Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

16 March 2016*

(Dumping — Imports of solar glass originating in the People's Republic of China — Definitive anti-dumping duty — Market Economy Treatment (MET) — Article 2(7)(b) and (c), third indent, of Regulation (EC) No 1225/2009 — Significant distortion arising from the former non-market economy system — Tax incentives)

In Case T-586/14,

Xinyi PV Products (Anhui) Holdings Ltd, established in Anhui (China), represented by Y. Melin and V. Akritidis, lawyers,

applicant,

v

European Commission, represented by L. Flynn and T. Maxian Rusche, acting as Agents,

defendant,

Application for the annulment of Commission Implementing Regulation (EU) No 470/2014 of 13 May 2014 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of solar glass originating in the People's Republic of China (OJ 2014 L 142, p. 1, with corrigendum in OJ 2014 L 253, p. 4),

THE GENERAL COURT (Fourth Chamber),

composed of M. Prek, President, I. Labucka (Rapporteur) and V. Kreuschitz, Judges,

Registrar: L. Grzegorczyk, Administrator,

having regard to the written part of the procedure and further to the hearing on 9 September 2015,

gives the following

* Language of the case: English.

Judgment

Background to the dispute and the contested regulation

1 The applicant, Xinyi PV Products (Anhui) Holdings Ltd, is a company established in China which manufactures in China and exports to the European Union solar glass covered by Commission Implementing Regulation (EU) No 470/2014 of 13 May 2014 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of solar glass originating in the People's Republic of China (OJ 2014 L 142, p. 1, with corrigendum in OJ 2014 L 253, p. 4) ('the contested regulation').

2 The applicant's sole shareholder is the company Xinyi Solar (Hong Kong) Ltd, established in Hong Kong (China) ('XsolarHK'), which is listed on the Hong Kong Stock Exchange.

3 On 26 November 2013, the European Commission adopted Regulation (EU) No 1205/2013 imposing a provisional anti-dumping duty on imports of solar glass from the People's Republic of China (OJ 2013 L 316, p. 8) ('the provisional regulation').

4 It is apparent from the contested regulation that the proceeding under which the provisional regulation was adopted was initiated on 28 February 2013 following a complaint lodged on behalf of producers representing more than 25% of the total Union production of solar glass (recital 2 of the contested regulation).

5 It is also apparent from the contested regulation that subsequent to the disclosure of the essential facts and considerations on the basis of which a provisional anti-dumping duty was imposed ('the provisional disclosure'), several interested parties, including the applicant, made written submissions making known their views on the provisional findings (recital 4 of the contested regulation).

6 The Commission continued to seek and verify all the information it deemed necessary for its definitive findings. The oral and written comments submitted by the interested parties were considered and, where appropriate, the provisional findings were modified (recital 5 of the contested regulation).

7 Subsequently, the Commission informed all the parties, including the applicant, of the essential facts and considerations on the basis of which it intended to impose a definitive anti-dumping duty on imports of solar glass originating in China and definitively collect the amounts secured by way of provisional duty ('the definitive disclosure'). All parties were granted a period within which they could make comments on the final disclosure (recital 6 of the contested regulation).

8 On 21 May 2013, the applicant made an application for the purpose of claiming Market Economy Treatment ('MET') and on 6 June 2013 lodged its replies to the Commission's anti-dumping questionnaire.

9 The applicant replied to the Commission's letter on 21 June 2013 inviting it to provide additional information.

10 The information provided by the applicant in the application form for MET and its replies to the Commission's questionnaire were verified at the applicant's Chinese headquarters between 21 and 26 June 2013.

11 At the end of June and in July 2013, the applicant produced additional information in agreement with the Commission and in accordance with the latter's requests.

12 By letter of 22 August 2013 ('Commission's letter of 22 August 2013'), the Commission informed the applicant that it took the view that it could not grant its request for MET on the sole ground that it did not meet the third criterion for that treatment to be granted. The Commission invited the applicant to submit its observations. By contrast, the four other criteria for MET were considered to have been met by the applicant.

13 In its letter of 22 August 2013, the Commission expressed the following view:

'The MET investigation revealed that [the applicant] benefited from various income tax breaks such as:

— The '2 Free 3 Halve' programme. This tax regime allows for foreign invested companies to benefit from a two-year income tax holiday (0%) followed by three years of income tax levied at a rate of 12.5% instead of the normal tax rate, which is 25%;

— the High-Tech Enterprises tax regime. Under this scheme the company is subject to a reduced income tax rate of 15% instead of the normal 25% income tax rate. This preferential tax rate is a subsidy of a quasi-permanent open-ended character which could also serve the purpose of attracting capital at discounted rates, thereby distorting competition.

It is considered that the reduced tax rates provide significant financial benefits and the company has therefore failed to demonstrate that its costs and financial situation are not subject to distortions carried over from the former non-market economy system ...

Accordingly, the Commission proposes to reject the [applicant's] MET request.'

14 On 1 September 2013, the applicant presented its observations to which the Commission responded in its final decision on the MET application on 13 September 2013 ('the Commission's letter of 13 September 2013') which confirmed the rejection of the applicant's MET request.

15 In the Commission's letter of 13 September 2013, the Commission expressed, inter alia, the following view:

'An income tax system that treats favourably certain companies and/or economic sectors deemed strategic by the government implies that the tax system is not one of market economy but still heavily influenced by state planning and may therefore be assessed under criterion 3 [of Article 2(7)(c), third indent, of Regulation (EC) No 1225/2009]. The application of a preferential tax rate scheme changes the amount of pre-tax profits the company has to achieve in order to be attractive to investors ...

In this regard, it is recalled the lower tax-rate for [the applicant] (14.01%) was possible as the company could combine the High Tech Enterprise tax regime with another scheme, the 'Two Free 3 Halve' programme. The combined effect was hence a significantly lower tax rate than that normally applied (25%) which could, inter alia, serve the purpose of attracting capital at discounted rates and thus affect the overall financial and economic situation of the company.

...

Finally, you argue that the Commission's finding that the tax regime is of quasi-permanent open-ended character is unsubstantiated. Your arguments that the two tax regimes are limited in time are duly noted. The fact that the two regimes do not have a permanent character does however not change the fact ... that they served to distort the financial and economic situation of the firm.'

16 Following the provisional disclosure and subsequently, after the definitive disclosure, the applicant claimed that the Commission erred in rejecting its MET application. The same claim in relation to the MET determination had already been made at the provisional stage and was rejected by the Commission in recitals 43 and 47 of the provisional regulation (recital 32 of the contested regulation).

17 Consequently, the findings in recitals 34 and 47 of the provisional regulation that the MET applications must be rejected were confirmed in the contested regulation (recital 34 of the contested regulation).

18 Recitals 34 to 47 of the provisional regulation read as follows:

‘(34) Pursuant to Article 2(7)(b) of [Regulation (EC) No 1225/2009], in anti-dumping investigations concerning imports from [China], normal value shall be determined in accordance with Article 2(1) to (6) of [Regulation (EC) No 1225/2009] for those exporting producers which were found to meet the criteria laid down in Article 2(7)(c) of [that Regulation].

(35) Briefly, and for ease of reference only, these criteria are set out below:

(1) business decisions are made in response to market conditions, without significant State interference, and costs reflect market values;

(2) firms have one clear set of basic accounting records which are independently audited, in line with international accounting standards and are applied for all purposes;

(3) there are no significant distortions carried over from the former non-market economy system,

(4) legal certainty and stability is provided by bankruptcy and property laws; and

(5) currency exchanges are carried out at the market rate.

(36) Ten cooperating companies requested MET pursuant to Article 2(7)(b) of [Regulation (EC) No 1225/2009] and replied to the MET claim form within the given deadlines. Pursuant to Article 2(7)(d) of [Regulation (EC) No 1225/2009] a MET verification was carried out on the companies which were included in the sample [including the applicant].

(37) It follows that a MET determination was made in respect of the following four companies or groups of companies:

— Sampled companies:

— ...;

— [the applicant] and [XSolarHK];

— ... .

— Company subject to individual examination:

— ... .

(38) The Commission sought all the information deemed necessary and verified all the information submitted in the MET claims at the premises of the companies in question.

(39) In case of related parties, the Commission shall examine whether the group of the related companies as a whole fulfils the conditions for MET. Therefore, in cases where a subsidiary or any other company related to the applicant in [China] is involved, directly or indirectly, in the production or sales of the product concerned, the MET examination is carried out in respect of each company individually as well as to the group of companies as a whole.

(40) Accordingly, the MET claims of four exporting producers (groups of companies), comprised of eleven legal entities, were investigated.

(41) The investigation established that all four exporting producers (groups of companies) claiming MET failed to demonstrate that they fulfilled all of the criteria laid down in Article 2(7)(c) of [Regulation (EC) No 1225/2009].

(42) ...

(43) [A]ll four exporting producers, either individually or as a group, failed to demonstrate that they were not subject to significant distortions carried over from the non-market economy system. Accordingly, these companies, or group of companies, did not fulfil MET criterion 3. More specifically, all four exporting producers, or groups of exporting producers, benefitted from preferential tax regimes.

(44) ...

(45) The Commission disclosed the results of the MET investigation to the companies concerned, the Chinese authorities and the complainant and invited them to comment.

(46) The comments received were not such as to alter the Commission's preliminary findings. After having consulted the Member States in accordance with Article 2(7)(c), all applicants were individually and formally notified, on 13 September 2013, of the Commission's final determination with regard to their respective MET claim.

(47) Accordingly, neither of the four cooperating exporting producers or groups of exporting producers in [China] that had requested MET could show that they fulfilled all the criteria set out in Article 2(7)(c) of [Regulation [(EC) No 1225/2009] and their MET claims were therefore rejected.'

Procedure and forms of order sought

19 By application lodged at the Court Registry on 7 August 2014, the applicant brought the present action.

20 At the written stage of the procedure the Commission, in the rejoinder, requested the Court to adopt a measure of organisation of procedure under Article 64 of the Rules of Procedure of 2 May 1991 requiring the applicant to show that it had obtained the agreement of a company to which the document annexed in the reply was addressed to the production of that document, since in the absence of such an agreement that document, concerning the fourth plea in the action alleging infringement of the rights of the defence, must be removed from the file.

21 Upon hearing the Report of the Judge-Rapporteur, the Court decided to open the oral part of the procedure.

22 Pursuant to Article 64(2)(a) of the Rules of Procedure of 2 May 1991, the Court submitted questions to the parties for written reply before the hearing.

23 The parties replied to those questions within the prescribed period.

24 By letter addressed to the Court Registry on 8 September 2015, the applicant lodged, in accordance with Article 85(3) of the Rules of Procedure of the General Court, a copy of the Commission's communication to the Council and Parliament dated 12 December 1997 on the treatment of former non-market economies in anti-dumping proceedings and a proposal for a Council Regulation amending Council Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European [Union] (COM(97) 677 final).

25 The same day, the Court sent the Commission, in accordance with Article 85(4) of the Rules of Procedure, the evidence produced by the applicant stating that it might comment on the document in question at the hearing.

26 The parties presented oral argument and replied to the questions put by the Court at the hearing on 9 September 2015.

27 The applicant claims that the Court should:

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

— order the Commission to pay the costs.

28 The Commission contends that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

Law

Late production of evidence

29 As was noted in paragraph 24 above, the applicant lodged a document at the Court Registry on the day before the hearing as new evidence.

30 At the hearing, the Commission requested the Court not to add that document to the file pursuant to Article 85(3) of the Rules of Procedure.

31 In that regard, it should be recalled that under Article 85(3) of the Rules of Procedure it is only 'exceptionally [that the main parties may] produce or offer further evidence before the oral part of the procedure is closed or before the decision of the General Court to rule without an oral part of the procedure, provided that the delay in the submission of such evidence is justified'.

32 In the present case, the applicant has not supplied any evidence to justify the delay in submitting the document at issue.

33 However, within the framework of the dispute as defined by the parties, the Court, while it must rule only on the applications submitted by the parties, cannot confine itself to the arguments put forward by the parties in support of their claims or it may be forced to base its decisions on erroneous legal considerations (see judgment of 5 October 2009 in *Commission* v *Roodhuijzen*, T-58/08 P, ECR, EU:T:2009:385, paragraph 35 and the case-law cited).

34 In particular, in a dispute between the parties concerning the interpretation and application of a provision of EU law, the Court is required to apply to the facts put before it by the parties the relevant rules of law for the solution of the dispute. According to the principle *iura novit curia*, determining the meaning of the law does not fall within the scope of application of a principle which allows the parties a free hand to determine the scope of the case (see judgment in *Commission* v *Roodhuijzen*, cited in paragraph 33 above, EU:T:2009:385, paragraph 36 and the case-law cited).

35 The document at issue is a preparatory document for the purpose of modifying the then applicable regulatory framework which was the basis for Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European [Union] (OJ 2009 L 343, p. 51, corrigendum OJ 2010 L 7, p. 22) ('the basic regulation'). That document might, therefore, concern matters of law to be taken into account by the court in the interpretation, in particular the historical interpretation, of the scope of Article 2(7)(c), third indent, of the basic regulation.

36 Therefore, the Commission's application that the document at issue be excluded from the case file must be rejected.

Substance

37 In support of the action the applicant relies on four pleas in law, the first of which alleges infringement of Article 2(7)(c), third indent, of the basic regulation, and argues that the Commission erred, in the contested regulation, in considering that its production costs and its financial situation were subject to significant distortions carried over from the former non-market economy system, within the meaning of that provision.

38 In that regard, 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 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 (see judgment of 19 July 2012 in *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, ECR, EU:C:2012:471, paragraph 66 and case-law cited).

39 However, pursuant to Article 2(7)(b) of the basic regulation, in anti-dumping investigations concerning imports from China, normal value is to be determined in accordance with Article 2(1) to (6) of the basic regulation for certain producers if it is shown, on the basis of properly substantiated claims by the producer or 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 that producer or those producers in respect of the manufacture and sale of the like product concerned (see, to that effect, judgment in *Council* v *Zhejiang Xinan Chemical Industrial Group*, cited in paragraph 38 above, EU:C:2012:471, paragraph 67).

40 Article 2(7)(b) and (c) was inserted into the basic regulation owing to the fact that the process of reform in particular in China had fundamentally altered its economy and had led to the emergence of firms for which market economy conditions prevailed, so that China had moved away from the economic circumstances which inspired use of the analogue country method as a matter of course (judgment in *Council* v *Zhejiang Xinan Chemical Industrial Group*, cited in paragraph 38 above, EU:C:2012:471, paragraph 68).

41 However, since, despite that process of reform, China is still not a market economy country to whose exports the rules set out in Article 2(1) to (6) of the basic regulation apply automatically, it is, in accordance with Article 2(7)(c), for each producer wishing to benefit from those rules to produce

sufficient evidence, as laid down by that provision, that it operates under market economy conditions (judgment in *Council* v *Zhejiang Xinan Chemical Industrial Group*, cited in paragraph 38 above, EU:C:2012:471, paragraph 69).

42 For that purpose, the burden of proof lies with the producer wishing to claim MET under Article 2(7)(b) of the basic regulation. The first subparagraph of Article 2(7)(c) provides that the claim submitted by such a producer must contain sufficient evidence, as laid down in that provision, that the producer operates under market economy conditions. Accordingly, there is no obligation on the EU institutions to prove that the producer does not satisfy the conditions laid down for the recognition of such status (judgment of 2 February 2012 in *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, ECR, EU:C:2012:53, paragraph 32).

43 On the other hand, it is for the EU institutions to assess whether the evidence supplied by the producer concerned is sufficient to show that the criteria laid down in Article 2(7)(c) of the basic regulation are fulfilled in order to grant it MET and it is for the EU judicature to examine whether that assessment is vitiated by a manifest error (judgments in *Brosmann Footwear (HK) and Others* v *Council*, cited in paragraph 42 above, EU:C:2012:53, paragraph 32, and *Council* v *Zhejiang Xinan Chemical Industrial Group*, cited in paragraph 38 above, EU:C:2012:471, paragraph 70).

44 In the present case, it is apparent from the wording of the Commission's letter of 22 August 2013, set out in paragraph 13 above, the wording of Commission's letter of 13 September 2013, set out in paragraph 15 above, and also that of recitals 34 to 47 of the provisional regulation, set out in paragraph 18 above, which is referred to in recital 34 of the contested regulation, noted in paragraph 17 above, that the Commission's grant of MET to the applicant was refused solely because it failed to establish that it satisfied the criteria set out in Article 2(7)(c), third indent, of the basic regulation.

45 Under that provision, the producer must provide sufficient evidence to establish that it operates under market economy conditions, namely that '[its] production costs and [its] financial situation ... are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts'.

46 Apart from depreciation of assets, other write-offs, barter trade and payment via compensation of debts, which are referred to in the basic regulation only as examples, as may be inferred from the use of the expression 'in particular', and which in any event are not relevant in the present case, the provision at issue establishes a double, cumulative condition requiring, first, the existence of a significant distortion in production costs and in the financial situation of the undertaking at issue and, secondly, that the distortion is established as being carried over from the former non-market economy system.

47 In the present case, the applicant complains that the Commission applied the contested regulation unlawfully, in particular, by taking the view that the tax incentives that it benefited from constituted distortions carried over from the non-market economy system, within the meaning of Article 2(7)(c), third indent, of the basic regulation.

48 To that effect, it claims, in essence, that the term 'carried over' conveys the continuity of a pre-existing factor, as is apparent from the development of the relevant EU provisions, and that those incentives cannot be considered to be part of a system in which trade is subject to a complete, or substantially complete, monopoly and where internal prices are fixed by the State, that is to say a State-trading country.

49 On the contrary, the tax incentives at issue are unrelated to a centralised and planned economic system, since in a large number of market economies they are commonplace in order to attract foreign investment and encourage certain economic activities. That is the case within the European Union, in particular in the light of the Commission's practice concerning tax incentives in State aid cases, with the result that the Commission manifestly erred in taking the view, in the letter of 13 September 2013, that an income tax regime favouring certain companies or certain economic sectors which the government regards as strategic implies that the tax regime at issue is not that of a market economy but is still strictly influenced by state planning.

50 Concerning the preferential tax scheme for foreign-owned companies, the applicant argues that China wishes to attract foreign capital and investment, which is a perfectly legitimate objective shared by all countries including most of the EU Member States, in particular Ireland, the Netherlands and Belgium.

51 According to the Commission, the applicant's arguments rest on a purely literal interpretation of Article 2(7)(c), third indent, of the basic regulation, as if it were a form of 'reverse grandfathering' clause, while the purpose of that provision is to take into account, by a nuanced approach, China's transition towards a market economy.

52 First, the reduced rate of taxation on company profits of 15% instead of 25% for high-tech companies is allocated on a discretionary basis by the Chinese administration, which is required to take into account the 12th Five-Year Plan in force in China, placing voltaic solar energy as an emerging strategic sector, and this reduced rate was adopted to implement the national plan for scientific and technological development in the medium and long term (2006-2020) so that the Commission was justified in considering that that tax incentive was carried over from the former non-market economy system.

53 The same is true for the reduced rate for foreign-owned companies.

54 Next, the Commission maintains, in that twofold context, that it did not base its analysis on the mere fact that the applicant had benefited from various tax incentives, but rather on the undisputed fact that such favourable treatment was the result of the designation of the applicant as an undertaking in the high-tech and new technology sector and as a foreign-owned company.

55 The aid granted by the Chinese public authorities was not the manifestation of a horizontal policy, inter alia, for the improvement of the environment, support for regional development or the promotion of any other objective in the common interest in the context of a market economy but indeed 'the embodiment of a non-market economy system'.

56 In addition, the applicant's reference to the tax policy of the Member States is completely misconceived since, while it is true that certain Member States give tax incentives for particular activities, those incentives are never in respect of the entire revenue of the undertakings concerned and are not granted for the sole reason that the investment is foreign.

57 Finally, the Commission maintains, so far as concerns the reduction in corporate taxation for undertakings in the high-tech and new technology sector, that it did not rely on the fact that that measure was connected to the five-year plans laid down by China in order to conclude that the applicant had not discharged the burden of proof in relation to the third criterion for the grant of MET. Nevertheless, the fact that the measure has its origin in the five year plans was a relevant factor which, together with other factors such as China's status as a country without a market economy, the privileged status of the applicant's sector, the nature and extent of the tax schemes at issue and the lack of evidence to the contrary, led the Commission to find that the schemes were such as to cause distortions.

58 The applicant misunderstands the essential distinction between supporting a specific activity and supporting all the activities of an undertaking which belongs to a sector which the State has decided to prioritise in relation to other sectors. The favourable tax treatment from which the applicant benefited is in the latter category and it would not be amongst the measures taken in a market economy.

59 In that regard, the Court notes that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the institutions of the European Union enjoy a broad discretion by reason of the complexity of the economic and political 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 power. The same applies to factual situations of a legal and political nature in the country concerned which the EU institutions must assess in order to determine whether an exporter operates under market conditions without significant State interference and may, accordingly, be granted MET. However, whilst, in the sphere of measures to protect trade, in particular anti-dumping measures, the EU judicature cannot interfere in the assessment reserved to the EU authorities, except in the case of a manifest error of assessment or misuse of powers, its task is nevertheless to satisfy itself that the institutions have taken account of all the relevant circumstances and appraised the facts of the matter with all due care (see judgment of 18 September 2012 in *Since Hardware (Guangzhou)* v *Council*, T-156/11, ECR, EU:T:2012:431, paragraphs 182 to 184 and the case-law cited).

60 To that effect, it has been held, as regards the status of Article 2(7)(b) and (c) of the basic regulation as an exception, that the requirement that a provision be interpreted strictly cannot enable the institutions to interpret and apply that provision in a manner inconsistent with its wording and purpose (judgment in *Council* v *Zhejiang Xinan Chemical Industrial Group*, cited in paragraph 38 above, EU:C:2012:471, paragraph 93).

61 Having regard to all the foregoing considerations, the question for the Court in its assessment of the first plea in law in the action is whether, as the applicant maintains, the Commission committed a manifest error of assessment in rejecting the arguments that it advanced to show that its production costs and its financial situation were not subject to any distortion carried over from the former non-market economy system for the purpose of being granted MET, notwithstanding the tax schemes at issue from which it had benefited.

62 In that respect it must be held that the Commission's assessment is manifestly wrong.

63 It should be noted that if the benefits carried over from a non-market economy system, within the meaning of Article 2(7)(c), third indent, of the basic regulation, could refer to any incentive given by the Chinese competent authorities that would call into question the practical effect and illustrative scope of the examples set out in that provision.

64 It is apparent from the wording of Article 2(7)(c), third indent, of the basic regulation that the distortions in the financial situation of undertakings must be carried over from the former non-market economy system. The various language versions of the basic regulation confirm that the term 'carried over' — inter alia 'induit' in French, 'infolge' in German, 'voortvloeien' in Dutch and 'derivanti' in Italian — have the sense that the former non-market economy system must have caused or led to the distortions at issue. Therefore, the incentives which are the basis for the alleged distortions cannot refer to any incentive whatsoever implemented by the competent Chinese authorities, but only those which stem from the former non-market economy system.

65 It cannot be held that the tax incentives at issue are carried over from a former non-market economy system, in the sense that they result from it or are a consequence of it.

66 It is common knowledge that market economy countries also give tax incentives to undertakings in the form of tax exemptions for a defined period or a reduced tax rate as is, moreover, apparent from the case-law of the Court of Justice in relation to State aid, in particular the judgments of 29 January 1998 in *Commission* v *Italy* (C-280/95, ECR, EU:C:1998:28, paragraph 2), of 21 March 2002 in *Spain* v *Commission* (C-36/00, ECR, EU:C:2002:196, paragraph 4), or of 28 July 2011, in *Diputación Foral de Vizcaya and Others* v *Commission* (C-471/09 P to C-473/09 P, EU:C:2011:521, paragraph 6).

67 The arguments advanced by the Commission, based on the exceptional nature and the dubious legality of those schemes in the light of EU law, cannot call into question the existence of tax schemes similar to those at issue having regard to the fact that comparable tax schemes have been adopted in the context of a market economy. Even if tax incentives such as reduced tax rates, which presuppose state intervention, may orientate the conduct of undertakings in a different direction to that caused by the forces present in a market economy, it must be held that such measures exist also in market-economy countries. Therefore, the mere existence of such measures does not suffice for them to be classified as carried over from a non-market economy.

68 That assessment cannot be called into question by the Commission's arguments in its written pleadings and at the hearing.

69 First, the argument alleging an indirect connection between the tax incentives at issue and various plans implemented in China is based on an overly formal approach, the continued existence of those plans not necessarily implying that those schemes were carried over from the former non-market economy in China, unless the view were taken that all the measures taken in China and connected to a plan are carried over from its former non-market economy, which would deprive Article 2(7)(b) and (c) of the basic regulation of any practical effect.

70 Next, in order to reject the argument of the Commission based on the allegedly non-horizontal character of the tax incentives at issue and the supposedly discretionary basis for their award, it suffices to note that during the hearing the applicant clearly demonstrated that those incentives were awarded by the competent authorities, not on a discretionary basis, but where their objective conditions for award were met, namely that the undertaking at issue belonged to the high-tech sector or its capital came from abroad.

71 In any event, it is apparent from Article 28 of the Corporate Income Tax Law of the People's Republic of China and from Article 93 of the implementing regulation for that law that the tax incentives awarded to undertakings in the high-tech sector, such as the applicant, which is not disputed by the Commission, are only awarded if certain objective conditions are met, namely, inter alia, that the undertakings at issue operate in the new advanced technologies sector, that they are the holders of intellectual property rights, that their goods or services are in high-tech sectors which are specifically supported by the State, that research and development costs reach a certain percentage of the whole of their revenue and that the number of technicians represents a certain percentage of all the employees.

72 Likewise, it is also apparent from Article 27 of the Corporate Income Tax Law of the People's Republic of China and Article 88 of the implementing regulation for that law that the tax incentives awarded to undertakings owned by foreign investors, such as the applicant, which the Commission does not dispute, are not awarded unless specific objective conditions are met, namely, inter alia, that the undertakings at issue are involved in environmental protection projects relating to energy or to the preservation of aquatic resources such as the innovation of technology for the purpose of saving energy and the reduction of certain emissions.

73 Therefore, the tax incentives at issue were awarded to the applicant because it belonged to a category of undertakings and not in its own right on a discretionary basis, a fact which the Commission also conceded at the hearing.

74 In that regard, the Commission is not persuasive in maintaining that the tax schemes at issue do not pursue legitimate objectives, such as environmental protection, public health or regional development.

75 It cannot be disputed that the support of certain business sectors, such as the high-tech sector, considered strategic by a given country, constitutes a legitimate objective in a market economy, irrespective of the legality of the measures at issue with regard, in particular, to EU law on State aid.

76 It also cannot be considered that the objective of attracting foreign investment is carried over from a former non-market economy system, since, first, such an objective is pursued by a good number of countries with a market economy and, secondly, such a policy seems, at least in theory, inconsistent with a form of economic organisation based on collective or state ownership of enterprises subject to production objectives defined in a central plan which characterises a non-market economy system.

77 Lastly, the Commission's argument that the tax incentives at issue have had an impact not only on costs directly connected to the objective pursued but on all the applicant's financial results and, therefore, on its overall economic situation, also cannot succeed.

78 Such an argument, even if it were well-founded, can be validly adduced only in respect of the extent of the distortion in production costs and the financial situation of the applicant, within the meaning of Article 2(7)(c), third indent, of the basic regulation, but not in order to hold that that distortion is carried over from the former non-market economy system, in the present case that of China, within the meaning of that same provision.

79 Consequently, it must be held that the Commission made a manifest error of assessment in finding, despite the evidence put forward by the applicant on that point, that the costs of production and the financial situation of the latter were subject to a distortion carried over from the former non-market economy system in order to refuse to grant the applicant MET.

80 Therefore, the contested regulation must be annulled in so far as it concerns the applicant without it being necessary to consider the three other pleas in support of the application nor, therefore, to decide on the Commission's application for a measure of organisation of procedure, that application being concerned only with the examination of the fourth plea in the action.

Costs

81 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Commission has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the applicant, in accordance with the form of order sought by the applicant.

On those grounds,

THE GENERAL COURT (Fourth Chamber),

hereby:

1. **Annuls Commission Implementing Regulation (EU) No 470/2014 of 13 May 2014 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of solar glass originating in the People's Republic of China in so far as it concerns Xinyi PV Products (Anhui) Holdings Ltd;**

2. **Orders the European Commission to pay the costs.**

Prek Labucka Kreuschitz

Delivered in open court in Luxembourg on 16 March 2016.

[Signatures]