



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

22 April 2021 *

(Appeal – Customs union – Regulation (EU) No 952/2013 – Article 211(6) – Authorisation for inward processing of certain grain-oriented electrical steel products – Risk of adverse effect on the essential interests of EU producers – Examination of the economic conditions – Implementing Regulation (EU) 2015/2447 – Article 259 – European Commission’s conclusion on the economic conditions – Article 263 TFEU – Act not open to challenge)

In Case C-572/18 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 13 September 2018,

thyssenkrupp Electrical Steel GmbH, established in Gelsenkirchen (Germany),

thyssenkrupp Electrical Steel Ugo, established in Isbergues (France),

represented by M. Günes and L. Heinisch, Rechtsanwälte,

appellants,

the other party to the proceedings being:

European Commission, represented by J.-F. Brakeland and F. Clotuche-Duvieusart, acting as Agents,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra (Rapporteur), D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: G. Hogan,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 26 November 2020,

gives the following

* Language of the case: English.

Judgment

- 1 By their appeal, thyssenkrupp Electrical Steel GmbH and thyssenkrupp Electrical Steel Ugo request the Court of Justice to set aside the order of the General Court of the European Union of 2 July 2018, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo v Commission* (T-577/17, not published, EU:T:2018:411) ('the order under appeal'), by which the General Court dismissed their action seeking annulment of the European Commission's conclusion contained in the minutes of the sixth meeting of the Customs Expert Group Section 'Special Procedures other than transit' of 2 May 2017 to the effect that the essential interests of European Union producers would not be adversely affected by an authorisation for inward processing of certain grain-oriented electrical steel products requested by Euro-Mit Staal BV ('EMS').

Legal context

European Union law

Regulation No 2913/92

- 2 Articles 130 to 136 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended by Regulation (EC) No 2700/2000 of the European Parliament and of the Council of 16 November 2000 (OJ 2000 L 311, p. 17) ('Regulation No 2913/92'), concerned the procedure for processing under customs control.
- 3 Article 130 of Regulation No 2913/92 provided:
- 'The procedure for processing under customs control shall allow non-Community goods to be used in the customs territory of the Community in operations which alter their nature or state, without their being subject to import duties or commercial policy measures, and shall allow the products resulting from such operations to be released for free circulation at the rate of import duty appropriate to them. Such products shall be termed processed products.'
- 4 According to Article 132 of that regulation:
- 'Authorisation for processing under customs control shall be granted at the request of the person who carries out the processing or arranges for it to be carried out.'
- 5 Article 133 of that regulation provided:
- 'Authorisation shall be granted only:
- ...
- (e) where the necessary conditions for the procedure to help create or maintain a processing activity in the Community without adversely affecting the essential interests of Community producers of similar goods (economic conditions) are fulfilled. The cases in which the economic conditions are deemed to have been fulfilled may be determined in accordance with the committee procedure.'
- 6 In accordance with Articles 247 to 249 of that regulation, the Commission was assisted by a committee.

- 7 Regulation No 2913/92 was repealed and replaced by Regulation (EC) No 450/2008 of the European Parliament and of the Council of 23 April 2008 laying down the Community Customs Code (Modernised Customs Code) (OJ 2008 L 145, p. 1), which was itself repealed and replaced by Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1) ('the Customs Code').

Regulation No 2454/93

- 8 Article 502(1) of Commission Regulation (EEC) No 2454/93 of 2 July 1993 laying down provisions for the implementation of Regulation No 2913/92 (OJ 1993 L 253, p. 1), as amended by Commission Regulation (EC) No 993/2001 of 4 May 2001 (OJ 2001 L 141, p. 1) ('Regulation No 2454/93') provided:

'Except where the economic conditions are deemed to be fulfilled pursuant to Chapters 3, 4 or 6, the authorisation [for processing under customs control] shall not be granted without examination of the economic conditions by the customs authorities.'

- 9 Article 503 of that regulation provided:

'An examination of the economic conditions involving the Commission may take place:

- (a) if the customs authorities concerned wish to consult before or after issuing an authorisation;
- (b) if another customs administration objects to an authorisation issued;
- (c) on the initiative of the Commission.'

- 10 Under Article 504(1) and (4) of that regulation:

'1. Where an examination in accordance with Article 503 is initiated, the case shall be sent to the Commission. It shall contain the results of the examination already undertaken.

...

4. The Committee's conclusion shall be taken into account by the customs authorities concerned and by any other customs authorities dealing with similar authorisations or applications.'

- 11 Regulation No 2454/93 was repealed by Commission Implementing Regulation (EU) 2016/481 of 1 April 2016 (OJ 2016 L 87, p. 24).

The Customs Code

- 12 Article 5 of the Customs Code, entitled 'Definitions', states in point 39 thereof that the concept of 'decision', for the purposes of that code, is to be understood as referring to 'any act by the customs authorities pertaining to the customs legislation giving a ruling on a particular case, and having legal effects on the person or persons concerned'.

- 13 Article 22 of that code, entitled 'Decisions taken upon application', provides:

'1. Where a person applies for a decision relating to the application of the customs legislation, that person shall supply all the information required by the competent customs authorities in order to enable them to take that decision.

...

2. Customs authorities shall, without delay and at the latest within 30 days of receipt of the application for a decision, verify whether the conditions for the acceptance of that application are fulfilled.

Where the customs authorities establish that the application contains all the information required in order for them to be able to take the decision, they shall communicate its acceptance to the applicant within the period specified in the first subparagraph.

3. The competent customs authority shall take a decision as referred to in paragraph 1, and shall notify the applicant without delay, and at the latest within 120 days of the date of acceptance of the application, except where otherwise provided

...

6. Before taking a decision which would adversely affect the applicant, the customs authorities shall communicate the grounds on which they intend to base their decision to the applicant, who shall be given the opportunity to express his or her point of view within a period prescribed from the date on which he or she receives that communication or is deemed to have received it. Following the expiry of that period, the applicant shall be notified, in the appropriate form, of the decision.

...

7. A decision which adversely affects the applicant shall set out the grounds on which it is based and shall refer to the right of appeal provided for in Article 44.'

¹⁴ Article 44 of that code, entitled 'Right of appeal', states in paragraphs 1 and 3 thereof:

'1. Any person shall have the right to appeal against any decision taken by the customs authorities relating to the application of the customs legislation which concerns him or her directly and individually.

Any person who has applied to the customs authorities for a decision and has not obtained a decision on that application within the time limits referred to in Article 22(3) shall also be entitled to exercise the right of appeal.

...

3. The appeal shall be lodged in the Member State where the decision was taken or was applied for.'

¹⁵ Article 211 of that code provides:

'1. An authorisation from the customs authorities shall be required for the following:

(a) the use of the inward ... processing procedure ...

...

4. Except where otherwise provided and in addition to paragraph 3, the authorisation referred to in paragraph 1 shall be granted only where all of the following conditions are fulfilled:

(a) the customs authorities are able to exercise customs supervision without having to introduce administrative arrangements disproportionate to the economic needs involved;

(b) the essential interests of Union producers would not be adversely affected by an authorisation for a processing procedure (economic conditions).

5. The essential interests of Union producers shall be deemed not to be adversely affected, as referred to in point (b) of paragraph 4, except where evidence to the contrary exists or where the economic conditions are deemed to be fulfilled.

6. Where evidence exists that the essential interests of Union producers are likely to be adversely affected, an examination of the economic conditions shall take place at Union level.’

16 The first paragraph of Article 213 of the Customs Code, entitled ‘Conferral of implementing powers’, provides:

‘The Commission shall specify, by means of implementing acts, the procedural rules for examining the economic conditions referred to in Article 211(6).’

The delegated regulation

17 Article 166(1) of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation No 952/2013 as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1) (‘the delegated regulation’) sets out the general rule that the condition laid down in Article 211(4)(b) of the Customs Code is not to apply to authorisations for inward processing, while providing for three exceptions to that rule.

The implementing regulation

18 Article 259 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation No 952/2013 (OJ 2015 L 343, p. 558) (‘the implementing regulation’), entitled ‘Examination of the economic conditions’, is worded as follows:

‘1. Where following an application for an authorisation as referred to in Article 211(1)(a) of the [Customs Code] an examination of the economic conditions is required in accordance with Article 211(6) of [that] Code, the customs administration of the customs authority competent for taking a decision on the application shall transmit the file to the Commission without delay requesting such examination.

...

4. The Commission shall establish an expert group, composed of the representatives of the Member States, which shall advise the Commission on whether the economic conditions are fulfilled or not.

5. The conclusion reached on the economic conditions shall be taken into account by the customs authority concerned and by any other customs authority dealing with similar applications or authorisations.

It may be specified in the conclusions reached on the economic conditions that the case under examination is unique and therefore cannot serve as a precedent for other applications or authorisations.

...’

Decision C(2016) 3301 final

- 19 Article 3(1)(c) of the Commission Decision of 30 May 2016 establishing horizontal rules on the creation and operation of Commission expert groups (C(2016) 3301 final) provides that those groups are to provide advice and expertise to the Commission in relation to, inter alia, the implementation of legislation as well as coordination and cooperation with Member States. According to Article 5 of that decision, the mandate of an expert group must be clearly defined and its tasks must be defined as precisely as possible.
- 20 The Customs Expert Group was set up pursuant to Article 259(4) of the implementing regulation and is subject to the horizontal rules referred to in the preceding paragraph. That group's role consists, in accordance with Article 2(g) of the 'Terms of Reference' adopted on 3 May 2016 (Ares (2016) 2109319), of advising the Commission and its departments in relation to the examination of whether the economic conditions are fulfilled.

Background to the dispute

- 21 The background to the dispute is set out in paragraphs 1 to 8 of the order under appeal and may, for the purposes of the present proceedings, be summarised as follows.
- 22 On 21 February 2017, EMS submitted to the Dutch customs authority, in accordance with Article 211(1)(a) of the Customs Code, an application for authorisation for inward processing of certain grain-oriented electrical steel products originating in Japan.
- 23 On 27 February 2017, pursuant to Article 259(1) of the implementing regulation, that authority transmitted the file to the Commission, requesting it to examine the economic conditions.
- 24 On 2 May 2017, at the sixth meeting of the Customs Expert Group, Section 'Special Procedures other than transit', the issue of the economic conditions was discussed and was then the subject of a vote in favour. The Commission concluded, on that basis, that the economic conditions for authorisation for inward processing were met ('the contested conclusion').
- 25 On the same day, the Dutch customs authority issued the authorisation for inward processing to EMS for the period from 2 May 2017 to 1 May 2020.
- 26 On 12 July 2017, the appellants submitted to that authority notices of opposition to the granting of that authorisation.
- 27 In its preliminary decisions of 11 December 2017 on those oppositions, the Dutch customs authority declared that it was 'obliged' (*verplicht*) to grant the authorisation requested because it had to 'take account of [the contested conclusion]'.

Proceedings before the General Court and the order under appeal

- 28 By application lodged at the Registry of the General Court on 25 August 2017, the appellants brought an action for annulment of the contested conclusion.
- 29 By separate document lodged at the Court Registry on 6 November 2017, the Commission raised a plea of inadmissibility under Article 130 of the Rules of Procedure of the General Court, based primarily on the absence of a challengeable act for the purposes of Article 263 TFEU and, in the alternative, on the absence of a direct and individual concern on the part of the appellants, within the meaning of the fourth paragraph of Article 263 TFEU.

30 Ruling on the plea of inadmissibility, the General Court held that the contested conclusion did not constitute a challengeable act for the purposes of Article 263 TFEU and, accordingly, dismissed the action as inadmissible, without ruling on the issue of whether the appellants were directly and individually concerned, within the meaning of the fourth paragraph of Article 263 TFEU.

Procedure before the Court of Justice and forms of order sought in the appeal

31 The appellants claim that the Court should:

- set aside the order under appeal;
- declare the action admissible;
- refer the case back to the General Court for further proceedings going to the substance of the case, and
- order the Commission to pay the costs of the present proceedings.

32 The Commission contends that the Court should:

- dismiss the appeal as unfounded and
- order the appellants to pay the costs.

33 By order of 7 March 2019, *thyssenkrupp Electrical Steel and thyssenkrupp Electrical Steel Ugo v Commission* (C-572/18 P, not published, EU:C:2019:188), the President of the Court of Justice dismissed EMS's application for leave to intervene in support of the form of order sought by the Commission on the ground that EMS had not established an interest in the result of the case.

The appeal

34 In support of their appeal, the appellants raise five grounds of appeal. The first ground of appeal alleges that the General Court erred in law in holding that the Customs Code, the delegated regulation and the implementing regulation do not confer on the Commission the power to adopt decisions which are binding on the national customs authorities in a procedure for granting authorisation for inward processing. The second ground of appeal alleges that the General Court erred in law in holding that the Commission's role in the examination of the economic conditions is purely procedural in nature. The third ground of appeal alleges that the General Court erred in law in treating the judgment of 11 May 2006, *Friesland Coberco Dairy Foods* (C-11/05, EU:C:2006:312) ('the judgment in *Friesland Coberco*') as binding legal precedent for the interpretation of Article 259(5) of the implementing regulation. The fourth ground of appeal alleges that the General Court erred in law in failing to take into consideration, as evidence of the binding nature of the contested conclusion, the document entitled 'Administrative practice regarding the examination of the economic conditions in accordance with Articles 211(6) [Union Customs Code (UCC)] and 259 [UCC Implementing Act (IA UCC)]', of 5 August 2016 (Ares(2016)4155451; 'the administrative practice'). The fifth ground of appeal alleges that the General Court erred in law in failing to consider that the appellants were directly and individually concerned by the contested conclusion.

- 35 As a preliminary point, it must be observed that in its statement in response the Commission, without formally raising a plea of inadmissibility, stated that, if the appellants have not brought legal proceedings against the rejection by the Dutch customs authority of their oppositions to the authorisation for inward processing granted to EMS, that authorisation has become final, with the result that they have not established an interest in pursuing the appeal.
- 36 However, in their statement in reply, the appellants confirmed that they had brought such proceedings before the Netherlands courts, which the Commission also acknowledged in its rejoinder.
- 37 Consequently, the Commission's arguments based on the lack of proof of an interest in pursuing the appeal must be rejected.

The first, second and fourth grounds of appeal

Arguments of the parties

- 38 By these grounds of appeal, which should be dealt with together in view of the connection between them, the appellants allege that the General Court committed, in its assessment of whether the contested conclusion constitutes an act open to challenge for the purposes of Article 263 TFEU, three errors of law concerning the interpretation and application, first, of the provisions of the Customs Code, the delegated regulation and the implementing regulation concerning the procedure for examining the economic conditions and, secondly, of the administrative practice.
- 39 In support of the first ground of appeal, directed against paragraph 48 of the order under appeal, the appellants claim that the Commission, under its implementing powers, established a procedure in which the question whether the economic conditions are satisfied must be examined at EU level, since no competence to examine those conditions has been conferred on the national customs authorities. The establishment of such a procedure differs from Regulation No 2913/92, as interpreted by the Court in the judgment in *Friesland Coberco*.
- 40 According to the appellants, since the grant of an inward processing authorisation is subject to the fulfilment of the economic conditions and the national customs authorities do not have the power to examine that question, the Commission's conclusions in that regard are necessarily binding on those authorities. That inference is corroborated by the administrative practice and by the preliminary decisions of the Dutch customs authority of 11 December 2017 on the appellants' oppositions.
- 41 The appellants also claim that the Commission's power to adopt binding decisions following examination of the economic conditions cannot be called into question either by the fact that Article 259 of the implementing regulation refers to the act resulting from that examination as a 'conclusion', or by the fact that that institution is assisted by the Customs Expert Group. They point out, in that regard, that the form in which an act is adopted cannot alter the nature of that act and that the opinions of that group are purely advisory.
- 42 In support of the second ground of appeal, directed against paragraphs 49 and 50 of the order under appeal, the appellants submit that no provision of the Customs Code, the delegated regulation or the implementing regulation limits the Commission's role to taking the votes of the representatives of the Member States in the Customs Expert Group and to counting those votes. According to the appellants, since the Commission is not required to follow the advice of that expert group, it must be 'legally responsible' for its conclusion on the economic conditions.

- 43 The appellants consider therefore that such a conclusion constitutes an act intended to produce binding legal effects and, consequently, that it may be the subject of an action under Article 263 TFEU.
- 44 In support of the fourth ground of appeal, directed against paragraph 66 of the order under appeal, the appellants claim that the General Court erred in law in its examination of the scope of the Commission's conclusion on the economic conditions, in that it did not take into consideration the administrative practice as evidence of the binding nature of that conclusion, whereas the first paragraph of point 3 of that practice states that 'the Commission's conclusion is binding on the competent customs authorities and therefore they cannot derogate from it'. Furthermore, the Dutch customs authority stated that it was 'obliged' (*verplicht*), pursuant to the contested conclusion, to grant the authorisation requested.
- 45 The Commission disputes the merits of those grounds of appeal.

Findings of the Court

- 46 As a preliminary point, it should be borne in mind that any provisions adopted by the EU institutions, whatever their form, which are intended to have binding legal effects capable of affecting the interests of the applicant by bringing about a distinct change in his or her legal position are regarded as 'challengeable acts' for the purposes of Article 263 TFEU (see, to that effect, judgments of 13 October 2011, *Deutsche Post and Germany v Commission*, C-463/10 P and C-475/10 P, EU:C:2011:656, paragraph 37, and of 20 September 2016, *Mallis and Others v Commission and ECB*, C-105/15 P to C-109/15 P, EU:C:2016:702, paragraph 51 and the case-law cited).
- 47 By contrast, any act not producing binding legal effects, such as preparatory acts, implementing measures, mere recommendations and opinions and, in principle, internal instructions, falls outside the scope of the judicial review provided for in Article 263 TFEU (see, to that effect, judgments of 12 September 2006, *Reynolds Tobacco and Others v Commission*, C-131/03 P, EU:C:2006:541, paragraph 55 and the case-law cited, and of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, paragraph 27).
- 48 According to the Court's case-law, in order to determine whether the contested act produces such effects, it is necessary to examine the substance of that act and to assess those effects on the basis of objective criteria, such as the content of that act, taking into account, as appropriate, the context in which it was adopted and the powers of the institution which adopted the act (judgments of 20 February 2018, *Belgium v Commission*, C-16/16 P, EU:C:2018:79, paragraph 32 and the case-law cited, and of 9 July 2020, *Czech Republic v Commission*, C-575/18 P, EU:C:2020:530, paragraph 47).
- 49 It would be otherwise only if acts adopted in the course of the preparatory proceedings were themselves the culmination of a special procedure distinct from that intended to permit the institution concerned to take a decision on the substance of the case (judgment of 11 November 1981, *IBM v Commission*, 60/81, EU:C:1981:264, paragraph 11).
- 50 In any event, while measures of a purely preparatory character may not themselves be the subject of an action for annulment, any legal defects therein may be relied upon in an action directed against the definitive act for which they represent a preparatory step (judgment of 11 November 1981, *IBM v Commission*, 60/81, EU:C:1981:264, paragraph 12).
- 51 In the present case, the General Court noted, first of all, in paragraph 48 of the order under appeal, that neither the Customs Code nor the delegated regulation nor the implementing regulation confer on the Commission the power to adopt decisions, let alone decisions that are binding on the national customs authorities in the examination of the economic conditions.

- 52 Next, the General Court stated, in paragraph 49 of the order under appeal, that the Customs Code does not in any way require the Commission itself to carry out the examination of the economic conditions, and described the role of that institution in the cooperation between itself and the experts of the Member States, on the one hand, and the customs authorities concerned, on the other hand, as being purely procedural. According to the General Court, that cooperation is not to be confused with a provision for decisions taken at EU level in which the conclusions reached in an informal context would be binding on the Member States.
- 53 Finally, the General Court pointed out, in paragraph 50 of the order under appeal, that it was not apparent from the procedure put in place by the Commission under the implementing powers that it derives from Article 213 of the Customs Code that the Commission must express its opinion or has the power to assess the question as to whether the economic conditions are fulfilled.
- 54 Furthermore, the General Court found, in paragraph 66 of the order under appeal, first, that the administrative practice merely replaced an earlier administrative document relating to the application of the relevant provisions of Regulation No 2454/93 and, secondly, that, in so far as that document had not drawn the consequences of the judgment in *Friesland Coberco*, it could not serve as a valid basis for the interpretation contained in the administrative practice.
- 55 In the context of the first and second grounds of the appeal, the appellants submit, in essence, that the relevant provisions of the Customs Code, the delegated regulation and the implementing regulation must be interpreted as meaning that the procedure for examining the economic conditions, conducted at EU level by the Commission in collaboration with the Customs Expert Group, is autonomous and separable from the inward processing authorisation procedure.
- 56 However, in the first place, the Commission's conclusions concerning the economic conditions, such as the contested conclusion, form part of the inward processing authorisation procedure, under which, in accordance with Article 211(1)(a) of the Customs Code, the placing of goods under the inward processing procedure is subject to authorisation by the national customs authorities, which thus exercise, exclusively, the final decision-making power in the context of that procedure.
- 57 That finding is borne out by Article 22 of the Customs Code. Under paragraph 3 of that article, it is for the competent customs authority to take the decision following an application for the application of customs legislation and to notify the applicant of that decision within the legal time limits. Paragraph 6 of that article, for its part, requires the customs authorities, before taking a decision which would adversely affect the applicant, to communicate the grounds on which they intend to base their decision, giving the applicant the opportunity to express his or her point of view on those grounds. Finally, under paragraph 7 of that article, a decision which adversely affects the applicant must set out the grounds on which it is based and refer to 'the right of appeal provided for in Article 44 [of the Customs Code]'; that appeal must be lodged, in accordance with paragraph 3 of that latter article, 'in the Member State where the decision was taken or applied for'.
- 58 As regards Article 5, point 39, of the Customs Code, which defines 'decision' as 'any act by the customs authorities pertaining to the customs legislation giving a ruling on a particular case, and having legal effects on the person or persons concerned', that provision leaves no doubt as to the fact that it is the national customs authorities which have the power to adopt acts in the nature of a decision under that code.
- 59 It is true that, among the cumulative conditions necessary for obtaining an inward processing authorisation, Article 211(4)(b) of the Customs Code requires that the economic conditions must be satisfied, and provides, in paragraph 6 thereof, in cases where an examination of those conditions is necessary, that it is to 'take place at Union level'. However, it is apparent from a combined reading of Article 211(1)(a), Article 211(4)(b) and Article 211(6) of that code that such an examination forms part

of the procedure leading to the adoption, following an application for authorisation to that effect, of the final decision of the national customs authorities and constitutes merely an intermediate stage of that procedure.

- 60 Thus, and whereas Article 211(1)(a) of the Customs Code expressly confers on the national customs authorities the decision-making power in respect of the inward processing procedure, Article 211(4)(b) and Article 211(6) of that code does not for its part confer any separate decision-making power on an EU entity in the examination of the economic conditions.
- 61 That finding is borne out by the fact that, contrary to what is provided for in Article 22 and Article 44(3) of the Customs Code as regards decisions adopted by the competent customs authority following an application, no provision of that code requires the EU entity which must examine the economic conditions to notify the applicant of the result of that examination, or even to communicate to the applicant the reasons which led to that result. Furthermore, in that context, no provision gives the applicant a right of appeal against such a result.
- 62 Moreover, contrary to what the appellants claim, it does not follow from the provisions of the Customs Code that the role of the competent customs authority is limited to implementing the result obtained after examination of the economic conditions at EU level. That code and, in particular, Article 211 thereof does not confer on the EU entity which is responsible for examining the economic conditions the power to adopt a measure other than a purely intermediate and preparatory measure.
- 63 In the second place, as regards the procedural rules applicable to the examination of the economic conditions which takes place at EU level, within the meaning of Article 211(6) of the Customs Code, it is admittedly apparent from a reading of Article 259(1) in conjunction with Article 259(4) of the implementing regulation that, where such an examination is necessary, it is for the Commission and must be carried out involving an expert group composed of the representatives of the Member States, on the basis of the information made available to it by the competent customs authority. It is also apparent from Article 259(5) of the implementing regulation that the Commission records the result of the examination of the economic conditions carried out at EU level in a ‘conclusion’ and that that conclusion is to be ‘taken into account’ by the competent customs authority and by any other customs authority dealing with similar applications or authorisations.
- 64 Thus, Article 259 of the implementing regulation supports the finding that the conclusion reached by the Commission following the examination of the economic conditions is merely an intermediate measure intended to prepare the final decision of the customs authorities on the application for authorisation for inward processing.
- 65 As the Advocate General observed, in essence, in point 52 of his Opinion, the expression ‘taken into account’ in the first subparagraph of Article 259(5) of the implementing regulation suggests, in view of its usual meaning in everyday language, a certain discretion on the part of the competent customs authority as to how to act on the Commission’s conclusion concerning the economic conditions. That expression thus implies that the competent customs authority must examine the conclusion issued by the Commission and, in the event that it disagrees with it, provide the grounds for its decision not to follow it (see, by analogy, judgment in *Friesland Coberco*, paragraph 27).
- 66 It is true, as the appellants point out, that, in accordance with the provisions of Article 259(1) of the implementing regulation, the competent customs authority to which an application for authorisation for inward processing is made is obliged, where an examination of the economic conditions carried out at EU level is necessary under Article 211(6) of the Customs Code, to transmit the file to the Commission, requesting such examination.

- 67 However, as the Court of Justice held, in essence, in paragraphs 28 and 29 of the judgment in *Friesland Coberco* in relation to Regulation No 2913/92, the obligation on the competent customs authority to transmit, in certain circumstances, the file to the Commission does not imply an obligation on that authority to follow the conclusion reached by that institution. As the General Court correctly pointed out in paragraphs 53 and 54 of the order under appeal, which are not challenged in the present appeal, the fact that the conclusion concerning the economic conditions is now reached by the Commission and not, as was the case under Regulation No 2913/92, by a committee established by the latter regulation, cannot invalidate that finding. As the Advocate General observed in point 64 of his Opinion, the objective pursued by that examination remains identical, as only the author of that examination has changed.
- 68 Furthermore, the obligation on the national customs authorities, when they intend to differ from the Commission's conclusion, to state reasons for their decisions in that regard supports the finding that that conclusion does not produce binding legal effects capable of bringing about a distinct change in an applicant's legal position. As the Advocate General observed, in essence, in point 70 of his Opinion, although that obligation to state reasons reveals the existence of a certain legal effect produced by the Commission's conclusion, that effect is not sufficient to confer on that conclusion the character of a challengeable act for the purposes of Article 263 TFEU.
- 69 So far as concerns the appellants' argument based on the wording of the second subparagraph of Article 259(5) of the implementing regulation – which provides that the Commission may specify in its conclusions that the case under examination is unique and cannot serve as a precedent for other applications or authorisations – it does not follow either from that provision that the Commission is empowered to adopt acts producing binding legal effects such as to affect the interests of an applicant by bringing about a distinct change in his or her legal position. Even in such a case, the national customs authorities concerned may depart from that conclusion, provided that they give reasons for their decisions to that effect.
- 70 Lastly, in so far as the appellants rely on the administrative practice in support of their position that the Commission's conclusion concerning economic conditions constitutes a challengeable act for the purposes of Article 263 TFEU, as the General Court rightly pointed out in paragraph 67 of the order under appeal – a point which is not disputed in the present appeal – although an administrative practice may be regarded as a valid aid to interpret the nature of such conclusions, it does not have legally binding force and cannot therefore alter the scope of the act to which it refers.
- 71 In the light of the interpretation of Article 259 of the implementing regulation, as set out in paragraphs 63 to 69 above, the General Court was also correct to reject, in paragraph 68 of the order under appeal, the interpretation contained in the administrative practice on the ground that it was not in accordance with the actual provisions of the implementing regulation.
- 72 In those circumstances, the administrative practice is not capable of calling into question the interpretation of the provisions of the Customs Code and of the implementing regulation set out in paragraphs 56 to 69 above, with the result that the appellants' argument based on that practice cannot succeed. The fact that, in the present case, the competent customs authority took its decision in the belief that it was bound by the contested conclusion does not, as the Advocate General observed in point 61 of his Opinion, have the effect of making that conclusion an act which is legally binding.
- 73 It follows that the appellants' arguments seeking to demonstrate that the General Court committed, in its assessment of whether the contested conclusion constitutes an act open to challenge for the purposes of Article 263 TFEU, three errors of law concerning the interpretation and application, first, of the provisions of the Customs Code, the delegated regulation and the implementing regulation concerning the procedure for examining the economic conditions and, secondly, of the administrative practice, cannot succeed.

74 Accordingly, the first, second and fourth grounds of appeal must be rejected as unfounded.

The third ground of appeal

Arguments of the parties

- 75 By the third ground of appeal, the appellants claim that the General Court erred in law in paragraphs 60 and 61 of the order under appeal by holding that the interpretation of Article 504(4) of Regulation No 2454/93 upheld by the Court of Justice in the judgment in *Friesland Coberco* was still relevant for the interpretation of Article 259(5) of the implementing regulation, which is applicable in the present case. They contest the General Court's finding that those two provisions 'may be regarded as equivalent'.
- 76 In opposition to that finding, the appellants claim that the procedure for processing under customs control, which was at issue in the case which gave rise to the judgment in *Friesland Coberco*, no longer appears in the Customs Code. That amendment also led to a change in the definition of the concept of 'economic conditions'. Furthermore, the Committee established by Regulation No 2913/92 no longer plays any role in the examination of the economic conditions, as the Commission now delivers the conclusions on those conditions.
- 77 The appellants also draw attention to the difference in wording between, on the one hand, Article 502(1) of Regulation No 2454/93 and, on the other hand, Article 211(6) of the Customs Code and Article 259(1) of the implementing regulation. The words 'shall be taken into account' in Article 259(5) of the implementing regulation should therefore be understood as meaning that the Commission's conclusions on economic conditions are binding on the national customs authorities.
- 78 The Commission contests the merits of the present ground of appeal.

Findings of the Court

- 79 By the present ground of appeal, directed against paragraphs 60 and 61 of the order under appeal, the appellants claim that, in view of the extent of the amendments made to the customs legislation since the interpretation adopted in the judgment in *Friesland Coberco* of Regulations No 2913/92 and No 2454/93, the General Court erred in law in holding that Article 504(4) of Regulation No 2454/93 and the first subparagraph of Article 259(5) of the implementing regulation constituted equivalent provisions and, in so doing, adopting an interpretation of the latter provision identical to that which the Court of Justice adopted of the former provision in that judgment, to the effect that the conclusions of the committee established by Regulation No 2913/92 were in no way binding on the national customs authorities.
- 80 In that regard, it is sufficient to note that, in the light of the considerations set out in paragraphs 56 to 69 above, the General Court did not err in law in holding, in paragraphs 60 and 61 of the order under appeal, that the interpretation of Article 504(4) of Regulation No 2454/93 upheld by the Court of Justice in the judgment in *Friesland Coberco* remains relevant for the purposes of interpreting the first subparagraph of Article 259(5) of the implementing regulation, given that the former and latter provisions may be regarded as equivalent.
- 81 In those circumstances, the appellants' arguments seeking to show that the General Court erred in law in holding that the interpretation of Article 504(4) of Regulation No 2454/93 upheld by the Court of Justice in the judgment in *Friesland Coberco* is still relevant for the purposes of interpreting Article 259(5) of the implementing regulation, which is applicable in the present case, cannot succeed either.

82 Accordingly, the third ground of appeal must be dismissed as unfounded.

The fifth ground of appeal

Arguments of the parties

83 By the present ground of appeal, the appellants submit that the General Court erred in law by failing to find that they were directly and individually concerned by the contested conclusion, within the meaning of the fourth paragraph of Article 263 TFEU.

84 The Commission contends that this ground of appeal is ineffective and, in any event, unfounded.

Findings of the Court

85 Since the General Court correctly held that the contested conclusion did not constitute a challengeable act for the purposes of Article 263 TFEU, it cannot be criticised for erring in law on the ground that it failed to examine whether the appellants were directly and individually concerned by such an act, within the meaning of the fourth paragraph of Article 263 TFEU. Since it was not directed against a challengeable act, the action could only be dismissed as inadmissible, even if the appellants were, as they maintain, directly and individually concerned by the contested conclusion.

86 In those circumstances, the fifth ground of appeal must be dismissed as unfounded.

87 Since none of the five grounds of appeal has been upheld, the action must be dismissed in its entirety.

Costs

88 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 the costs.

89 Under Article 138(1) of those rules of procedure, applicable to the procedure on an 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.

90 Since the Commission has applied for costs and the appellants have been unsuccessful in their appeal, the appellants should be ordered, in addition to bearing their own costs, to pay those incurred by the Commission.

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

- 1. Dismisses the appeal in Case C-572/18 P;**
- 2. Orders thyssenkrupp Electrical Steel GmbH and thyssenkrupp Electrical Steel Ugo, in addition to bearing their own costs, to pay those incurred by the European Commission.**

Vilaras

Piçarra

Šváby

Rodin

Jürimäe

Delivered in open court in Luxembourg on 22 April 2021.

A. Calot Escobar
Registrar

M. Vilaras
President of the Fourth Chamber