Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

14 December 2022*

(Subsidies – Imports of biodiesel originating in Indonesia – Implementing Regulation (EU) 2019/2092 – Definitive countervailing duty – Article 8(1) and (2) of Regulation (EU) 2016/1037 – Price undercutting – Price pressure – Article 8(5) of Regulation 2016/1037 – Causal link – Article 3(1)(a)(iv) and (2) of Regulation 2016/1037 – Action consisting in 'entrusting' or 'directing' a private body to carry out a function constituting a financial contribution – Less than adequate remuneration – Income or price support – Article 3(2) and Article 6(d) of Regulation 2016/1037 – Benefit – Article 3(1)(a)(i) and (2) of Regulation 2016/1037 – Direct transfer of funds – Article 7 of Regulation 2016/1037 – Calculation of the amount of the benefit – Article 8(1) and (8) of Regulation 2016/1037 – Threat of material injury – Rights of the defence)

In Case T-143/20,

PT Pelita Agung Agrindustri, established in Medan (Indonesia),

PT Permata Hijau Palm Oleo, established in Medan,

represented by F. Graafsma, J. Cornelis and E. Rogiest, lawyers,

applicants,

v

European Commission, represented by P. Kienapfel, G. Luengo and P. Němečková, acting as Agents,

defendant,

supported by

European Biodiesel Board (EBB), established in Brussels (Belgium), represented by M.-S. Dibling and L. Amiel, lawyers,

intervener,

THE GENERAL COURT (Fourth Chamber, Extended Composition),

* Language of the case: English.

composed, at the time of the deliberations, of S. Gervasoni (Rapporteur), President, L. Madise, P. Nihoul, R. Frendo and J. Martín y Pérez de Nanclares, Judges,

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

further to the hearing on 14 January 2022,

gives the following

Judgment

1 By their action under Article 263 TFEU, the applicants, PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo, seek annulment of Commission Implementing Regulation (EU) 2019/2092 of 28 November 2019 imposing a definitive countervailing duty on imports of biodiesel originating in Indonesia (OJ 2019 L 317, p. 42; 'the contested regulation'), in so far as that regulation concerns them.

Background to the dispute

2 The applicants are Indonesian companies that produce biodiesel and export it to the European Union.

3 On 19 November 2013, the Council of the European Union adopted Implementing Regulation (EU) No 1194/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia (OJ 2013 L 315, p. 2), which imposed a definitive anti-dumping duty on the applicants.

4 On 25 November 2013, the European Commission adopted Regulation (EU) No 1198/2013 terminating the anti-subsidy proceeding concerning imports of biodiesel originating in Argentina and Indonesia and repealing Regulation (EU) No 330/2013 making such imports subject to registration (OJ 2013 L 315, p. 67).

5 On 15 September 2016, the Court annulled Articles 1 and 2 of Implementing Regulation No 1194/2013 in so far as it concerned the first of the applicants (judgment of 15 September 2016, *PT Pelita Agung Agrindustri* v *Council*, T-121/14, not published, EU:T:2016:500).

6 On 25 January 2018, following a request from the Republic of Indonesia, the World Trade Organization (WTO) Panel issued an anti-dumping report on the anti-dumping measures imposed by Implementing Regulation No 1194/2013 on imports of biodiesel from Indonesia (WTO Panel report entitled 'European Union – Anti-dumping measures on biodiesel from Indonesia', adopted on 25 January 2018 (WT/DS 480/R); 'the "EU-biodiesel (Indonesia)" Panel report'). The WTO Panel concluded that the European Union had acted in a manner incompatible with several provisions of the General Agreement on Tariffs and Trade (GATT) and the Agreement on Implementation of Article VI of the GATT (OJ 1994 L 336, p. 103), set out in Annex 1A to the Agreement establishing the WTO (OJ 1994 L 336, p. 3).

7 On 22 October 2018, European Biodiesel Board (EBB) lodged a complaint with the Commission pursuant to Article 10 of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ 2016 L 176, p. 55), as amended by Regulation (EU) 2018/825 of the European Parliament and of the Council of 30 May 2018 (OJ 2018 L 143, p. 1) ('the basic regulation'). That complaint alleged that imports of biodiesel originating in Indonesia were subsidised and were thereby causing injury to the Union industry.

8 By notice published in the *Official Journal of the European Union* on 6 December 2018 (OJ 2018 C 439, p. 16), the Commission initiated an anti-subsidy proceeding concerning imports of biodiesel originating in Indonesia.

9 The product subject to the investigation was 'fatty-acid mono-alkyl esters and/or paraffinic gasoils obtained from synthesis and/or hydro-treatment, of non-fossil origin, commonly known as "biodiesel", in pure form or as included in a blend, originating in Indonesia' ('the product concerned').

10 Biodiesel produced in Indonesia is mainly palm oil methyl ester ('PME'), which is derived from crude palm oil ('CPO'). Biodiesel produced in the European Union, by contrast, is mainly rapeseed methyl ester ('RME'), but it is also produced from other raw materials, including CPO.

11 PME and RME both belong to the category of fatty-acid mono-alkyl esters. The term 'ester' refers to the transesterification of vegetable oils, that is to say, the mingling of the oil with alcohol, which produces biodiesel and, as a by-product, glycerine. The term 'methyl' refers to methanol, the most commonly used alcohol in the process. Fatty-acid mono-alkyl esters are also known as 'fatty-acid methyl esters' ('FAME'). Although PME and RME are both FAME, they have partially different physical and chemical properties and, in particular, a different cold filter plugging point ('CFPP'). The CFPP is the temperature at which a fuel will cause a fuel filter to plug due to the crystallisation or jellification of some of its components. For RME, the CFPP can be – 14 °C while for PME it is approximately 13 °C. On the market, biodiesel with a specific CFPP is often described as FAME X, for example FAME 0 or FAME 5.

12 The investigation into subsidisation and injury covered the period from 1 October 2017 to 30 September 2018 ('the investigation period'). The examination of trends relevant for the purpose of determining injury covered the period from 1 January 2015 to the end of the investigation period. Where appropriate, the Commission also examined post-investigation period data.

13 By letter of 18 January 2019, the applicants submitted their replies to the anti-subsidy questionnaire sent to them by the Commission; they supplemented those replies on 1 March 2019. The Commission carried out verification visits at the applicants' premises in Indonesia from 12 to 15 March and on 22 March 2019.

14 On 12 August 2019, the Commission adopted Implementing Regulation (EU) 2019/1344 imposing a provisional countervailing duty on imports of biodiesel originating in Indonesia (OJ 2019 L 212, p. 1) ('the provisional regulation'). The provisional countervailing duty applicable to the applicants was 18%.

15 On 28 August 2019, the applicants submitted their comments on the provisional disclosure documents. A hearing with the Commission was held on 6 September 2019.

16 On 4 October 2019, the Commission disclosed the essential facts and considerations on the basis of which it intended to impose definitive countervailing measures on biodiesel originating in Indonesia. The applicants submitted their observations on those considerations on 14 October 2019. Hearings were held on 14 October 2019 in the presence of the Hearing Officer and on 17 October 2019.

17 At the end of the anti-subsidy proceeding the Commission adopted the contested regulation, by which it confirmed the conclusions which it had reached in the provisional regulation. It took the view that the Indonesian Government had supported the biodiesel industry by means of subsidies within the meaning of Article 3(1) of the basic regulation. The Commission found that that support had been provided through certain schemes. Those schemes included, inter alia, that under which the Oil Palm Plantation Fund, a public body, paid to biodiesel producers which delivered biodiesel to companies designated as 'Petrofuel entities' the difference between the mineral diesel reference price, which those entities paid, and the biodiesel reference price set by the Minister for Energy and Mineral Resources. Thus, the Commission concluded that the Indonesian Government had entrusted or directed producers of CPO – a raw material which biodiesel producers purchased to process into biodiesel – to provide that raw material for less than adequate remuneration, in particular by means of export restrictions and price control through the group of public companies PT Perkebunan Nusantara ('PTPN').

18 The definitive countervailing duty applicable to the applicants was 18%.

Forms of order sought

19 The applicants claim that the Court should:

– annul the contested regulation in so far as it concerns them;

– order the Commission to pay the costs.

20 The Commission, supported by EBB, contends that the Court should:

– dismiss the action as unfounded;

– order the applicants to pay the costs.

Law

21 In support of their action, the applicants rely in essence on seven pleas in law, alleging:

– first, infringement of Article 8(1) and (2) of the basic regulation in the establishment of undercutting;

– second, infringement of Article 8(5) of the basic regulation in the examination of the causal link;

– third, a manifest error of assessment on the part of the Commission in concluding that there was a subsidy in the form of the provision of CPO for less than adequate remuneration;

– fourth, a manifest error of assessment and infringement of Article 3(1)(a)(i) and (2) of the basic regulation, vitiating the Commission's conclusion as to the existence of a subsidy in the form of a direct transfer of funds;

– fifth, infringement of Article 7 of the basic regulation and a manifest error of assessment on the part of the Commission in calculating the amount of the benefit conferred by the Oil Palm Plantation Fund scheme;

– sixth, infringement of Article 8(1) and (8) of the basic regulation in the determination of the existence of a threat of material injury;

– seventh, infringement of the applicants' rights of defence.

The first plea in law, alleging infringement of Article 8(1) and (2) of the basic regulation in the establishment of undercutting

22 The first plea is divided into two parts, which are disputed by the Commission, supported by EBB.

The first part of the first plea, alleging failure on the part of the Commission to take into account all the relevant data when establishing undercutting

23 By the first part, the applicants claim that the Commission infringed Article 8(1) and (2) of the basic regulation, since the undercutting calculation is not based on positive evidence and is not the result of an objective examination. More specifically, by their first complaint, they claim that the first method used by the Commission in order to calculate price undercutting disregards the fact that direct competition cannot exist between PME imported from Indonesia and PME produced in the European Union, the former being used as an input material to produce a biodiesel blend and the latter being directly blended with mineral diesel. By their second complaint, the applicants submit that the second method, which consists in comparing imports of PME from Indonesia with sales of PME produced in the European Union and biodiesel with a CFPP of 0 °C ('FAME 0') produced in the European Union, also fails to take account of the fact that Indonesian biodiesel is an input material for the production of FAME 0 and that it cannot be used in certain cold regions of the European Union on account of its high CFPP level. By their third complaint, the applicants submit that the third method, which consists in comparing all biodiesel imports from Indonesia with all sales of biodiesel in the European Union without price adjustment, fails to take account of differences in the prices of biodiesel types according to their CFPP levels.

24 As a preliminary point, it should be borne in mind that, in accordance with the case-law, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy a broad discretion by reason of the complexity of the economic and political situations which they have to examine (see judgment of 18 October 2018, *Gul Ahmed Textile Mills* v *Council*, C-100/17 P, EU:C:2018:842, paragraph 63 and the case-law cited).

25 That broad discretion covers, inter alia, the determination of the existence of injury caused to the Union industry in the context of an anti-subsidy proceeding. The judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts relied on have been accurately stated and whether there has been a

manifest error in the appraisal of those facts or a misuse of powers (see, by analogy, judgments of 10 September 2015, *Bricmate*, C-569/13, EU:C:2015:572, paragraph 46, and of 19 May 2021, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v *Commission*, T-254/18, under appeal, EU:T:2021:278, paragraph 149 and the case-law cited). That is particularly the case as regards the determination of the factors injuring the Union industry in an anti-subsidy investigation (see, by analogy, judgment of 10 September 2015, *Bricmate*, C-569/13, EU:C:2015:572, paragraph 46 and the case-law cited).

26 The General Court's review of the evidence on which the EU institutions based their findings does not constitute a new assessment of the facts replacing that made by the institutions. That review does not encroach on the broad discretion those institutions have in the field of commercial policy, but is restricted to showing whether that evidence was able to support the conclusions reached by the institutions. The Court must therefore not only establish whether the evidence put forward is factually accurate, reliable and consistent but also ascertain whether that evidence contained all the relevant information which had to be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions reached (judgment of 18 October 2018, *Gul Ahmed Textile Mills* v *Council*, C-100/17 P, EU:C:2018:842, paragraph 64).

27 Moreover, it should be borne in mind that, in accordance with Article 8(1) of the basic regulation, the determination of injury to the Union industry is to be based on positive evidence and is to involve an objective examination of (i) the volume of the subsidised imports and the effect of those imports on prices in the Union market for like products, and (ii) the consequent impact of those imports on that industry. With regard more particularly to the effect of the subsidised imports on prices, Article 8(2) of the basic regulation provides for the obligation to give consideration to whether there has been, for those imports, significant price undercutting as compared with the price of a like product of the Union industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraphs 236 and 237).

28 The basic regulation does not contain any definition of the concept of price undercutting and does not lay down any method for the calculation of that concept (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 238). The method used to determine possible price undercutting must, in principle, be applied at the level of the 'like product', within the meaning of Article 2(c) of the basic regulation, even though that product may consist of different product types (see, by analogy, judgment of 20 January 2022, *Commission* v *Hubei Xinyegang Special Tube*, C-891/19 P, EU:C:2022:38, paragraphs 73 and 74 and the case-law cited, and Opinion of Advocate General Pitruzzella in *Commission* v *Hubei Xinyegang Special Tube*, C-891/19 P, EU:C:2021:533, point 64, followed by the Court of Justice in that case).

29 The calculation of the price undercutting of the imports in question is carried out, in accordance with Article 8(1) and (2) of the basic regulation, for the purpose of determining the existence of injury suffered by the Union industry by reason of those imports and it is used, more broadly, to assess that injury and to determine the injury margin, namely the injury elimination level. The obligation to carry out an objective examination of the impact of the subsidised imports, set out in Article 8(1) of the basic regulation, requires a fair comparison to be made between the price of the product concerned and the price of the like product of that industry when sold in the territory of the European Union (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 239).

30 In general terms, when determining whether there is undercutting, the institutions compare EU prices with adjusted import prices, so as to obtain an undercutting margin expressed as a percentage (see, by analogy, judgment of 25 October 2011, *Transnational Company "Kazchrome" and ENRC Marketing* v *Council*, T-192/08, EU:T:2011:619, paragraph 65).

31 In that context, it should be noted that the analysis of price undercutting involves the assessment of complex economic situations and that the Commission's broad discretion extends, at the very least, to decisions relating to the choice of analytical method, to the data and evidence to be gathered, to the method of calculation to be used in order to determine undercutting and to the interpretation and assessment of the data gathered (see, by analogy, judgment of 20 January 2022, *Commission* v *Hubei Xinyegang Special Tube*, C-891/19 P, EU:C:2022:38, paragraphs 78 and 107, and Opinion of Advocate General Pitruzzella in *Commission* v *Hubei Xinyegang Special Tube*, C-891/19 P, EU:C:2021:533, points 27 to 30, followed by the Court of Justice in that case).

32 It is in the light of those considerations that the first part of the first plea in law must be examined.

– *The first method of calculation*

33 According to recital 234 of the contested regulation, the first method for calculating price undercutting 'compared imports of PME from Indonesia to sales of PME produced in the European Union', 'the undercutting margins [ranging] from 6.0% to 11.6%'. Recital 235 of the contested regulation states that 'the exact comparison was between PME at [CFPP] +13 from Indonesia and PME at CFPP +10 from the Union industry', that 'the PME sold at CFPP +10 was not blended to reach that CFPP', that 'an additive costing less than EUR 1 per MT, i.e. only around 0.1% of the cost of production, was added to the biodiesel' and that 'the Commission does not consider that an adjustment for this additive is necessary as it would not have any impact on the calculations'.

34 According to recital 293 of the provisional regulation, that comparison covered around 20% of all sales made by the sampled Union producers.

35 It is apparent from recital 292 of the provisional regulation that that comparison relates to the same product as regards the imports originating in Indonesia and the product of the Union industry, namely pure palm oil biodiesel. That point is not disputed by the applicants.

36 The Commission also stated, in recital 242 of the contested regulation, that it had found no price difference between those products. In addition, it observed, in the same recital, that the quotes for pure PME made no reference to the actual CFPP of the product, but only to PME. As the applicants have not produced any evidence capable of invalidating those findings, the Commission rightly inferred from this that all PME was sold at similar prices irrespective of their precise CFPP. As regards the competitive relationship between the two products, the contested regulation states, in recital 228, that an analysis of the sales of the sampled Union producers showed significant sales of pure PME made directly to mineral diesel refineries, which will be in direct competition with imports of pure PME from Indonesia. The fact that, according to recital 290 of the provisional regulation, pure PME is 'not normally' blended with mineral diesel by itself, but is usually mixed with other biodiesels with lower CFPP first to produce a blend with a CFPP of 5 °C or 0 °C, which is then blended with mineral diesel, does not preclude that product from being sold directly to mineral diesel refineries.

37 The applicants' argument that imported PME is used as an input material to produce a biodiesel blend whereas the PME produced in the European Union is directly blended with mineral diesel and that, consequently, there can be no direct competition between the two is not substantiated by evidence and appears to be based on a misreading of the contested regulation.

38 The fact that recital 253 of the contested regulation states that PME made in the European Union is sold directly to the oil companies does not mean that the imported PME is not. On the contrary, that situation is expressly mentioned in recital 228 of the contested regulation, in which the Commission explained that there was direct competition between the two products by stating that 'an analysis of the sales of the sampled Union producers showed significant sales of pure PME directly to mineral diesel refineries, which will be in direct competition with imports of pure PME from Indonesia'. As the Commission rightly points out, recital 254 of that regulation states only that 'the Commission does not dispute that PME is also imported into the Union to be mixed with other biodiesels'.

39 The applicants have therefore failed to adduce sufficient evidence to render implausible the assessment of the facts set out in the provisional regulation and confirmed in the contested regulation. Such evidence is, however, necessary in order to establish that an EU institution has committed a manifest error of assessment such as to justify the annulment of a measure (see judgment of 11 September 2014, *Gold East Paper and Gold Huasheng Paper* v *Council*, T-444/11, EU:T:2014:773, paragraph 62 and the case-law cited).

40 It follows from the foregoing that, with the first method of calculation, the Commission took into account the type and physical properties of the products to be compared, their uses and their competitive relationship. It thus made a fair comparison between the price of the product concerned and the price of the like product of the Union industry when sold in the territory of the European Union, as required by the case-law cited in paragraph 29 above.

41 Accordingly, the applicants' arguments concerning the first method of calculation must be rejected.

– *The second method of calculation*

42 According to recital 245 of the contested regulation, the second method for calculating price undercutting 'expanded the quantity of Union produced biodiesel that was compared to imports from Indonesia by including the sales of FAME 0 biodiesel by the sampled Union producers in the comparison'.

43 Recitals 246 to 248 of the contested regulation state:

'(246) To compare the Union sales of FAME 0 to the countrywide imports of PME from Indonesia, the price of Union sales of FAME 0 was adjusted and as a result reduced to the price level of Union sales of PME in order to take into account the market value of the differences in physical properties.

(247) To clarify the calculation, on the request of those submitting comments, the price of the reduction above was in the range of EUR 100 to 130 per metric [tonne]. Also, to clarify the calculation, the 55% of all sales of the Union industry covered by this comparison includes both PME and FAME 0 …

(248) The countrywide undercutting margin found under this method was 7.4%.'

44 It is clear from the contested regulation that the Commission expanded the scope of the comparison made using the first method of calculation to include, as regards the sales of the Union industry, both PME and FAME 0. To that end, the prices of FAME 0 were adjusted downwards, to the price level of Union sales of PME, in order to take into account the market value of the differences in physical properties.

45 The applicants claim that the Commission failed to take account of the fact that Indonesian biodiesel is an input material for the production of biodiesel with a CFPP of 0 °C and that it cannot be used in certain cold regions of the European Union on account of its high CFPP level. In support of their claims, they rely on the reports of the WTO Panel, and in particular the 'EU-biodiesel (Indonesia)' Panel report which pointed, in paragraph 7.158, to 'complexities in competitive relationships between PME and blended CFPP 0 biodiesel, given that Indonesian PME is an input to blended biodiesel, including blended CFPP 0'.

46 In that regard, it should be borne in mind that, according to the case-law, interpretations of the Agreement on Subsidies and Countervailing Measures in Annex 1A to the Agreement establishing the WTO (OJ 1994 L 336, p. 156) ('the SCM Agreement') adopted by that body cannot bind the General Court in its assessment of the validity of the contested regulation (see, to that effect and by analogy, judgments of 1 March 2005, *Van Parys*, C-377/02, EU:C:2005:121, paragraph 54; of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 103; and of 19 May 2021, *China Chamber of Commerce for Import and Export of Machinery and Electronic Products and Others* v *Commission*, T-254/18, under appeal, EU:T:2021:278, paragraph 419).

47 However, the Court of Justice also points out that the general international law principle of compliance with treaty commitments (*pacta sunt servanda*), laid down in Article 26 of the Vienna Convention on the Law of Treaties of 23 May 1969, means that the Courts of the European Union must, for the purposes of interpreting and applying the SCM Agreement, take account of the interpretation that the WTO's Dispute Settlement Body has given to the various provisions of that agreement (see, by analogy, judgment of 20 January 2022, *Commission* v *Hubei Xinyegang Special Tube*, C-891/19 P, EU:C:2022:38, paragraph 32, and Opinion of Advocate General Pitruzzella in *Commission* v *Hubei Xinyegang Special Tube*, C-891/19 P, EU:C:2021:533, point 24, followed by the Court in that case). Thus, there is nothing to preclude the General Court from referring to it when it comes to interpreting the provisions of the basic regulation which correspond to provisions of the SCM Agreement (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 103).

48 In any event, first of all, the Commission rightly pointed out, in recitals 251 and 252 of the contested regulation, the change in the structure of the Union industry which, now, also produces PME. The market situation had thus changed as compared with the situation which gave rise to the analysis, set out in paragraph 45 above, contained in the 'EU-biodiesel (Indonesia)' Panel report.

49 Next, and contrary to the applicants' claims, it is clear from recital 246 of the contested regulation that the Commission did in fact take into account the market value of the differences in physical properties when adjusting the EU sale price of FAME 0 in order to make the comparison.

Moreover, the applicants do not call into question the adjustment made by the Commission to the price of FAME 0. On the contrary, they use that adjustment as a starting point to propose their own calculation for price undercutting for all sales of biodiesel in the European Union.

50 Lastly, the Commission also found, in recital 254 of the contested regulation, that PME imported from Indonesia was used as an 'input material' and was mixed with other biodiesels to make, for example, FAME 0, and added that 'the quantity of PME imported [was] driven by the price of these imports as well as their physical properties, and therefore the price of imported PME [exerted] a price pressure on blends as well'. The Commission added that 'PME [was] among the cheapest types of biodiesel which [could] be used in blends such as FAME 0 and FAME +5 which [were] suitable for use in a significant part of the Union market throughout the year' and that 'imports of PME thus directly compete with other types of biodiesel produced in the [European Union] which would otherwise be blended in larger quantities to achieve the same blend result'. In addition, in recital 297 of the provisional regulation, the Commission explained that FAME 0 often included up to 20% of PME.

51 It is thus apparent that the Commission duly took into account in its analysis both the use of the products and their competitive relationships.

52 Accordingly, the applicants have not established that the price undercutting resulting from the second method is manifestly incorrect.

– *The third method of calculation*

53 According to recital 256 of the contested regulation, the third method for calculating price undercutting 'compared the countrywide imports of biodiesel from Indonesia to all the sales of biodiesel of the sampled Union producers', 'the countrywide undercutting margin found under this method [being] 17.1%'.

54 The Commission stated, in recital 270 of the contested regulation, that that calculation compared Indonesian PME with a CFPP of 13 °C with all Union sales of the Union industry's own production, which also included PME, and that no substantiated and quantified claim for an adjustment had been submitted.

55 The applicants maintain that that calculation method totally disregards the difference in terms of CFPP level between Indonesian biodiesel and biodiesel sold by EU producers and underline the importance, for the WTO Appellate Body and the WTO Panel, of making the necessary adjustments in order to ensure a proper comparison of prices.

56 In that regard, it should be borne in mind that, in accordance with the case-law cited in paragraphs 46 and 47 above, the interpretations of the SCM Agreement adopted by those bodies are not capable of binding the General Court in its assessment of the validity of the contested regulation, even though the Courts of the European Union must take them into account.

57 Moreover, the WTO Panel stated that 'the prices being compared [had to] correspond to products and transactions that [were] comparable if they [were] to provide any reliable indication of the existence and extent of price undercutting by the dumped or subsidised imports as compared with the price of the domestic like product, which [could] then be relied upon in assessing causality between subject imports and the injury to the domestic industry'. It added that 'the authority's discretion [was] also circumscribed by the overarching obligation … that the

determinations of injury "[were] based on positive evidence and [involved] an objective examination"' and that 'a comparison of prices that [were] not comparable would not, in [its] view, satisfy the requirement for the investigating authority to conduct an "objective examination" of "positive evidence"'. The Panel points out that several factors determine the selling price in a given transaction and that, consequently, price comparability has to be ensured in terms of the various features of the products and transactions being compared. Thus, a fundamental determining factor of the price is the physical characteristics of the product and, where the investigating authority 'performs a price comparison on the basis of a "basket" of products or sales transactions, the authority must ensure that the groups of products or transactions compared on both sides of the equation are sufficiently similar so that any price differential can reasonably be said to result from "price undercutting" and not merely from differences in the composition of the two baskets being compared', it being specified that 'alternatively, the authority must make adjustments to control and adjust for relevant differences in the physical or other characteristics of the product' (WTO Panel report entitled 'China – Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States', adopted on 2 August 2013 (WT/DS 427/R, paragraphs 7.475, 7.476, 7.480 and 7.483)).

58 It is common ground that the Commission did not make adjustments under the third method of calculating undercutting. It is therefore necessary to examine whether the comparison between the price of the product concerned and the price of the like product of the Union industry is fair within the meaning of the case-law cited in paragraph 29 above and whether the Commission exceeded the limits of its discretion in the analysis of price undercutting, which entails the assessment of complex economic situations in accordance with the case-law cited in paragraph 31 above.

59 In that regard, it should be noted that the Commission stated, in its defence, that the like product of the Union industry taken into account for that comparison had a varying CFPP level of between – 20 °C and 10 °C. It is of the view that there is no correlation between price and CFPP in that a gap of X degrees leads to a price change of Y euros per tonne. Whilst the Commission was able to estimate the market value of the differences in physical properties between Union sales of FAME 0 and imports of PME from Indonesia and adjust the price of Union sales of FAME 0 accordingly, the Commission submits that it could not find any reasonable approach to make further adjustments with respect to other types of biodiesel, such as between PME biodiesel and biodiesel with a CFPP of – 14 °C.

60 It is common ground between the parties that, during the summer months and in warmer regions, biodiesels with higher levels of CFPP can be sold, whereas, during winter months and in colder regions, biodiesels with a lower CFPP level are required. The amount of PME used in a blend depends on the season and the location in Europe.

61 The Commission thus observed that the biodiesel market is highly complex. It does not agree with the applicants' analysis that the CFPP level has, in every case, an impact on prices. The CFPP level may have an impact on prices where, depending on the season and the location, various CFPP levels can compete on that market. For example, biodiesel with a CFPP of 13 °C would compete with biodiesel with a CFPP of 10 °C throughout the year in several regions of southern Europe. However, such competition is not automatically reflected in a price difference. Thus, the Commission states that Union sales of PME with a CFPP of 10 °C were compared with imports of Indonesian PME with a CFPP of 13 °C without any adjustment having been necessary to take account of any differences regarding the CFPP level. By contrast, in certain climatic conditions, for example in winter in the north of Europe, biodiesel with a CFPP of 13 °C would not compete

with biodiesel with a CFPP of – 10 °C, irrespective of any difference in price, since biodiesel with a CFPP of 13 °C cannot be used in those wintry conditions. The Commission deduces from this that, although an adjustment of the price on the basis of the observed market value was considered necessary for FAME 0, which is the highest-selling product by EU producers, the same is not true of other types of low-CFPP biodiesel which are not necessarily in direct competition, from the point of view of prices, with biodiesels with higher CFPP levels.

62 It is apparent from the explanations provided by the Commission that the decision not to make price adjustments in the third calculation method was based on objective factors, namely the complexity of the competitive relationships between biodiesels with different CFPP levels, the difference in market conditions for biodiesels with different CFPP levels and the absence of a direct correlation between the CFPP level and the price. Those factors are capable of providing a plausible basis for the findings of the Commission, which in the present case did not exceed its broad discretion in defining the precise method for analysing price undercutting.

63 In that context, the applicants have not demonstrated that the adjustment requested was necessary in order to make the price of the product concerned comparable with the price of the like product of the Union industry, as required by the case-law (see, to that effect and by analogy, judgment of 16 February 2012, *Council* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 58).

64 That conclusion cannot be called into question by the alternative calculation of the price undercutting proposed by the applicants in the reply. Relying on the information provided by the Commission in its defence, the applicants propose an undercutting calculation which, by applying a ratio of EUR 10 or EUR 13 per tonne (that is to say, the same difference per unit as that found by the Commission between the prices of biodiesel with a CFPP of 0 °C and the prices of biodiesel with a CFPP of 10 °C) in order to take account of each degree of difference in CFPP, results in an average undercutting of – 0.27% only.

65 It must be stated, as the applicants conceded at the hearing, that that calculation method is based on the presumption that the price adjustment between the product with a CFPP of 0 °C and the product with a CFPP of 10 °C adopted by the Commission in the second method of calculation can serve as a basis for making adjustments for each degree of difference in CFPP. As the Commission rightly points out in the rejoinder, the applicants fail to show on what basis taking the difference between CFPP 0 and CFPP 10 divided by 10 is representative of any price difference by degree. Such a presumption cannot be accepted for CFPP levels ranging from – 20 °C to 10 °C, which the applicants include in their proposed calculation without providing any explanation as to the relevance of their approach.

66 The applicants also claim, first, that they had submitted justified requests for adjustments to the Commission and, second, that while they had not provided alternative calculations, that was because the Commission had not provided them with the information necessary to do so. They do not, however, claim in their pleadings that their rights of defence were infringed as a result of that lack of information.

67 In that regard, it should be noted that, as regards the first point raised by the applicants, it is apparent from the documents on which they rely that their proposed adjustment, like that of the Indonesian Government, concerned the first method of calculating undercutting and the

comparison between PME with a CFPP of 13 °C and PME with a CFPP of 10 °C. Accordingly, those proposals did not concern the third method of calculation and the applicants do not explain how they would be relevant in that context.

68 As regards the second point raised by the applicants, it is common ground between the parties that the Commission did not disclose, during the investigation, the Union industry sales ranges by CFPP level, despite the applicants' requests.

69 In that regard, it should be noted that the provisional regulation already provided information on Union industry sales by CFPP. Thus, according to recitals 295 and 296 of the provisional regulation and recital 247 of the contested regulation, 20% of Union sales have a CFPP of 10 °C and 35% of Union sales have a CFPP of 0 °C (the total of the second method, that is to say, 55%, minus the percentage corresponding to the PME with a CFPP of 10 °C, namely 20%). That information already showed that Union sales other than sales of PME with a CFPP of 10 °C and with a CFPP of 0 °C amounted to approximately 45%. Moreover, the explanations provided in recital 247 of the contested regulation and in recital 295 of the provisional regulation support the conclusion that a large part of that 45% relates to PME with a negative CFPP, as the applicants indeed point out in the application. The applicants thus had available to them information which enabled them to understand the Commission's calculations and to submit, on that basis, alternatives to those calculations. Their argument must, therefore, be rejected.

70 Even if the applicants' criticism of the third method were upheld, on the ground that the Commission wrongly failed to make adjustments that were necessary on account of the differences between the products, the Commission's finding of undercutting as evidenced by the first and second methods, the results of which have not been called into question, would remain well founded. In the light of the foregoing considerations, the applicants' arguments and, accordingly, the whole of the first part of the first plea, must, in any event, be rejected.

The second part of the first plea, alleging a failure to determine the price undercutting for the Union industry's product as a whole and an error in finding that there was price pressure

71 By the second part, which comprises two complaints, the applicants submit, as regards their first complaint, that the Commission did not establish price undercutting for the Union industry's product as a whole. By their second complaint, they claim that imports of biodiesel from Indonesia do not exert pressure on Union market prices.

– *The determination of price undercutting for the product as a whole*

72 It should be noted that it follows from Article 1 of the basic regulation, entitled 'Principles', paragraph 1 of which refers to 'any product whose release for free circulation in the Union causes injury', that the anti-subsidy investigation concerns a specific product. That 'product under consideration' is defined by the EU institutions when the investigation is initiated. Thus, Article 2(c) of that regulation defines the 'like product' as a product which is identical, that is to say, alike in all respects, to the product under consideration, or, in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.

73 The effect of the subsidised imports on prices in the Union market for like products, necessary for the determination of injury pursuant to Article 8(1)(a) of the basic regulation, is determined on the basis of the 'product under consideration'. In order to determine that effect, consideration is to be given, pursuant to Article 8(2) of that regulation, inter alia, to 'whether there has been significant price undercutting by the subsidised imports as compared with the price of a like product of the Union industry'.

74 It is on the basis of the definition of the 'product under consideration' as put forward by the EU institutions at the time the investigation was initiated, to which the concept of 'like product' refers, that price undercutting is to be calculated (see, to that effect and by analogy, judgment of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council*, C-376/15 P and C-377/15 P, EU:C:2017:269, paragraph 57).

75 According to the case-law, the basic regulation does not in itself require the concept of 'product under consideration' necessarily to refer to a product considered to be a homogeneous whole composed of similar products (see, by analogy, judgment of 17 March 2016, *Portmeirion Group*, C-232/14, EU:C:2016:180, paragraph 42). The definition of the 'product under consideration', at the time the investigation is initiated, does not prevent the EU institutions from subdividing that product into individual product types or models or from relying on model-by-model or type-by-type comparisons between the price of a product on the Union market and the price of imports (see, to that effect and by analogy, judgment of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council*, C-376/15 P and C-377/15 P, EU:C:2017:269, paragraph 59).

76 The applicants submit that an obligation on the part of the Commission to establish undercutting for the 'product under consideration' as a whole can be based on an application by analogy of the conclusions drawn from the judgment of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2017:269, paragraph 60).

77 However, the conclusions drawn from the judgment of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2017:269), regarding the interpretation of Article 2(11) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21), are not applicable to the analysis of the impact on Union industry prices of the dumped imports as provided for by Article 3(2) and (3) of that regulation, the equivalent of which in the basic anti-subsidy regulation is Article 8(1) and (2). It should be noted that there is a fundamental difference between the determination of the dumping margin and the analysis, for the purposes of determining injury, of the impact of the dumped imports on the Union industry prices due to the fact that that analysis entails a comparison of sales not of the same undertaking, as is the case with the determination of the dumping margin which is calculated on the basis of the data of the exporting producer concerned, but of several undertakings, namely the sampled exporting producers and the undertakings forming part of Union industry included in the sample (judgment of 20 January 2022, *Commission* v *Hubei Xinyegang Special Tube*, C-891/19 P, EU:C:2022:38, paragraphs 150 to 159, and Opinion of Advocate General Pitruzzella in *Commission* v *Hubei Xinyegang Special Tube*, C-891/19 P, EU:C:2021:533, points 136 to 139, followed by the Court of Justice in that case). The same conclusion is valid, *mutatis mutandis*, where it is a question of establishing price undercutting under the basic anti-subsidy regulation. The conclusions drawn

from the judgment of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2017:269), cannot therefore be transposed to the present case.

78 In the present case, recital 27 of the contested regulation refers, for the definition of the product concerned, to recitals 31 to 37 of the provisional regulation (see paragraphs 9 to 11 above).

79 The applicants claim that, in the context of the first method of calculation, the Commission determined price undercutting for only 20% of the total sales of the sampled Union producers. Furthermore, in the context of the second method of calculation, the undercutting analysis is deficient, since it fails to take into consideration the great complexity of the competitive relationship between those products, and covers only 55% of the total sales of the sampled Union producers, while the third method is meaningless. According to the applicants, such an approach would lead to situations in which the existence of undercutting for a small percentage of the sales of the Union industry would be extrapolated to the rest of the Union industry's sales.

80 It must be stated that that line of argument of the applicants is based on the premiss that the third method for calculating price undercutting comparing imports of biodiesel from Indonesia to all sales of biodiesel by the sampled Union producers is incorrect and that, in the second method of calculation, which in their view is deficient, the undercutting analysis covers only 55% of the total sales of the sampled Union producers. However, the applicants' arguments to that effect were rejected by the General Court's principal line of reasoning when examining the first part of the first plea. It should be noted that the Commission calculated price undercutting first for 20%, then for 55% and finally for all of the Union producers' sales. Thus, as the Commission rightly points out, no extrapolation from the findings made on the basis of 20% of Union sales was made.

81 That complaint must therefore be rejected. Even if the Commission had wrongly relied on the third method of calculating undercutting, the applicants' line of argument still cannot succeed. The use of two other methods enabled the Commission to assess the significance of undercutting for 55% of Union producers' sales, that is to say, a majority of sales, which is representative of the situation on the market as a whole. The applicants, who have failed to establish that that analysis is manifestly flawed, cannot therefore validly claim that the undercutting calculation is manifestly incorrect in that it is based on an improper extrapolation of data which is too fragmentary or represents a small percentage of sales.

– *Price pressure*

82 The applicants submit that the Commission was wrong to find that imports of biodiesel from Indonesia could have exerted pressure on prices since PME accounts for only 20% of biodiesel with a CFPP of 0 °C and between 35% and 45% of biodiesel sold on the Union market has a CFPP below zero. Furthermore, Table 2 of the contested regulation shows that only 13% of the decrease in costs during the post-investigation period was passed on to customers, thus proving that imports from Indonesia do not exert any pressure on Union sales prices. According to the applicants, the analysis of the information included in Table 2 of the contested regulation and Table 11 of the provisional regulation shows that the profit margin of the EU producers increased from – 1.8% to 0.4%.

83 As a preliminary point, it should be noted that Article 8(1)(a) of the basic regulation does not require an assessment of the effect of undercutting as such on Union prices (see, to that effect and by analogy, judgment of 12 December 2014, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council*, T-643/11, EU:T:2014:1076, paragraph 174 (not published)), but of the more overall effect of the subsidised imports on prices in the Union market for like products.

84 In any event, the Commission, relying on the data contained in Table 11 of the provisional regulation, set out in recital 325 thereof, observed, in recital 328 of the provisional regulation, that undercutting of approximately 10% had exerted a significant downward pressure on prices, the consequence of which was that the Union industry had been unable to benefit from the decreasing production costs during the investigation period, because it had had to pass that decrease on to its customers in full in order to avoid an even larger loss of market share.

85 In that regard, account should be taken of the data in Table 2 set out in recital 325 of the contested regulation and of Table 11 set out in recital 325 of the provisional regulation:

Union industry (before, during and after the investigation period)					
	2015	2016	2017	Investigation period	October 2018 to June 2019
Average unit sales price in the Union on the total market (EUR/tonne)	715	765	832	794	790
Unit cost of production (EUR/tonne)	728	767	827	791	760

86 It is apparent from those data that, during and after the investigation period, the Union sales price is higher than production costs. However, that does not rule out the existence of price pressure from Indonesian imports. It is also apparent from those data that, although the fall in production costs (of 4.35% between 2017 and the investigation period) made it possible to avoid a loss as against costs, the Union industry's prices decreased more (by 4.56% between 2017 and the investigation period), which supports the Commission's conclusion in recital 399 of the contested regulation that the Union industry was unable to benefit from the reduction in costs during the investigation period. In addition, it must be stated that the data set out in the tables mentioned in paragraph 85 above concern all Union sales and not only a percentage of its sales, as the applicants claim.

87 Thus, since those data are capable of substantiating the Commission's conclusions, it must be held that, in the present case, the Commission did not commit a manifest error of assessment within the meaning of the case-law cited in paragraph 25 above.

88 In the light of the foregoing considerations, this complaint must be rejected, as must, consequently, the first plea in law in its entirety.

The second plea in law, alleging that the contested regulation, in its analysis of the causal link, infringes Article 8(5) of the basic regulation

89 By the second plea, the applicants claim that the Commission based its analysis of the causal link between the allegedly subsidised imports and the injury caused to the Union industry on an erroneous conclusion concerning undercutting. Thus, the infringement of Article 8(1) and (2) of the basic regulation, committed by the Commission in determining price undercutting, gives rise to an infringement of Article 8(5) of that regulation.

90 In that regard, it is sufficient to observe that the second plea is based on the presumption that the first plea, alleging infringement of Article 8(1) and (2) of the basic regulation when calculating price undercutting, would be upheld. Since that plea was rejected in its entirety, the Commission cannot be criticised for having taken into account the undercutting found in the contested regulation in order to assess its effects on the Union industry.

91 The second plea in law must therefore be rejected.

The third plea in law, alleging a manifest error of assessment by the Commission in finding that there was a subsidy in the form of the provision of CPO for less than adequate remuneration

92 The third plea consists of three parts, all of which are disputed by the Commission, supported by EBB.

The first part of the third plea, alleging infringement of Article 3(1)(a)(iv) of the basic regulation and a manifest error of assessment inasmuch as the Commission concluded that the Indonesian Government entrusted or directed the CPO suppliers to provide their goods for less than adequate remuneration

93 By the first part, the applicants submit that the Commission was wrong to conclude that the Indonesian Government had entrusted or directed the CPO suppliers to provide their goods for less than adequate remuneration, first, by means of export restrictions and, second, by means of transparent 'price setting' by PTPN, a CPO producer fully owned by the Indonesian Government.

94 As a preliminary point, it should be borne in mind that Article 3 of the basic regulation provides that a subsidy is deemed to exist if the conditions in paragraphs 1 and 2 of that article are fulfilled, that is to say, if there is a 'financial contribution' by a government in the country of origin or export and if a 'benefit' is thereby conferred.

95 The broad discretion enjoyed by the EU institutions in the sphere of measures to protect trade, according to the case-law (see paragraph 24 above), also covers the determination of the existence of a financial contribution within the meaning of Article 3(1) of the basic regulation (see, to that effect, judgment of 11 October 2012, *Novatex* v *Council*, T-556/10, not published, EU:T:2012:537, paragraphs 34 and 35).

96 Under Article 3(1)(a)(iv) of the basic regulation, a 'financial contribution' exists if a government 'entrusts or directs a private body to carry out one or more of the type of functions illustrated in points (i), (ii) and (iii) which would normally be vested in the government, and the practice, in no real sense, differs from practices normally followed by governments'.

97 The concepts of 'entrusting' or 'directing' are not defined in the basic regulation.

98 According to settled case-law, the meaning and scope of a term for which EU law provides no definition must be determined by considering its usual meaning in everyday language, while also taking into account the context in which it occurs and the purposes of the rules of which it is part (see, to that effect, judgments of 3 September 2014, *Deckmyn and Vrijheidsfonds*, C-201/13, EU:C:2014:2132, paragraph 19, and of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council*, C-376/15 P and C-377/15 P, EU:C:2017:269, paragraph 52).

99 In that regard, it should be noted that the objective of Article 3 of the basic regulation is to define the concept of a 'subsidy' which could be subject to a countervailing duty.

100 More specifically, the aim of Article 3(1)(a) of the basic regulation is to define the concept of 'financial contribution' so as to exclude government measures that do not fall within one of the categories listed in that provision. It is with that in mind that Article 3(1)(a)(i) to (iii) of the basic regulation lists specific situations which must be regarded as involving a financial contribution by a government, namely the direct or indirect transfer of funds, foregone government revenue or the provision of goods or services or the purchase of goods, while Article 3(1)(a)(iv) of the basic regulation provides in its second indent that the act, for a government, of entrusting or directing a private body to carry out one or more of the type of functions listed in points (i), (ii) and (iii) is equivalent to the grant by that government of a financial contribution within the meaning of Article 3(1)(a) of the basic regulation (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 106).

101 In that context, the second indent of Article 3(1)(a)(iv) of the basic regulation is, in essence, an anti-circumvention provision, which aims to ensure that governments of third countries are not able to escape the rules on subsidies by adopting measures which, in appearance, do not strictly fall within the scope of Article 3(1)(a)(i) to (iii) of the regulation, but have, in practice, equivalent effects (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 107). That is also the WTO Appellate Body's interpretation of Article 1.1(a)(1)(iv) of the SCM Agreement, the content of which is similar to that of Article 3(1)(a)(iv) of the basic regulation (see the WTO Appellate Body report, entitled 'United States – Countervailing duty investigation on Dynamic Random Access Memory (DRAMS) from Korea', adopted on 27 June 2005 (WT/DS 296/AB/R, paragraph 113)).

102 According to its usual meaning in everyday language, the term 'to entrust' means 'to bestow upon someone a function or office, to endow, delegate or appoint'. Thus, the case-law has interpreted that term, in order to ensure full effectiveness of the second indent of Article 3(1)(a)(iv) of the basic regulation, as 'any action of the government which amounts, directly or indirectly, to conferring on a private body the responsibility of performing a function of the type referred to in Article 3(1)(a)(i) to (iii) of that regulation' (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 108). It follows that the term 'to direct', which, according to its usual meaning in everyday language, means 'to implore, order, dictate, require, prescribe or insist', includes any act of the government which consists, directly or indirectly, in exercising their powers over a private body so that it performs a function of the type referred to in Article 3(1)(a)(i) to (iii) of the basic regulation.

103 Furthermore, it is clear from the coordinating conjunction indicating the alternative, 'or', between 'entrust' and 'direct' that those two actions may take place independently of each other, but also together. Moreover, it is apparent from the second indent of Article 3(1)(a)(iv) of the basic

regulation, which does not restrict the nature or purpose of the action of 'entrusting' or 'directing', and from the case-law cited in paragraph 102 above, which takes into consideration 'any action of the government', that such action does not necessarily have to be the result of an act or measure taken in isolation, but that it may also be the result of several measures taken together.

104 It is in the light of those considerations that it is necessary to analyse the Commission's conclusion that, by measures such as an export tax and an export levy and de facto control through PTPN of domestic CPO prices, the Indonesian Government sought to obtain from CPO producers the provision of that product on the Indonesian market for less than adequate remuneration.

– *The export tax and the export levy*

105 By the first complaint, the applicants claim that the Commission was wrong to find that the export tax, which was set at zero during the investigation period, and the export levy, which had been suspended since December 2018, had the effect of 'entrusting' or 'directing' CPO suppliers to provide their goods in return for less than adequate remuneration. Furthermore, they claim that the aim of those measures is not to keep CPO prices at a low level in order to support the biodiesel industry. Such a result is merely a side effect of the measures the main aim of which was to ensure the price stability of cooking oil and to finance the Oil Palm Plantation Fund.

106 It is apparent from recitals 113 to 117 of the provisional regulation that, in the present case, the Indonesian Government imposed an export tax and an export levy on CPO.

107 According to recitals 87 and 88 of the provisional regulation, the export tax had been introduced in 1994 and the 2016 version consisted of a progressive tariff schedule on CPO and on other products, including biodiesel (the rate of which was systematically lower than that applied to CPO). Indonesian exporters paid a tax linked to the Indonesian Government's reference price for CPO exports. Therefore, when the reference export price set by the Indonesian Government increased, so did the export tariff. When the reference price was below 750 United States dollars (USD) per tonne, the applicable export tax rate was 0%. During the investigation period, the CPO price remained below the threshold of USD 750 per tonne and, therefore, no export tax was payable.

108 According to recital 89 of the provisional regulation, in 2015 the Indonesian Government had also introduced an export levy on CPO and downstream products. During the investigation period that levy was set at USD 50 per tonne for CPO and at USD 20 per tonne for biodiesel.

109 In order to establish the existence of a financial contribution in the provisional regulation, the findings of which are confirmed by the contested regulation (in recitals 102 to 161), the Commission carried out an analysis based on the relevant WTO case-law.

110 On the basis of that analysis, the Commission took the view, in recitals 111 to 157 of the provisional regulation, that the action of the Indonesian Government against the CPO producers was an action 'entrusting' or 'directing' them to provide their goods to national users at less than adequate remuneration in order to create a domestic market in Indonesia where prices were artificially low. The Commission then noted, in recital 160 of that regulation, that all Indonesian CPO producers were to be regarded as private bodies and, in recitals 162 and 169 of that regulation, that those undertakings had supplied CPO on the domestic market in return for less than adequate remuneration. Lastly, in recital 170 of that regulation, the Commission considered that the provision of CPO located on Indonesian soil to the Indonesian biodiesel industry was a

function which was normally vested in the government. The Commission took the view in the same recital that the determination, by the government of a State which had sovereignty over its natural resources, of the regulatory conditions for the provision of the country's raw materials to undertakings in that country came within such a function.

111 By the analysis at issue, the Commission established, as is apparent from recital 134 of the contested regulation, that, by means of the export tax and the export levy, in combination, as stated in recitals 103, 146 and 157 of the contested regulation, with other measures, the Indonesian Government had sought to obtain from CPO producers the provision of CPO on the Indonesian market for less than adequate remuneration. That government had put in place a system of export restrictions which made the export of CPO commercially unattractive.

112 The fact that the Indonesian Government devised and established such a system is highlighted by various factors mentioned by the Commission in the contested regulation and in the provisional regulation which the applicants have not called into question.

113 Thus, it was noted, in recital 116 of the provisional regulation, that the Indonesian Government directly linked the export tax system to international CPO prices and not to other data (such as production levels or environmental effects) with the aim to have an effect on prices paid by exporting producers. It is apparent from Table 1 in that recital that the Indonesian Government followed the trend in prices at international level and adjusted the level of export taxes on the basis of those prices with the result that there was a fall in the profitability of exports.

114 The Commission also noted, in recital 119 of the provisional regulation, that the Indonesian Directorate-General for Customs and Excise had publicly explained, in 2015, that export duties were intended to ensure the availability of raw materials and to stimulate the growth of the domestic downstream palm oil industry, of which biodiesel manufacturing is an integral part.

115 As regards the export levy, the Commission stated, in recital 117 of the provisional regulation, that its introduction in 2015 had coincided with a period when Indonesian prices were almost identical to world prices and had allowed biodiesel producers to purchase CPO at lower prices than would otherwise be available. In addition, in recital 114 of the contested regulation, the Commission explained that that levy financed the Oil Palm Plantation Fund and de facto exclusively supported the biodiesel industry by means of subsidies.

116 The contested regulation also mentions, in recitals 128 and 129, two press articles from after the investigation period which confirm the Commission's findings in relation to that period. Thus, in an article of 19 December 2018, the Secretary-General of the Indonesian Palm Oil Association predicted that exports of CPO could jump once the export levy had been reduced to zero. In an article of 6 December 2018, an independent analyst took the view that the suspension of the export levy would increase the competitiveness of Indonesian palm oil exporters as they would have made savings the bulk of which were likely to flow back to the Indonesian farmers via higher domestic CPO prices.

117 On the basis of those considerations, the Commission was entitled to conclude, in recital 118 of the contested regulation, that 'the overall system of export restraints put in place by the [Indonesian Government] [was] designed to benefit the biodiesel industry by keeping domestic prices of CPO artificially low'.

118 In that regard, in the first place, the applicants claim, relying on the case-law of the WTO, that those export restrictions did not come within the scope of Article 3(1)(a) of the basic regulation, because their purpose was to ensure local demand and the stability of cooking oil prices (as regards export tax) and to finance the Oil Palm Plantation Fund (as regards the export levy) and since the effect they had on CPO prices was merely a side effect of that regulation. The Indonesian Government's only role was one of encouragement by simply exercising their revenue collecting activity.

119 First of all, as regards the applicants' argument that the Indonesian Government did not play a more active role than providing mere acts of encouragement, it must be held that, in adopting the export restrictions in question in a specific context in which, first, the export tax was linked to international CPO prices and increased when those prices increased, and, second, the export levy was introduced during a period in which Indonesian prices were almost identical to world prices, that government restricted the freedom of action of those companies by limiting, in practice, their ability to decide the market on which to sell their products (see, to that effect, judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 124).

120 Next, the applicants' argument that the Indonesian Government was merely carrying out its revenue collecting activity and any effect that activity may have had on CPO prices was merely secondary, cannot be accepted. As is apparent from paragraphs 111 to 116 above, the export restrictions at issue were introduced, together with other measures, with the aim of ensuring the supply of CPO on the Indonesian market at a less than adequate price and were even adjusted in line with international prices in order to obtain that result. The fact that the legislation in question does not expressly mention that aim is not sufficient to invalidate that conclusion.

121 Lastly, the arguments which the applicants base, in that regard, on the case-law of the WTO Dispute Settlement Body, in particular the Panel report of the WTO Dispute Settlement Body entitled 'United States' – Measures treating export restraints as subsidies', adopted on 23 August 2001 (WT/DS 194/R), must be rejected. Without prejudice to the case-law cited in paragraphs 46 and 47 above, that case concerned the question of whether United States countervailing duty laws, which, in Canada's view, assimilated government regulatory action limiting the export of goods, that is to say, an export restriction, to a 'financial contribution' within the meaning of Article 1.1(a)(1) of the SCM Agreement, were compatible with the latter article. Therefore, that dispute did not concern specific export restrictions, which form part of a series of measures with the same objective and which are examined in the light of declarations made by the Indonesian Directorate-General for Customs and Excise concerning the purpose of guaranteeing the availability of raw materials and stimulating the growth of a given industry, as noted in paragraph 114 above (see, to that effect, judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 134).

122 In the second place, the applicants claim that the export restrictions did not deprive CPO suppliers of the possibility of making a rational choice and did not affect their ability to export, since more than 70% of Indonesian CPO was exported.

123 That argument cannot be accepted. The fact that 70% of Indonesian CPO was exported does not mean that CPO producers were able freely to choose to export their product and to obtain adequate remuneration. On the contrary, as the Commission correctly points out, the CPO producers first satisfied domestic demand, which corresponded to 30% of the production according to the public sources referred to in recital 153 of the contested regulation, and it was

only afterwards that they had recourse to exports. It follows that those producers were not seeking to export a greater proportion of their production where prices were higher, because the potential additional export benefits were limited by the export restrictions introduced by the Indonesian Government.

124 In the third place, the applicants submit that the export tax, which was set at zero during the investigation period, and the export levy, which had been suspended since December 2018, could not entrust or direct CPO suppliers to provide their goods in return for less than adequate remuneration.

125 As has been pointed out in paragraphs 106 and 113 above, the Indonesian Government directly linked the export tax system to international CPO prices. It follows that the fact that the export tax was set at zero during the investigation period was due, as stated in recital 113 of the contested regulation, to the specific market circumstances. The low international price levels were sufficient in themselves to encourage CPO producers to satisfy the internal demand as a matter of priority. As the Commission rightly points out, if the intention of the Indonesian Government was no longer to collect that tax, they would have repealed the tax.

126 As regards the export levy, it is common ground that it was collected during the investigation period and that it was set at USD 50 per tonne for CPO and USD 20 per tonne for biodiesel. The fact that that levy was suspended, as the applicants allege, after the investigation period, namely in December 2018, does not affect the validity of the conclusions drawn by the Commission in the contested regulation in respect of the investigation period.

127 In the fourth place, the applicants claim that the Commission also infringed the second subparagraph of Article 15(1) of the basic regulation by introducing countervailing measures despite the fact that the export tax and the export levy had been 'withdrawn' or that they no longer conferred any benefit on the exporters involved within the meaning of that article at the time the anti-subsidy measures were adopted.

128 In that regard, it must be borne in mind that the second subparagraph of Article 15(1) of the basic regulation provides that no countervailing measures are to be imposed if it has been demonstrated that the subsidies have been withdrawn or that they no longer confer any benefit on the exporters involved.

129 It is clear from the wording of that article that the applicant's argument is based on a misinterpretation of that article. Even if the export tax and the export levy had been 'withdrawn' as the applicants claim, that would mean nothing more than the disappearance of one of the instruments available to the Indonesian Government to provide CPO for less than adequate remuneration, alongside the fixing of prices by PTPN and the grant of subsidies to CPO producers. That disappearance does not therefore lead to the abolition of the subsidy which, in addition to the provision of CPO for less than adequate remuneration (recitals 102 to 187 of the contested regulation), took the form of a direct transfer of funds via the Oil Palm Plantation Fund (recitals 28 to 101 of the contested regulation) and an exemption from import duties on machinery imported into bonded zones (recitals 188 to 193 of the contested regulation). Nor can it be held that those subsidies no longer conferred a benefit on the exporters involved, since such a benefit does not depend on the level of export duties, but on their deterrent effect and on the fact that the CPO producers were, by means of a series of measures, including export restrictions, 'entrusted' or 'directed' to provide CPO at a less than adequate price.

130 The first complaint must therefore be rejected.

– *Price control by PTPN*

131 By their second complaint, the applicants submit that the Commission infringed Article 3(1)(a)(iv) of the basic regulation and committed a manifest error of assessment in finding that the Indonesian Government had, by means of transparent 'price setting' by PTPN, 'entrusted' or 'directed' CPO suppliers.

132 As a preliminary point, it should be borne in mind, as is apparent from recitals 91 to 99 and 126 of the provisional regulation and from recitals 120 and 123 of the contested regulation, that, in view of the lack of cooperation on the part of CPO and PTPN suppliers, the Commission applied Article 28(1) of the basic regulation and based its findings on the facts available.

133 According to the case-law, Article 28 of the basic regulation authorises the institutions to use the facts available in order not to undermine the effectiveness of EU trade defence measures each time the EU institutions are faced with a refusal to cooperate or lack of cooperation in the context of an investigation (see, to that effect and by analogy, judgment of 26 January 2017, *Maxcom* v *City Cycle Industries*, C-248/15 P, C-254/15 P and C-260/15 P, EU:C:2017:62, paragraph 67), but does not require them to use the best facts available (judgment of 11 September 2014, *Gold East Paper and Gold Huasheng Paper* v *Council*, T-444/11, EU:T:2014:773, paragraph 94). It follows from this that the Commission's broad discretion in the realm of measures to protect trade, in accordance with the case-law cited in paragraph 24 above, also applies where Article 28 of the basic regulation is to be applied.

134 In the first place, the applicants claim that the Commission made a manifest error of assessment in finding that PTPN set its CPO prices at an artificially low level. They maintain that PTPN did not set its prices since, first, those prices were determined by daily auctions and, second, the domestic market was characterised by CPO buyers' significant degree of buying power.

135 In that regard, it is apparent from recitals 128 to 131 of the provisional regulation that PTPN is a group of fully State-owned companies, under the control of the Indonesian Government, which produces different commodities, including CPO.

136 It is explained in recitals 132 and 133 of the provisional regulation, and it is common ground between the parties, that PTPN organised daily auctions to sell its CPO. Before launching the daily tendering procedure, PTPN identified a 'price idea' for the day, but was not obliged to reject bids below that 'price idea'.

137 The Commission relied on a number of items of available data in order to conclude that PTPN set its CPO prices at an artificially low level. First, it is apparent from recital 151 of the contested regulation that the Indonesian Government influenced PTPN's decisions as regards its pricing policy. When the price offered for the purchase of CPO was lower than the 'price idea' set for the day, PTPN's Board of Directors, on which only the Indonesian Government was represented, could decide to accept the offer, which it did regularly. Second, it is apparent from recital 125 of the contested regulation and recital 135 of the provisional regulation that the available information had revealed that, by following the Indonesian Government's directives, PTPN had been loss-making in recent years. Third, as is apparent from recitals 122 to 124 of the contested

regulation, the Commission was unable to obtain any evidence proving that the 'price idea' reflected any market price resulting from a competitive tendering process. Rather, the domestic CPO price was lower than all of the international benchmarks.

138 On the basis of the foregoing, it must be held that the Commission did not make a manifest error of assessment when it concluded, on the basis of the facts available, that PTPN did not act as a rational operator on the market and set the CPO price at a level below the benchmarks.

139 As regards the applicants' argument relating to market imbalance, it must be stated that it is true that the market is characterised by such an imbalance in favour of CPO buyers, which are large undertakings with 'countervailing buyer power'. The Commission acknowledged this, in recital 146 of the provisional regulation. However, that fact cannot call into question the conclusion that, through the intermediary of PTPN, the Indonesian Government had been able to implement a price-setting mechanism. As the Commission noted in the same recital without being contradicted, another feature of the CPO market, this time on the supply side, was its fragmentation between a large number of small undertakings, in particular individual farmers. In such a context, once PTPN had set a price for the day, it was very difficult for CPO suppliers, each with a small market share, to set higher prices when faced with buyers with significant buying power. The applicants' claims that the structure of the market prevented PTPN from setting prices must therefore be rejected. On the contrary, it appears that that market structure was a factor which enabled PTPN to set CPO prices.

140 Furthermore, the applicants' claim that the Commission failed to fulfil its obligation to state reasons must be rejected.

141 According to settled case-law, a claim that there is no, or only an inadequate, statement of reasons constitutes a plea of infringement of an essential procedural requirement, which, as such, is different from a plea that the grounds of the decision are inaccurate, the latter plea being a matter to be reviewed by the Court when it examines the substance of that decision (judgments of 19 June 2009, *Qualcomm* v *Commission*, T-48/04, EU:T:2009:212, paragraph 175, and of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler* v Council, T-351/13, not published, EU:T:2016:616, paragraph 110). The statement of reasons required by the second paragraph of Article 296 TFEU must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measures in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the court having jurisdiction to exercise its power of review (see, by analogy, judgments of 30 September 2003, *Eurocoton and Others* v *Council*, C-76/01 P, EU:C:2003:511, paragraph 88, and of 12 December 2014, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council*, T-643/11, EU:T:2014:1076, paragraph 129 (not published)).

142 In the present case, the recitals of the contested regulation and the provisional regulation analysed in paragraphs 135 to 139 above clearly set out the reasons the Commission considered that PTPN was not acting as a rational operator on the market and set the CPO price at a level below the benchmarks. Those explanations enabled the applicants to ascertain the reasons for the measure adopted in order to defend their rights and enabled the EU Courts to exercise their power of review, as is apparent from paragraph 134 et seq. above.

143 In the second place, the applicants submit that the Commission was wrong to conclude that, by transparently communicating PTPN's daily CPO prices, the Indonesian Government had 'entrusted' or 'directed' the other CPO suppliers to provide their goods on the domestic market

for less than adequate remuneration. The prices of independent CPO suppliers are set by the factual circumstances of the individual case, the structure of the market and the exercise of free choice by the actors in the market. The behaviour of CPO suppliers is a 'mere by-product' of the transparency on the part of PTPN.

144 It is apparent from recital 160 of the contested regulation that the action of 'entrusting' or 'directing' consists, in the present case, in the fact that the Indonesian Government, through PTPN, acted as price-setters on the Indonesian domestic market and that all independent CPO suppliers followed those price indications. First of all, as is apparent from paragraphs 135 to 137 above, the Commission established that PTPN set its CPO prices at an artificially low level, and the applicants have not validly challenged those findings. Next, the Commission noted, in recitals 140 and 141 of the provisional regulation, that PTPN published the result of the daily tender on its online platform always at 15.30 on the day of the tender, indicating the exact award unit price for CPO, and that the daily negotiations between CPO suppliers other than PTPN and CPO purchasers, in which the starting price corresponded to the daily PTPN prices, generally took place after the results of the tenders were available. The daily price of CPO on the domestic market closely reflected the award price of the daily auctions organised by PTPN and, in addition, the unit price paid by the exporting producers to non-State-owned CPO producers was, during the investigation period, always the same as or lower than the PTPN price for that day. Lastly, as is apparent from recital 138 of the contested regulation, those acts took place in a context in which the Indonesian Government had adopted measures undermining suppliers' ability to export their CPO.

145 Against such a background, the Commission did not commit a manifest error of assessment in finding that the Indonesian Government had, by means of transparent 'price setting' by PTPN, entrusted or directed CPO suppliers within the meaning of the case-law cited in paragraphs 101 to 103 above.

146 For those reasons, the applicants' arguments cannot be accepted and, consequently, the whole of the first part of the third plea must be rejected.

The second part of the third plea, alleging infringement of Article 3(1)(b) of the basic regulation and a manifest error of assessment inasmuch as the Commission found that the Indonesian Government had provided income or price support

147 The Commission submits that the second part of the third plea must be rejected, since the applicants refer in the application to provision of income or price support to 'CPO suppliers', whereas the Commission's findings relate to support provided to biodiesel producers. The Commission also maintains that the applicants' explanations in that regard, provided at the stage of the reply, are inadmissible pursuant to Article 84(1) of the Rules of Procedure of the General Court.

148 It should be noted that according to Article 76(d) of the Rules of Procedure, the application must state the subject matter of the proceedings and a summary of the pleas in law and that statement must be clear and precise enough to enable the defendant to prepare its arguments and the Court to rule on the application (judgment of 3 May 2018, *Sigma Orionis* v *Commission*, T-48/16, EU:T:2018:245, paragraph 54). In view of the arguments submitted by it in the defence and in the rejoinder, the Commission was in a position to understand clearly the applicants' criticisms of the contested regulation. In addition, the essential elements of fact and of law on which that part of the third plea is based are indicated coherently and intelligibly in the application itself, despite

the indication in the heading of that part that income or price support is provided to 'CPO suppliers' and despite an incorrect reference to recital 172 of the provisional regulation, which in fact concerns the existence of a financial contribution under Article 3(1)(a)(iv) of the basic regulation (see, to that effect, judgment of 3 July 2018, *Transtec* v *Commission*, T-616/15, EU:T:2018:399, paragraph 46). The application therefore satisfies the requirements of Article 76(d) of the Rules of Procedure.

149 Moreover, Article 84 of the Rules of Procedure provides that no new plea in law may be introduced in the course of proceedings unless it is based on matters of law or of fact which come to light in the course of the procedure. According to the case-law, a plea which constitutes an amplification of a plea made previously, whether directly or by implication, in the original application, and which is closely connected therewith, will be declared admissible. The same applies to a submission made in support of a plea in law (judgment of 19 March 2013, *In 't Veld* v *Commission*, T-301/10, EU:T:2013:135, paragraph 97).

150 The second part of the third plea, concerning the Commission's findings regarding income or price support, had already been raised in the application initiating proceedings. The clarifications provided by the applicants in the reply, in response to the allegations made in the defence, merely amplify that part of the plea, which must therefore be regarded as admissible.

151 The applicants submit that the Commission adopted too broad an interpretation of the concept of 'income or price support' within the meaning of Article 3(1)(b) of the basic regulation, disregarding WTO case-law. That concept includes only direct government intervention in the market with the aim of fixing the price of a product at a particular level. Actions having only an indirect effect on the market, such as the export restrictions and the communication of prices by PTPN in the present case, do not come within that scope. Nor did the other measures taken into account by the Commission result in income or price support.

152 In that regard, it must be stated that the applicants do not dispute, in the context of this part of the plea, the existence of the series of measures adopted by the Indonesian Government set out by the Commission in recitals 188 to 190 of the provisional regulation, the findings of which were confirmed by recital 169 of the contested regulation, but only their classification as 'income or price support' within the meaning of Article 3(1)(b) of the basic regulation.

153 Since that expression is not defined in the basic regulation, it must be interpreted, in accordance with the case-law cited in paragraph 98 above, in accordance with its usual meaning in everyday language, while also taking into account the context in which it occurs and the objectives of the rules of which it is part.

154 The objective of Article 3 of the basic regulation is to define the concept of a 'subsidy' which would justify the imposition of a countervailing duty. More specifically, Article 3(1) of that regulation provides, under point (a), that a subsidy is deemed to exist if there is a 'financial contribution', 'or', under point (b), if there is 'any form of income or price support within the meaning of Article XVI of the GATT 1994'. It follows that the objective of Article 3(1)(b) of the basic regulation is to provide for an alternative form of subsidy to that referred to in Article 3(1)(a), as is clearly indicated by the use of the coordinating conjunction which marks the alternative, 'or', in order to extend the scope of that provision.

155 That provision is used in the context of determining whether a subsidy exists and expressly refers to Article XVI of the GATT for its interpretation, hence the EU legislature's own intention to limit its discretion in the application of the GATT and WTO rules (see, to that effect, judgment of 16 July 2015, *Commission* v *Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraphs 40 and 41 and the case-law cited). That article refers to 'any subsidy, including any form of income or price support, which operates directly or indirectly to increase exports of any product from, or to reduce imports of any product into, its territory'. It follows from this that, for the purposes of that provision, 'income or price support' is a form of subsidy and that that provision focuses on the effects of that subsidy on exports and imports.

156 According to its usual meaning in everyday language, the term 'support' means 'help', 'protection', 'assistance' or 'back-up' and the action of 'supporting' means 'maintaining, carrying, backing up' or 'helping, encouraging, assisting'. It is clear from the wording of Article 3(1)(b) of the basic regulation and from Article XVI of the GATT that such action may take 'any form', a formulation which leaves open the 'appearance', 'look', 'configuration' or 'way or manner of acting or proceeding'. Thus, the expression 'income or price support' must be interpreted as encompassing any act of the government which amounts, directly or indirectly, to maintaining or increasing revenue stability or prices. The reference in Article 3(1)(b) of the basic regulation to Article XVI of the GATT means that account must also be taken of the effects of that action on exports and imports.

157 In the present case, in order to establish the existence of income or price support in the provisional regulation, the conclusions of which are confirmed in recital 169 of the contested regulation, the Commission found that – by means of a series of measures, namely (i) a system of restraints on the export of CPO, (ii) the de facto setting of CPO prices in the internal market at an artificially low level and (iii) direct subsidies granted to CPO producers in order to encourage them to comply with the objectives of the government, considered in the wider context of encouraging the development of the biodiesel industry, for example through mandatory blending requirements as well as the establishment of the Oil Palm Plantation Fund for the benefit of biodiesel producers – the Indonesian Government intended to intervene in the market to ensure a particular result, namely that the biodiesel producers would benefit from artificially low prices for their supply of CPO – the raw material that represents around 90% of their production costs.

158 The Commission concluded, in recital 191 of the provisional regulation, that those actions of the Indonesian Government had contributed to the income received by biodiesel producers by allowing them to have access to their main raw material and main cost component at a price below the world market price, which was then translated into artificially higher profits resulting mainly from exports to third markets. The Commission also noted a significant increase in biodiesel exports in 2018, as is apparent from Table 2 set out in recital 192 of the provisional regulation. That analysis was confirmed in its entirety by the contested regulation (see recital 169 of the contested regulation).

159 It follows from those findings, in the light of the considerations set out in paragraphs 154 to 156 above, that the Commission did not infringe Article 3(1)(b) of the basic regulation and did not commit a manifest error of assessment when it concluded that the measures implemented by the Indonesian Government could be classified as income or price support for biodiesel producers.

160 Without prejudice to the case-law cited in paragraphs 46 and 47 above, that conclusion cannot be called into question by the considerations contained in the WTO Panel report entitled 'China – Countervailing and Anti-Dumping Duties on Grain Oriented Flat-rolled Electrical Steel from the

United States', adopted on 15 June 2012 (WT/DS 414/R), relied on by the applicants. In that case, the Panel considered that the phrase 'any form of … price support' in Article 1(1.1)(a)(2) of the SCM Agreement did not have a sufficiently wide scope to encompass voluntary restraint agreements restricting imports of steel into the United States, which could have an incidental side-effect, of random magnitude, on prices. Therefore, that dispute did not concern a series of measures having the same objective and nature as those examined by the contested regulation, in particular specific export restrictions and de facto price-setting through an undertaking fully owned by the Indonesian Government.

161 Accordingly, the second part of the third plea in law must be rejected.

The third part of the third plea, alleging infringement of Article 3(2) and Article 6(d) of the basic regulation and a manifest error of assessment inasmuch as the Commission found that a benefit had been conferred on Indonesian producers

162 By the third part of the third plea, the applicants claim that, in finding that there was a benefit and in using incorrect benchmark prices for the calculation of that benefit, the Commission infringed Article 3(2) and Article 6(d) of the basic regulation.

163 In that regard, it should be noted that Article 3 of the basic regulation provides that a subsidy is deemed to exist where there is a 'financial contribution' or 'income or price support' provided by a government and if a 'benefit' is thereby conferred. Articles 6 and 7 of that regulation lay down the procedures for calculating the 'benefit' conferred. As regards a financial contribution or income or price support consisting in the provision of goods by a government, Article 6(d) of the basic regulation provides, in essence, that that provision confers a benefit if it is made for less than adequate remuneration (see, to that effect, judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraphs 195 and 196).

164 Article 6 of that regulation lays down rules for determining, according to the type of measure concerned, whether it may be regarded as a 'benefit conferred on the recipient'. In accordance with those rules, a benefit exists if, in practice, the recipient received a financial contribution enabling it to obtain more favourable conditions than those to which it would have access on the market. As regards, in particular, the supply of goods, Article 6(d) of the basic regulation provides that there is a benefit only if 'the provision is made for less than adequate remuneration', 'the adequacy of remuneration [being] determined in relation to prevailing market conditions for the product or service in question in the country of provision or purchase, including price, quality, availability, marketability, transportation and other conditions of purchase or sale'. It follows from that wording that the determination of the 'benefit' involves a comparison and that, since it aims to assess the appropriateness of the price paid as against normal market conditions, in principle in the country of provision, that comparison must take into account all the elements of the cost to the recipient of receiving the goods provided by the government. Therefore, it follows from that provision that, as far as possible, the method used by the Commission to calculate the advantage must make it possible to reflect the benefit actually conferred on the recipient (see, to that effect, judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraphs 208 to 210).

165 In the present case, it is apparent from recitals 170 and 171 of the contested regulation that the Commission determined the existence of a benefit by using as the benchmark price for the purposes of the comparison the free on board (FOB) CPO export prices from Indonesia to the rest of the world, as found in the Indonesia Export Statistics, and that it calculated the benefit

conferred on the recipient as being the sum of the differences between those benchmark prices of CPO calculated per month during the investigation period and the prices paid for domestically purchased CPO. More specifically, according to recitals 199 to 201 of the provisional regulation, the Commission calculated the monthly average FOB world export price from Indonesia for the investigation period and then compared the domestic price of CPO paid by the Indonesian biodiesel producers with that price. The Commission considered that the total difference represented the 'savings' obtained by the Indonesian biodiesel producers that purchased CPO in the Indonesian domestic market compared to the price they would have paid in the absence of distortions on the Indonesian market and that that amount corresponded to the benefit conferred on those producers by the Indonesian Government during the investigation period.

166 It is apparent from those grounds, first, that the applicants' argument that the Commission wrongly used international prices as benchmark prices is based on a misreading of the provisional regulation and of the contested regulation and must be rejected. It is clear from recital 198 of the provisional regulation and recital 182 of the contested regulation that the Commission did not use international prices as benchmark prices, but rather the FOB export prices from Indonesia to the rest of the world.

167 Second, the applicants' arguments seeking to invalidate the Commission's conclusion that the CPO prices on the Indonesian market were distorted by the intervention of the Indonesian Government have already been rejected in the context of the first part of the present plea. Accordingly, the Commission did not commit a manifest error of assessment in finding that, in order to calculate the benefit conferred on the recipient by the provision of goods for less than adequate remuneration, it was necessary to determine an appropriate benchmark price.

168 Third, it is apparent from recital 198 of the provisional regulation that the Commission considered that the FOB CPO export prices from Indonesia to the rest of the world constituted an appropriate benchmark because they were set according to free market principles, reflected prevailing market conditions in Indonesia, were not distorted by government intervention and, therefore, were the best indicator of what an undistorted Indonesian domestic price would have been without the intervention of the Indonesian Government. Against that analysis, the applicants claim that, even if the CPO prices on the Indonesian domestic market were distorted, the export FOB price is not a valid benchmark price, since it is itself distorted by the export restrictions. The applicants substantiated that argument at the hearing, emphasising that a price which incorporates the export levy, amounting to USD 50 per tonne, which is by definition paid only for the exported product, cannot be used as a reference price for what would have been an undistorted price on the domestic market. According to the applicants, the Commission itself acknowledged, in the defence, that the difference between domestic CPO prices and the export CPO prices was approximately the amount of the export levy.

169 That argument must be rejected. First of all, the fact that the FOB CPO export price from Indonesia includes the effects of the export levy, as noted by the Commission in recitals 173 and 181 of the contested regulation, does not necessarily mean that that price is distorted. On the contrary, given that the price of CPO on the domestic market was less than adequate, because of a series of measures including the export tax, the export levy and the setting of prices by PTPN, the CPO export price, once the export levy had been paid, corresponded, as the Commission rightly points out, to the export price that was offered by sellers and that buyers were prepared to pay on the international market.

170 Next, the Commission explained, in recital 173 of the contested regulation, that the starting point for the applicants' arguments was the premiss that the domestic CPO prices were not artificially low, but that the export prices were too high because of the export levy. It is common ground that the applicants' argument is based on a comparison between the price on the domestic market and the FOB export price. The Commission demonstrated, without making a manifest error of assessment, that CPO was sold to the biodiesel producer at an artificially low price as a result of a set of measures taken by the Indonesian Government, of which the export levy was merely one component. It follows that the applicants' argument is based on a false premiss.

171 Lastly, although the export levy is one of the measures which have the effect of inducing CPO suppliers to sell on the domestic market at less than adequate prices, it does not, for that reason, render the FOB export price inappropriate as the benchmark price for calculating the benefit.

172 Therefore, the Commission did not make a manifest error of assessment in taking the view that that price was capable, in accordance with the rule laid down in Article 6(d) of the basic regulation and the case-law cited in paragraph 164 above, of reflecting, as far as possible, the benefit actually conferred on the recipient.

173 In the light of those considerations, the third part of this plea and, consequently, the third plea in law in its entirety, must be rejected.

The fourth plea in law, alleging that the Commission, in finding that there was a subsidy in the form of a direct transfer of funds, committed a manifest error of assessment and infringed Article 3(1)(a)(i) and (2) of the basic regulation

174 The fourth plea consists of two parts, which are disputed by the Commission, supported by EBB.

The first part of the fourth plea, alleging infringement of Article 3(1)(a)(i) of the basic regulation and a manifest error of assessment inasmuch as the Commission classified the payments made by the Oil Palm Plantation Fund as a grant

175 By the first part, the applicants claim that the payments made by the Oil Palm Plantation Fund do not constitute a direct transfer of funds in the form of a grant, but a payment for the purchase of biodiesel.

176 It should be borne in mind that Article 3(1)(a)(i) of the basic regulation provides that there is a 'financial contribution by a government in the country of origin or export' where 'a government practice involves a direct transfer of funds (for example, grants, loans, equity infusion)'.

177 The objective of Article 3 of the basic regulation is to define, on the one hand, the concept of a 'subsidy' that would justify the imposition of a countervailing duty and, on the other hand, the concept of 'financial contribution' so as to exclude from that concept government measures that do not come within one of the categories listed in that provision (see paragraphs 99 and 100 above).

178 It is apparent from Article 3(1)(a)(i) of the basic regulation, and in particular from the words 'a government practice', that the direct transfer of funds must be attributable to the government. However, that provision contains no details as to the origin of the funds transferred. Thus, in paragraph 1(a)(i), that article includes in the concept of 'financial contribution' a 'government

practice' which involves a direct transfer of funds, without adding requirements as to the origin of those funds. The fact that the source of the funds does not affect the classification of a government practice as a 'financial contribution by a government' is clearly apparent in the situation envisaged by the second indent of Article 3(1)(a)(iv) in which a government entrusts or directs a private body to carry out certain functions such as the direct transfer of funds, without specifying the origin of the funds used. It is clear from those provisions that the concept of 'financial contribution by a government' covers all the financial means a government may actually use. Furthermore, in order to determine whether a direct transfer of funds may justify the imposition of a countervailing duty, the absence of consideration, or of equivalent consideration, on the part of the undertaking receiving it, must be taken into account.

179 In the present case, it is apparent from recitals 30 to 33 of the contested regulation and it is not disputed that the Oil Palm Plantation Fund is a public body. That body is used to support purchases of biodiesel by entities appointed by governmental bodies and it entrusted an agency, the Fund Management Agency ('the Management Agency'), to collect export levies on the exportation of palm oil commodities, which constitute its funds (recitals 41 to 43 of the provisional regulation).

180 According to recitals 45 to 50 of the provisional regulation (and recital 37 of the contested regulation), the procedure classified by the Commission as a 'direct transfer of funds' was the following:

> '(45) More precisely, Presidential Regulation 26/2016 stipulates in its Article 9(1) that "[t]he Director-General of [the Directorate-General of New Renewable Energy and Energy Conservation] shall appoint the Petrofuel Entity which shall carry out the procurement of biodiesel as meant in Article 4 in the framework of financing by the … Management Agency by observing the policy of the Steering Committee of the … Management Agency" and in the following Article 9(8) that "[b]ased on the approval from the Minister as meant in paragraph (7), the Director-General of [the Directorate-General of New Renewable Energy and Energy Conservation] on behalf of the Minister shall appoint: a. the biodiesel producers which are going to participate in the procurement of biodiesel; and b. the allocation of volume of biodiesel for each biodiesel producer". …
>
> (46) The biodiesel producers which choose to participate and have been allocated a quota pursuant to that regulation are under the obligation to sell the monthly amount of biodiesel to the so-called "Petrofuel Entity". So far, the [Indonesian Government] has appointed the following as Petrofuel Entity:
>
> (a) PT Pertamina ("Pertamina"), a State-owned oil and gas company, and
>
> (b) PT AKR Corporindo Tbk ("AKR"), a private oil and gas company.
>
> (47) The [Oil Palm Plantation Fund] envisages a specific payment mechanism, whereby Pertamina (and for some small volumes, AKR) pays biodiesel producers the diesel reference price (as opposed to the actual biodiesel price which, during the [investigation period] … would have been higher), whereas the difference between such diesel reference price and the biodiesel reference price is paid to the biodiesel producers out of the [Oil Palm Plantation Fund] by the Management Agency.

(48) The reference price for diesel and biodiesel is determined by the Minister [for] Energy and Mineral Resources … in [the] following way:

(a) The diesel reference price is based on prices reported by Platts Singapore for oil … and the production cost of diesel in Indonesia.

(b) … the biodiesel reference price is based on the CPO domestic price, to which transformation costs are added …

(49) More precisely, each biodiesel producer – including all the exporting producers – invoices Pertamina (or AKR, as the case may be) the volume of biodiesel which the buyer is required to use under the blending obligation [under which, for a number of applications, such as for example public transport, operators are under the legal obligation to use as fuel a blend of mineral diesel and biodiesel which contains at least 20% of biodiesel], and Pertamina (or AKR) pays to the producer the diesel reference price for that period. …

(50) The producer of biodiesel, in order to obtain reimbursement of the price difference between the price paid by Pertamina and AKR (based on the diesel reference price) and the reference price for biodiesel, shall then send an additional invoice for the same volume to the Management Agency, enclosing a list of documents. Once the Management Agency has received the invoice, and after verification of the elements contained therein, the Management Agency shall pay to the relevant biodiesel producer the difference between the reference price for diesel (paid by Pertamina or AKR, as the case may be) and the reference price of biodiesel set for that period.'

181 In the first place, the applicants claim that the Commission was wrong to classify the payments made by the Oil Palm Plantation Fund as a direct transfer of funds in the form of a grant and not as payments made in consideration for the sale of biodiesel to PT Pertamina ('Pertamina'), since, as Pertamina is also a public body, it was part of the Indonesian State and, in any event, was, together with the Management Agency, part of a single economic entity.

182 In that regard, first, it should be noted that it is clear from recital 46 of the provisional regulation that Pertamina belongs to the Indonesian State. However, apart from the fact that Pertamina and the Management Agency belong to the Indonesian State, the applicants do not put forward any matter of fact or law in support of their claim that, in accordance with the case-law on which they rely (judgment of 16 February 2012, *Council* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 52 to 55), those entities act within a group formed by legally distinct companies 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. On the contrary, it is common ground that a private undertaking which is not affiliated to the State, namely PT AKR Corporindo Tbk ('AKR'), performs the same functions as Pertamina.

183 Second, even if, contrary to the Commission's findings in recitals 48 and 49 of the contested regulation, Pertamina were a public body, it is a separate entity from the Oil Palm Plantation Fund and the Management Agency and there is nothing to indicate that Pertamina acted, together with the Management Agency and the Indonesian Government, as a single purchaser of biodiesel by means of the 'combined actions' of several public bodies, as the applicants maintain. As the Commission rightly points out, Pertamina was not an agency entrusted by the Government to perform only certain functions, but an oil and gas company which performed the same functions as AKR, a private oil and gas company, as is clear from recital 46 of the provisional

regulation and recital 55 of the contested regulation, a point that has not been disputed by the applicants. The applicants' argument put forward at the hearing, that it is apparent from the evidence in the file submitted by the Commission that Pertamina and AKR were designated by the Indonesian Government to provide biodiesel, is not capable of altering that conclusion.

184 In the light of the foregoing considerations, it must be observed that, even if the applicants' claims that Pertamina was a public body were correct, such an error on the part of the Commission would justify annulment of the contested regulation only if it called into question its lawfulness by invalidating the Commission's entire analysis relating to the existence of a subsidy (see, to that effect and by analogy, judgment of 25 October 2011, *Transnational Company "Kazchrome" and ENRC Marketing* v *Council*, T-192/08, EU:T:2011:619, paragraph 119), which is not the case here.

185 In the second place, the applicants put forward a series of arguments seeking to establish that, if the Court considers that Pertamina is not a public body and that it does not form a single economic entity together with the Indonesian Government, it must therefore be held that it was 'entrusted' or 'directed' by the Indonesian Government to purchase biodiesel within the meaning of Article 3(1)(a)(iv) of the basic regulation.

186 In that regard, it must be stated that it was not Pertamina's payment of the reference price for diesel as consideration for the purchase of biodiesel that was considered by the Commission to be a 'direct transfer of funds', but rather the payment, by the Management Agency, a public body, of the difference between the reference price for diesel and the reference price for biodiesel fixed for the period in question to the biodiesel producer concerned. Accordingly, Article 3(1)(a)(iv) of the basic regulation, which concerns the conduct of private bodies (see paragraph 96 above), is not applicable.

187 In the third place, the applicants claim that there was a contractual relationship between them and the Oil Palm Plantation Fund which made payment by the latter conditional on the delivery of biodiesel to Pertamina. It is a purchase for which it is not necessary for the entity making the payment for the goods to also gain possession of those goods.

188 In that regard, it should be noted that, in recital 38 of the contested regulation, the Commission stated that 'the disbursement[s] of the [Oil Palm Plantation Fund] in favour of the biodiesel producers cannot qualify as payments due in a purchase contract between the [Indonesian Government] and the biodiesel producers but constitute a direct transfer of funds'.

189 It is apparent from the factual context of the present case, as set out in recitals 45 to 50 of the provisional regulation and recital 37 of the contested regulation (see paragraph 180 above), and which is not disputed by the applicants, that, in the context of the system conceived by Presidential Regulation 26/2016, the Management Agency did not intervene in the transaction between the biodiesel producers and Pertamina and AKR. It was the Director-General of the Directorate-General of New Renewable Energy and Energy Conservation who, first, appointed the entities that would carry out the procurement of biodiesel (in accordance with the policy defined by the Steering Committee of the Management Agency) and, second, on behalf of the Minister, appointed the biodiesel producers who were to participate in the procurement of biodiesel and allocated the volume of biodiesel for each biodiesel producer. The reference price for diesel and biodiesel was determined by the Minister for Energy and Mineral Resources. Next, each producer invoiced Pertamina or AKR the volume of biodiesel which these undertakings were required to use under the blending mandate and the latter paid the producer the diesel reference price. It was only at the end of that transaction that the biodiesel producers sent an additional

invoice for the same volume of biodiesel to the Management Agency in order to obtain reimbursement of the difference between the reference price for diesel and the reference price for biodiesel, together with a copy of the decision of the Directorate-General of New Renewable Energy and Energy Conservation certifying that they were allowed to participate in the procurement of biodiesel and indicating the respective volumes of biodiesel allocated, a copy of the contract for procurement of biodiesel between them and Pertamina or AKR, the certificate signed by Pertamina or AKR and the biodiesel producer in question, stamped by the Indonesian Government and including information about the place of delivery, the volume and type of biodiesel provided and the amount of transport fees, and a copy of the agreement between the Management Agency and the relevant biodiesel producer.

190 In addition, the Commission also considered, in recitals 67 and 69 of the contested regulation, and that point was not disputed by the applicants either, that the reference price for biodiesel that was paid to independent suppliers did not reflect supply and demand under normal market conditions without government intervention, and that the amount of the transformation costs calculated by the Indonesian Government as part of the formula used to calculate the reference price for biodiesel was excessive. The Commission deduced from that situation, in recital 68 of the contested regulation, that, without those payments, biodiesel prices in Indonesia would be lower. Since the payments made by the Management Agency to biodiesel producers are calculated on the basis of a reference price for biodiesel that does not result from normal market conditions, they cannot be regarded as a price supplement which the producers are entitled to obtain in return for their supplies to Pertamina or AKR.

191 On the basis of those facts, the Commission did not make a manifest error of assessment in finding, in recital 37 of the contested regulation, having regard for its broad discretion in determining whether there was a financial contribution within the meaning of Article 3(1) of the basic regulation and in accordance with the case-law cited in paragraph 95 above, that the funds paid by the Oil Palm Plantation Fund '[were] not therefore part of a contract for consideration (such as the purchase of biodiesel by the government in exchange of a price)'. It is not apparent from the presentation of the facts that the Oil Palm Plantation Fund was involved in the transaction between the biodiesel producers and the 'Petrofuel entities', namely Pertamina and AKR, or that that fund received any consideration for the payments it made. Thus, the nature of the transaction does not lead to the conclusion that the payments made by that fund formed part of a reciprocal obligation scheme.

192 Against that background, the applicants' argument that the concept of conditional grants must be interpreted restrictively is ineffective.

193 Consequently, the whole of the first part of the fourth plea must be rejected.

The second part of the fourth plea, alleging infringement of Article 3(2) of the basic regulation and a manifest error of assessment on the part of the Commission in finding that a benefit was conferred

194 By the second part of the fourth plea, the applicants dispute the Commission's finding that the payments made by the Oil Palm Plantation Fund constitute a benefit.

195 By their first complaint, the applicants submit that the Commission relied on a manifestly incorrect counterfactual scenario when it found that, in the absence of the Oil Palm Plantation Fund and its payments, the biodiesel producers could not have sold their product on the Indonesian market and that the prices of biodiesel would be lower. The Oil Palm Plantation Fund

and the blending mandate are two separate legal tools with different objectives. In the absence of the first, the second would still exist and the blenders would be required to purchase biodiesel in order to comply with the blending mandate.

196 As was pointed out in paragraph 163 above, Article 3 of the basic regulation provides that a subsidy is deemed to exist where there is a 'financial contribution' by a government and if a 'benefit' is thereby conferred. Articles 6 and 7 of that regulation lay down the procedures for calculating the 'benefit conferred'. According to the case-law, a benefit is conferred on the recipient if the latter is in a more favourable situation than it would have been in in the absence of the subsidy scheme. In addition, it is clear from Article 3(1) and (2) of the basic regulation that it is only where a government financial contribution confers a real benefit on an exporting producer that a subsidy is deemed to exist for that exporting producer (see, to that effect, judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraphs 195 and 210).

197 In the present case, the Commission considered, in recital 65 of the contested regulation, that the correct counterfactual scenario was not one in which, in the absence of the Oil Palm Plantation Fund, the blenders would pay the reference price for biodiesel. According to the Commission, without the blending mandate, without the Oil Palm Plantation Fund and without its payments, blenders would not have an incentive to purchase biodiesel and biodiesel producers would not receive the supplement corresponding to the difference between the reference price for diesel and the reference price for biodiesel set by the Indonesian Government. The Commission also considered, as stated in paragraph 190 above, that the reference price for biodiesel paid to independent suppliers was excessive.

198 It is apparent from the provisional regulation that the blending mandate was introduced by Regulation of the Ministry of Energy and Mineral Resources No 12/2015 (recital 189). In the same year, 2015, the Biodiesel Subsidy Fund, which is part of the Oil Palm Plantation Fund, was established by Presidential Regulation 61/2015 (recital 40) and the Management Agency was entrusted with the task of collecting export levies on the exportation of palm oil commodities which constituted the financing of the Oil Palm Plantation Fund (recitals 41 and 42). By the same provision (Article 1(4) of Presidential Regulation 61/2015), the Indonesian Government granted the Management Agency the right to use export levies and export taxes imposed on CPO and its derivatives and imposed an obligation to procure and use biodiesel (recital 60). The funds used to pay biodiesel producers the difference between the diesel reference price and the biodiesel reference price came from the funds thus allocated to the Management Agency.

199 It appears that the implementation of the blending mandate in the system devised by the Indonesian Government depended on financing by the Management Agency. It is a complex scheme established by the Indonesian Government with the objective of supporting purchases of biodiesel by entities appointed by governmental bodies, as is apparent from Presidential Regulations 24/2016 and 26/2016 (recital 44 of the provisional regulation). The scenario of the existence of the blending mandate without funding by the Management Agency is thus purely hypothetical and the Commission cannot be criticised for not having based its analysis on it.

200 Accordingly, the Commission did not make a manifest error of assessment within the meaning of the case-law cited in paragraphs 24 and 25 above, which also applies to the determination of the existence of a benefit conferred on the recipient of a subsidy, in considering the scheme as a

whole and concluding, in recital 71 of the contested regulation, that its existence put biodiesel producers in a more favourable situation than they would otherwise have been in and therefore conferred a benefit on them.

201 In addition, the applicants have not disputed the Commission's finding that, in that scheme, the amount of transformation costs in the context of the formula used to calculate the reference price for biodiesel was excessive (paragraph 197 above). Thus, as the Commission correctly points out, the biodiesel reference price taken into consideration by the Management Agency in order to determine the amount of its payments to biodiesel producers does not reflect what the price would be under market conditions. The Commission was entitled to deduce from this, without committing a manifest error, that, as a result of that financial contribution by the government, the recipients were better off than they would have been without that contribution, even in the counterfactual scenario proposed by the applicants.

202 Accordingly, the applicants' first complaint must be rejected.

203 By their second complaint, the applicants claim that, if a benefit was conferred, it was fully passed on to the blenders, Pertamina and AKR. According to the applicants, the Oil Palm Plantation Fund scheme was designed to support blenders in their purchases of biodiesel and to ensure that they pay a price lower than the market reference price for that product, and not to support biodiesel producers.

204 In that regard, it must be stated that the applicants' arguments seeking to dispute the existence of a financial contribution conferring a benefit on them have been rejected (paragraphs 181 to 192 and 195 to 201 above). It is also common ground that the payments at issue, corresponding to the difference between the diesel reference price and the biodiesel reference price, were paid by the Management Agency to the biodiesel producers, including the applicants. The applicants have failed to adduce sufficient evidence to show that part of those sums or the benefit derived from their payment was transferred to AKR and Pertamina. Such evidence is, however, necessary in order to establish that an EU institution has committed a manifest error of assessment such as to justify the annulment of a measure (see, to that effect, judgment of 11 September 2014, *Gold East Paper and Gold Huasheng Paper* v *Council*, T-444/11, EU:T:2014:773, paragraph 62). The fact that the scheme established by the Indonesian Government could also have been beneficial to AKR and Pertamina does not mean that the benefit conferred on the recipients was passed on to those undertakings. Furthermore, even assuming that the blenders benefited from advantageous purchase terms for biodiesel by acquiring it at the reference price for diesel and not at the reference price for biodiesel, that fact does not preclude that, under the same scheme, the biodiesel producers enjoyed another benefit as a result of the payments made by the Management Agency.

205 In the light of the foregoing considerations, the second complaint and, consequently, the whole of the second part of the fourth plea must be rejected.

206 Since all of the arguments put forward in the context of the fourth plea in law have been rejected, that plea must be rejected.

The fifth plea in law, alleging infringement of Article 7 of the basic regulation and a manifest error of assessment on the part of the Commission in calculating the amount of the benefit conferred by the Oil Palm Plantation Fund scheme

207 The applicants' arguments under the fifth plea can be divided into two complaints. The first complaint concerns the manifest error of assessment that the Commission allegedly committed in calculating the amount of the benefit conferred by the Oil Palm Plantation Fund scheme, by not deducting from the amount of the subsidy the export levies paid to the Oil Palm Plantation Fund and transport costs. The second complaint concerns the manifest error of assessment that the Commission allegedly made in the same calculation by allocating the payments made by the Oil Palm Plantation Fund to the total biodiesel turnover.

208 The Commission, supported by EBB, disputes this plea in law.

The failure to deduct export levies and transport costs from the amount of the subsidy

209 Article 7(1) of the basic regulation provides as follows:

'…

In establishing [the amount of the countervailable subsidy], the following elements may be deducted from the total subsidy:

(a) any application fee or other costs necessarily incurred in order to qualify for, or to obtain, the subsidy;

(b) export taxes, duties or other charges levied on the export of the product to the Union specifically intended to offset the subsidy.

Where an interested party claims a deduction, it must prove that the claim is justified.'

210 As a preliminary point, it should be noted that it is clear from Article 7(1) of the basic regulation, and in particular from the wording 'may be deducted', that the Commission enjoys a broad discretion in the application of that provision, in accordance with the case-law cited in paragraph 24 above. The deduction of those elements from the amount of the countervailable subsidy is subject to the interested party proving that its claim for deduction is justified. Once that proof has been adduced, the Commission must make the deduction requested.

211 In the first place, the applicants submit that the Commission should have deducted from the amount of the countervailable subsidy the export levies paid to the Oil Palm Plantation Fund, since those levies are different in nature from ordinary taxes and are linked to the biodiesel industry as they form part of the biodiesel value chain.

212 It must be stated that no evidence has been adduced by the applicants, in accordance with the burden of proof borne by them under the last subparagraph of Article 7(1) of the basic regulation and the case-law cited in paragraph 204 above, establishing that the export levies in question were specifically intended to offset the subsidy. On the contrary, it is clear from recital 89 of the provisional regulation, and it has not been disputed by the applicants, that the export levy does not concern only biodiesel, but rather 'CPO and the downstream products', including biodiesel. The applicants do not explain how an export levy which concerns several products is specifically

intended to offset the subsidy from which one of those products benefits. In addition, the fact that those levies fund the Oil Palm Plantation Fund and enter into the biodiesel value chain is not sufficient to establish that they were specifically intended to offset the subsidy and, therefore, that the Commission erred as to the scope of Article 7(1)(a) of the basic regulation or vitiated its analysis by a manifest error.

213 Accordingly, the applicants' argument in that regard must be rejected.

214 In the second place, the applicants submit that the transport costs were necessary, for the purposes of Article 7(1)(a) of the basic regulation, in order to deliver the biodiesel and thus receive payment from the Oil Palm Plantation Fund and that they should have been deducted from the amount of the countervailable subsidy. In their view, the Commission was wrong to rely on its information on the calculation of the amount of subsidy in countervailing duty investigations (OJ 1998 C 394, p. 6) ('the guidelines on the calculation of the subsidy'), a document which has no binding force, in order to refuse to deduct transport costs on the ground that they were non-compulsory costs which were paid to private undertakings.

215 In that regard, it should be noted that guidelines are an instrument intended to define, while complying with higher-ranking law, the criteria which the Commission proposes to apply in the exercise of its discretion when calculating the amount of countervailable subsidies (see, to that effect and by analogy, judgment of 15 March 2006, *Daiichi Pharmaceutical* v *Commission*, T-26/02, EU:T:2006:75, paragraph 49). It follows that, when it adopts guidelines, the Commission cannot depart from the higher-ranking text of which it sets out the application criteria.

216 Furthermore, according to the case-law, by adopting rules of conduct intended to produce external effects, as is the case with guidelines which are aimed at economic operators, and announcing by publishing them that it will apply those rules to the cases to which they relate, the institution in question imposes a limit on the exercise of its discretion and cannot depart from those rules under pain of being found to be in breach of general principles of law, such as the principles of equal treatment or the protection of legitimate expectations. It cannot therefore be precluded that, on certain conditions and depending on their content, such rules of conduct, which are of general application, may produce legal effects (see, by analogy, judgment of 28 June 2005, *Dansk Rørindustri and Others* v *Commission*, C-189/02 P, C-202/02 P, C-205/02 P to C-208/02 P and C-213/02 P, EU:C:2005:408, paragraphs 210 and 211).

217 The guidelines on the calculation of the subsidy provide, under heading 'G. Deduction from amount of subsidy', that 'the only fees or costs that may normally be deducted are those paid directly to the government [during] the investigation period', that 'it must be shown that such payment is compulsory in order to receive the subsidy' and that 'payments to private parties, e.g. lawyers, accountants, incurred in applying for subsidies, are not deductible'.

218 Those clarifications are compatible with the higher-ranking text which they are intended to clarify. First, the specification that the deductible fees and costs must be 'compulsory in order to receive the subsidy' is consistent with the condition laid down in Article 7(1)(a) of the basic regulation, namely that the deductible fees or costs must be 'necessarily incurred' in order to qualify for the subsidy. Second, the clarification that 'the only fees or costs that may normally be deducted are those paid directly to the government [during] the investigation period' is also compatible with that provision. In view of the Commission's broad discretion in this area, in accordance with the case-law cited in paragraph 24 above, the Commission did not, contrary to what the applicants claim, wrongly limit deductible fees and costs when it stated in the guidelines

that the 'application fee … or other costs necessarily incurred in order to qualify for … the subsidy' referred to in Article 7(1)(a) of the basic regulation were those 'paid directly to the government [during] the investigation period'.

219 Accordingly, the Commission was fully entitled to apply, in recitals 87 to 92 of the contested regulation, the guidelines on the calculation of the subsidy to the request for the deduction of transport costs.

220 In the present case, first, the applicants do not claim that the transport costs for delivery of the biodiesel were paid directly to the Indonesian Government during the investigation period. Second, their argument that the payments from the Oil Palm Plantation Fund were conditional on the biodiesel being delivered and, therefore, that the transport costs relating to them were 'necessarily incurred in order to qualify for … the subsidy' within the meaning of Article 7(1)(a) of the basic regulation, cannot be accepted. Those costs were linked exclusively to the performance of the sale contract between the applicants and Pertamina or AKR. The fact that, in order to receive the payments from the Management Agency, the biodiesel producers had to attach to their invoice a series of supporting documents including the information relating to the place of delivery, the volume and type of biodiesel provided and the amount of transport costs does not mean that those costs were 'compulsory in order to receive the subsidy' within the meaning of the guidelines on the calculation of the subsidy and does not alter that conclusion.

221 Accordingly, those arguments must be rejected.

The allocation of the amount of the subsidy to the total biodiesel turnover

222 Article 7(2) of the basic regulation provides that 'where the subsidy is not granted by reference to the quantities manufactured, produced, exported or transported, the amount of countervailable subsidy shall be determined by allocating the value of the total subsidy, as appropriate, over the level of production, sales or exports of the products concerned during the investigation period for subsidisation'.

223 It is clear from the provisions in the heading '(b) Appropriate denominator for allocation of subsidy amount', which appears under the heading 'F. Investigation period for subsidy – calculation expense versus allocation' of the guidelines on the calculation of the subsidy, that '(ii) For non-export subsidies the total sales (domestic plus export) should normally be used as the denominator, since such subsidies benefit both domestic and export sales'.

224 In the present case, in recital 81 of the provisional regulation, confirmed in recital 100 of the contested regulation, the Commission allocated those subsidy amounts over the total turnover generated by the sales of biodiesel of the exporting producers during the investigation period, a turnover including domestic sales and export sales.

225 The applicants submit that the Commission made a manifest error in allocating the amount of the payments received by the Oil Palm Plantation Fund in respect of the total turnover of their biodiesel sales. According to the applicants, those amounts should have been allocated solely over sales of biodiesel on the Indonesian domestic market, those being the only sales that justify obtaining payments from the Oil Palm Plantation Fund.

226 However, first, since the subsidies were not granted by reference to the quantities manufactured, produced, exported or transported, the Commission, by allocating the amounts of subsidies over the total turnover generated by the sales of the product concerned, namely biodiesel, during the investigation period, complied with Article 7(2) of the basic regulation. Second, and since, in the present case, the subsidies in question are not export subsidies, the Commission acted in accordance with the guidelines on the calculation of the subsidy by using as denominator total (domestic and export) sales of that product. As the Commission rightly points out, the payments from the Oil Palm Plantation Fund did not limit their effects on the Indonesian domestic market, but constituted support provided to biodiesel producers and could also confer a benefit on export sales. The argument put forward by the applicants in their pleadings and at the hearing, that if the principle that money is a fungible asset were to be applied the benefit would have to be allocated in respect of all sales, is not such as to alter that conclusion, but rather to support it. Such an argument amounts to accepting that the allocation should be made on a broader basis than only in respect of sales of biodiesel on the domestic market.

227 It follows that the approach consisting in taking into account the total turnover of biodiesel sales is appropriate and does not therefore appear to be manifestly incorrect.

228 Furthermore, the applicants submit that the Commission infringed its obligation to state reasons by failing to respond, in the contested regulation, to their argument that the amount of the subsidy should have been allocated over their total turnover.

229 According to settled case-law, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned, but it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (judgment of 6 March 2003, *Westdeutsche Landesbank Girozentrale and Land Nordrhein-Westfalen* v *Commission*, T-228/99 and T-233/99, EU:T:2003:57, paragraph 280). Thus, the Commission is not required to reply, in the statement of reasons for the provisional or definitive regulation, to all the points of fact and law raised by the persons concerned during the administrative procedure (see, by analogy, judgment of 25 October 2011, *Transnational Company "Kazchrome" and ENRC Marketing* v *Council*, T-192/08, EU:T:2011:619, paragraph 256 and the case-law cited). Moreover, the Commission is not required to give specific reasons, in the regulation imposing a definitive countervailing duty, explaining why it did not take account of the various arguments put forward by the parties in the course of the administrative procedure. It is sufficient for that regulation to contain a clear explanation of the main factors considered in its analysis, provided that that justification is capable of casting light on the reasons why the Commission rejected the relevant arguments raised in that regard by the parties during the administrative procedure (see, by analogy, judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council*, T-442/12, EU:T:2017:372, paragraph 90).

230 However, where, in an anti-subsidy case, the interested parties insist during the administrative procedure on obtaining answers or clarifications in respect of the key method to be used by the institutions in making the calculations, it must be held that it is even more important for the institutions to give reasons for their decision in such a way that the persons concerned are able to understand the calculations thus made (see, by analogy, judgment of 11 July 2017, *Viraj Profiles* v *Council*, T-67/14, not published, EU:T:2017:481, paragraph 127). In addition, the reasons for a measure must appear in the actual body of the measure and may not, save in exceptional circumstances, be stated in written or oral explanations given subsequently when the measure is already the subject of proceedings brought before the EU judicature (judgment of 1 June 2017, *Changmao Biochemical Engineering* v *Council*, T-442/12, EU:T:2017:372, paragraph 91).

231 In the present case, it is common ground that one of the applicants claimed during the administrative procedure, in the alternative, that the amount of the subsidy should be allocated over its total turnover, including both biodiesel and other products, and that the contested regulation does not explicitly address that argument. However, it is clear from recital 81 of the provisional regulation, the analysis of which was confirmed by the contested regulation, that the allocation took place in accordance with Article 7(2) of the basic regulation, which provides for the allocation of the value of the total subsidy over the level of production, sales or exports of the 'products concerned', which is, in the present case, biodiesel.

232 It is clear that that justification is capable of casting light on why the Commission rejected the arguments relied on in that respect by the parties during the administrative procedure in accordance with the case-law cited in paragraph 229 above.

233 In addition, the method of allocating the amount of the subsidy is sufficiently clear from recital 100 of the contested regulation and recital 81 of the provisional regulation, which enabled the applicants to ascertain the reasons for the measure in order to defend their rights and enabled the Courts of the European Union to exercise their power of review, as is apparent from paragraph 225 et seq. above. Accordingly, that argument must be rejected in accordance with the case-law cited in paragraph 141 above.

234 Therefore, the complaint alleging the existence of an infringement of the obligation to state reasons must be rejected.

235 Since all of the complaints put forward in the context of the fifth plea in law have been rejected, that plea must be rejected.

The sixth plea in law, alleging infringement of Article 8(1) and (8) of the basic regulation in the determination of the existence of a threat of material injury

236 By the sixth plea, the applicants claim that the Commission infringed Article 8(1) and (8) of the basic regulation in finding that there was a threat of material injury without examining certain factors set out in Article 8(8) of the basic regulation and without taking into account all the evidence submitted.

237 In the present case, the Commission concluded, in recitals 319 and 320 of the contested regulation, that the EU industry had not suffered material injury during the investigation period, even though that industry was not robust. Yet, it considered that there was, in the present case, a threat of material injury to that industry.

238 As a preliminary point, it should be recalled, in that regard, that Article 2(d) of the basic regulation defines the term 'injury' as meaning, unless otherwise specified, inter alia, material injury to the Union industry or threat of material injury to the Union industry, and that it refers to the provisions of Article 8 for the interpretation of that concept.

239 Article 8(1) of the basic regulation governs the determination of injury. Such determination is to involve an objective examination of the volume of the subsidised imports and the effect of the subsidised imports on prices in the Union market for like products as well as the consequent impact of those imports on the Union industry.

240 Article 8(8) of the basic regulation governs the 'determination of a threat of material injury'. It is specified that that determination is to be based on facts and not merely on allegations, conjecture or remote possibility and that the change in circumstances which would create a situation in which the subsidy would cause injury must have been clearly foreseen and must be imminent. It follows that the determination of a threat of injury must be clearly apparent from the circumstances of the case. It also follows that the injury threatened must be impending (see, by analogy, judgment of 29 January 2014, *Hubei Xinyegang Steel* v *Council*, T-528/09, EU:T:2014:35, paragraph 54).

241 That provision sets out a non-exhaustive list of the factors to be taken into consideration in determining whether there is a threat of material injury (see, by analogy, Opinion of Advocate General Mengozzi in Joined Cases *ArcelorMittal Tubular Products Ostrava and Others* v *Council* and *Council* v *Hubei Xinyegang Steel*, C-186/14 P and C-193/14 P, EU:C:2015:767, point 44), namely factors such as:

'(a) the nature of the subsidy or subsidies in question and the trade effects likely to arise therefrom;

(b) a significant rate of increase of subsidised imports into the Union market indicating the likelihood of substantially increased imports;

(c) whether there is sufficient freely disposable capacity on the part of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased subsidised exports to the Union, account being taken of the availability of other export markets to absorb any additional exports;

(d) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports;

(e) inventories of the product being investigated.'

242 Article 8(8) of the basic regulation also states that no one of those factors can give decisive guidance, but the totality of the factors considered must be such as to lead to the conclusion that further subsidised exports are imminent and that, unless protective action is taken, material injury will occur.

243 In addition, the Court of Justice has already stated that the existence of a threat of injury, like that of an injury, must be established as at the date of the adoption of the anti-subsidy measure, having regard to the situation of the Union industry at that time. It is only in view of that situation that the EU institutions can determine whether the imminent increase in future subsidised imports will cause material injury to that industry if no trade defence measure is taken. However, the EU institutions are entitled, in certain circumstances, to take post-investigation period data into consideration (see, by analogy, judgment of 4 February 2021, *eurocylinder systems*, C-324/19, EU:C:2021:94, paragraphs 40 and 41).

244 It must be borne in mind, in that respect, that, in accordance with the case-law cited in paragraph 24 above, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine. In that

respect it must be observed that the examination of a threat of injury involves the assessment of complex economic matters and that the judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there have been manifest errors in the assessment of those facts or a misuse of powers. That limited judicial review does not mean that the EU judicature must refrain from reviewing the institutions' interpretation of information of an economic nature (see, by analogy, judgment of 29 January 2014, *Hubei Xinyegang Steel* v *Council*, T-528/09, EU:T:2014:35, paragraph 53). In particular, it is for the General Court not only to establish whether the evidence put forward is factually accurate, reliable and consistent but also to ascertain whether that evidence contained all the relevant information which had to be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions reached (see, by analogy, judgment of 18 October 2018, *Gul Ahmed Textile Mills* v *Council*, C-100/17 P, EU:C:2018:842, paragraph 64).

245 In addition, the Commission's conclusion as to the situation of the Union industry, established in the context of the analysis of material injury caused to a Union industry, for the purposes of Article 8(4) of the basic regulation, remains, in principle, relevant in the analysis of the threat of material injury to that industry, within the meaning of Article 8(8) of that regulation (see, by analogy, judgment of 4 February 2021, *eurocylinder systems*, C-324/19, EU:C:2021:94, paragraph 42).

246 It is in the light of those principles that the Court must examine whether the Commission infringed Article 8(1) and (8) of the basic regulation when it concluded, in recital 405 of the contested regulation, that, during the investigation period, the imports from Indonesia had constituted a threat of material injury to the Union industry.

The situation of the Union industry

247 In order to reach the conclusion that the Union industry was not robust during the investigation period, the Commission took into consideration, in recitals 309 to 340 of the provisional regulation, a number of microeconomic and macroeconomic indicators, and confirmed that analysis in recitals 279 to 317 of the contested regulation, in which it also examined, in recitals 321 to 341, economic indicators relating to after the investigation period.

248 The applicants, without calling into question the veracity of the data used by the Commission, claim that, in the light of the microeconomic and macroeconomic indicators which show certain positive trends, the Commission is wrong to claim that the Union industry was in a fragile situation.

249 In the first place, as regards the macroeconomic indicators, first, the applicants submit that EU production, production capacity and capacity utilisation increased during the investigation period.

250 In that regard, it should be observed that it is apparent from Table 3 set out in recital 268 of the provisional regulation that, after an increase between 2015 and 2017, EU production remained almost stable between 2017 and the investigation period (an increase from 13 071 053 tonnes to 13 140 582 tonnes for a stable index of 111), whereas EU consumption increased considerably, as is apparent from Table 4 set out in recital 271 of the provisional regulation (from 14 202 128 tonnes to 15 634 102 tonnes, an increase of 10.08%). It follows that EU production did not follow

the increase in EU consumption and therefore in demand. Moreover, it is apparent from Table 8 set out in recital 309 of the provisional regulation that EU production capacity increased slightly between 2017 and the investigation period (from 16 594 853 tonnes to 17 031 230 tonnes), while the use of that capacity, after increasing in 2015, 2016 and 2017, fell slightly between 2017 and the investigation period.

251 On the basis of those data, the Commission found, in recital 310 of the provisional regulation, that the increase in the Union industry's production capacity was significantly lower than the increase in demand, since that industry had been able to benefit from market growth only to a very limited extent due to the significant increase in subsidised imports, in particular during the investigation period.

252 Since that finding corresponds to the data analysed and is capable of substantiating the conclusion that the Union industry was in a fragile situation, the applicants' first argument must be rejected.

253 Second, the applicants claim that the volume of sales increased.

254 However, it is clear from Table 9 set out in recital 314 of the provisional regulation that, although the Union market sales volume increased between 2015 and 2017, those sales decreased between 2017 and the investigation period, a period which corresponds, as the Commission observes in recital 317 of the provisional regulation, to the removal of duties on imports from Indonesia. The applicants' argument in that regard must therefore be rejected.

255 Third, the applicants submit that the Union industry retained a high market share of between 81% and 95%.

256 However, it must be stated that it is apparent from Table 9 set out in recital 314 of the provisional regulation that the Union industry's market share decreased significantly between 2017 and the investigation period (from 91.6% to 81.5%). The Commission explains, in recital 317 of that regulation, and the applicants do not challenge that point, that that decrease is due to the removal of duties on imports from Indonesia which changed the market situation in March 2018, during the investigation period. In the light of those data, the applicants' argument in that regard must be rejected.

257 Fourth, the applicants argue that employment and productivity display positive trends.

258 It is apparent from Table 10 set out in recital 319 of the provisional regulation that the number of employees of the Union industry increased slightly between 2015 and the investigation period (by 78 employees). However, productivity decreased between 2017 and the investigation period (from 4 782 tonnes per employee to 4 625 tonnes per employee). It follows that the slight increase in the number of employees is not in itself sufficient to invalidate the Commission's conclusions drawn from all the macroeconomic indicators. According to the case-law, although the examination by the institutions must lead to the conclusion that the threat of injury is significant, it is not necessary for all the relevant economic factors and indices to show a negative trend (see, to that effect and by analogy, judgment of 23 April 2018, *Shanxi Taigang Stainless Steel* v *Commission*, T-675/15, not published, EU:T:2018:209, paragraph 93 and the case-law cited).

259 It follows that the arguments of the applicants in that regard must be rejected.

260 In the second place, as regards the microeconomic indicators, first, the applicants submit that the sale prices in the European Union increased.

261 It is clear from Table 11 set out in recital 325 of the provisional regulation that, after increasing between 2015 and 2017, the period during which there were duties on imports from Indonesia, prices fell from EUR 832 per tonne to EUR 794 per tonne between 2017 and the investigation period. The applicants' argument must therefore be rejected.

262 Second, the applicants submit that production costs have decreased since 2017.

263 It is apparent from Table 11 set out in recital 325 of the provisional regulation that production costs decreased from EUR 827 per tonne to EUR 791 per tonne between 2017 and the investigation period. However, it is apparent from all the data in that table, in particular the decrease in the sales price, that the Union industry was unable to benefit from that decrease in costs, since it had to pass on that decrease in full to its customers, as the Commission correctly observes in recital 328 of the provisional regulation. The applicants' argument in that regard must therefore be rejected.

264 Third, the applicants maintain that cash flow, sales profitability and return on investments showed positive trends.

265 In that regard, it must be stated that it is apparent from Table 14 set out in recital 334 of the provisional regulation that cash flow increased between 2015 and 2017 (with a sharp increase between 2016 and 2017) and then fell back to 2016 levels. It is therefore not possible to infer a positive trend, contrary to what the applicants claim.

266 As regards the return on investments, it increased considerably between 2015 and 2016 and then remained relatively stable (18% in 2016, 16% in 2017 and 17% during the investigation period). That stabilisation of the return on investments, and the stabilisation of the profitability of sales in the European Union to unrelated customers at 0.8% in 2017 and during the investigation period, a rate which remains low, do not call into question the Commission's findings as to the situation of the Union industry based on all the relevant factors in that regard.

267 As regards the post-investigation data, the applicants claim that they are not representative and cannot be relied on in order to draw meaningful conclusions.

268 In that regard, it should be borne in mind that, according to the case-law, the possibility of taking into consideration, in certain circumstances, post-investigation period data is justified in the context of investigations intended, not to find injury, but to determine whether there is a threat of injury which, by its very nature, requires a prospective analysis. Those data may thus be used to confirm or invalidate the forecasts in the Commission regulation imposing a provisional countervailing duty and allow, in the former case, the imposition of a definitive countervailing duty. However, the EU institutions' use of those post-investigation period data cannot escape review by the Courts of the European Union (see, by analogy, judgment of 4 February 2021, *eurocylinder systems*, C-324/19, EU:C:2021:94, paragraph 41).

269 In the present case, the Commission examined, in recitals 321 to 341 of the contested regulation, the data relating to the period from October 2018 to June 2019 ('the post-investigation period') and concluded that, during the post-investigation period, the economic situation of the Union industry had further deteriorated.

270 The applicants claim that the Commission used data that were not representative because, first, it is mentioned in the contested regulation that, for four out of the nine months of the post-investigation period, the data were skewed because of exceptional circumstances faced by one producer and, second, it is held, in recital 322 of the contested regulation, that 'the figures for the investigation period are not directly comparable to the figures for the [post-investigation period]'.

271 Those claims made by the applicants are unfounded. The Commission was careful to specify the circumstances that made it possible to quantify the representativeness of the post-investigation period data or to justify its relevance. First, it explained, in recital 331 of the contested regulation, that the higher profits in winter 2018-2019 were exceptional because they were recorded by one sampled company which was able to take advantage of a temporary shortage of supply in its region, enabling it to increase its prices and, therefore, its profits during that period. Second, the Commission stated, in recital 322 of that regulation, that the figures for the investigation period were not directly comparable to the post-investigation period figures. Thus, it noted that, given the time limits for the investigation, certain macroeconomic indicators could be analysed only for the sampled Union producers. Moreover, it compared the 12 months of the investigation period to the 9 months of the post-investigation period, because the data relating to the 12 months of the post-investigation period were not yet available.

272 It follows that those data may be used to confirm or invalidate the forecasts in the Commission regulation imposing a provisional countervailing duty in order to allow the imposition of a definitive countervailing duty, in accordance with the case-law cited in paragraph 268 above.

273 In the light of all the foregoing, the applicants' arguments must be rejected, without it being necessary to rule on the issue of admissibility, addressed by implication by the Commission, according to which those arguments were raised for the first time at the stage of the reply (see, to that effect, judgment of 5 April 2017, *France* v *Commission*, T-344/15, EU:T:2017:250, paragraph 92).

The nature of the subsidies at issue and the trade effects likely to arise therefrom

274 The applicants claim that the Commission failed to take account of the evidence which they and other parties had provided concerning the nature and effects of the subsidies at issue. That evidence demonstrated, first, that the alleged provision of CPO for less than adequate remuneration no longer had trade effects, since the export tax and export levies had ceased to apply in December 2018 and, second, that the payments made under the Oil Palm Plantation Fund scheme had dropped to zero between September and December 2018, before resuming at lower levels from January 2019, and no longer had trade effects on Indonesian biodiesel producers' export activities. In addition, any benefits received by the Oil Palm Plantation Fund should be allocated solely to biodiesel sales on the domestic market.

275 In that regard, it should be recalled that the applicants' arguments seeking to invalidate the Commission's conclusions concerning price undercutting, the provision of CPO for less than adequate remuneration and the existence of a subsidy in the form of a direct transfer of funds from the Oil Palm Plantation Fund were rejected in the context of the first, third and fourth pleas, respectively. The arguments concerning the allocation of the amount of the subsidy to the total turnover of biodiesel were rejected in the context of the fifth plea in law.

276 In those circumstances, the facts put forward by the applicants, relating to the setting of the export tax at zero, the suspension of the export levy from December 2018 and the fluctuation of payments made under the Oil Palm Plantation Fund scheme, all of which relate to the post-investigation period, cannot invalidate the Commission's conclusion that the Indonesian Government, by means of a series of measures, distorted the domestic market for CPO in Indonesia and kept the price of that product at an artificially low level to the advantage of the downstream biodiesel industry (see recitals 80, 162, 172, 190 and 203 of the provisional regulation).

277 Therefore, the Commission did not make a manifest error of assessment in finding, in recital 343 of the contested regulation, as it had noted in recital 349 of the provisional regulation, that the subsidies in question were capable of keeping exports of Indonesian biodiesel at a price level affecting the Union industry even more negatively, thereby confirming (recital 351 of the contested regulation) the assessment in recital 350 of the provisional regulation that the measures taken by the Indonesian Government affected the economic situation of the Union industry.

The rate of increase in subsidised imports

278 The applicants claim that the post-investigation period data show no increase in imports of Indonesian biodiesel into the Union market and that, consequently, it is unlikely that such an increase will occur in the future.

279 However, it must be observed that Table 4 set out in recital 353 of the contested regulation shows that there was a greater quantity of imports from Indonesia during the three quarters of the post-investigation period (581 078 tonnes) than during the four quarters of the investigation period (516 068 tonnes), and the applicants do not challenge the accuracy of that data. The applicants' argument that the quarterly volume of imports in the post-investigation period was lower than the volume of imports in the third quarter of 2018 cannot invalidate the Commission's findings as to the rate of increase in imports. As the Commission rightly points out in recital 355 of the contested regulation, the first three quarters following the investigation period are not directly comparable to the last three quarters of the investigation period on account of seasonal variations, and the peak achieved in 2018, namely 263 678 tonnes in the third quarter, cannot be compared with the result of the third quarter of 2019, since the imports during that period were affected by the imposition of provisional duties.

280 Accordingly, the applicants' claims that the post-investigation period data show no increase in imports must be rejected.

281 The applicants also submit that the adoption of Directive (EU) 2018/2001 of the European Parliament and of the Council of 11 December 2018 on the promotion of the use of energy from renewable sources (OJ 2018 L 328, p. 82) restricts imports of PME.

282 In that regard, it must be noted that that directive was adopted after the investigation period and the time limit for transposition did not expire until 30 June 2021, pursuant to Article 36(1) of that directive. In addition, under Article 26(2) of that directive, the full restriction on the import of 'high indirect land-use change-risk biofuels, bioliquids or biomass fuels produced from food and feed crops for which a significant expansion of the production area into land with high-carbon stock is observed' will be gradual as from 31 December 2023, in accordance with Article 26(2) of that directive. Accordingly, the Commission did not make a manifest error of assessment in

finding, in recital 360 of the contested regulation, that the effect of that directive could not be forecast and that it '[did] not affect the … analysis [being undertaken at that time] of threat of injury that Indonesian imports pose[d] to the Union industry in the near future'.

283 The applicants' arguments must therefore be rejected.

Sufficient freely disposable capacity of the exporter

284 As regards the freely disposable production capacity of Indonesian exporters, the applicants submit that the Commission received contradictory information from the Indonesian Government and from EBB and that it chose to rely on the information received by EBB and on the 2019 'US GAIN Jakarta' report concerning Indonesian biofuels. In those circumstances, the Commission should have concluded that the evidence available on that subject was of little probative value.

285 In that regard, it should be borne in mind that, in accordance with the case-law cited in paragraph 244 above, it is for the Court not only to establish whether the evidence put forward is factually accurate, reliable and consistent but also to ascertain whether that evidence contained all the relevant information which had to be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions reached.

286 In that context, it must be noted that, when the institutions examine the risk of material injury to the Union industry, taking into account production and exportation capacities in the exporting country, they must take into account not only the existence of other export markets, but also the potential development of internal consumption in the exporting country (see, to that effect and by analogy, judgment of 29 January 2014, *Hubei Xinyegang Steel* v *Council*, T-528/09, EU:T:2014:35, paragraph 81).

287 In the present case, the applicants do not call into question the Commission's findings in recitals 353 and 354 of the provisional regulation, based on information provided by the Indonesian Government, according to which the production capacity of Indonesian biodiesel producers greatly exceeds the domestic demand by approximately 300% and that the spare capacity of the Indonesian producers during the investigation period is estimated at around 40% of EU consumption. Nor do they dispute the Commission's finding in recital 373 of the contested regulation that, according to the 2019 'US GAIN Jakarta' report, the Indonesian biodiesel production capacity was expected to increase from 11.5 thousand million litres to 13 thousand million litres between 2019 and 2021.

288 The applicants claim that the Indonesian Government provided information showing that there was an expected capacity utilisation of 85% for 2019. However, it is apparent from the Indonesian Government's arguments of 6 September 2019 to which the applicants refer that the 85% capacity utilisation for 2019 results from an extrapolation of the available data for the period from January to May 2019 and concerns the part of production used by the internal and external demand. The applicants do not explain precisely how those data call into question the Commission's findings. Furthermore, even in the situation set out by the applicants, 15% of production capacity in 2019 remained unused.

289 The applicants also submit that the Indonesian Government provided information seeking to show that Indonesia would pass, in 2020, from a 'B20' blending mandate, that is to say, from a biodiesel and mineral diesel blend containing 20% of biodiesel, to a 'B30' blending mandate, that

is to say, to a blend containing 30% of biodiesel, which would absorb the entire freely disposable capacity of Indonesian producers. The Commission therefore wrongly sided with EBB, which maintained that the implementation of the 'B20' blending mandate had caused problems and that the switch from the 'B20' blending mandate to a 'B30' blending mandate could pose similar problems.

290 More specifically, the applicants claim that it is apparent from the 2019 'US GAIN Jakarta' report that the 'B20' blending mandate was extended to the transport sector not covered by the public service obligations only in September 2018, which led to an increase in local biodiesel consumption of 54% in 2019 and that the blending rate has been increasing exponentially since 2017 (from 8.2% in 2017 to 12.7% in 2018, reaching 19.9% in 2019). The declarations set out in that report state that implementation of the 'B30' blending mandate is planned for 2020.

291 It is apparent from recitals 374 to 376 of the contested regulation that the Commission took note of the Indonesian Government's comments concerning the move from the 'B20' to the 'B30' blending mandate.

292 The Commission noted, in recital 382 of the contested regulation, that, according to the 2019 'US GAIN Jakarta' report, it had been possible to meet the 'B20' blending mandate – which had been a mandatory target since 2016 – for the first time only in 2019, that is to say, three years after the deadline set. The applicants accept, in their written pleadings, the accuracy of that information.

293 It is also apparent from recital 376 of the contested regulation that the Commission had studied the data provided by the Indonesian Government in relation to information provided by EBB in its observations of 29 April 2019, showing that Indonesian operators were facing difficulties in distribution, availability of storage and blending infrastructure in implementing the 'B20' blending mandate and that the purpose of that mandate was to reduce imports of mineral diesel, rather than to reduce exports of biodiesel to other markets. It also took into consideration, in recital 377 of the contested regulation, information provided by EBB showing that the implementation of the 'B30' blending mandate was expected to take time.

294 As regards the possibility of increasing the blend rate to 30% biodiesel in a single year, the Commission considered, in recital 383 of the contested regulation, that, taking into account the increase in blend rates since 2011, an increase from 19.9% to 30% appeared to be extremely ambitious.

295 In that regard, it must be stated that, as the applicants claim (see paragraph 290 above), the largest increase in the mixture rate took place from 2018 to 2019, the blend rate increasing from 12.7% to 19.9%. That increase of 7.2 percentage points was considerably lower than the 10 percentage points necessary to achieve the 'B30' blending mandate in one year.

296 In the light of the foregoing observations, the Commission complied with its obligation to examine, with care and impartiality, all the relevant factors of the case (see, to that effect and by analogy, judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council*, T-249/06, EU:T:2009:62, paragraph 53), and did not make a manifest error of assessment in finding, in recital 384 of the contested regulation, that it was unlikely that a 'B30' blending mandate would be met in the near future and significantly affect the spare capacity in Indonesia in the short term.

297 It must be held that the applicants have failed to adduce sufficient evidence to render implausible the Commission's assessment, in the contested regulation, of the facts regarding the blending mandate. Since such evidence is necessary in order to establish that an EU institution has committed a manifest error of assessment such as to justify the annulment of a measure (see, to that effect, judgment of 11 September 2014, *Gold East Paper and Gold Huasheng Paper* v *Council*, T-444/11, EU:T:2014:773, paragraph 62), those circumstances are sufficient for the applicants' arguments to be rejected.

Price level of the subsidised imports

298 The applicants submit that, as regards the price level of the subsidised imports, the Commission simply referred to its findings as regards undercutting, which, as demonstrated in the context of the first plea, do not satisfy the requirements of Article 8(1) and (2) of the basic regulation. Moreover, imports from Indonesia do not exert any pressure on EU prices.

299 In that regard, it should be recalled that the arguments put forward by the applicants in the context of their first plea in law, seeking to demonstrate that the Commission infringed Article 8(1) and (2) of the basic regulation when determining price undercutting and that the Commission was wrong to find that the imports of biodiesel from Indonesia had exerted pressure on EU prices, were rejected in their entirety. Furthermore, it is apparent from Table 7 set out in recital 283 of the provisional regulation and which is not disputed by the applicants that the import price of biodiesel from Indonesia was EUR 671 per tonne during the investigation period, whereas, as is apparent from Table 11 set out in recital 325 of the provisional regulation, the average unit selling price in the European Union fell from EUR 832 per tonne to EUR 794 per tonne between 2017 and the investigation period.

300 Consequently, those arguments of the applicants and, accordingly, the sixth plea in law, must be rejected.

The seventh plea in law, alleging infringement of the applicants' rights of defence

301 In the context of their seventh plea in law, the applicants claim that certain information was disclosed to them only in the contested regulation, thus depriving them of the opportunity to comment on that information. According to the applicants, it cannot be ruled out that if they had been able to submit their observations on those points, the outcome of the procedure might have been different.

302 As a preliminary point, it should be borne in mind that, according to settled case-law, respect for the rights of the defence is, in all proceedings initiated against a person which are liable to culminate in a measure adversely affecting that person, a fundamental principle of EU law which must be guaranteed even in the absence of any rules governing the proceedings in question (see judgment of 1 October 2009, *Foshan Shunde Yongjian Housewares & Hardware* v *Council*, C-141/08 P, EU:C:2009:598, paragraph 83 and the case-law cited).

303 Under that principle, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of subsidisation and the resultant injury (see, by analogy, judgments of 16 February 2012, *Council* v *Interpipe Niko Tube*

and Interpipe NTRP, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 76, and of 28 October 2004, *Shanghai Teraoka Electronic* v *Council*, T-35/01, EU:T:2004:317, paragraph 289 and the case-law cited).

304 Although, it is true, respect for the rights of the defence is of crucial importance in anti-subsidy investigations (see, by analogy, judgment of 16 February 2012, *Council* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 77 and the case-law cited), the existence of an irregularity with regard to the respect of those rights can lead to the annulment of a regulation establishing a countervailing duty only to the extent that there is a possibility that, as a result of that irregularity, the administrative procedure might have had a different outcome, thereby materially affecting the rights of defence of the party concerned (see judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia* v *Commission*, T-300/16, EU:T:2019:235, paragraph 77 and the case-law cited).

305 In accordance with the case-law, the applicant cannot be required to demonstrate that the institutions' decision would have been different, but simply that such a possibility cannot be totally ruled out, since it would have been better able to defend itself had there been no procedural error thus in fact affecting the rights of the defence (see, to that effect and by analogy, judgment of 16 February 2012, *Council* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 78 and 79).

306 It is in the light of those principles that it is necessary to examine whether the applicants' rights of defence were infringed during the investigation procedure.

307 In the first place, the applicants criticise the Commission for having allegedly made, in recitals 230 to 233 of the contested regulation, new findings relating to the lack of sensitivity of demand for biodiesel to fluctuations in prices on the EU biodiesel market, stating that a low-price biodiesel did not lead to increased consumption and that price competition was therefore a zero-sum game irrespective of the raw materials used.

308 This argument must be rejected. By the findings set out in recitals 230 to 233 of the contested regulation, the Commission clarified the scope of the explanations provided, first, in recital 289 of the provisional regulation, namely in that 'in most cases the final customer purchasing biodiesel is not aware of, nor concerned by, the feedstock that was used in the production, but requires a product that fulfils a certain maximum CFPP level', then, in recital 299 of that regulation, namely in that 'imports of PME from Indonesia at subsidised prices would have the effect of lowering the price of most blends sold on the Union market' and, lastly, in recital 328 of that regulation, namely in that 'a price undercutting of around 10% does exercise a significant downward pressure on prices'. The applicants cannot therefore claim that recitals 230 to 233 of the contested regulation contained new information altering the analysis made up to that point by the Commission and on which they should have been able to submit comments.

309 In the second place, the applicants claim that the Commission introduced, in recitals 251 to 254 of the contested regulation, new statements regarding changes on the Union market since the previous investigation and the fact that imports of PME were in competition with other types of biodiesel.

310 This argument must be rejected. The applicants cannot be unaware that the Union industry was then producing PME. That statement was, in fact, set out in recitals 292 to 294 of the provisional regulation. Therefore, it cannot be claimed that the Commission infringed the applicants' rights of defence by failing to inform them of the fact that the Union industry produced PME.

311 Accordingly, the Commission set out in the provisional regulation, during the administrative procedure which comes to an end with the adoption of the contested regulation (see, to that effect and by analogy, judgment of 21 November 2002, *Kundan and Tata* v *Council*, T-88/98, EU:T:2002:280, paragraph 131), its position concerning the evidence relied on by the applicants set out in paragraphs 307 and 309 above. It follows that the applicants had, as from the stage of the communication of the provisional regulation, the opportunity to state their views on those points.

312 In the light of the foregoing, the seventh plea in law must be rejected and, consequently, the action must be dismissed in its entirety.

Costs

313 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission and by EBB, in accordance with the forms of order sought by the Commission and EBB.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. Dismisses the action.

2. Orders PT Pelita Agung Agrindustri and PT Permata Hijau Palm Oleo to pay the costs.

Gervasoni Madise Nihoul

Frendo Martín y Pérez de Nanclares

Delivered in open court in Luxembourg on 14 December 2022.

E. Coulon M. van der Woude
Registrar President

Table of contents