Reports of Cases

JUDGMENT OF THE COURT (Ninth Chamber)

26 October 2016*

(Appeal — Dumping — Implementing Regulations (EU) No 1138/2011 and (EU) No 1241/2012 — Imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia — Regulation (EC) No 1225/2009 — Article 2(10)(i) — Adjustment — Functions similar to those of an agent working on a commission basis — First subparagraph of Article 2(10) — Symmetry between the normal value and the export price — Principle of sound administration)

In Case C-468/15 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 September 2015,

PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas), established in Medan (Indonesia), represented by D. Luff, avocat,

appellant,

the other parties to the proceedings being:

Council of the European Union, represented by J.-P. Hix, acting as Agent, and by N. Tuominen, avocate,

defendant at first instance,

European Commission, represented by J.-F. Brakeland and M. França, acting as Agents,

Sasol Olefins & Surfactants GmbH, established in Hamburg (Germany),

and

Sasol Germany GmbH, established in Hamburg (Germany),

interveners at first instance,

THE COURT (Ninth Chamber),

composed of E. Juhász, President of the Chamber, K. Jürimäe (Rapporteur) and C. Lycourgos, Judges,

Advocate General: P. Mengozzi,

Registrar: A. Calot Escobar,

* Language of the case: English.

having regard to the written procedure,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

Judgment

1 By its appeal, PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas) ('PTMM') seeks to have set aside the judgment of the General Court of the European Union of 25 June 2015, *PT Musim Mas* v *Council* (T-26/12, not published, 'the judgment under appeal', EU:T:2015:437), by which that Court dismissed its action seeking the annulment of Council Implementing Regulation (EU) No 1138/2011 of 8 November 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain fatty alcohols and their blends originating in India, Indonesia and Malaysia (OJ 2011 L 293, p. 1) and of Council Implementing Regulation (EU) No 1241/2012 of 11 December 2012 amending Implementing Regulation No 1138/2011 (OJ 2012 L 352, p. 1) (together 'the contested regulations').

Legal context

2 At the time of the facts underlying the dispute, the provisions governing the adoption of anti-dumping measures by the European Union were set out in 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, and corrigendum OJ 2010 L 7, p. 22), as amended by Council Regulation (EU) No 765/2012 of the European Parliament and of the Council of 13 June 2012 (OJ 2012 L 237, p. 1) ('the basic regulation').

3 Article 2(9) of the basic regulation provided:

'In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.

In these cases, adjustment for all costs, including duties and taxes, incurred between importation and resale, and for profits accruing, shall be made so as to establish a reliable export price, at the Community frontier level.

...'

4 Article 2(10) of that regulation provided:

'A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at, as closely as possible, the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis, due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be made are listed as follows:

...

(i) Commissions An adjustment shall be made for differences in commissions paid in respect of the sales under consideration. The term "commissions" shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis. ...'

Background to the dispute and the contested regulations

5 PTMM is a company established in Indonesia which produces, inter alia, fatty alcohols ('the product concerned'). It markets its products in the European Union through, on the one hand, two related companies established in Singapore, Inter-Continental Oils & Fats Pte Ltd ('ICOF S'), a subsidiary wholly controlled by shareholders which also control PTMM, and Besdale Trading Pte Ltd and, on the other, a company established in Germany, ICOF Europe GmbH ('ICOF E'), which is wholly owned by ICOF S.

6 Following a complaint lodged on 30 June 2010 by two European Union producers, Cognis GmbH and Sasol Olefins & Surfactants GmbH, and subsequent to the investigation initiated by the European Commission, the Council of the European Union adopted Implementing Regulation No 1138/2011. That regulation imposes a definitive anti-dumping duty of EUR 45.63 per tonne on imports of the product concerned manufactured by PTMM.

7 In order to calculate that definitive anti-dumping duty, the Council carried out, in the comparison between the normal value and the export price, a downward adjustment of the export price for commissions paid by PTMM to ICOF S for the sales to the European Union made by the latter, in accordance with Article 2(10)(i) of the basic regulation. In that regard, in recital 31 of Implementing Regulation No 1138/2011, the Council, inter alia, rejected PTMM's claim that it formed a single economic entity with ICOF S within which the latter was acting as an internal export department. In addition, in recital 35 of that regulation, the Council rejected PTMM's claim that an identical adjustment to the normal value should be made, pursuant to that provision of the basic regulation, on the ground that the contract providing for the payment of a commission to ICOF S covered only export sales, and not domestic sales, and that those sales were invoiced directly by PTMM.

8 On 13 June 2012 the Commission informed PTMM that, following the 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), it intended to amend Implementing Regulation No 1138/2011 in order to amend the anti-dumping duty imposed on another Indonesian company, PT Ecogreen Oleochemicals, and Ecogreen Oleochemicals (Singapore) Pte. Ltd ('Ecogreen') in so far as it was in a comparable situation to that of the case which gave rise to that judgment and to the judgment of the General Court of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council* (T-249/06, EU:T:2009:62) and formed a single economic entity with Ecogreen Oleochemicals GmbH.

9 On 11 December 2012 the Council adopted Implementing Regulation (EU) No 1241/2012. Pursuant to that regulation, the rate of definitive anti-dumping duty applicable to Ecogreen was reduced to EUR 0 per tonne. In spite of PTMM's requests seeking recognition that its situation was identical to that of Ecogreen, the Council, by that regulation, maintained the definitive anti-dumping duty applicable to PTMM.

The procedure before the General Court and the judgment under appeal

10 By application lodged at the Registry of the General Court on 20 January 2012, PTMM brought an action for annulment of the contested regulations.

11 In support of its action before the General Court, PTMM relied on four pleas in law.

12 The first plea in law alleged infringement of Article 2(10)(i) of the basic regulation. That plea was divided into two parts. First, PTMM criticised the Council for making a manifest error of assessment and for misusing its powers by refusing to recognise the existence of a single economic entity between it and ICOF S. Second, it submitted that that institution had not adduced any convincing evidence proving that ICOF S carried out functions similar to those of an agent working on a commission basis. The second plea in law alleged infringement of the first subparagraph of Article 2(10) of the basic regulation. That plea was also divided into two parts. Only the first part of the plea is relevant to the present appeal. In the context of that part of the plea, PTMM argued that, by making an adjustment to the export price, the Council had caused an asymmetry between the normal value and the export price and that a similar adjustment ought thus to have been made to the normal value. The third and fourth pleas in law alleged breach of the principle of sound administration and of the principle of non-discrimination, respectively.

13 By the judgment under appeal, the General Court rejected the four pleas and dismissed the action in its entirety.

Forms of order sought by the parties to the appeal

14 PTMM claims that the Court should:

— set aside the judgment under appeal;

— adjudicate definitively on the dispute, upholding the claims put forward by PTMM before the General Court and annulling the anti-dumping duty imposed on it under the contested regulations, and

— order the Council and the interveners to bear their own costs and to pay the costs incurred by PTMM at first instance and on appeal.

15 The Council claims that the Court should:

— dismiss the appeal;

— in the alternative, dismiss the action, and

— order PTMM to pay the costs incurred at first instance and on appeal.

16 The Commission claims that the Court should:

— dismiss the appeal as inadmissible, and

— order PTMM to pay the costs of the proceedings.

The appeal

17 In support of its appeal, PTMM puts forward four grounds.

The first ground of appeal, alleging an infringement of Article 2(10)(i) of the basic regulation in so far as the General Court wrongly applied the 'single economic entity' concept

18 The first ground of appeal is divided into seven parts.

The first part of the first ground of appeal, alleging the application of a wrong methodology and the disregarding of key evidence

– Arguments of the parties

19 PTMM argues, in the first place, that the General Court used a wrong methodology to reject the application of the 'single economic entity' concept to it. It follows from paragraph 47 of the judgment under appeal that the General Court proposed that a simple demonstration of indicators that suggest the absence of a single economic entity is sufficient to reject the application of that doctrine. However, it is apparent from the case-law that the Council and the Commission ('the EU institutions') and the General Court must consider the positive evidence which establishes that the producer entrusts to its related distributor tasks which are normally the responsibility of an internal sales department.

20 In the second place, PTMM claims that the General Court failed to consider decisive evidence, particularly evidence showing that PTMM does not have a sales and marketing department for the product concerned and that it relies entirely on ICOF S to sell that product on both the domestic and international markets. Instead of examining that evidence, the General Court wrongly concluded, in paragraph 42 of the judgment under appeal, from a statement made by PTMM during the hearing, that, in claiming that the Council had ignored that evidence, PTMM sought only to support its claim alleging infringement of the principle of sound administration. By doing so, it distorted PTMM's arguments.

21 The Council disputes the merits of this part of the present ground of appeal. The Commission considers that this part is inadmissible and, in any event, unfounded.

– Findings of the Court

22 In the first place, so far as concerns the argument alleging the application of an incorrect methodology, it should be noted that, by paragraph 47 of the judgment under appeal, the General Court did not in any way develop a new methodology consisting of presenting indicators that suggest the absence of a single economic entity in order to reject the application of that doctrine. On the contrary, in the judgment under appeal, the General Court applied the case-law of the Court of Justice relating to the 'single economic entity' concept and to adjustments under Article 2(10) of the basic regulation.

23 Thus, in paragraphs 43 to 46 of the judgment under appeal, the General Court set out that case-law. In particular, in paragraph 46 of that judgment, the General Court made reference to the 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), according to which, where the EU institutions consider that it is appropriate to apply a downward adjustment to the export price under Article 2(10)(i) of the basic regulation, it is for those institutions to prove or, at the very least, to provide indications showing that the conditions for the application of that provision are satisfied.

24 Paragraph 47 of the judgment under appeal constitutes an introductory paragraph by which the General Court essentially indicated that, in the light of the case-law cited in paragraphs 43 to 46 of that judgment, it would examine the evidence underlying the Council's conclusion that PTMM and ICOF S did not form a single economic entity. That examination is set out in paragraphs 50 to 71 of that judgment.

25 Contrary to what PTMM claims, the General Court did specifically intend to verify that the EU institutions had examined the evidence establishing, in PTMM's view, that it entrusted to ICOF S tasks normally falling within the responsibilities of an internal sales department, before it ruled out the existence of a single economic entity and made an adjustment under Article 2(10)(i) of the basic regulation.

26 The present argument must therefore be rejected as unfounded.

27 In the second place, with regard to the argument that the General Court disregarded key evidence, it is necessary to point out that the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Provided that the evidence has been properly obtained and the general principles of law and the rules of procedure in relation to the burden of proof and the taking of evidence have been observed, it is for the General Court alone to assess the value which should be attached to the evidence produced to it. Save where the clear sense of the evidence has been distorted, that appraisal does not therefore constitute a point of law which is subject as such to review by the Court of Justice (judgment of 11 September 2014, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, C-602/12 P, not published, EU:C:2014:2203, paragraph 37).

28 It follows that the Court does not have jurisdiction to examine the evidence relied on by the General Court in reaching its conclusion that PTMM and ICOF S did not form a single economic entity, unless that evidence was distorted.

29 It is true that PTMM claims that the General Court distorted, in paragraph 42 of the judgment under appeal, the arguments which it had raised relating to the disregarding of key evidence. However, on the one hand, it merely states that the General Court 'wrongly' concluded that, by its argument, it sought to support its claim alleging infringement, by the Council, of the principle of sound administration, without specifying what that distortion entailed. On the other hand, it does not argue that that failure to take account constitutes a distortion of the evidence relied on by the General Court in reaching the conclusion referred to in the previous paragraph or that that evidence was in fact distorted. It follows that, there being no claim by PTMM of any distortion, the present argument must be rejected as inadmissible.

30 In any event, it should be noted that paragraph 42 of the judgment under appeal concerns PTMM's argument that the EU institutions misused their powers by denying the existence of a single economic entity and by ignoring certain facts. However, in the same paragraph, the General Court merely indicated that the allegation as to abuse of power would be dealt with in the context of examination of the plea relating to an alleged infringement of the principle of sound administration. That allegation was thus examined by the General Court in paragraphs 111 to 122 of the judgment under appeal. In particular, in paragraphs 115 to 120 of that judgment, the General Court found that the EU institutions had examined the principal arguments raised by PTMM during the administrative procedure as well as the evidence linked to those arguments.

31 Accordingly, the first part of the first ground of appeal must be rejected as being partly unfounded and partly inadmissible.

The second, third and seventh parts of the first ground of appeal, alleging that irrelevant indicators were taken into account in determining whether there was a single economic entity

– Arguments of the parties

32 In the context of the second part of the first ground of appeal, PTMM claims that, in finding, in paragraph 51 of the judgment under appeal, that the functions carried out by ICOF S in respect of the sale of products other than the product concerned were relevant in rejecting the application of the 'single economic entity' concept, the General Court took into account a wrong indicator in the analysis of the 'single economic entity' concept and unduly extended the scope of Article 2(10)(i) of the basic regulation. According to PTMM, the fact that ICOF S acts as an internal sales and marketing department for the product concerned should not prevent it from carrying out business with unrelated parties regardless of whether the products are the same as the product concerned or not.

33 In the context of the third part of the first ground of appeal, PTMM claims that, by taking into account, in paragraph 53 of the judgment under appeal, sales made by ICOF S of products supplied by third parties, the General Court erred in law. First, the business that a distributor conducts with respect to other enterprises cannot affect the relationship of that same distributor with a parent company. Second, in this case, the sales of products sourced from unrelated parties are unrelated to the product concerned. However, Article 2(10)(i) of the basic regulation deals with the product concerned and not with other products. In that connection, it was established, during the investigation and the General Court proceedings, that ICOF S and ICOF Europe only sold the product concerned manufactured by PTMM, not selling that manufactured by other producers. Third, in paragraphs 54 to 57 of the judgment under appeal, the General Court erred in law by creating a new, vague criterion of 'dependency'. Furthermore, the General Court did not specify the percentage of sales from unrelated parties that is sufficient to determine such 'dependency'.

34 In the context of the seventh part of the first ground of appeal, PTMM criticises the General Court for taking the view, in paragraph 69 of the judgment under appeal, that the level of its direct export sales was an indication that it and ICOF S did not form a single economic entity. Furthermore, the General Court did not indicate how such a criterion was to be used and what would be the threshold of direct export sales beyond which the existence of a single economic entity could no longer be established.

35 The EU institutions dispute the admissibility and merits of those parts of the first ground of appeal.

– Findings of the Court

36 By the second, third and seventh parts of the first ground of appeal, which should be examined together, PTMM essentially criticises the General Court for taking into account irrelevant indicators or factors in analysing the 'single economic entity' concept, namely the sale by ICOF S of products other than the product concerned and products supplied by third parties as well as the direct invoicing by PTMM of a proportion of its export sales to the European Union.

37 In that regard, it is necessary to recall that, pursuant to Article 2(10) of the basic regulation, a fair comparison must be made between the export price and the normal value. That provision provides that, where the normal value and the export price are not on such a comparable basis, due allowance, in the form of adjustments, is to be made, on the merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability.

38 Among the factors for which adjustment can be made, Article 2(10)(i) of the basic regulation provides that an adjustment is to be made for differences in commissions paid in respect of the sales under consideration. That provision states that the term 'commissions' is to be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis.

39 However, an adjustment under Article 2(10)(i) of the basic regulation cannot be made where the producer established in a third State and its related distributor responsible for exports to the European Union form a single economic entity.

40 According to the Court's case-law, the division of production and sales activities within a group made up of legally distinct companies can in no way alter the fact that the group is a single economic entity which organises in that way activities that in other cases are carried on by what is, also from a legal point of view, a single entity (see, by analogy, judgment of 13 October 1993, *Matsushita Electric Industrial* v *Council*, C-104/90, EU:C:1993:837, paragraph 9).

41 In those circumstances, recognition of the existence of a single economic entity avoids costs, which are clearly included in the sale price of a product when that sale is carried out by an integrated sales department in the producer's organisation, no longer being included where the same sales activity is carried out by a company which is legally distinct, even though economically controlled by the producer (see, to that effect and by analogy, judgment of 10 March 1992, *Canon* v *Council*, C-171/87, EU:C:1992:106, paragraph 13).

42 It follows that a distributor that forms a single economic entity with a producer established in a third State cannot be regarded as carrying out functions comparable to those of an agent working on a commission basis, within the meaning of Article 2(10)(i) of the basic regulation.

43 In the analysis of whether there is a single economic entity between a producer and its related distributor, it is crucial, under the case-law of the Court, to consider the economic reality of the relationship between that producer and that distributor (see, to that effect, 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 55). In view of the requirement of a conclusion reflecting the economic reality of the relationship between that producer and that distributor, the EU institutions are required to take account of all factors relevant to the determination as to whether or not that distributor carries out the functions of an integrated sales department within that producer.

44 Those factors cannot be limited to the functions carried out by the related distributor in connection only with the sales of the product concerned manufactured by the producer which claims to form a single economic entity with that distributor.

45 Thus, the EU institutions are entitled to take into account factors such as sales by the related distributor of products other than the product that is the subject of the anti-dumping investigation and sales by that distributor of products supplied by producers other than the producer to which it is related.

46 The General Court therefore did not err in law in finding, in paragraphs 51 and 53 of the judgment under appeal, that, in order to assess whether a single economic entity existed, the activities of the related trader relating to products other than the product concerned had to be taken into account, as did the proportion of sales made by that distributor that related to products from unrelated producers.

47 It is important to point out, as regards sales of products from unrelated producers, that, contrary to what PTMM claims, the General Court in no way created a new criterion of 'dependency', in paragraphs 54 to 57 of the judgment under appeal. Although the General Court did indicate, in paragraph 54 of that judgment, that ICOF S could not be regarded 'as being in a position of

dependency in relation to the group to which it is related', that Court merely carried out, in paragraphs 53 to 57 of that judgment, an analysis of the proportion of sales made by the related distributor of products from unrelated producers.

48 Thus, in paragraph 53 of that judgment, the General Court stated that the proportion of sales made by the related distributor of products from unrelated producers must be regarded as an important factor for the purposes of determining whether that distributor forms a single economic entity with the related producer. In paragraphs 54 to 57 of that judgment, the General Court then pointed out that the activities of ICOF S, both for 2009 and for 2010, were based to a significant extent on supplies from unrelated undertakings, which, according to the General Court, appeared to be at variance with the existence of a single economic entity.

49 In the same way as the EU institutions are entitled to take into account sales of products other than the product concerned manufactured by the related producer for the purposes of determining whether there is a single economic entity, the direct invoicing by the producer established in a third State of a proportion of export sales to the European Union is a relevant factor which those institutions may also take into account. In that regard, the General Court was right to observe, in paragraph 69 of the judgment under appeal, that the larger the proportion of such direct sales, the more difficult it is to maintain that the related trader carries out the functions of an internal sales department. Contrary to what PTMM asserts, paragraph 69 of that judgment is therefore not vitiated by any error of law.

50 It follows that the second, third and seventh parts of the first ground of appeal must be rejected as unfounded.

The fourth and sixth parts of the first ground of appeal, relating to the contract concluded between PTMM and ICOF S

– Arguments of the parties

51 In the context of the fourth part of the first ground of appeal, PTMM claims that the General Court made assumptions which were legally and factually wrong in relation to the existence of a contract concluded between it and ICOF S, providing for the payment of a commission to the latter. It thereby criticises the General Court for finding, in paragraph 60 of the judgment under appeal, that that contract constituted a relevant factor for the purposes of determining whether there was a single economic entity.

52 First, according to PTMM, the General Court wrongly assumed that there was a difference in content between a written contract and 'a series of verbal agreements', such as those between Ecogreen and its related trader. Second, the General Court ignored evidence showing that several compensatory arrangements existed between PTMM and ICOF S. Third, a transfer pricing agreement between two related companies provides further indication of the existence of a single economic entity between them. Such an agreement allocates risks and profit margins within a group of companies located in different jurisdictions. Such allocation demonstrates the existence of an intimate connection between the two companies which are together responsible for the collective profitability of the group to which they belong. Moreover, all companies active in international trade are expected to conclude a transfer pricing agreement with their related distributors abroad similar to the contract between PTMM and ICOF S. The General Court thus ignored essential realities of international trade and intra-group transfers.

53 In the context of the sixth part of the first ground of appeal, PTMM claims that, in paragraphs 62 and 64 of the judgment under appeal, the General Court misinterpreted the provisions of the contract, inter alia clause 7.3 thereof, which is a standard clause intended to avoid joint liability of the two companies towards third parties. It is unrelated to the allocation of functions between those two companies.

54 The EU institutions consider that these parts of the first ground of appeal must be rejected as inadmissible and that they are, in any event, unfounded.

– Findings of the Court

55 By the fourth and sixth parts of the first ground of appeal, which should be examined together, PTMM calls into question, in essence, the fact that the General Court relied on the contract concluded between PTMM and ICOF S to conclude that there was no single economic entity as well as that Court's analysis of that contract.

56 In the first place, with regard to the argument that the contract concluded between PTMM and ICOF S is not a relevant factor for the purposes of determining the existence of a single economic entity, it has already been pointed out, in paragraph 43 of the present judgment, that, in view of the requirement of a conclusion reflecting the economic reality of the relationship between the producer and the related distributor, all factors relevant to determining whether that distributor carries out the functions of an integrated sales department must be taken into account. The existence of a contract concluded between the producer and its related distributor, providing for the payment of commissions to the latter, is an important factor in the relationship between those two companies. To disregard it would be to obfuscate part of the economic reality of that relationship.

57 Therefore, the General Court did not err in law in taking the view, in paragraph 60 of the judgment under appeal, that the existence of a contract concluded between PTMM and ICOF S, which provides for the payment of commissions to the latter, constitutes a relevant factor for the purposes of determining whether those two companies form a single economic entity.

58 It follows that the argument that the contract concluded between PTMM and ICOF S is not a relevant factor for the purposes of determining whether there is a single economic entity must be rejected as unfounded.

59 In the second place, as regards the arguments concerning the alleged lack of difference between a written contract and 'a series of verbal agreements', such as those between Ecogreen and its related distributor, the disregarding of certain evidence, the disregarding of the realities of international trade and intra-group transfers as well as the misinterpretation of the provisions of the contract, in paragraphs 62 and 64 of the judgment under appeal, it is necessary to recall that, according to the case-law cited in paragraph 27 of the present judgment, save where evidence is distorted, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts.

60 By those arguments, PTMM calls into question the factual assessments made by the General Court in paragraphs 62 to 64 of the judgment under appeal, in relation to the contract concluded between PTMM and ICOF S, without, however, invoking any distortion of the facts or evidence. Those arguments must therefore be rejected as inadmissible.

61 In view of the foregoing considerations, the fourth and sixth parts of the first ground of appeal must be rejected as being partly inadmissible and partly unfounded.

The fifth part of the first ground of appeal, alleging that the General Court unduly made a substitution of grounds

– Arguments of the parties

62 PTMM criticises the General Court for making a substitution of grounds by basing itself, in paragraph 62 of the judgment under appeal, on specific provisions of the contract that PTMM had concluded with ICOF S for the purpose of determining that the Council was reasonably entitled to conclude that those provisions indicated that PTMM and ICOF S did not form a single economic entity. It is common ground that the EU institutions did not consider the contents of the contract during the anti-dumping investigation or subsequently.

63 The Council considers that this part of the first ground of appeal is unfounded. The Commission contends, as its principal argument, that it is inadmissible or, in the alternative, unfounded.

– Findings of the Court

64 To the extent that PTMM criticises the General Court for making a substitution of grounds, it is appropriate to recall that, according to settled case-law, the General Court cannot, in the context of an action for annulment, substitute its own reasoning for that of the author of the contested act (judgment of 14 April 2016, *Netherlands Maritime Technology Association* v *Commission*, C-100/15 P, not published, EU:C:2016:254, paragraph 57 and the case-law cited).

65 In the present case, the General Court stated, in paragraph 61 of the judgment under appeal, that the contract concluded between PTMM and ICOF S contains various provisions that are difficult to reconcile with the notion that those two companies form a single economic entity. As PTMM notes, the General Court made reference, in paragraph 62 of that judgment, to specific provisions of that contract, namely clauses 7.3 and 12 thereof, which show, according to that Court, a lack of solidarity between PTMM and ICOF S and thus constitute evidence that they do not form a single economic entity.

66 Contrary to what PTMM claims, the General Court did not in any way make a substitution of grounds. It follows from recital 31 of Implementing Regulation No 1138/2011 and from recitals 29 to 31 of Implementing Regulation No 1241/2012 that the contract concluded between PTMM and ICOF S was indeed taken into account by the EU institutions during the anti-dumping investigation. Thus, according to those recitals, the existence of that contract, which provided that ICOF S was to receive a commission — in the form of a fixed mark-up — on export sales, is an indication that PTMM and ICOF S do not form a single economic entity but that the functions of ICOF S are comparable to those of an agent working on the basis of commissions.

67 Accordingly, the fifth part of the first ground of appeal must be rejected as unfounded, and the first ground of appeal must be rejected in its entirety as being partly inadmissible and partly unfounded.

The second ground of appeal, alleging infringement of Article 2(10)(i) of the basic regulation in so far as the General Court found that the Council had sufficiently demonstrated that the functions carried out by ICOF S are similar to those of an agent working on a commission basis

68 The second ground of appeal is divided into two parts.

The first part of the second ground of appeal, alleging discriminatory and insufficient reasoning and misuse of the evidence

– Arguments of the parties

69 PTMM argues that the reasoning in paragraphs 80 and 82 of the judgment under appeal is discriminatory and insufficient. In addition, the factual elements referred to in those paragraphs do not support the General Court's conclusion, but could be used to demonstrate that ICOF S acts as PTMM's internal sales and marketing department.

70 The Council contends, as its principal argument, that the present part of the second ground of appeal is inadmissible or, in the alternative, unfounded. The Commission is of the view that that part is inadmissible.

– Findings of the Court

71 In the first place, with regard to the argument that the reasoning in the judgment under appeal is discriminatory and insufficient, it should be pointed out that, according to the Court's settled case-law, the duty incumbent on the General Court under Article 36 of the Statute of the Court of Justice of the European Union, applicable to the General Court under the first paragraph of Article 53 of that statute, and under Article 81 of the Rules of Procedure of the General Court, to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all of the arguments articulated by the parties to the case. The reasoning of the General Court may therefore be implicit, on condition that it enables the persons concerned to know the reasons why that Court has not upheld their arguments and that it provides the Court of Justice with sufficient material for it to exercise its powers of review (see, to that effect, 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 105, and of 19 March 2015, *MEGA Brands International* v *OHIM*, C-182/14 P, EU:C:2015:187, paragraph 54).

72 In the present case, it is clear from paragraphs 80 and 82 of the judgment under appeal, as well as from paragraphs 79, 81 and 83 to 85 of that judgment, that the rejection of the part of the ground of appeal alleging an error of assessment made by the Council in concluding that the conditions for the application of Article 2(10)(i) of the basic regulation were satisfied was sufficiently reasoned to enable, first, the Court of Justice to review its lawfulness and, second, PTMM to know the reasons which led the General Court to that rejection.

73 It follows that the argument that the reasoning in the judgment under appeal is discriminatory and insufficient must be rejected as unfounded.

74 In the second place, in relation to the argument alleging misuse by the General Court of the evidence, it must be recalled that, according to the case-law cited in paragraph 27 of the present judgment, save where evidence is distorted, the Court of Justice has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts.

75 However, while PTMM disputes the factual elements in paragraphs 80 and 82 of the judgment under appeal and the conclusions reached by the General Court on the basis of those factual elements, it does not invoke any distortion of the facts or evidence. That argument must consequently be rejected as inadmissible.

76 In view of the foregoing considerations, the first part of the second ground of appeal must be rejected as being partly inadmissible and partly unfounded.

The second part of the second ground of appeal, alleging breach of the rules pertaining to the burden of proof in the application of Article 2(10)(i) of the basic regulation

– Arguments of the parties

77 PTMM considers that, in basing itself on the evidence mentioned in paragraphs 80 to 82 of the judgment under appeal, the General Court breached the rules pertaining to the burden of proof in the application of Article 2(10)(i) of the basic regulation.

78 There is, in the basic regulation, a presumption that two related companies are not operated and managed independently, and that they are tied together by compensatory arrangements. Article 2(9) of that regulation thus confirms the existence of such a presumption.

79 Therefore, making an adjustment under Article 2(10)(i) of that regulation requires proof that the sums paid by the producer to the distributor are a 'commission' or a 'mark-up' like those which a principal would pay to an unrelated agent for the trading functions performed by the latter. Moreover, it must be shown that the two entities are independently operated and managed. In the present case, however, the Council has not been able to show that the existence of a governance arrangement whereby management of ICOF S and PTMM is clearly separated and both companies are legally prevented from interfering in each other's business. Nor has the Council shown that the compensation between ICOF S and PTMM was a commission that an independent agent would have received and was not the result of compensatory arrangements between the related companies.

80 The EU institutions consider that the present part of the second ground of appeal must be rejected as inadmissible.

– Findings of the Court

81 By the second part of the second ground of appeal, PTMM argues, in essence, that there is a presumption, in the application of Article 2(10)(i) of the basic regulation, that two related companies are not operated and managed independently. Therefore, in basing itself on the evidence referred to in paragraphs 80 to 82 of the judgment under appeal, the General Court, according to PTMM, breached the rules pertaining to the burden of proof.

82 In that regard, so far as concerns that burden of proof, it must be recalled that, according to the Court's case-law, if a party claims adjustments under Article 2(10) of the basic regulation in order to make the normal value and the export price comparable for the purpose of determining the dumping margin, that party must prove that its claim is justified (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 58).

83 Moreover, the burden of proving that the specific adjustments listed in Article 2(10)(a) to (k) of the basic regulation must be made lies with those who wish to rely on them (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 60).

84 Thus, where a producer claims that an adjustment of the normal value, in principle downward, or an adjustment of the export price, logically upward, applies, it is for that operator to indicate and to establish that the conditions for granting such an adjustment are satisfied. Conversely, where the EU institutions take the view that it is appropriate to apply a downward adjustment of the export price, on the ground that a sales company affiliated to a producer carries out functions comparable to those of an agent working on a commission basis, it is the responsibility of those institutions to adduce at the

very least consistent evidence showing that that condition is fulfilled (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 61).

85 It follows that, where the EU institutions have adduced consistent evidence that a distributor affiliated to a producer carries out functions comparable to those of an agent working on a commission basis, it will be for that distributor or that producer to adduce evidence that an adjustment under Article 2(10)(i) of the basic regulation is not justified, for example by demonstrating that they form a single economic entity. To that end, those economic operators could, inter alia, prove that they are not operated independently, and that they are tied together by compensatory arrangements.

86 Contrary to what PTMM claims, there is no presumption, in the context of the application of Article 2(10)(i) of the basic regulation, that two related companies are not operated independently, and that they are tied together by compensatory arrangements, such that the EU institutions would be required, in order to make an adjustment under that provision, to demonstrate that the two entities are managed independently.

87 The interpretation advocated by PTMM finds no foundation in the basic regulation, Article 2(10)(i) of that regulation containing no reference whatsoever to such a presumption. That provision merely states that an adjustment is to be made for differences in commissions paid in respect of the sales under consideration and stipulates that the term 'commissions' is to be understood to include the mark-up received by a trader if the functions of such a trader are similar to those of an agent working on a commission basis.

88 It is true, as PTMM points out, that Article 2(9) of the basic regulation is founded on the presumption that two related undertakings are not operated independently. Thus, that provision states, in essence, that the export price cannot be regarded as reliable where there is an association or a compensatory arrangement between the exporter and the importer or a third party. Nevertheless, no conclusion, applicable to the analysis to be carried out by the EU institutions in the context of Article 2(10)(i) of the basic regulation, can be drawn on the basis of Article 2(9) of that regulation. Even though that latter provision concerns the calculation of the export price and states that the relationship between the exporter and the distributor may distort that price, Article 2(10)(i) of that regulation, which concerns the comparison between the normal value and the export price, focuses, not on the relationship between the exporter and the distributor, but on the functions carried out by the latter.

89 In the present case, it must be pointed out that the General Court verified, in paragraphs 80 to 82 of the judgment under appeal, that the Council had consistent evidence that the functions carried out by ICOF S were comparable to those of an agent working on a commission basis. The General Court was thus in conformity with the rules relating to the burden of proof resting on the EU institutions and did not err in law in that regard.

90 Accordingly, the second part of the second ground of appeal must be rejected as unfounded, and the second ground of appeal must be rejected in its entirety as being partly inadmissible and partly unfounded.

The third ground of appeal, alleging infringement of the first subparagraph of Article 2(10) of the basic regulation

Arguments of the parties

91 PTMM takes the view that, in ruling, in paragraph 97 of the judgment under appeal, that PTMM had not demonstrated that the costs relating to all sales were borne by ICOF S and that domestic sales were financed by commission revenue received on export sales, the General Court ignored unrebutted

evidence produced during the anti-dumping investigation. Had the General Court considered the evidence available brought forward by PTMM, it would have reached the conclusion that the Council had inevitably affected the symmetry between the normal value and the export price, in infringement of the first subparagraph of Article 2(10) of the basic regulation.

92 The Council contends, as its principal argument, that the present ground of appeal is inadmissible or, in the alternative, unfounded. The Commission also takes the view, as its principal argument, that the present ground of appeal is inadmissible. In the alternative, it considers it ineffective.

Findings of the Court

93 It should be noted that, in paragraph 96 of the judgment under appeal, the General Court pointed out that, in order to justify a downward adjustment to the normal value under Article 2(10)(i) of the basic regulation, PTMM was required to establish that ICOF S carried out functions similar to those of an agent working on a commission basis on the domestic market of the exporting country. In paragraph 97 of that judgment, the General Court found, in essence, that PTMM merely claimed that the costs relating to all sales were borne by ICOF S, without providing any evidence to that effect. It also noted that the contract between PTMM and ICOF S did not contain any provision or indication capable of substantiating that argument.

94 It follows that the findings contained in that paragraph 97, which PTMM contests in the context of the present part of the appeal, come within the scope of the General Court's factual assessment. In accordance with the case-law cited in paragraph 27 of the present judgment, that assessment cannot be reviewed by the Court of Justice.

95 Given that PTMM does not invoke any distortion of the facts or evidence, the third ground of appeal must be rejected as inadmissible.

The fourth ground of appeal, alleging infringement of the principle of sound administration

Arguments of the parties

96 PTMM considers, in the first place, that the reasoning of the General Court, in paragraph 117 of the judgment under appeal, is speculative and insufficiently reasoned. The General Court did not indicate to which documents it was referring when it stated that it was 'apparent from the documents in the case that the Council found, during the administrative procedure, that the explanations put forward by [PTMM] were unsubstantiated and, in any event, irrelevant'. Such documents do not exist and the General Court engaged in mere speculation in that regard. It is instead apparent from the case file that PTMM provided all necessary explanations during the investigation. Those explanations were verified and they must be regarded as undisputed. The General Court therefore reached a conclusion that is inconsistent with the evidence available.

97 In the second place, in the same paragraph 117 of the judgment under appeal, the General Court erroneously accepted that the Council had ignored the evidence and arguments put forward by PTMM during the investigation, on the ground that they were 'in any event irrelevant'. However, these are key arguments that were made during the investigation and which the Council did not address, in breach of the principle of sound administration and without sufficiently stating why they were irrelevant.

98 The Council contends that the present ground of appeal is partly unfounded and partly ineffective. The Commission contends, as its principal argument, that this ground of appeal is inadmissible or, in the alternative, unfounded.

Findings of the Court

99 In the first place, PTMM essentially criticises the General Court for not providing sufficient reasoning for paragraph 117 of the judgment under appeal. That Court did not indicate to which documents it was referring when it stated that it was 'apparent from the documents in the case that the Council found, during the administrative procedure, that the explanations put forward by [PTMM] were unsubstantiated and, in any event, irrelevant'.

100 It must be stated, in that regard, that the considerations set out in paragraph 117 of that judgment specifically concern PTMM's arguments that it invoices the sales on the Indonesian market for tax reasons and that the commissions paid to ICOF S are intended to cover all the costs of that company, including those incurred for the marketing of the products on the domestic market.

101 However, while it is true that the General Court did not indicate, in paragraph 117 of the judgment under appeal, the documents to which it was referring, it is nevertheless apparent from paragraphs 64 and 97 of the same judgment that the General Court did explain the reasons why, and indicated the documents on the basis of which, it took the view that PTMM's arguments were unsubstantiated.

102 It follows that the present argument, alleging breach of the obligation to state reasons, must be rejected as unfounded.

103 In the second place, PTMM criticises the General Court for erroneously accepting, in paragraph 117 of the judgment under appeal, that the Council ignored evidence and arguments brought forward by PTMM during the investigation, on the ground that they were 'in any event irrelevant'.

104 PTMM thus calls into question the factual assessments carried out by the General Court in that paragraph 117. In accordance with the case-law cited in paragraph 27 of the present judgment, those assessments cannot be reviewed by the Court of Justice.

105 Given that PTMM does not invoke any distortion of the facts or evidence, the present complaint must be rejected as inadmissible.

106 Accordingly, the fourth ground of appeal must be rejected as being partly inadmissible and partly unfounded.

107 It follows from all of the foregoing that none of the grounds relied on by the appellant in support of its appeal can be upheld and, accordingly, the appeal must be dismissed in its entirety.

Costs

108 In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which applies to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since PTMM has been unsuccessful and the Council has applied for costs to be awarded against it, PTMM must be ordered to pay the costs incurred by that institution.

109 Pursuant to Article 140(1) of the Rules of Procedure of the Court of Justice, also applicable to appeal proceedings by virtue of Article 184(1) of those rules, the Member States and institutions which intervene in the proceedings are to bear their own costs.

110 Consequently, the Commission must bear its own costs.

On those grounds, the Court (Ninth Chamber) hereby:

1. **Dismisses the appeal;**

2. **Orders PT Perindustrian dan Perdagangan Musim Semi Mas (PT Musim Mas) to bear its own costs and to pay the costs incurred by the Council of the European Union;**

3. **Orders the European Commission to bear its own costs.**

[Signatures]