Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 3 October 2018 [1]

Case C-466/16 P

Council of the European Union
v

Marquis Energy LLC

(Appeal — Dumping — Imports of bioethanol originating in the United States of America — Definitive anti-dumping duty — Implementing Regulation (EU) No 157/2013 — Regulation (EC) No 1225/2009 — Standing to bring proceedings of a non-exporting producer — Direct concern)

I. Introduction

1. By this appeal, the Council of the European Union asks the Court to set aside the judgment of the General Court of the European Union of 9 June 2016, *Marquis Energy* v *Council*, (T-277/13, not published, EU:T:2016:343), by which the General Court, on the one hand, found to be admissible the action brought by Marquis Energy LLC for annulment of Council Implementing Regulation (EU) No 157/2013 of 18 February 2013 imposing a definitive anti-dumping duty on imports of bioethanol originating in the United States of America [2] and, on the other hand, annulled that regulation in so far as it concerned Marquis Energy.

2. As I shall explain in my analysis of the first part of the Council's first ground of appeal, I consider that the General Court was wrong to find that Marquis Energy was directly affected by the regulation at issue. Accordingly, the judgment under appeal must, in my view, be set aside and the action at first instance dismissed.

3. If the Court concurs with my analysis, there will be no need to rule on the substantive grounds of appeal raised by the Council, which seek, as in the parallel Case C-465/16 P *Council* v *Growth Energy and Renewable Fuels Association*, in which I am also delivering an Opinion today, a declaration that the General Court misinterpreted and misapplied Article 9(5) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [3] ('the basic regulation'), in the light of the provisions of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) [4] ('the WTO Anti-Dumping Agreement'). Consequently, I shall confine myself to referring to the arguments relating to those grounds of appeal put forward, in the alternative, in my Opinion in Case C-465/16 P *Council* v *Growth Energy and Renewable Fuels Association*.

1 Original language: French.

2 OJ 2013 L 49, p. 10; 'the regulation at issue'.

3 OJ 2009 L 343, p. 51.

4 OJ 1994 L 336, p. 103.

II. Summary of the background to the dispute and the judgment of the General Court

4. The background to the dispute is set out by the General Court in paragraphs 1 to 14 of the judgment under appeal. Only the elements essential to an understanding of the arguments put forward by the parties in the appeal proceedings will be set out below.

5. Following a complaint, the European Commission published, on 25 November 2011, a notice of initiation of an anti-dumping proceeding concerning imports into the European Union of bioethanol originating in the United States of America,[5] in which it announced its intention to use sampling to select the exporting producers in the United States of America to be investigated.

6. On 16 January 2012, the Commission notified five member companies of Growth Energy and Renewable Fuels Association, namely Marquis Energy, Patriot Renewable Fuels LLC, Plymouth Energy Company LLC, POET LLC and Platinum Ethanol LLC, that they had been selected to be part of the sample of exporting producers.[6]

7. On 24 August 2012, the Commission sent Marquis Energy the provisional disclosure document stating its intention to continue the investigation, without the adoption of provisional measures, and to extend the investigation to traders/blenders. That document stated that it was not possible at that stage to assess whether the exports of bioethanol originating in the United States had been made at dumped prices, on the ground that the sampled producers did not make a distinction between domestic sales and sales for export, and all their sales were to unrelated traders/blenders established in the United States, which then blended the bioethanol with gasoline and sold it on.

8. On 6 December 2012, the Commission sent Marquis Energy the definitive disclosure document in which it examined, on the basis of the data from unrelated traders/blenders, the existence of dumping causing injury to the European Union industry and envisaged imposing definitive measures at the rate of 9.6% countrywide, for a period of three years.

9. Pursuant to the basic regulation, on 18 February 2013 the Council adopted the regulation at issue, which imposed an anti-dumping duty on bioethanol, referred to as 'fuel ethanol', at a rate of 9.5% countrywide for a period of five years.

10. The General Court also pointed out, first, that, in recitals 12 to 16 of the regulation at issue, the Council stated that the investigation had shown that none of the sampled producers had exported bioethanol to the European Union market and that it was not the US producers of bioethanol but the traders/blenders who were the exporters of the product concerned to the European Union, so that, in order to complete the dumping investigation, the Council had relied on the data of the two traders/blenders that had agreed to cooperate (paragraph 13 of the judgment under appeal). The General Court pointed out, secondly, that the Council explained, in recitals 62 to 64 of the regulation at issue, that it was appropriate to establish a countrywide dumping margin, in so far as the structure of the bioethanol industry and the way in which the product concerned was produced and sold on the US market and exported to the European Union made it impracticable to establish individual dumping margins for US producers (paragraph 14 of the judgment under appeal).

11. The General Court then ruled on the *admissibility* of the application lodged by Marquis Energy as a producer of bioethanol.

5 OJ 2011 C 345, p. 7.

6 Unlike Marquis Energy, the four other producers referred to above did not lodge their own action for annulment of the regulation at issue but were represented before the General Court by the trade associations Growth Energy and Renewable Fuels Association. In its judgment of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council* (T-276/13, EU:T:2016:340), the General Court upheld the action brought by those two associations. The appeal against that judgment is examined in my Opinion delivered today in Case C-465/16 P *Council* v *Growth Energy and Renewable Fuels Association*.

12. In paragraphs 55 to 67 of the judgment under appeal, the General Court found, first, that Marquis Energy was *directly concerned* by the regulation at issue, rejecting, moreover, in paragraphs 69 to 80 of the judgment under appeal, various arguments to the contrary put forward by the Council and the European Commission.

13. In paragraphs 81 to 92 of the judgment under appeal, the General Court found that Marquis Energy was *individually concerned* by the regulation at issue and rejected, in paragraphs 93 to 106 of that judgment, the arguments to the contrary put forward by the Council and the Commission as well as the other objections of those institutions as to the admissibility of the action examined in paragraphs 107 to 118 of the judgment under appeal.

14. As regards the *substance*, at the end of the reasoning set out in paragraphs 121 to 168 of the judgment under appeal, the General Court upheld the second part of the first plea in law raised by Marquis Energy, alleging that the regulation at issue infringed Article 9(5) of the basic regulation, and therefore annulled the regulation at issue in so far as it concerned Marquis Energy, without examining either the other parts of that plea or the nine other pleas in law put forward by Marquis Energy at first instance.

15. In essence, the General Court held that the Council was wrong to consider that, under Article 9(5) of the basic regulation, it was entitled to use a countrywide dumping margin and not obliged to calculate individual dumping margins for each US producer included in the sample in the regulation at issue.

16. In order to reach that conclusion, the General Court noted, in the first place, that, by Article 9(5) of the basic regulation, the EU legislature had intended to implement a particular obligation assumed in the context of the WTO agreements and contained, in this instance, in Articles 6.10 and 9.2 of the WTO Anti-Dumping Agreement; Article 9(5) of the basic regulation therefore had to be interpreted in a manner that is consistent with those articles (see paragraphs 129 to 139 of the judgment under appeal).

17. In the second place, the General Court considered that, as the Commission had retained Marquis Energy in the sample of US producers and exporters, it had acknowledged that it was a 'supplier' of the dumped product, with the result that the Council was, under Article 9(5) of the basic regulation, required in principle to calculate an individual dumping margin and an individual anti-dumping duty (see paragraphs 140 to 168 of the judgment under appeal).

18. In the third place, and lastly, the General Court held that, although Article 9(5) of the basic regulation provides for an exception to the individual calculation of the amount of duty imposed where 'that is impracticable', which then makes it possible simply to name the supplying country, that is to say to impose a countrywide anti-dumping duty, the word 'impracticable' must be interpreted in a manner that is consistent with the analogous term used in Articles 6.10 and 9.2 of the WTO Anti-Dumping Agreement (see, to that effect, paragraph 188 of the judgment under appeal). In the light of those provisions, the General Court held that Article 9(5) of the basic regulation does not allow for any exception to the obligation to impose an individual anti-dumping duty on a sampled producer which cooperated in the investigation where the institutions consider that they are not in a position to establish an individual export price for that producer (see the last sentence of paragraph 188 of the judgment under appeal). The General Court therefore held that, in the light of the explanations provided by the institutions, the Council was wrong to conclude 'that the imposition of individual anti-dumping duties for the members of the sample of US exporters was "impracticable" within the meaning of Article 9(5) of the basic regulation' (paragraph 197 of the judgment under appeal), and the fact that the institutions considered that there were difficulties in tracing individual purchases or in comparing the normal values with the corresponding export prices for sampled

producers was not sufficient to justify the use of that exception (see, to that effect, paragraphs 198 to 200 of the judgment under appeal). The General Court therefore annulled the regulation at issue on the ground of infringement of Article 9(5) of the basic regulation and in so far as it concerned Marquis Energy.

III. Forms of order sought

19. The Council claims that the Court should:

– set aside the judgment under appeal;

– dismiss the action brought at first instance by Marquis Energy;

– order Marquis Energy to pay the costs relating to the proceedings as a whole.

20. In the alternative, the Council claims that the Court should:

– refer the case back to the General Court;

– reserve the costs relating to the proceedings as a whole.

21. The Commission claims that the Court should:

– set aside the judgment under appeal;

– declare the action at first instance inadmissible;

– order Marquis Energy to pay the costs of the proceedings before the General Court and before the Court of Justice.

22. In the alternative, the Commission claims that the Court should:

– set aside the judgment under appeal;

– dismiss the second part of the first plea in law put forward by Marquis Energy at first instance and refer the case back to the General Court as to the remainder;

– reserve the costs of the proceedings at first instance and on appeal.

23. Marquis Energy contends that the Court should:

– dismiss the appeal in its entirety;

– order the Council to pay the costs of the whole proceedings.

IV. Analysis

24. In support of its appeal, the Council, supported by the Commission, puts forward three grounds of appeal. The first ground concerns the admissibility of the action at first instance and alleges misinterpretation of the fourth paragraph of Article 263 TFEU and an infringement of the obligation to state reasons in the judgment under appeal. The two other grounds concern the substantive

assessments made by the General Court and both allege misinterpretation and misapplication of Article 9(5) of the basic regulation. As I stated in my introductory remarks, I shall confine myself to examining the first part of the Council's first ground of appeal, since I consider that it must be upheld and, consequently, the judgment under appeal must be set aside.

25. Before considering the Council's appeal, however, it is important to address the argument put forward by the Commission in its rejoinder that the response lodged by Marquis Energy is inadmissible.

A. The admissibility of the response lodged by Marquis Energy

1. Arguments of the Commission

26. The Commission submits that the response lodged by Marquis Energy was signed electronically by a person in respect of whom no evidence was produced to establish that person's status as a lawyer or his authority to act. Those circumstances should therefore result, if not rectified, in the response being declared inadmissible.

2. Assessment

27. The Commission's argument must, in my view, be rejected as having no factual basis.

28. I would recall that, under Article 119(2) of the Rules of Procedure of the Court of Justice, which applies to the response in appeal proceedings pursuant to Article 173(2) of those rules, lawyers must lodge at the Registry an official document or an authority to act issued by the party whom they represent.

29. Moreover, it follows from Article 44(1) of the Court's Rules of Procedure that, in order to qualify for the privileges, immunities and facilities specified in Article 43 of those rules, lawyers must furnish proof of their status by an authority to act issued by the party which they represent, where the latter is a legal person governed by private law.

30. It follows that, in order validly to represent a legal person governed by private law before the Court, including in appeal proceedings, a lawyer must have an official document or an authority to act granted by that party.

31. In the present case, irrespective of the status of the person who electronically lodged at the Court Registry the response of Marquis Energy using an account providing access to the computer application known as 'e-Curia',[7] it is important to note that it was Mr Vander Schueren, whose status as a lawyer and authority to act have not been called into question by the Commission, who signed the original of that response.

32. Consequently, the Commission's objection lacks any basis in fact. The response lodged by Marquis Energy is therefore entirely admissible.

7 Pursuant, in particular, to the Decision of the Court of Justice of 13 September 2011 on the lodging and service of procedural documents by means of e-Curia (OJ 2011 C 289, p. 7).

B. The first ground of appeal, alleging infringement of the fourth paragraph of Article 263 TFEU and infringement of the obligation to state reasons

33. In essence, this ground is divided into two parts. By the first part of the first ground of appeal, the Council submits that, by concluding that Marquis Energy was *directly* concerned by the regulation at issue, the General Court misinterpreted that requirement, set out in the fourth paragraph of Article 263 TFEU. In the second part, the Council criticises the General Court for having misinterpreted the requirement of *individual* concern, laid down in the fourth paragraph of Article 263 TFEU, without explaining or demonstrating why Marquis Energy possessed qualities distinguishing it from other US producers of bioethanol.

34. As I have already stated, I consider that the first part of the first ground of appeal put forward by the Council should be upheld, which, in view of the cumulative nature of the two conditions of admissibility laid down in the fourth paragraph of Article 263 TFEU, must render examination of the second part redundant.

1. Summary of the parties' arguments relating to the first part of the first ground of appeal, alleging errors of law as to the conclusion that Marquis Energy was directly concerned by the regulation at issue

35. The Council, supported by the Commission, claims that the General Court misinterpreted the requirement relating to direct concern laid down in the fourth paragraph of Article 263 TFEU, as interpreted by the Court, by finding, not that the regulation at issue had direct effects on the legal situation of Marquis Energy, but by indicating, at most, an indirect effect on the economic situation of that company, which does not export its products to the European Union market. According to those institutions, the Court has previously rejected, in particular in the judgment of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284), the argument that, in order to fulfil the requirement of direct concern, it is sufficient to show that the measure at issue gives rise to purely economic consequences or a competitive disadvantage. In the present case, the errors of law allegedly committed by the General Court are particularly apparent in paragraphs 72, 73, 76, 78 and 79 of the judgment under appeal. The Commission adds that, in applying the case-law relating to the requirement of direct concern, the General Court, in paragraphs 56 to 67 of the judgment under appeal, was wrong to consider that it was sufficient, for the purpose of establishing direct concern, that Marquis Energy manufactured a product which, if exported by a third party to the European Union, was subject to anti-dumping duty. Such an interpretation confuses what is direct with what is indirect and what is legal with what is economic. In the Commission's view, Marquis Energy's attempt, in its written submissions before the Court, to obscure the factual content of the judgment under appeal in no way alters that analysis.

36. Marquis Energy contends, in the first place, that the Council is inviting the Court to reassess the factual findings made by the General Court, which does not fall within the jurisdiction of the court hearing the appeal. Those criticisms, which concern the factual findings made by the General Court in paragraphs 66 and 76 of the judgment under appeal, are therefore inadmissible. In the second place, Marquis Energy takes the view that the fact that large quantities of bioethanol which it produced were exported to the European Union and the fact that it was identified as a producer/exporter in the regulation at issue were sufficient for the General Court to find that it was directly concerned by that regulation. The General Court was right to find that Marquis Energy was a US producer of bioethanol exporting its production to the European Union and that, since that production was subject to anti-dumping duties, those duties affected that company's legal position. In any event, as the sampled producers knew that their sales were intended for export to the European Union and therefore had an export price, the absence of direct sales is irrelevant. According to Marquis Energy, the concern is

equally direct in the case of a potential exporter of the product concerned to the European Union. Moreover, the case-law of the Court cited by the institutions in support of their argument is irrelevant, because it does not concern the criterion of direct concern or relates to factual situations that are not comparable.

2. Assessment

37. As the General Court was right to point out in paragraph 44 of the judgment under appeal, a point which is, moreover, not disputed in the present case, the concept of direct concern referred to in the fourth paragraph of Article 263 TFEU requires that two cumulative criteria be fulfilled. First, the act at issue must *directly affect the legal situation* of the person seeking to have it annulled. Second, that act must leave no discretion to its addressees, who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules without the application of other intermediate rules. [8]

38. In the present case, only the application of the first criterion, that is to say the direct effect of the regulation at issue on the legal situation of Marquis Energy, is the subject of the criticisms of the judgment under appeal made by the Council and the Commission.

39. In that regard, it is first necessary to reject Marquis Energy's claims that the first part of the Council's first ground of appeal seeks to call into question before the Court the factual findings and assessments made by the General Court.

40. As I shall explain in more detail, the Council appears to me to be reading quite correctly the factual premisses on which the General Court based its legal finding that Marquis Energy was directly concerned by the regulation at issue, a finding which is disputed by the institutions. It is, conversely, Marquis Energy which, on various occasions in its submissions, attempts to distort the factual findings and assessments made by the General Court in the judgment under appeal.

41. I shall explain that observation.

42. The parties to the dispute before the General Court have discussed at length whether the five US producers of bioethanol sampled during the investigation, including Marquis Energy, exported their bioethanol production to the European Union or whether, on the contrary, those exports were made by unrelated traders/blenders.

43. As the General Court pointed out in paragraph 57 of the judgment under appeal, the regulation at issue stated that, since none of the five sampled producers themselves exported bioethanol to the European Union market, their sales were made on the domestic (US) market to unrelated traders/blenders, which then blended the bioethanol with gasoline for the purpose of reselling it on the domestic market and for export, in particular to the European Union.

44. Following the various findings made by the General Court in paragraphs 58 to 65 of the judgment under appeal, which are not called into question in this appeal, the General Court drew the conclusion, in paragraph 66 of that judgment, that it 'has been established to a sufficient standard that the very significant volumes of bioethanol that were purchased during the investigation period by the eight traders/blenders surveyed from the five sampled US bioethanol producers, including [Marquis Energy], were in large part exported to the European Union. ...'.

8 See, to that effect, inter alia, judgment of 13 October 2011, *Deutsche Post and Germany* v *Commission* (C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 66), and order of 10 March 2016, *SolarWorld* v *Commission* (C-142/15 P, not published, EU:C:2016:163, paragraph 22 and the case-law cited).

45. By using an impersonal and indirect form, as previously used in paragraph 60 of the judgment under appeal ('... a significant volume of bioethanol from [Marquis Energy] had been exported on a regular basis to the European Union during the investigation period'), the General Court did not find, even by implication, and contrary to what Marquis Energy argues before the Court, that that company itself exported its production to the European Union.

46. It is clear from paragraph 66 of the judgment under appeal that the General Court acknowledged that the bioethanol produced by Marquis Energy had been 'purchased' by the unrelated traders/blenders surveyed before being exported by them, in large part to the European Union. As the Commission points out, the General Court therefore merely found that bioethanol produced by Marquis Energy had been indirectly brought onto the European Union market, that is to say via unrelated traders/blenders after they had blended it with gasoline.

47. There is no suggestion in any passage of the judgment under appeal that the General Court considered that the US producers of bioethanol had the status of exporters. The lack of recognition of such status is expressly acknowledged in paragraph 72 of the judgment under appeal, in which the General Court stated that a producer, 'even if it is not the exporter of those products', may find itself 'substantially affected' by the imposition of anti-dumping duties on imports of the products into the European Union. This is further confirmed by paragraph 73 of that judgment, which states that Marquis Energy 'produced bioethanol in its pure state during the investigation period and that it was its products that the traders/blenders blended with gasoline and exported to the European Union'.

48. It follows that, contrary to what is claimed by Marquis Energy, neither the Council nor the Commission is in any way inviting the Court to reassess the facts. On the contrary, those institutions have accurately read the relevant paragraphs of the judgment under appeal.

49. The Council's criticisms, like those of the Commission, merely challenge the General Court's legal inference that, in essence, the imposition of anti-dumping duties provided for by the regulation at issue has had direct effects on the *legal situation* of Marquis Energy because of its status as a sampled US producer of bioethanol, part of whose production was exported to the European Union.

50. I consider that those criticisms are well founded, since the grounds put forward by the General Court which led it to conclude that the regulation at issue had direct effects on the legal situation of Marquis Energy are, in my view, insufficient and erroneous.

51. First of all, I should point out that the General Court, in paragraph 67 of the judgment under appeal, infers from the assessments made in paragraphs 60 to 66 of that judgment that Marquis Energy was directly concerned, within the meaning, inter alia, of the case-law referred to in paragraph 44 of that judgment, whereas, in paragraphs 69 to 79 of that judgment, it rejects, in turn, the objections to that conclusion raised by the Council and the Commission.

52. Paragraphs 60 to 65 of the judgment under appeal are limited to considerations relating to the destination, volume and characteristics of the bioethanol production of the sampled US producers, including Marquis Energy. As previously stated, in paragraph 66 of the judgment under appeal the General Court inferred from those considerations that it had been established to a sufficient standard that very significant volumes of bioethanol purchased from the sampled producers by unrelated traders/blenders were in large part exported to the European Union.

53. Although such assessments of an economic nature are not inaccurate and are, in any event, not disputed by the Council, they are nevertheless insufficient to demonstrate, as the General Court essentially held in paragraph 67 of the judgment under appeal, that the anti-dumping duties imposed by the regulation at issue *directly* affected *the legal situation* of Marquis Energy.

54. The finding that, before the introduction of the anti-dumping duties, the bioethanol production of the sampled producers, including Marquis Energy, entered the European Union market via unrelated traders/blenders, after being blended with gasoline, does not necessarily mean that it has been shown that the legal situation of Marquis Energy was changed by the imposition of those duties.

55. A ruling to that effect would suggest that any producer from a third country whose products find their way onto the European Union market is directly affected, for the purpose of the fourth paragraph of Article 263 TFEU as interpreted by the Court, by the imposition of anti-dumping duties on those products.

56. It is important to recall that, according to the Court's case-law, regulations introducing an anti-dumping duty are legislative in nature and scope, inasmuch as they apply to all traders generally and that it is therefore only on account of certain particular circumstances that the provisions of those regulations may be of direct (and individual) concern to those *producers and exporters* of the product in question who are *alleged on the basis of information about their business activities to be dumping*.[9]

57. The mere fact that a product enters the European Union market, even in a significant volume, is not a sufficient basis for finding that, once an anti-dumping duty has been imposed on that product, the legal situation of its producer is directly affected by that duty.

58. If that were the case, the legislative nature of anti-dumping regulations would have no basis. In other words, each producer of a product subject to an anti-dumping duty would automatically, by default, because of its objective position as a producer of that product, be regarded as directly affected by the regulation imposing that duty.

59. The fact that that producer participated in the investigation by being included in the sample used in the procedure leading to the adoption of the regulation at issue does not alter that assessment. Indeed, the inclusion of an undertaking in a representative sample in the investigation carried out by the Commission may at most be an indication that the operator is individually concerned.[10] It does not mean that that producer's legal situation is directly affected by the imposition of definitive anti-dumping duties at the end of that investigation.

60. The conclusion drawn prematurely by the General Court in paragraph 67 of the judgment under appeal seems to me all the more open to criticism, since, at the same time, the General Court never contradicted either the finding in the regulation at issue, as referred to in paragraph 57 of the judgment under appeal, that the producers in question made their sales on the domestic (US) market to unrelated traders/blenders for the purpose of its resale by those traders/blenders both on the domestic (US) market and the export market, or the finding, similarly referred to in paragraph 65 of the judgment under appeal, that it was not possible to compare the normal values with the relevant export prices, findings which support the institutions' argument that Marquis Energy sold its production *on the domestic US market* to those traders/blenders and had no influence on the destination or the pricing of export sales.

61. The assessments made in paragraphs 70 to 74 and 76 to 79 of the judgment under appeal, the effect of which was to reject the arguments put forward by the Council and the Commission concerning the conclusion reached by the General Court in paragraph 67 of that judgment, are no more convincing.

9 See, in particular, to that effect, judgments of 14 March 1990, *Gestetner Holdings* v *Council and Commission* (C-156/87, EU:C:1990:116, paragraph 17), and of 16 April 2015, *TMK Europe* (C-143/14), EU:C:2015:236, paragraph 19 and the case-law cited).

10 See, to that effect, judgment of 28 February 2002, *BSC Footwear Supplies and Others* v *Council* (T-598/97, EU:T:2002:52, paragraph 61), and order of 7 March 2014, *FESI* v *Council* (T-134/10, not published, EU:T:2014:143, paragraph 58).

62. First, the findings of the General Court, set out in paragraphs 70 to 72 of the judgment under appeal, that, in essence, whether an operator is directly concerned by a regulation imposing anti-dumping duties does not depend on its status as a producer or exporter, since a producer which is not the exporter of the exported products subject to anti-dumping duty may find itself 'substantially affected' by the imposition of such duty on the product concerned, do not, in the final analysis, answer the question whether the legal situation of Marquis Energy is directly affected by the imposition of the anti-dumping duties in the regulation at issue.

63. Indeed, I am ready to accept that the mere fact that an operator is a producer is not sufficient to exclude *ipso jure* fulfilment of the requirement that an operator be directly concerned by a regulation, within the meaning of the fourth paragraph of Article 263 TFEU.

64. However, the General Court failed to explain why the legal situation of a producer from a third country which sells its products only on the domestic market of that country to other operators which themselves sell on the product, after adding another substance, on that domestic market as well as on the export market, might be directly changed by the imposition of anti-dumping duties on that product which are applicable on the European Union market. In that regard, the fact that, in paragraph 72 of the judgment under appeal, the General Court used the phrase 'substantially affected', which relates to the requirement of individual concern and not to that of direct concern, appears to indicate not only a terminological approximation but, more fundamentally, the failure to carry out a proper examination of, first, the impact of the imposition of anti-dumping duties on the legal situation of the sampled US producers of bioethanol, which relates to the requirement of direct concern laid down in the fourth paragraph of Article 263 TFEU, and, secondly, the argument of the institutions that the regulation at issue had only an indirect economic effect on the situation of those producers, including Marquis Energy.

65. Similar considerations apply to the General Court's assessments in paragraphs 76 to 78 of the judgment under appeal.

66. In the first place, in paragraph 76 of that judgment, which merits being reproduced in its entirety, the General Court states that '... even supposing that the traders/blenders bore the anti-dumping duty and it were proven that the bioethanol marketing chain was interrupted so that they were not able to pass on the anti-dumping duty to the producers, it must nevertheless be recalled that the imposition of an anti-dumping duty changes the legal conditions under which the bioethanol produced by the sampled producers will be marketed on the European Union market. Therefore, the legal position of the producers in question on the European Union market will, in any event, be directly and substantially affected'. Moreover, in paragraph 77 of the judgment under appeal, the General Court also rejected the Commission's argument that the imposition of the anti-dumping duties had only an indirect effect on Marquis Energy's situation, stating that the Commission is wrong 'in disputing the fact that an undertaking in the marketing chain other than the exporter found to engage in dumping practices ought to be able to challenge an anti-dumping duty …'.

67. Those paragraphs of the judgment under appeal appear to me to contain two errors of law.

68. On the one hand, the General Court fails to explain how the legal position of a producer from a third country, such as Marquis Energy, which sells its product only on the *domestic market* of that country to independent operators found to engage in dumping practices may be directly affected by the imposition of anti-dumping duties on the product exported by those independent operators, even though the latter cannot pass on the anti-dumping duties to that producer.

69. In other words, if, in the situation examined by the General Court in paragraphs 76 and 77 of the judgment under appeal, the unrelated traders/blenders engage in dumping practices and bear all the anti-dumping duties imposed by the regulation at issue on the European Union market, I fail to see how the legal situation of the producers of the product in question, which sell that product exclusively on the US domestic market, can be directly affected by the levying of those duties.

70. In such a situation, it is undoubtedly possible, as the Commission submits, that the imposition of anti-dumping duties has an impact on the volume of sales made by bioethanol producers on the US domestic market to unrelated traders/blenders. The latter are likely to reduce their purchases for export to the European Union, without being in a position to offset that reduction by increasing their supplies to the US domestic market or to export markets other than that of the European Union. However, those consequences are of an economic nature and are therefore, in my view, insufficient to show that the imposition of anti-dumping duties directly changes the legal situation of the producers in question on the European Union market. In fact, in that scenario, and contrary to what the General Court stated in the second sentence of paragraph 76 of the judgment under appeal, the US producers of bioethanol have no 'legal position' on the European Union market.

71. On the other hand, the General Court seems, at least by implication, to attach importance to the fact that the producers in question participated in the investigation carried out by the Commission. As I have already stated in point 64 of this Opinion, such participation may, at most, be relevant in connection with establishing that the requirement that an operator should be individually concerned is fulfilled, but cannot be relevant for the purpose of examining the requirement relating to direct concern, within the meaning of the fourth paragraph of Article 263 TFEU.

72. In the second place, the General Court's findings in paragraph 78 of the judgment under appeal cannot invalidate what has been stated above and nor do they justify a finding that the General Court was fully entitled to conclude that Marquis Energy was directly concerned by the regulation at issue.

73. On the one hand, it is, in my view, wrong to claim that 'the structure of the contractual arrangements between economic operators in the bioethanol marketing chain has no bearing on whether a producer of bioethanol is directly concerned by the … regulation [at issue]' and that to argue otherwise 'would effectively mean that only a producer which sells its product directly to an importer in the European Union may be directly concerned …, a proposition for which there is no support in the basic regulation'.

74. Indeed, the Court's case-law, correctly cited by the General Court in paragraphs 47 and 48 of the judgment under appeal, demonstrates that the situations in which the Court has found actions brought by economic operators against regulations imposing anti-dumping measures to be admissible were based, inter alia, on the fact that account was taken of the particular features of the business dealings with other operators, in particular for the purpose of constructing the export price to the European Union.

75. I therefore fail to see why that rationale should not apply to the particular features of the structure of the contractual arrangements between US producers of bioethanol and unrelated traders/blenders, even if consideration of those particular features might result in a finding that those producers are not directly concerned.

76. Moreover, I cannot agree with the assertion that that conclusion is tantamount to finding that a producer is directly concerned only if it sells its production directly on the European Union market. Other situations are indeed possible, depending, specifically, on the commercial arrangements, such as sales to intermediaries/exporters related to the producer in question. In any event, as the General Court pointed out, the fact that the basic regulation is silent on that question is irrelevant, since the conditions for the admissibility of an action for annulment, such as that in the present case, are governed by the fourth paragraph of Article 263 TFEU.

77. On the other hand, contrary to what the General Court stated in the last sentence of paragraph 78 of the judgment under appeal, the approach adopted by the institutions, with which I concur, does not have 'the effect of restricting the legal protection of producers of products subject to anti-dumping duties solely according to the export marketing structure'.

78. That approach is based, as I have already stated, on an examination of the requirements relating to the direct concern of those producers, which are governed by the fourth paragraph of Article 263 TFEU.

79. Moreover, if, as I propose, the Court finds that the General Court erred in law by finding that Marquis Energy was directly concerned by the regulation at issue, that would not mean that that producer is deprived of legal protection.

80. An operator which is found, without question, not to be directly and individually concerned by a regulation imposing anti-dumping duties cannot be prevented — including, in my view, when granted leave to intervene — from pleading that such a regulation is invalid before a court of a Member State hearing a dispute relating to the duties to be paid to the competent customs or tax authorities.[11]

81. Accordingly, I am of the view that, in concluding that Marquis Energy was directly affected by the regulation at issue, the General Court committed several errors of law in the judgment under appeal.

82. Consequently, I propose that the Court uphold the first part of the Council's first ground of appeal and set aside the judgment under appeal.

83. It is therefore only in the alternative that it is necessary to examine the substantive grounds of appeal put forward by the Council, supported by the Commission, alleging misinterpretation and misapplication of Article 9(5) of the basic regulation.

84. As I stated in my introductory remarks, since those grounds are identical to those put forward by the Council in Case C-465/16 P, I would refer to the arguments relating to those grounds as set out, in the alternative, in my Opinion delivered today in that case.

V. The action before the General Court

85. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court may, where the decision of the General Court has been set aside, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

86. I consider that the Court is in a position to rule on the admissibility, which is disputed by the Council, of the action at first instance. In that regard, it is sufficient to observe, in my view, that Marquis Energy's action is inadmissible, since that operator has failed to demonstrate that it was directly affected, for the purposes of the fourth paragraph of Article 263 TFEU, by the anti-dumping duties imposed by the regulation at issue.

11 See, in particular, to that effect, judgment of 17 March 2016, *Portmeirion Group* (C-232/14, EU:C:2016:180, paragraphs 23 to 32 and the case-law cited). For the record, I would point out that, in that context, the Court has sole jurisdiction to declare an act of the European Union invalid and that it is incumbent on a court whose decisions are not subject to judicial review under domestic law to stay proceedings and to make a reference to the Court for a preliminary ruling on the act's validity if that court considers that one or more pleas alleging invalidity raised before it are well founded: see, in particular, to that effect, judgments of 10 January 2006, *IATA and ELFAA* (C-344/04, EU:C:2006:10, paragraphs 27 to 32), and of 28 April 2015, *T & L Sugars and Sidul Açúcares* v *Commission* (C-456/13 P, EU:C:2015:284, paragraphs 44 to 48).

VI. Costs

87. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Under Article 138(1) of those rules, which applies to appeal proceedings 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. Article 140(1) of the Rules of Procedure provides that the institutions which have intervened in the proceedings must bear their own costs, while under Article 140(3) of those rules, the Court may order an intervener other than those mentioned in the preceding paragraphs to bear its own costs.

88. Since the first part of the Council's first ground of appeal should, in my view, be upheld and the action at first instance dismissed, I propose that Marquis Energy be ordered to pay the costs incurred by the Council both at first instance and in connection with the appeal, in accordance with the form of order sought by the Council.

89. In addition, I propose that the Commission be ordered to bear the costs it incurred both at first instance and in connection with the present proceedings.

VII. Conclusion

90. In the light of the foregoing considerations, I propose that the Court should:

(1) Set aside the judgment of the General Court of the European Union of 9 June 2016, *Marquis Energy* v *Council*, (T-277/13, not published, EU:T:2016:343);

(2) Dismiss the action at first instance as inadmissible;

(3) Order Marquis Energy to bear its own costs and to pay those incurred by the Council of the European Union;

(4) Order the European Commission to bear its own costs at first instance and on appeal.