of the anti-dumping proceeding, the Council adopted Implementing Regulation (EU) No 158/2013 of 18 February 2013, reimposing a definitive anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2013 L 49, p. 29), with effect from 23 February 2013. Two requests for a preliminary ruling have been submitted to the Court of Justice to determine the validity of that regulation (Joined Cases C-283/14 *CM Eurologistik* and C-284/14 *GLS*).

Procedure and forms of order sought

12 By application lodged at the Registry of the General Court on 27 March 2014 the applicant brought this action.

13 The Commission applied for the present proceedings to be suspended, first, until the national authorities had definitively ruled on the proceedings referred to in paragraph 9 above and, secondly and in the alternative, until the Court of Justice had ruled on the questions relating to Regulation No 158/2013 referred for a preliminary ruling in Joined Cases C-283/14 and C-284/14 referred to above. The applicant and the Council did not raise any objections to these applications for suspension.

14 The applicant claims that the Court should:

— order the European Union to pay it damages in the sum of EUR 345 644, together with interest at the rate of 8% per annum from the date of delivery of the judgment, or to declare that the applicant is entitled to compensation;

— order the Commission and the Council to pay the costs.

15 At the hearing, as noted in the minutes thereof, the applicant asked the Court, in the alternative, for a preliminary ruling that its action was admissible and that the misconduct of the Council and the Commission was such as to render the European Union liable, and then for the present proceedings to be suspended pending a definitive decision in the proceedings before the Finanzgericht Hamburg (Finance Court, Hamburg) in the matter referred to in paragraph 9 above.

16 The Council and the Commission contend that the Court should:

— dismiss the action as inadmissible or, in the alternative, as unfounded;

— order the applicant to pay the costs.

Law

Admissibility of the action

17 In their submissions, the Council and the Commission maintain that the present action should be dismissed as inadmissible since the applicant has failed to exhaust the domestic legal remedies that might provide compensation for the damage it claims to have suffered.

18 It is settled case-law that an action for damages under Article 268 TFEU and the second paragraph of Article 340 TFEU must be appraised with regard to the entire system for the judicial protection of the individual established by the Treaty. It follows that, where an individual considers that he has been harmed by the lawful application of EU legislation which he considers to be unlawful, and the event giving rise to the alleged damage is therefore attributable exclusively to the European Union, the admissibility of such an action for damages may nevertheless, in certain cases, be subject to the prior exhaustion of domestic remedies. It is nonetheless a necessary precondition that those domestic remedies give effective protection to the individuals concerned and that they are capable of leading to compensation for the damage alleged (see judgments of 30 May 1989 in *Roquette frères* v *Commission*, 20/88, ECR, EU:C:1989:221, paragraph 15 and the case-law cited and 23 November 2004 *Cantina sociale di Dolianova and Others* v *Commission*, T-166/98, ECR, EU:T:2004:337, paragraph 115 and the case-law cited).

19 Even assuming the requirement to exhaust domestic legal remedies could be applied to the present case, where there are domestic proceedings seeking payment of interest on the reimbursed anti-dumping duties in addition to the present action before the EU courts seeking compensation for loss suffered by way of bank interest on loans taken out to cover cash losses resulting from the payment of those duties, and irrespective of the judgment of 18 September 2014 in *Holcim (Romania)* v *Commission* (T-317/12, ECR, under appeal, EU:T:2014:782, paragraphs 73 to 77), which placed limits on the situations in which inadmissibility is caused by non-exhaustion of domestic remedies, failure by the applicant to exhaust domestic remedies should, in any event, not be regarded as leading to its action being inadmissible.

20 Indeed, the administrative and judicial proceedings brought or capable of being brought before the national authorities in the present case cannot be regarded as giving effective protection to the applicant in accordance with the case-law referred to in paragraph 18 above and, therefore, did not need to be exhausted for the purposes of the admissibility of the present action.

21 Bearing in mind that an assessment of the effectiveness of domestic remedies is bound to be prospective, and that the plea of inadmissibility in question is, by definition, used against an applicant who has not exhausted domestic remedies, the EU courts have dismissed pleas of inadmissibility of this sort in cases where the outcome of domestic remedies was ‘highly uncertain’ (judgment of 30 May

1984 in *Eximo Molkereierzeugnisse Handelsgesellschaft* v *Commission*, 62/83, ECR, EU:C:1984:197, paragraph 15; see also, to that effect, judgment of 26 February 1986 in *Krohn Import-Export* v *Commission*, 175/84, ECR, EU:C:1986:85, paragraph 28) or where those domestic remedies were 'excessively difficult' to exercise (judgment in *Cantina sociale di Dolianova and Others* v *Commission*, cited in paragraph 18 above, EU:T:2004:337, paragraph 117). It follows that the burden of proof placed on an applicant accused of failing to exhaust domestic remedies cannot go beyond adducing evidence of a nature such as to give rise to serious doubts as to the effectiveness of the protection afforded by domestic remedies (see, to that effect and by analogy, judgments of 26 October 1993 in *Caronna* v *Commission*, T-59/92, ECR, EU:T:1993:91, paragraph 35, and 9 March 2005 *L* v *Commission*, T-254/02, ECR-SC, EU:T:2005:88, paragraph 148).

22 In the present case, the applicant has adduced such evidence.

23 The applicant presented in detail the applicable provisions and pointed out, as was confirmed by the Council in its defence, that those provisions did not allow for the repayment of the interest claimed in the present case.

24 Article 241 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended ('the Community Customs Code'), as applicable at the date of the facts in the present case, as was confirmed by the Council and the Commission at the hearing, provides as follows:

'Repayment by the competent authorities of amounts of import duties or export duties or of credit interest or interest on arrears collected on payment of such duties shall not give rise to the payment of interest by those authorities. However, interest shall be paid:

— where a decision to grant a request for repayment is not implemented within three months of the date of adoption of that decision,

— where national provisions so stipulate.

…'

25 In the present case, there is no evidence on the file and nothing submitted by any of the parties to indicate that the decision ordering the repayment was not implemented within the time limit set out in the first indent of the first paragraph of Article 241 of the Community Customs Code. In addition, the relevant national provision for the purposes of the second indent of the first paragraph of Article 241 of the Community Customs Code, that is, Paragraph 236 of the Abgabenordnung (German Tax Code), provides for the payment of interest only when the repayment of the duty at issue was ordered by a decision of the national courts, which was not the situation in the present case.

26 In addition, the applicant annexed to its application and to a communication sent in response to a question raised by the Court the decisions of the national authorities which had all refused to allow the interest claimed, on the basis of the provisions referred to in the paragraph above, together with a letter from the President of the Fourth Chamber of the Finanzgericht Hamburg (Finance Court, Hamburg) dated 5 February 2015 confirming prima facie refusal in the domestic proceedings, described as a 'test case', relating to the payment of interest on repaid anti-dumping duties (see paragraph 9 above).

27 Those decisions all precluded the applicability to the present case of the solution reached in the judgment of 27 September 2012 in *Zuckerfabrik Jülich and Others* (C-113/10, C-147/10 and C-234/10, ECR, EU:C:2012:591, paragraphs 65 to 67; see also judgment of 18 April 2013 in *Irimie*, C-565/11, ECR, EU:C:2013:250, paragraphs 21 and 22). According to that judgment, individuals entitled to

reimbursement of sums paid unduly in respect of production levies in the sugar sector determined on the basis of an invalid regulation are also entitled to payment of the interest on such sums (judgment in *Zuckerfabrik Jülich and Others*, EU:C:2012:591, paragraph 67), the Court of Justice having upheld in this field the principle of an obligation on Member States to repay with interest amounts of tax levied in infringement of EU law (judgment in *Zuckerfabrik Jülich and Others*, EU:C:2012:591, paragraph 66).

28 Therefore, even though, as the Commission noted, the possibility cannot be entirely ruled out that, on the basis of the judgment in *Zuckerfabrik Jülich and Others*, cited in paragraph 27 above (EU:C:2012:591), the exercise of domestic legal remedies would result in payment of the interest claimed, the evidence supplied by the applicant in the present case is sufficient to cast serious doubt on such an outcome.

29 As a result of all the foregoing, the applicant has sufficiently established the ineffectiveness of domestic legal remedies, without there being any need to await the conclusion of the pending domestic proceedings.

30 Consequently, the plea of inadmissibility on the basis of non-exhaustion of domestic legal remedies must be rejected, as must the Commission's application to suspend proceedings in the present case pending the outcome of the domestic proceedings referred to above.

Substance of the action

31 In accordance with settled case-law, the non-contractual liability of the European Union under the second paragraph of Article 340 TFEU for unlawful conduct on the part of its institutions depends on the fulfilment of a set of conditions, namely the unlawfulness of the acts alleged against the institutions, the fact of damage and the existence of a causal link between that conduct and the damage complained of (see judgments of 19 April 2012 in *Artegodan* v *Commission*, C-221/10 P, ECR, EU:C:2012:216, paragraph 80 and the case-law cited, and 16 May 2013 *Gap granen & producten* v *Commission*, T-437/10, EU:T:2013:248, paragraph 16 and the case-law cited).

Unlawfulness of the acts alleged against the institutions

32 The applicant maintains that, as a result of the judgment in *GLS*, cited in paragraph 7 above (EU:C:2012:158), the Commission and the Council breached their duty of care and infringed the principle of sound administration since they determined the normal value of the product concerned on the basis of the prices actually paid or payable for a like product in the European Union without taking all due care to determine that value on the basis of the prices paid for that same product in a market economy third country, contrary to the requirements of Article 2(7)(a) of the Basic Regulation.

33 In the judgment in *GLS*, cited in paragraph 7 above (EU:C:2012:158, paragraph 36), the Court of Justice held that since the Commission and the Council had determined the normal value of the product concerned on the basis of the prices actually paid or payable in the European Union for a like product without taking all due care to determine that value on the basis of the prices paid for that same product in a market economy third country, they had infringed the requirements of Article 2(7)(a) of the Basic Regulation.

34 The first point to follow from that judgment is that the invalidity of Regulation No 1355/2008 and, therefore, the alleged unlawful acts, are attributable as much to the Commission, which conducted the anti-dumping proceeding and adopted the provisional anti-dumping regulation, as to the Council, which adopted the definitive anti-dumping regulation ratifying the provisional regulation.

35 The second point is that both institutions are accused of breaching their duty to take due care, which essentially constitutes the duty of care and the principle of sound administration, breach of which is alleged by the applicant, at the time of implementing the provisions of Article 2(7)(a) of the Basic Regulation, which determines the method for calculating the normal value.

36 It should be recalled that, according to settled case-law, non-contractual liability on the part of the European Union arises only from a sufficiently serious breach of a rule of law intended to confer rights on individuals and that, in order to assess the existence of a sufficiently serious breach of a rule of law, the degree of discretion available to the institution in question must be taken into account. Thus, when the institutions have discretion available to them, the decisive test for finding that a breach of EU law is sufficiently serious is whether there was a manifest and grave disregard of the limits on that discretion. By contrast, when they have only considerably reduced, or even no, discretion, the mere infringement of EU law may be sufficient to establish the existence of a sufficiently serious breach (see judgments of 4 July 2000 in *Bergaderm and Goupil* v *Commission*, C-352/98 P, ECR, EU:C:2000:361, paragraphs 42 to 44 and the case-law cited, and 2 March 2010 *Arcelor* v *Parliament and Council*, T-16/04, ECR, EU:T:2010:54, paragraph 141 and the case-law cited).

37 It is therefore first necessary to establish the degree of discretion available to the institutions when implementing Article 2(7)(a) of the Basic Regulation.

– The degree of discretion available to the institutions

38 In order to establish the degree of discretion available to the institutions, it is first necessary to determine the conduct of which the institutions are accused in implementing Article 2(7)(a) of the Basic Regulation and, in the present case, the unlawfulness justifying the declaration of invalidity of Regulation No 1355/2008. This is because the implementation of a provision can entail various actions over which the institution responsible for the implementation may not necessarily have the same degree of discretion. This is the case, in particular, with provisions establishing the method for calculating a value, such as the normal value that is used in calculating the dumping margin (for a similar approach, in relation to the method of calculating import price in the cereal sector, see judgment in *Gap granen & producten* v *Commission*, cited in paragraph 31 above, EU:T:2013:248, paragraphs 30 to 41).

39 In the present case, despite what the applicant maintains to the contrary, the unlawfulness alleged on the part of the institutions does not consist of the choice of the alternative calculation method, based on the prices practised in the European Union, rather than the prices practised in a market economy third country, a choice in which they had no discretion (see, to that effect, judgment in *GLS*, cited in paragraph 7 above, EU:C:2012:158, paragraph 26, and Opinion of Advocate General Bot in *GLS*, C-338/10, ECR, EU:C:2011:636, point 97).

40 Contrary to what the applicant maintained at the hearing, neither is the Commission reproached for having completely failed to examine the data provided by Eurostat for the purposes of calculating the normal value of the product concerned. In fact, the Court of Justice criticised the Commission, as can be seen from the judgment in *GLS*, cited in paragraph 7 above (EU:C:2012:158, paragraphs 34 to 36; see also Opinion of Advocate General Bot in *GLS*, cited in paragraph 39 above, EU:C:2011:636, points 107 to 119), for not taking all due care to examine the Eurostat data, in other words, for not having sufficiently exploited the statistical data or carried out its research into a market economy third country on the basis of those data.

41 The Commission enjoys a degree of discretion both in relation to the analysis of the Eurostat data and in the pursuit of its investigations on the basis of that analysis.

42 First, the discretion enjoyed by the institutions in examining the Eurostat data is, as was pointed out by the Commission, evident from the fact that the information collected for the purposes of determining a market economy third country within the meaning of Article 2(7)(a) of the Basic Regulation is of necessity economic information leading to complex evaluations, such as the determination of the existence and the importance of production in that country of the product concerned or a similar product (see, to that effect, judgments of 22 October 1991 in *Nölle*, C-16/90, ECR, EU:C:1991:402, paragraphs 11 to 17; 29 May 1997 *Rotexchemie*, C-26/96, ECR, EU:C:1997:261, paragraph 10; and 28 September 1995 *Ferchimex* v *Council*, T-164/94, ECR, EU:T:1995:173, paragraph 66).

43 Secondly, the discretion enjoyed by the institutions in pursuing the investigations following the first analyses is confirmed by the Basic Regulation which provides that the Commission will select a market economy third country on the basis of 'any reliable information made available' (second paragraph of Article 2(7)(a) of the Basic Regulation), thus giving the Commission a degree of discretion in determining the availability of information, since the means of investigation stated are optional and are all the more difficult to implement in the present case as they relate to information about a third country (Article 6(4) of the Basic Regulation), and also a degree of discretion in determining the reliability of the information gathered, since examination of the accuracy of the information is to be made 'as far as possible' (Article 6(8) of the Basic Regulation).

44 That reasoning is not called into question by the confirmation given by the Court of Justice in paragraph 32 of the judgment in *GLS*, cited in paragraph 7 above (EU:C:2012:158; see also Opinion of Advocate General Bot in *GLS*, cited in paragraph 39 above, points 101 and 102), according to which the Commission has an obligation to consider on its own initiative all the information available, since in an anti-dumping investigation, it does not act as an arbitrator whose remit is limited to making an award solely on the basis of the information and the evidence provided by the parties to the investigation. In providing that confirmation, the Court of Justice clarified the sources of the 'information made available' on which the Commission had to base its analysis, which is not limited to information supplied by the parties to the investigation, and did not seek to restrict the Commission's discretion in determining the availability of the information available from those sources, especially given that, in the same paragraph of the judgment in *GLS*, cited in paragraph 7 above (EU:C:2012:158), the Court of Justice referred to the investigative powers under Article 6(4) of the Basic Regulation.

45 Therefore, since in the present case the Commission enjoys a degree of discretion, in order for liability on the part of the European Union to arise the applicant must establish that there was a manifest and grave disregard of that discretion.

– Manifest and grave disregard by the institutions of the limits on their discretion

46 It should be noted from the outset that, according to case-law, failure to take due care is one of the criteria whereby the irregularity or error on the part of an institution is held to constitute a sufficiently serious breach of EU law (see judgment in *Gap granen & producten* v *Commission*, cited in paragraph 31 above, EU:T:2013:248, paragraph 28 and the case-law cited). In this respect, the duty to take due care is the qualifying factor for the breach of another principle or another rule of law of the European Union. However, in the present case, the duty to take due care is itself the principle which is alleged to have been breached and which has been confirmed by the Court of Justice.

47 It follows from the case-law that, in order for a breach of the duty to take due care to constitute a manifest and grave disregard of the limits on the discretion enjoyed by an institution, there must have been a complete failure to comply with the duty to take due care, a simple failure to properly appreciate the extent of the obligations arising from that duty not sufficing (see, in relation to the duty of care and sound administration, judgment of 18 September 1995 in *Nölle* v *Council and Commission*, T-167/94, ECR, EU:T:1995:169, paragraph 89 and the case-law cited).

48 In the present case, it is therefore necessary to determine whether the Commission's conduct can be regarded as a complete failure to comply with the obligations arising from the duty to take due care or simply a poor appreciation of the extent of those obligations.

49 As is apparent from paragraph 40 above, in its judgment in *GLS*, cited in paragraph 7 above (EU:C:2012:158), the Court of Justice declared Regulation No 1355/2008 to be invalid on the grounds that the Commission had failed to comply with its duty to take due care by not pursuing its investigations on the basis of Eurostat data about imports into the European Union of the product concerned from a market economy third country.

50 In so doing, the institutions did not completely fail to comply with the obligations arising from the duty to take due care.

51 In the absence of any suggestion from the parties concerned in relation to a market economy third country, the Commission did not omit to research such countries, whereas such an omission would have constituted a manifest and grave disregard of its duty to take due care (see, by analogy, judgments in *Nölle* v *Council and Commission*, cited in paragraph 47 above, EU:T:1995:169, paragraph 88, and of 16 September 2013 in *ATC and Others* v *Commission*, T-333/10, ECR, EU:T:2013:451, paragraphs 88 and 91).

52 As is apparent from recital 40 of the preamble to Regulation No 642/2008, and as the Commission pointed out at the hearing, the Commission carried out investigations on its own initiative during the anti-dumping proceeding. More precisely, given that the anti-dumping proceeding was initiated following a complaint by a Spanish association, the Commission asked the Spanish authorities to carry out the checks and enquiries necessary to determine the market economy third countries exporting the product in question to the European Union. It was that investigation that led the Commission to identify two Thai producers of the product in question, to whom it sent questionnaires.

53 As Advocate General Bot has pointed out, by acting in this way the Commission cannot be criticised for failing to take due care with regard to the two companies in question. The way in which the Commission sent the questionnaires and the time limit within which the two companies were asked to complete them would have enabled them to reply, so that their failure to do so is entirely attributable to themselves, especially since the Commission has no means of bringing pressure to bear on companies in third countries to compel them to cooperate (Opinion of Advocate General Bot in *GLS*, cited in paragraph 39 above, EU:C:2011:636, points 115 and 116).

54 However, in the absence of any reply from the two Thai companies, the Commission should have pursued its investigations, especially when it still had time to do so, given that this setback with the said companies occurred in December 2007 and the provisional regulation was adopted in July 2008. By omitting to pursue its investigations, the Commission therefore was not making a serious and sufficient effort (see, to that effect, judgment in *GLS*, cited in paragraph 7 above, EU:C:2012:158, paragraph 34, and Opinion of Advocate General Bot in *GLS*, cited in paragraph 39 above, EU:C:2011:636, points 117 and 119; see also, by analogy, judgment in *Nölle* v *Council and Commission*, cited in paragraph 47 above, EU:T:1995:169, paragraph 88).

55 Consequently, the Commission wrongly assessed the extent of its obligations arising under its duty to take due care, but it did not completely fail to comply with the obligations arising from that duty.

56 As a result of all the foregoing, there is no action or conduct on the part of the institutions in the present case such as to render the European Union liable.

57 There can therefore be no liability on the part of the European Union, since the non-fulfilment of any one of the three conditions necessary for liability to arise is sufficient for the compensation claim to fail, without there being any need to examine whether the other two conditions are fulfilled (judgment

of 20 February 2002 in *Förde-Reederei* v *Council and Commission*, T-170/00, ECR, EU:T:2002:34, paragraph 37; see also, to that effect, judgment of 15 September 1994 in *KYDEP* v *Council and Commission*, C-146/91, ECR, EU:C:1994:329, paragraph 81).

58 Nevertheless, for the sake of completeness, the question of whether there is a sufficient direct and certain causal link between the alleged misconduct and the damage allegedly suffered should be examined.

Causal link between the misconduct and the damage

59 It is settled case-law that the alleged damage must be a sufficiently direct consequence of the conduct complained of, which must be the determining cause of the harm, although there is no obligation to make good every harmful consequence, even a remote one, of an unlawful situation (judgment of 4 October 1979 in *Dumortier and Others* v *Council*, 64/76, 113/76, 167/78, 239/78, 27/79, 28/79 and 45/79, ECR, EU:C:1979:223, paragraph 21; see also judgment of 10 May 2006 in *Galileo International Technology and Others* v *Commission*, T-279/03, ECR, EU:T:2006:121, paragraph 130 and the case-law cited). It is for the applicant to adduce evidence of a causal link between the conduct complained of and the damage pleaded (see judgment of 30 September 1998 in *Coldiretti and Others* v *Council and Commission*, T-149/96, ECR, EU:T:1998:228, paragraph 101 and the case-law cited).

60 Such a causal link has not been established by the applicant in the present case.

61 The evidence supplied by the applicant does not prove that the interest said to form the damage suffered relates to the loans taken out as a result of the cash losses due to payment of the disputed anti-dumping duties.

62 The only evidence supplied, comprising Annex A4 to the application, entitled ‘Expenditure statement of additional interest incurred’, presented in the form of tables showing the amounts of interest due by period (column headed ‘Gesamtzinsen’, meaning ‘Total interest’), setting out the interest rates (column headed ‘Zinssatz’) and the amounts to which they relate (column headed ‘Betrag’). However, aside from the fact that that annex does not include any clarification of the nature of those amounts, other than a reference containing the words ‘Notice of assessment’ (‘Steuerbescheid’) followed by a number, it should be noted that it was drafted by the applicant for the purposes of this action, as was confirmed by the applicant at the hearing. In the absence of any evidence from an external source or any other official corroborative document, it is therefore not sufficient in itself to prove the alleged link between the interest, the loans and the anti-dumping duties wrongly imposed by Regulation No 1355/2008 (as to the weak probative value of a document drafted by an applicant, see Order of 3 September 2014 in *Diadikasia Symvouloi Epicheiriseon* v *Commission*, T-261/12, EU:T:2014:755, paragraph 38).

63 In addition, even if Annexes C2 and C3 to the reply could be declared admissible despite being presented late, without any reason being given for the delay, they would not assist in proving the causal link relied on.

64 It is true that the information contained in Annex C2 (bank statements, notices of assessment and notices of repayment issued by the customs authorities, customs declarations and repayment claims made by the applicant and the other four companies) confirms the payment and repayment of the anti-dumping duties and the amounts in question. Annex C3, which contains certificates from the applicant’s bank setting out the principal terms of its credit agreements (amounts borrowed, interest rates, amount of interest, term) is also proof of the payment of interest. In addition, following an analysis made difficult by the unclear presentation of the many documents included in Annex C2, it

can be concluded that certain amounts or certain additions of amounts referred to in Annex C2 correspond to certain sums referred to in Annex A4 under sums borrowed and that the interest rates appearing in Annex C3 correspond to those cited in Annex A4.

65 However, a combined reading of the three annexes in question does not, of itself, lead to a finding that the applicant entered into borrowing as a result of the anti-dumping duties wrongly paid rather than solely in order to finance its activity generally, irrespective of the anti-dumping duties in question. First, as the Council rightly maintained at the hearing, there is no obvious connection between Annexes C2 and C3, since the amounts borrowed, as they appear in Annex C3, are much greater than the amounts of anti-dumping duties wrongly paid, as shown in Annex C2. Secondly, the most that Annexes C2 and C3 can do is to provide evidence, externally sourced and/or in the form of official documents, concerning the amounts of the anti-dumping duties in question and the interest rates (see paragraph 64 above), but this cannot compensate for the insufficient probative value of Annex A4 (see paragraph 62 above) and is therefore not enough, even when combined with Annex A4, to prove the link between the anti-dumping duties wrongly paid, the loans entered into and the payment of the relevant interest (see, to that effect, judgment of 1 February 2001 in *T. Port* v *Commission*, T-1/99, ECR, EU:T:2001:36, paragraphs 72 and 73).

66 The need for the applicant to take out the loans referred to above as a result of the disputed anti-dumping duties is all the more questionable given that, as the applicant acknowledged in the reply, and as the Council and the Commission pointed out, the applicant passed those duties on to its clients. Therefore, the applicant would at most have needed the loan to finance its purchases while waiting for its products to be sold and for the effect of passing on the anti-dumping duties to its clients to be felt, but had no cause to borrow the amounts in question for much longer loan terms, as shown in Annex A4 to the application, namely for the period from payment of the anti-dumping duties in question until the time they were repaid by the customs authorities. What is more, the Council raised the point, which was not denied by the applicant, that the activity subject to the anti-dumping duties in question represented only 6% at most of the turnover of the importers who were the subject of the anti-dumping investigation, including the applicant, therefore making it very unlikely, in the absence of evidence or even arguments to the contrary on the part of the applicant, that cash losses due to the payment of the disputed anti-dumping duties made a loan necessary.

67 In the light of all the foregoing, the applicant has not proven the existence of a causal link between the alleged misconduct and the alleged damage.

68 That precondition for EU liability has therefore not been fulfilled and there is no need to rule on the allegations made by the Council and the Commission that the causal link was broken by the applicant's negligent conduct and the reintroduction of the disputed anti-dumping duties by Regulation No 158/2013. Neither is it necessary to grant the Commission's application for a suspension of the present proceedings which was based on the fact that two questions concerning the validity of Regulation No 158/2013 (Joined Cases C-283/14 *CM Eurologistik* and C-284/14 *GLS*) are pending before the Court of Justice for a preliminary ruling.

69 This action must therefore be dismissed as unfounded, in respect of both the principal and the subsidiary pleas, without there being any need to rule on either the alleged partial inadmissibility of the action, in respect of the interest connected with the credit arrangements entered into as a result of the anti-dumping duties paid on the imports made through the intermediary of the other four companies, or on the plea of inadmissibility alleging an abuse of procedure, in that the action was actually seeking the annulment of the decisions of the national customs authorities.

Costs

70 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 applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those of the Council and the Commission, in accordance with the forms of order sought by the Council and the Commission.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. Dismisses the action;

2. Orders I. Schroeder KG (GmbH & Co.) to pay the costs.

Martins Ribeiro Gervasoni Madise

Delivered in open court in Luxembourg on 23 September 2015.

[Signatures]