Reports of Cases

OPINION OF ADVOCATE GENERAL
JÄÄSKINEN
delivered on 24 September 2015 [1]

Joined Cases C-283/14 and C-284/14

CM Eurologistik GmbH (C-283/14)
v
Hauptzollamt Duisburg
and
Grünwald Logistik Service GmbH (C-284/14)
v
Hauptzollamt Hamburg-Stadt

(Requests for a preliminary ruling from the Finanzgericht Düsseldorf (Germany) and the Finanzgericht Hamburg (Germany))

(References for a preliminary ruling — Anti-dumping duty imposed on imports of certain prepared or preserved citrus fruits originating in China — Reimposition of an anti-dumping duty originally imposed by a regulation held to be invalid by the Court — Reopening of the original investigation concerning the determination of normal value — Reimposition of the anti-dumping duty on the basis of the same data)

I – Introduction

1. By their two references for a preliminary ruling, the national courts question the Court about the validity of Council Implementing Regulation (EU) No 158/2013 of 18 February 2013 reimposing a definitive anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China. [2] In essence, these references illustrate the dialectical opposition between anti-dumping legislation as a system of protective measures in the sphere of commercial policy, on the one hand, and as the expression of an administrative decision subject to judicial review, on the other.

2. The questions were raised in the course of proceedings between CM Eurologistik GmbH ('Eurologistik') and the Hauptzollamt Duisburg (the Principal Customs Office, Duisburg), and between Grünwald Logistik Service GmbH ('GLS') and the Hauptzollamt Hamburg-Stadt (the Principal Customs Office of the city of Hamburg), concerning the collection, by those customs authorities, of an anti-dumping duty on imports of preserved mandarins originating in the People's Republic of China.

1 — Original language: French.

2 — OJ 2013 L 49, p. 29, hereafter 'the implementing regulation at issue'.

3. The referring courts raise several grounds of invalidity of the implementing regulation at issue. Nevertheless, in accordance with the Court's request, this Opinion will be limited to the issue of whether, when an anti-dumping proceeding has been partially reopened, following a judgment of the Court declaring invalid an earlier regulation imposing a definitive anti-dumping duty, the institutions may still use the original investigation period for the purpose of determining the normal value of the products concerned in the implementing regulation subsequently adopted.

II – **Legal framework**

4. Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ('the basic regulation') [3] states in recital 20:

'It is necessary to provide that measures are to lapse after five years unless a review indicates that they should be maintained. It is also necessary to provide, in cases where sufficient evidence is submitted of changed circumstances, for interim reviews or for investigations to determine whether refunds of anti-dumping duties are warranted. … '

5. Article 2 of the basic regulation, headed 'Determination of dumping', provides that '[t]he normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country. ...'

6. Article 2(7)(a) of the basic regulation provides that 'in the case of imports from non-market economy countries, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin. An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. ...'

7. According to Article 6 of the basic regulation, headed 'The investigation':

'1. Following the initiation of the proceeding, the Commission, acting in cooperation with the Member States, shall commence an investigation at Community level. Such investigation shall cover both dumping and injury and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of dumping shall, normally, cover a period of no less than six months immediately prior to the initiation of the proceeding. Information relating to a period subsequent to the investigation period shall, normally, not be taken into account. ... '

8. Article 11 of the basic regulation, headed 'Duration, reviews and refunds' provides in paragraphs 2 and 3:

'2. A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury. ...

3 — OJ 2009 L 343, p. 51. The basic regulation, which entered into force on 11 January 2010, repealed and replaced Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 2117/2005 of 21 December 2005 (OJ 2005 L 340, p. 17) ('Regulation No 384/96').

...

3. The need for the continued imposition of measures may also be reviewed, where warranted, on the initiative of the Commission. ...

An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury. ... '

III – **Factual background to the adoption of the implementing regulation at issue**

9. The decisive factor in answering the questions before the Court relates, therefore, to the implications of the judgment in *GLS*,[4] by which the Court declared invalid Regulation (EC) No 1355/2008 imposing a definitive anti-dumping duty on imports of certain citrus fruits.[5] It is apparent from recital 3 of that regulation that the investigation into dumping and injury covered the period from 1 October 2006 to 30 September 2007.[6]

10. In its judgment in *GLS*, the Court held, following the Advocate General's Opinion in this regard,[7] that in the light of Article 2(7)(a) of the basic regulation, in the case of imports from non-market economy third countries the European institutions were required to examine all the information available to them in order to identify an analogue market economy country.[8]

11. The Court stated, therefore, that 'since they have determined the normal value of the product concerned on the basis of the prices actually paid or payable in the European Union for a like product, without taking all due care to determine that value on the basis of the prices paid for that same product in a market economy third country, the Commission and the Council have infringed the requirements of Article 2(7)(a) of the basic regulation'.[9]

12. Following the judgment in *GLS*, on 19 June 2012 the Commission published a notice reopening the anti-dumping proceeding,[10] in which it announced that the definitive anti-dumping duties paid pursuant to Regulation No 1355/2008 were to be repaid or remitted. It also stated that, as a consequence of the judgment of 22 March 2012, 'imports into the European Union of certain

4 — Judgment in *GLS* (C-338/10, EU:C:2012:158).

5 — Council Regulation (EC) No 1355/2008 of 18 December 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2008 L 350, p. 35, hereafter 'Regulation No 1355/2008'). I would add that, by its judgment *Zhejiang Xinshiji Foods Co. Ltd and Hubei Xinshiji Foods Co. Ltd* v *Council* (T-122/09, EU:T:2011:46), the General Court annulled Regulation No 1355/2008 in so far as it concerned the applicants Zhejiang Xinshiji Foods Co. Ltd and Hubei Xinshiji Foods Co. Ltd, on the ground that it infringed the rights of defence and failed to set out reasons.

6 — As was also apparent from recital 12 of Commission Regulation (EC) No 642/2008 of 4 July 2008 imposing a provisional anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2008 L 178, pp. 19).

7 — See the Opinion of Advocate General Bot in *GLS* (C-338/10, EU:C:2011:636, point 10), from which it is apparent that 'Regulation No 1355/2008 is unlawful in so far as it does not show that the institutions made a serious and sufficient effort to determine the normal value of preserved mandarins and other citrus fruits on the basis of the prices in or from one of the market-economy third countries cited in the Eurostat statistics as being countries from which products with the same tariff classification as the product concerned were imported into the Community in 2006 or 2007 in quantities which were not manifestly insignificant'.

8 — They must therefore satisfy themselves that it is not possible to determine the normal value on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, before determining the normal value on another reasonable basis.

9 — Judgment in *GLS* (C-338/10, EU:C:2012:158, paragraph 36).

10 — Notice concerning the anti-dumping measures on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China and a partial reopening of the anti-dumping investigation concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ 2012, C-175, pp. 19 to 21, hereafter 'the reopening notice').

prepared or preserved citrus fruits (namely mandarins, etc.)[11] are no longer subject to the anti-dumping measures imposed by Regulation (EC) No 1355/2008'. The notice also *partially reopened* the relevant anti-dumping investigation concerning imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in China, in order to implement the above judgment of the Court. It stated that the scope of the investigation was limited to the selection of an analogue country, if any, and the determination of the normal value pursuant to Article 2(7)(a) of the basic regulation was to be used for the calculation of any margin of dumping.

13. Subsequently, on 18 February 2013, the implementing regulation was adopted, taking effect on 23 February 2013. It was due to expire on 31 December 2013.[12] The investigation into dumping and injury on which it was based covered the period from 1 October 2006 to 30 September 2007.[13]

IV – **The main proceedings, the questions referred and the proceedings before the Court**

14. In Case C-283/14, Eurologistik, a company providing warehousing and distribution services, placed mandarin oranges originating in China in a duly authorised customs warehouse on 20 and 25 March 2013.[14] In April 2013, Eurologistik removed some of those mandarin oranges from the customs warehouse and then presented a declaration for release for free circulation. For this purpose it calculated anti-dumping duty of EUR 9657.99. By notice dated 7 May 2013, the Hauptzollamt Duisburg imposed on it anti-dumping duties in the sum of EUR 9657.99.

15. Eurologistik lodged an objection to that notice, alleging that the implementing regulation at issue was invalid. After reimbursing, by decision of 17 May 2013, EUR 255.25 in respect of anti-dumping duty, the Hauptzollamt Duisburg rejected the objection, by decision of 9 September 2013, on the grounds that it was bound by that regulation., Eurologistik therefore brought an action against that decision before the Finanzgericht Düsseldorf (Finance Court, Düsseldorf), asserting afresh that the implementing regulation was invalid.

16. The Finanzgericht Düsseldorf decided to stay proceedings and to refer the following question to the Court for a preliminary ruling:

'Is [the implementing regulation] valid?'

17. In Case C-284/14, by notice dated 3 April 2013, the Hauptzollamt Hamburg-Stadt imposed on GLS, an importer of preserved mandarins originating from China, import duties including anti-dumping duty of EUR 62983.52, on the basis of the implementing regulation at issue.

11 — The reference is to mandarins (including tangerines and satsumas), clementines, wilkings and other citrus hybrids, as defined under CN heading 2008, originating from China.

12 — It is necessary to emphasise the scope *ratione temporis* of the new anti-dumping duty, which related to an initial period of five years; that is to say, it was calculated from the entry into force of Regulation No 1355/2008. The implementing regulation at issue, giving effect to the judgment in *GLS*, was therefore to expire five years after the entry into force (on 31 December 2008) of Regulation No 1355/2008, that is, on 31 December 2013.

13 — See footnote 6 of this Opinion.

14 — More specifically, 48 000 cases each containing 24 cans (312 grammes) of preserved mandarin oranges not containing added spirit and containing added sugar (13.95%) falling under TARIC (Integrated Tariff of the European Communities) subheading 2008 30 75 90. It declared a customs value of EUR 5.91 per case.

18. Having asserted that the implementing regulation was invalid, on 30 April 2013 GLS lodged an objection to the notice of 3 April 2013 before the Hauptzollamt Hamburg-Stadt, which was dismissed as unfounded by decision of 24 May 2013. On 26 June 2013, GLS brought an action against that decision before the Finanzgericht Hamburg, which decided to stay the proceedings and refer the following question to the Court for a preliminary ruling:

'Is [the implementing regulation at issue] valid, even though it was based not on an independent anti-dumping investigation carried out shortly before its adoption but on the continuation of an anti-dumping investigation which had at that time already been carried out in respect of the period from 1 October 2006 to 30 September 2007, the conduct of which, however, the Court of Justice of the European Union, in its judgment of 22 May 2012 in *GLS* held to have infringed the requirements of [Regulation No 384/96], with the consequence that the Court, in that judgment, declared [Regulation No 1355/2008], adopted on the basis of that investigation, to be invalid?'

V – **Analysis**

A – *The plea of invalidity raised before the Court*

19. One of the pleas of invalidity raised before the Court in these proceedings involves determining whether the implementing regulation at issue is contrary to Article 6(1) of the basic regulation, in so far as it is based on a period of investigation dating back more than five years, running from 1 October 2006 to 30 September 2007. The referring courts ask the Court whether it was lawful to take the original investigation period into account, when examining whether an analogue country existed, in the course of reimposing the anti-dumping duty at issue.

20. In the view of the Finanzgericht Düsseldorf, it is apparent from the third sentence of Article 6(1) of the basic regulation that the examination must of necessity relate to a current period of investigation, which is equally the case if an anti-dumping duty is re-imposed. The Finanzgericht Hamburg adds that, even if it were, in principle, permissible for the original investigation period to be taken into account, it would in the circumstances of the case be precluded, because infringement of the duty of diligence recognised by the Court in *GLS* could not then be excluded with sufficient certainty. It observes that undertakings in third countries become less inclined to respond to questions the further the investigation period recedes in time.

21. For their part, Eurologistik and GLS propose that Article 6(1) and Article 6(9) of the basic regulation should be examined together, which would, they claim, show that anti-dumping measures may be introduced only on the basis of the selection of an investigation period as close to the present as possible. They maintain that the judgment in *Industrie des poudres spheriques* v *Council*[15] provides a basis for the obligation incumbent on institutions to select an investigation period close in time. Finally, while referring to Article 11(3) of the basic regulation, which governs interim reviews, those parties maintain that that provision also shows that the fact that an anti-dumping duty is in force does not prevent an examination being carried out on the basis of current data.

15 — C-458/98 P, EU:C:2000:531.

B – *Whether the investigation period in question may lawfully be taken into account*

22. In dealing with the ground of invalidity based on the selected investigation period, I propose to recall certain principles governing the introduction of anti-dumping duties, and the established rules concerning the adoption of administrative decisions, too, before turning my attention more specifically to whether these have been observed in the context of the adoption of the implementing regulation at issue.

1. Observations from the perspective of the anti-dumping legislation as a system of measures of protection in the sphere of the common commercial policy

23. It is common ground that Article 6(1) of the basic regulation does not fix, in mandatory terms, the period of investigation to be taken into account by the institutions. It indicates only that the period of investigation is normally to cover a period of not less than six months immediately preceding the initiation of the proceeding.

24. It should be observed at the outset that anti-dumping duties are intended to neutralise the dumping margin arising from the difference between the price on export to the EU and the normal value of the product and thereby to nullify the injurious effects of the importation of the goods concerned into the EU.[16] The purpose of anti-dumping proceedings is to protect EU industry, which is entitled to such protection when the conditions set out in the basic regulation are met (Article 5(9) and Article 6(4) of the basic regulation).[17]

25. Thus the Court has stated, in the judgment in *Industrie des poudres sphériques* v *Council*,[18] that the adoption of anti-dumping duties *is not a penalty relating to earlier behaviour*,[19] but a protective and preventive measure against unfair competition resulting from dumping practices, and that, for that reason, anti-dumping duties cannot, as a general rule, be adopted or increased with retroactive effect. The Court went on to conclude that the institutions were obliged to carry out the investigation *for the purposes of determining injury* 'on the basis of as recent information as possible'.[20]

26. Moreover, the EU institutions have broad discretion in the sphere, most particularly, of anti-dumping measures, by reason of the complexity of the economic, political and legal situations they must examine. Judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers.[21]

16 — Judgment in *Carboni e derivati* (C-263/06, EU:C:2008:128, paragraphs 39 to 41).

17 — See judgments in *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL)* v *Commission*, (191/82, EU:C:1983:259, paragraphs 15 to 25) and *Eurocoton* v *Council*, (C-76/01 P, EU:C:2003:511, paragraphs 54 to 74).

18 — C-458/98 P, EU:C:2000:531.

19 — While it should be pointed out that anti-dumping measures cannot continue indefinitely, as is apparent from Article 11 of the basic regulation, it should also be noted that, having regard to their nature as protective measures, and not penal or even administrative sanctions, the principle *ne bis in idem* does not apply to them.

20 — C-458/98 P, EU:C:2000:531, paragraphs 91 and 92.

21 — See judgment in *Simon, Evers & Co.* (C-21/13, EU:C:2014:2154, paragraph 29).

27. In accordance with Article 2(7)(a) of the basic regulation, the analogue country must be chosen in a not unreasonable manner.[22] The choice of this country falls within the discretion enjoyed by the institutions when analysing complex economic situations. Although the exercise of this discretion is not excluded from the judicial review carried out by the Court, the scope of that review remains relatively limited.[23]Consequently, the extent of the error that the judgment in *GLS* found to exist must be interpreted *sensu stricto*.

28. Furthermore, I should like to clarify a matter relating to the duration of anti-dumping measures, which has been a source of confusion for the parties to the main proceedings. It is apparent from Article 11(1) and 11(2) of the basic regulation, read in the light of recital 20 of that regulation, that an anti-dumping measure remains in force only as long as necessary. A definitive anti-dumping measure expires five years after its institution, unless a review indicates that it ought to be continued.

29. Review (of measures nearing expiry) within the meaning of Article 11(2) of the basic regulation means, therefore, that it is necessary for the Commission to establish a new investigation period. Moreover, the purpose of the interim review provided for in Article 11(3) of that regulation is to respond to a change in circumstances. This naturally involves fixing a new investigation period. Furthermore, the effectiveness and recentness of the period of investigation take on particular importance in the context of reimbursement of anti-dumping duties, in accordance with Article 11(8) of the basic regulation,[24] for the procedure involves an investigation relating to the producer/exporter's exports into the Union, and a calculation of the new margin of dumping. The Commission may thus come to fix two periods of investigation.[25] I note, however, that neither the procedure following the judgment in *GLS*, nor the adoption of the implementing regulation at issue, fell within any of those cases.

30. Finally, it should be pointed out that the basic regulation is to be interpreted in the light of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT),[26] which appears in Annex 1A of the Agreement Establishing the World Trade Organization (WTO), signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC, of 22 December 1994, concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994).[27]

31. It is apparent from the explanatory notes to the anti-dumping agreement that observation of the time limits ceases to be obligatory when the products in question are the object of judicial proceedings.[28] It is true that this clarification applies to the provisions of that agreement concerning the opening of the investigation and its subsequent conduct, which is limited to 18 months under the WTO framework, whereas, under EU law, Article 6(9) of Regulation No 384/96 limited it to 15 months. While that is so, this rule arises, in my view, from the general principle that the prolongation of an anti-dumping proceeding by reason of subsequent judicial proceedings does not give rise to an

22 — Judgments in *Nölle* (C-16/90, EU:C:1991:402, paragraphs 11 and 12); *Rotexchemie* (C-26/96, EU:C:1997:261, paragraphs 10 and 11), and *GLS* (C-338/10, EU:C:2012:158, paragraph 22).

23 — Opinion of Advocate General Sharpston in *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:349, point 35).

24 — See point 3.6 of the Commission Notice concerning the reimbursement of anti-dumping duties (OJ 2014, C 164, p. 9).

25 — See Commission Implementing Decision concerning applications for a refund of anti-dumping duties paid on imports of ferro-silicon originating in Russia (C(2014) 9807 final).

26 — OJ 1994, L 336, p. 103, hereafter 'the anti-dumping agreement'.

27 — OJ 1994, L 336, p. 3. See judgment of 27 January 2000 in *BEUC* v *Commission* (T-256/97, EU:T:2000:21, paragraphs 66 and 67).

28 — Article 9.3.1 of the anti-dumping agreement is in the following terms: 'When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within 12 months, and in no case more than 18 months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested'.

obligation to re-examine the substantive conditions for the imposition of anti-dumping duties solely by reason of the passage of time. Nevertheless, it is evident that a legal challenge to an anti-dumping measure must not make the administrative proceeding a *perpetuum mobile*. In my opinion, this principle also governs the application of Article 6(1) of the basic regulation.

2. Observations from the perspective of review of the legality of the administrative procedure

32. From the perspective of review of the legality of, and the rules applicable to, any administrative procedure, the obligations incumbent on the institutions in the present matters have their basis in Article 266 TFEU, which provides that the institution whose act has been declared void is required to take the necessary measures to comply with the judgment of the Court.

33. It should be pointed out in this regard that annulment of an act terminating an administrative procedure having various stages, such as an anti-dumping proceeding, does not necessarily lead to annulment of the entire procedure before the contested act was adopted. [29]

34. An anti-dumping proceeding is an example of a procedure having various stages. Consequently, annulment of a regulation instituting anti-dumping measures does not automatically lead to annulment of the entire procedure before that regulation was adopted. Consequently, as stated by the Council in its written observations, the institutions are systematically to reopen in part the original investigation, in order to remedy the illegality in the original regulation. The scope of the reopening is therefore limited to giving effect to the judgment of the EU court annulling the original regulation. [30]

35. I therefore share the view of the institutions, in that they maintain that, in order to comply with a judgment declaring a measure to be invalid, it is sufficient to go back and remedy the single vitiating factor identified by the Court.

36. Nonetheless, it is important to distinguish the ground for annulment itself, here, failure to fulfil the obligation to take due care in determining normal value, on the one hand, from the scope *ratione materiae* of that ground for annulment, that is to say, its effect ('spread-effects') on the entirety of the act invalidated by the Court. The implications of a procedural defect must be assessed on the basis of the error found to have been made. [31] In my view it is obvious that there may be cases in which the investigation as a whole has been so badly conducted that it is appropriate to start the proceeding all over again. However, this should be clearly apparent from the judgment of the Court declaring the implementing regulation invalid. I note, in this context, that the judgment in *GLS* did not cast doubt on the other findings of Regulation No 1335/2008, concerning, for example, injury, Community interest or export price. In particular, no doubt was cast on the probative value of the investigation in itself. On the contrary, the procedural defect concerned uncertainty relating to the insufficiency of the data from the point of view of selecting an analogue third country.

29 — See judgments in *Asteris and Others* v *Commission* (97/86, 99/86, 193/86 and 215/86, EU:C:1988:199, paragraph 30) and *Fedesa and Others* (C-331/88, EU:C:1990:391, paragraph 34).

30 — See judgments in *Council v Parliament* (34/86, EU:C:1986:291, paragraph 47); *Spain v Commission* (C 415/96, EU:C:1998:533, paragraph 31), and *Industrie des poudres sphériques* v *Council* (C-458/98 P, EU:C:2000:531).

31 — For example, in the event of a procedural defect that does not prejudice the interests of the undertaking having participated in the anti-dumping proceeding. This is the case when the institutions, having received evidence from an undertaking, decide to institute the anti-dumping duty without notifying their decision to the interested undertaking in due time.

3. Choice of investigation period

37. Having regard to the foregoing, the crux of the issue is whether the limits of the discretion enjoyed by the institutions, in giving effect to a judgment of the Court declaring an anti-dumping regulation invalid, have been observed. That discretion may be exercised only within the bounds of the objectives pursued by the basic regulation. [32]

38. I note that the investigation period under Article 6(1) of the basic regulation is intended to ensure, in particular, that the factors on which the determination of dumping and injury is based are not influenced by the conduct of the producers concerned after the anti-dumping proceeding has been initiated and, therefore, that the definitive duty imposed as a result of the proceeding is such as actually to remedy the injury caused by the dumping. [33]

39. In the present cases, the assessment of the effects of the ground of annulment must therefore answer the question whether, having regard to this function of the investigation period, it is possible to remedy the flaw identified by the Court in the judgment in *GLS* without carrying out an investigation based on a more recent period and more up-to-date information. In other words, it must be determined how far the defect in the determination of normal value could have affected the assessment of dumping. [34]

40. It follows from the judgment in *GLS* that the Commission made a procedural, not a substantive, error. The reopening notice makes it clear that it related solely 'to the selection of an analogue country, if any, and the determination of the normal value pursuant to Article 2(7)(a) of the basic Regulation to be used for the calculation of any margin of dumping'. [35]

41. I note that recitals 43 and 86 of the implementing regulation at issue set out two grounds prompting the institutions to make the contested choice. On the one hand, 'given that antidumping duties had been in place, any data collected during a new investigation period would have been distorted by the existence of these antidumping duties' and, on the other, 'the points raised by the parties on the alleged absence of dumping at the present point in time can be more appropriately discussed in the framework of an interim review pursuant to Article 11(3) of the basic Regulation'.

42. In addition, recital 54 of the implementing regulation at issue confirms that, 'account taken of the comments made by the parties, the analysis thereof and, in spite of significant efforts by the Commission services, the lack of cooperation from potential third country producers, it was concluded that a normal value on the basis of the price or constructed value in a market economy third country as prescribed by Article 2(7)(a) of the basic Regulation could not be determined'.

43. Furthermore, as the Council argues, the duties imposed by the implementing regulation at issue have effect only for the remainder of the duration of Regulation No 1355/2008, and not for five years from the date of entry into force of the implementing regulation at issue. These cases do not, therefore, relate to an investigation initiated under Article 5 of the basic regulation. In the same vein, the Commission adds that it is apparent from the further examination that the error of procedure did not in fact have *any impact on the results of the examination*. Accordingly, the results of the original investigation are reflected, as far as possible, in the results of the examination as they appear from the

32 — Judgment in *Eurocoton and Others* v *Council* (C-76/01 P, EU:C:2003:511, paragraph 60).

33 — Judgment in *Transnational Company 'Kazchrome' and ENRC Marketing* v *Council* (T-192/08, EU:T:2011:619, paragraphs 221 to 224).

34 — Moreover, I share the view expressed by Advocate General Sharpston as to the consequences of factual errors, in that she considered that the mere existence of such errors — however manifest — should not on its own entail the automatic invalidity of an anti-dumping regulation. What matters is not the obviousness of the errors but whether they were such as to render it uncertain that the Council would have reached the same conclusions if it had had the correct figures at its disposal. See the Opinion of Advocate General Sharpston in *Bricmate* (C-569/13, EU:C:2015:342, point 61).

35 — Reopening notice, point 3.

implementing regulation at issue. To conduct an entirely new investigation relating to an updated investigation period would involve considerable delay, unwarranted, having regard to the right of EU industry to this protection and to the fact that the procedural error was limited to one aspect of the proceeding.

44. Consequently, I am of the opinion that, in the circumstances, the error in determining an analogue country did not affect other matters entering into the calculation of anti-dumping duty. Thus, even if the logic of the rules of the common commercial policy would, at first sight, plead in favour of the use of the most recent data, in my view it is the administrative logic, according to which the legality of an administrative act is not to be called into question by a subsequent change in factual circumstances, that prevails in the dialectical opposition between these two approaches in the present cases. Accordingly, the institutions have not overstepped the limits of their discretion.

45. Having regard to all the foregoing, examination of the implementing regulation at issue cannot lead to a declaration that the latter is invalid.

VI – **Conclusion**

46. Without prejudice to examination of the other grounds of invalidity relied on, I propose that the Court should answer the questions submitted by the Finanzgericht Düsseldorf and the Finanzgericht Hamburg to the effect that examination of Council Implementing Regulation (EU) No 158/2013 of 18 February 2013, reimposing a definitive anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China has not brought to light any matters that would indicate that that regulation is invalid.