



Reports of Cases

JUDGMENT OF THE GENERAL COURT (Seventh Chamber)

14 July 2021 *

(Dumping – Imports of certain seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine – Interim review – Calculation of the normal value – Selling, general and administrative costs – Sales between related companies – Ordinary course of trade – Single economic entity – Article 2(3), (4) and (6) of Regulation (EU) 2016/1036 – Export price – Adjustment – Functions similar to those of an agent working on a commission basis – Article 2(10)(i) of Regulation 2016/1036 – Manifest error of assessment – Methodology different from that used in a previous investigation – Article 11(9) of Regulation 2016/1036 – Legitimate expectations – Rights of the defence)

In Case T-716/19,

Interpipe Niko Tube LLC, established in Nikopol (Ukraine),

Interpipe Nizhnedneprovsky Tube Rolling Plant OJSC, established in Dnipro (Ukraine),

represented by B. Servais, lawyer,

applicants,

v

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

defendant,

APPLICATION under Article 263 TFEU for annulment of Commission Implementing Regulation (EU) 2019/1295 of 1 August 2019 amending Implementing Regulation (EU) 2018/1469 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine, following a partial interim review pursuant to Article 11(3) of Regulation (EU) 2016/1036 (OJ 2019 L 204, p. 22),

THE GENERAL COURT (Seventh Chamber),

composed of R. da Silva Passos, President, L. Truchot (Rapporteur) and M. Sampol Pucurull, Judges,

Registrar: E. Artemiou, Administrator,

having regard to the written part of the procedure and further to the hearing on 17 December 2020,

gives the following

* Language of the case: English.

Judgment

Background to the dispute

- 1 The applicants, Interpipe Niko Tube LLC and Interpipe Nizhnedneprovsky Tube Rolling Plant OJSC, are two companies incorporated under Ukrainian law which are active in the manufacture and export of seamless pipes and tubes.
- 2 Following a complaint lodged on 14 February 2005 by the Defence Committee of the Seamless Steel Tube Industry of the European Union, the Commission of the European Communities initiated an anti-dumping proceeding concerning imports of seamless pipes and tubes, of iron or steel, originating in Croatia, Romania, Russia and Ukraine, pursuant to 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) (replaced by Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51), itself replaced by 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; ‘the basic regulation’)), and, in particular to Article 5 of Regulation No 384/96 (now Article 5 of the basic regulation), in the version resulting from Council Regulation (EC) No 461/2004 of 8 March 2004 amending Regulation No 384/96 and Regulation (EC) No 2026/97 on protection against subsidised imports from countries not members of the European Community (OJ 2004 L 77, p. 12; ‘Regulation No 384/96, as amended’).
- 3 On 27 June 2006, the Council of the European Union adopted Regulation (EC) No 954/2006 imposing definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, repealing Council Regulations (EC) No 2320/97 and (EC) No 348/2000, terminating the interim and expiry reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, inter alia, in Russia and Romania and terminating the interim reviews of the anti-dumping duties on imports of certain seamless pipes and tubes of iron or non-alloy steel originating, inter alia, in Russia and Romania and in Croatia and Ukraine (OJ 2006 L 175, p. 4).
- 4 By Regulation No 954/2006, the Council imposed an anti-dumping duty of 25.1% on imports of certain seamless pipes and tubes, of iron or steel, produced by CJSC Nikopolsky Seamless Tubes Plant Niko Tube and OJSC Nizhnedneprovsky Tube Rolling Plant, two companies incorporated under Ukrainian law which subsequently changed their names, respectively, to Interpipe Nikopolsky Seamless Tubes Plant Niko Tube ZAT (Interpipe Niko Tube ZAT) and Interpipe Nizhnedneprovsky Tube-Rolling Plant VAT (together, ‘the former Interpipe companies’), which have been succeeded by the applicants. In that regulation, the Council considered that those two companies were ‘related’ to two sales companies: SPIG Interpipe, established in Ukraine, and Sepco SA, established in Switzerland.
- 5 By application lodged at the Registry of the General Court on 8 September 2006, the former Interpipe companies sought the annulment of Regulation No 954/2006, in so far as it concerned them.
- 6 By judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP v Council* (T-249/06, EU:T:2009:62; ‘the first *Interpipe* judgment’), the Court, finding that there had been a manifest error of assessment and an infringement of the rights of the defence, annulled Article 1 of Regulation No 954/2006, in so far as the anti-dumping duty fixed for exports to the European Union of the products manufactured by the Ukrainian companies in question exceeded that which would have been applicable had the export price not been adjusted for a commission, within the meaning of Article 2(10)(i) of Regulation No 384/96, as amended (now Article 2(10)(i) of the basic regulation), when sales had taken place through the intermediary of the Swiss company, Sepco. It follows from paragraph 178 of that judgment that, where it is found that a producer entrusts tasks normally falling

within the responsibilities of an internal sales department to a company for the distribution of its products which it controls economically and with which it forms a single economic entity, the fact that the Council and the Commission base their reasoning on the prices paid by the first independent buyer from the affiliated distributor, without making an adjustment for a commission, is justified. According to the Court, Sepco could be regarded as an internal sales department of the former Interpipe companies, so that no adjustment should have been applied by the institutions to the prices which it charged. The Court dismissed the action as to the remainder.

- 7 By judgment of 16 February 2012, *Council and Commission v Interpipe Niko Tube and Interpipe NTRP* (C-191/09 P and C-200/09 P, EU:C:2012:78), the Court of Justice dismissed the appeals brought by the Council and the Commission against the first *Interpipe* judgment.
- 8 The Council complied with the first *Interpipe* judgment by adopting Implementing Regulation (EU) No 540/2012 of 21 June 2012 amending Regulation No 954/2006 (OJ 2012 L 165, p. 1). According to recitals 11 to 14 of that implementing regulation, the dumping margin was re-calculated without adjusting the export price for sales made via the related company Sepco, for differences in commissions, within the meaning of Article 2(10)(i) of Regulation No 1225/2009 (now Article 2(10)(i) of the basic regulation), which had in the meantime replaced Regulation No 384/96, as amended. The anti-dumping duty applicable to the applicants was fixed at 17.7%.
- 9 The anti-dumping measures provided for by Regulation No 954/2006, as amended by Implementing Regulation No 540/2012, were maintained for an additional period of five years, pursuant to Council Implementing Regulation (EU) No 585/2012 of 26 June 2012 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine, following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009, and terminating the expiry review proceeding concerning imports of certain seamless pipes and tubes, of iron or steel, originating in Croatia (OJ 2012 L 174, p. 5). The Council considered that the applicants continued to work with two related traders, established in Ukraine and Switzerland (see paragraph 4 above), now called LLC Interpipe Ukraine ('IPU') and Interpipe Europe SA ('IPE'). The anti-dumping duty applicable to the applicants remained fixed at 17.7%.
- 10 Following an interim review proceeding requested by the applicants on the basis of Article 11(3) of Regulation No 1225/2009 (now Article 11(3) of the basic regulation) ('the interim review terminated in 2012'), the Council adopted Implementing Regulation (EU) No 795/2012 of 28 August 2012 amending Implementing Regulation No 585/2012 (OJ 2012 L 238, p. 1), under which the rate of the anti-dumping duty applicable to them was reduced to 13.8%.
- 11 On 4 July 2017, the Commission published in the Official Journal a notice of initiation of an expiry review of the anti-dumping measures applicable to imports of certain seamless pipes and tubes of iron or steel originating in Russia and Ukraine (OJ 2017 C 214, p. 9). The review referred to in that notice ('the final review terminated in 2018') was based on Article 11(2) of the basic regulation.
- 12 On 7 May 2018, the Commission also published in the Official Journal a notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of certain seamless tubes and pipes originating, inter alia, in Ukraine (OJ 2018 C 159, p. 18). The review referred to in that notice ('the interim review terminated in 2019'), which followed a request from the applicants under Article 11(3) of the basic regulation, was limited in scope to their alleged dumping.
- 13 On 13 July 2018, in the context of the final review terminated in 2018, the Commission sent the applicants, in accordance with Article 20 of the basic regulation, a General Disclosure Document informing them that, for the purposes of determining their selling, general and administrative costs ('SG&A costs'), necessary for calculating the normal value, pursuant to Article 2(3) and (4) of the basic regulation, it intended to take into consideration not only the SG&A costs relating to sales of the product concerned that the applicants made to independent customers established in Ukraine either

directly, or through IPU, but also the SG&A costs – excluding transport costs – of sales of the product concerned made by the applicants to IPU, so that IPU can resell it to independent customers established in Ukraine.

- 14 Furthermore, the Commission noted that the applicants now export their products to the European Union not only, as before, through IPE, but also through another related company, Interpipe Central Trade GmbH ('IPCT'), established in Germany, which should be regarded as an importer. In accordance with the first *Interpipe* judgment, the Commission did not envisage applying an adjustment under Article 2(10)(i) of the basic regulation to the prices paid by independent customers to IPE, whereas it did have the intention to apply an adjustment, pursuant to Article 2(9) of that regulation, to the products sold in the European Union by IPCT.
- 15 In their observations of 30 July 2018 on the General Disclosure Document of 13 July 2018, the applicants disputed the Commission's calculation of the SG&A costs, claiming that the intended methodology differed, in breach of Article 11(9) of the basic regulation, from the methodology applied previously. That allegedly new methodology artificially inflated the SG&A costs and, therefore, the dumping margin.
- 16 Following the final review terminated in 2018, the Commission adopted Implementing Regulation (EU) 2018/1469 of 1 October 2018 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel, originating in Russia and Ukraine, following an expiry review pursuant to Article 11(2) of Regulation 2016/1036 (OJ 2018 L 246, p. 20). The anti-dumping measures in question were thus maintained.
- 17 In recitals 82 and 83 of Implementing Regulation 2018/1469, the Commission stated that, following the analysis of all the elements, it accepted the applicants' claim regarding the calculation of SG&A costs between related companies.
- 18 In recitals 86 and 87 of Implementing Regulation 2018/1469, the Commission stated that, when the exporting producers exported the product concerned to independent customers in the European Union through IPE acting as a trader, the export price was established on the basis of prices actually paid or payable for the product concerned when sold for export to the European Union, in accordance with Article 2(8) of the basic regulation. By contrast, when the exporting producers exported the product concerned to the European Union through IPCT acting as an importer, the export price was constructed on the basis of the price at which the imported product was first resold to independent customers in the European Union, in accordance with Article 2(9) of the basic regulation, with the adjustments permitted by that provision.
- 19 The anti-dumping duty applicable to the applicants remained fixed at 13.8%.
- 20 On 21 May 2019, in the context of the interim review terminated in 2019, the Commission sent the applicants a General Disclosure Document ('the 2019 General Disclosure Document'), in accordance with Article 20 of the basic regulation. By that document, in the first place, the Commission informed them that, in the calculation of their SG&A costs, account was taken of the costs they had incurred in respect of their sales to IPU. In the second place, the Commission noted that, in its view, IPE and IPCT operated as two channels for exporting the same products to the European Union. On that basis, and with regard to the coordinating role of IPU between the applicants, on the one hand, and IPE and IPCT, on the other, the specific features of contracts concluded between IPU and the two latter companies, and the absence, in the articles of association of IPE, of an exclusivity obligation in terms of suppliers of the products to be sold, the Commission concluded that IPE could no longer be considered as an internal export sales department within the Interpipe Group to which the applicants belong and that, in the calculation of the export price, an adjustment should therefore be applied, pursuant to Article 2(10)(i) of the basic regulation, to the prices paid to IPE by independent customers in the European Union.

- 21 In their comments of 4 June 2019 on the 2019 General Disclosure Document, the applicants challenged, in particular, in the first place, the Commission's calculations relating to the SG&A costs, claiming that the intended methodology corresponded to the methodology already proposed, and ultimately abandoned, in the context of the final review terminated in 2018. In the second place, they claimed that the application of an adjustment, under Article 2(10)(i) of the basic regulation, to the prices paid to IPE by independent customers constituted an infringement of the principles laid down in the first *Interpipe* judgment (see paragraph 6 above). They maintained that the factual circumstances had not changed, despite the creation of IPCT.
- 22 On 27 June 2019, the Commission sent the applicants an additional disclosure document, according to which it had accepted a number of arguments set out in their observations of 4 June 2019, other than those set out in paragraph 21 above. The Commission added that those arguments had been analysed, but that they would be addressed in the implementing regulation, which would be published no later than 6 August 2019. The rate of the anti-dumping duty envisaged by the Commission in that additional disclosure document was 8.1%.
- 23 On 1 August 2019, following the interim review terminated in 2019, the Commission adopted Implementing Regulation (EU) 2019/1295 amending Implementing Regulation 2018/1469 (OJ 2019 L 204, p. 22) ('the contested regulation'), in which the rate of anti-dumping duty applicable to the applicants was fixed at 8.1%.
- 24 In recitals 32, 33 and 39 to 42 of the contested regulation, the Commission rejected the applicants' arguments set out in paragraph 21 above. It stated that, in view of the confidential nature of the commercial information relating to the presentation and analysis of those arguments, the reasons for their rejection were set out in detail in a separate letter, which it sent to the applicants on 2 August 2019 ('the letter of 2 August 2019').

Procedure and forms of order sought

- 25 The applicants brought the present action by application lodged at the Registry of the General Court on 22 October 2019.
- 26 The written part of the procedure was closed on 15 April 2020.
- 27 By document lodged at the Court Registry on 26 April 2020, the applicants made a request for a hearing under Article 106(2) of the Rules of Procedure of the General Court.
- 28 Acting on a proposal from the Judge-Rapporteur, the General Court (Seventh Chamber) decided to open the oral part of the procedure. By way of measures of organisation of procedure provided for in Article 89 of the Rules of Procedure, it put questions to the parties to be answered in writing before the hearing and requested that the Commission produce certain documents. The parties complied with those measures within the prescribed period.
- 29 The parties presented oral argument and answered the oral questions put to them by the Court at the hearing on 17 December 2020.
- 30 The applicants claim that the Court should:
- annul the contested regulation;
 - order the Commission to pay the costs.

31 The Commission contends that the Court should:

- dismiss the application;
- order the applicants to pay the costs.

Law

32 In support of their action, the applicants put forward four pleas in law.

33 The first plea alleges that the inclusion, in the calculation of the normal value, of the SG&A costs relating to the applicants' sales to IPU was unlawful. In so doing, the Commission infringed the first subparagraph of Article 2(3), the first subparagraph of Article 2(4) and the first sentence of Article 2(6) of the basic regulation and the first sentence of Article 2.2.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103; 'the WTO Anti-Dumping Agreement'), set out in Annex 1A to the Agreement Establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 3).

34 The second plea alleges a manifest error of assessment in the application, to the export price, of an amount corresponding to the SG&A costs and a profit as achieved by an agent working on a commission basis. The Commission should not have deducted from the applicants' export price an amount corresponding to the SG&A costs and IPE's profit pursuant to the first to fourth sentences of Article 2(10) and Article 2(10)(i) of the basic regulation.

35 The third plea alleges infringement of Article 11(9) of the basic regulation, in so far as the Commission determined the applicants' normal value and export price using a methodology different from the methodology applied previously.

36 Within the context of those three pleas, the applicants allege the infringement of the second subparagraph of Article 9(4) of the basic regulation and Article 9.3 of the WTO Anti-Dumping Agreement, in so far as, following the infringements and manifest error of assessment relied on, the anti-dumping duty exceeds the amount of dumping.

37 The fourth plea alleges infringement of the rights of the defence.

The first plea, alleging that the taking into account, in the calculation of the normal value, of the SG&A costs relating to the applicants' sales to IPU was unlawful

38 The applicants claim that, by including in the calculation of the normal value the SG&A costs relating to their sales to IPU, the Commission infringed the first subparagraph of Article 2(3), the first subparagraph of Article 2(4) and the first sentence of Article 2(6) of the basic regulation, its own decision-making practice and the first sentence of Article 2.2.2 of the WTO Anti-Dumping Agreement, as interpreted by the decisions of the WTO Dispute Settlement Body. Moreover, the applicants submit that, in reality, they did not incur the SG&A costs at issue.

39 As a preliminary point, the applicants note that their sales of the product concerned on the domestic market in Ukraine have always taken place either directly – made by themselves to independent domestic customers ('direct sales') – or indirectly, in the sense that they sold the product concerned to IPU which in turn resold it to independent domestic customers ('indirect sales').

- 40 By the present plea, first of all, the applicants claim that, during the interim review terminated in 2019, which led to the adoption of the contested regulation, the Commission, in the calculation of the normal value, with regard to the SG&A costs, did not rely, as it had done previously, only on the applicants' SG&A costs relating to the direct sales of the product concerned and the SG&A costs incurred by IPU for indirect sales of that product. The Commission wrongly included the applicants' SG&A costs relating to their sales of the product concerned to IPU ('the SG&A costs at issue'), which IPU then resold to independent customers on the domestic market in Ukraine. The applicants take the view that the inclusion of the SG&A costs at issue – which were not included in the calculations made by the Commission in the context of the interim review terminated in 2012 and which were ultimately excluded from the calculations made in the context of the final review terminated in 2018 (see paragraphs 11, 13 and 17 above) – artificially inflated the dumping margin.
- 41 Next, the applicants observe that, according to the first subparagraph of Article 2(1) of the basic regulation, the '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' and that, pursuant to the third subparagraph of Article 2(1) of that regulation, prices between parties which appear to be associated may not, in principle, be considered to be in the ordinary course of trade. In the present case, the Commission was right to apply that principle, but wrongly failed to draw from it the consequence that the SG&A costs related to the sales between such parties could not be considered to be in the ordinary course of trade either. The applicants note that the first sentence of Article 2(6) of the basic regulation provides that SG&A costs must be calculated on the basis of data relating to the ordinary course of trade. The same principle follows from the first sentence of Article 2.2.2 of the WTO Anti-Dumping Agreement.
- 42 Lastly, the applicants claim that the inclusion of the SG&A costs at issue artificially inflated the normal value and, therefore, the dumping margin, as is apparent from the following two elements.
- 43 First, the applicants note that, pursuant to the first and third subparagraphs of Article 2(4) of the basic regulation and the Commission's practice, sales of the product concerned on the domestic market of the exporting country to independent customers must be made in the ordinary course of trade in order to be taken into account in the calculation of the normal value. The test required to determine whether a sale is made in the ordinary course of trade ('the OCT test') involves, in accordance with Article 2(4) of the basic regulation, comparing unit production costs plus SG&A costs with actual sales prices by product type. The applicants add that the basic regulation, in particular Article 2(4) thereof, does not contain any rule requiring the inclusion of all costs – including costs incurred for sales between related companies – under the SG&A costs used for the purposes of the OCT test.
- 44 For those product types in respect of which more than 80% of sales on the exporter's domestic market are profitable, in the sense that they were made at prices above unit cost ('profitable sales'), and where the weighted average sales price is equal to or higher than the weighted average unit cost, normal value is calculated on the basis of all sales, whether or not they were profitable.
- 45 By contrast, where the volume of profitable sales of a product type on that market is equal to or less than 80% of the total sales volume of that product type, or where the weighted average price of that product type is lower than the unit cost of production, normal value is based solely on profitable sales.
- 46 The applicants state that taking account of all sales of a product type (see paragraph 44 above) or profitable sales of that product type only (see the previous paragraph) has an impact on the calculation of the normal value, in so far as the normal value of the product type in question increases in the second situation. The dumping margin will also be higher.

- 47 The applicants observe that, in the present case, the inclusion of the SG&A costs at issue in the calculation of the normal value had the effect of increasing total costs and, therefore, reducing the percentage of profitable sales. Thus, for a larger number of product types sold on the domestic market in Ukraine, profitable sales did not reach the 80% threshold, so that only profitable sales were taken into account and the normal value was higher.
- 48 Secondly, according to the applicants, it follows from the first subparagraph of Article 2(3) of the basic regulation that, for product types which were not sold by the producer on its domestic market to independent customers, but which were exported to the European Union, the normal value has to be constructed on the basis of the cost of production plus a reasonable amount for SG&A costs and for profits. That reasonable amount is calculated on the basis of sales of other types of the product concerned made in the ordinary course of trade. The inclusion of the SG&A costs at issue also had the effect of increasing the constructed normal value of product types not sold on the domestic market.
- 49 The applicants infer from all the foregoing arguments that, by taking account of the SG&A costs at issue, the Commission infringed the first subparagraph of Article 2(3), the first subparagraph of Article 2(4) and the first sentence of Article 2(6) of the basic regulation.
- 50 The Commission disputes the merits of the applicants' arguments and, as regards those relating to the infringement of its decision-making practice and the lessons to be drawn from the decisions of the WTO Dispute Settlement Body, also their admissibility, on account of the fact that they were presented in a manner inconsistent with paragraph 115 of the Practice Rules for the Implementation of the Rules of Procedure, in that they do not correspond to the arguments relied on in the application.
- 51 In the latter regard, it should be noted that non-compliance with the drafting recommendations contained in the Practice Rules for the Implementation of the Rules of Procedure can lead to the inadmissibility of all or part of an action only if the action does not comply with Article 76(d) of those rules. However, as will be explained below, the application explains the nature of the first plea and the complaints put forward in support of it are sufficiently clear and precise (see, to that effect, judgment of 25 March 2015, *Belgium v Commission*, T-538/11, EU:T:2015:188, paragraph 131 and the case-law cited).
- 52 The pleas of inadmissibility raised by the Commission are therefore unfounded.
- 53 As to the substance, it is appropriate to examine the present plea after recalling the principal applicable provisions and the case-law which has interpreted them.
- 54 Pursuant to Article 1(2) of the basic regulation, 'a product is to be considered as being dumped if its export price to the European Union is less than a comparable price for a like product, in the ordinary course of trade, as established for the exporting country'. The first sentence of Article 2(12) of that regulation states that 'the dumping margin shall be the amount by which the normal value exceeds the export price'.
- 55 It follows that the determination of the normal value of a product constitutes one of the essential steps required to establish the existence of dumping (judgment of 1 October 2014, *Council v Alumina*, C-393/13 P, EU:C:2014:2245, paragraph 20; see also, to that effect, judgment of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74, paragraph 105).

- 56 The main method of determining the normal value of a product is set out in the first subparagraph of Article 2(1) of the basic regulation (judgment of 11 July 2017, *Viraj Profiles v Council*, T-67/14, not published, EU:T:2017:481, paragraph 110), which provides that ‘the 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’.
- 57 As the Court of Justice has pointed out, it is apparent from both the wording and the scheme of the first subparagraph of Article 2(1) of the basic regulation that, in the determination of the normal value, it is the price actually paid or payable in the ordinary course of trade which must, as a matter of priority, be taken into consideration in principle to establish the normal value. Under the first subparagraph of Article 2(3) of the basic regulation, that principle may be derogated from only when there are no sales of the like product in the ‘ordinary course of trade’ or when such sales are insufficient or do not permit a proper comparison. Those derogations from the method of establishing the normal value on the basis of actual prices are exhaustive in nature (see judgment of 1 October 2014, *Council v Alumina*, C-393/13 P, EU:C:2014:2245, paragraphs 20 and 21 and the case-law cited).
- 58 The Court of Justice has also specified that the purpose of the concept of ‘ordinary course of trade’ is to ensure that the normal value of a product corresponds as closely as possible to the normal price of the like product on the domestic market of the exporter. Where a sale is concluded on terms and conditions that are incompatible with commercial practice for sales of the like product on that market at the relevant time for determining whether or not dumping has occurred, that sale does not constitute an appropriate basis on which to determine the normal value of the like product on that market (judgment of 1 October 2014, *Council v Alumina*, C-393/13 P, EU:C:2014:2245, paragraph 28).
- 59 The basic regulation does not define the concept of ‘ordinary course of trade’. However, that regulation explicitly mentions, in Article 2, two cases of sales which, under certain conditions, cannot constitute such sales. In the first place, the third subparagraph of Article 2(1) of the basic regulation states that prices between parties which appear to be associated or to have concluded a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined, exceptionally, that those prices are unaffected by that relationship (see judgment of 1 October 2014, *Council v Alumina*, C-393/13 P, EU:C:2014:2245, paragraphs 22 and 23 and the case-law cited). In the second place, under the first subparagraph of Article 2(4) of that regulation, sales of the like product on the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs may be disregarded in determining normal value only if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time (judgment of 1 October 2014, *Council v Alumina*, C-393/13 P, EU:C:2014:2245, paragraph 24). The third subparagraph of Article 2(4) of that regulation states that the ‘extended period of time’ must normally be understood as meaning one year but is in no case to be less than six months, and sales below unit cost are to be considered to be made in substantial quantities within such a period when it is established that the weighted average selling price is below the weighted average unit cost, or that the volume of sales below unit cost is not less than 20% of sales being used to determine normal value.
- 60 According to the Court of Justice, the ‘ordinary course of trade’ is a concept which relates to the character of the sales themselves (see judgment of 1 October 2014, *Council v Alumina*, C-393/13 P, EU:C:2014:2245, paragraph 25 and the case-law cited).

The provisions of the contested regulation relating to the normal value

- 61 In the present case, as is apparent from recitals 25 to 31 of the contested regulation, the Commission determined the normal value as follows.

- 62 First, in accordance with Article 2(2) of the basic regulation, the Commission examined whether the applicants' total volume of domestic sales, namely in Ukraine, of the like product to independent customers was representative in comparison with their total volume of export sales to the EU, in that the total volume of such sales represented at least 5% of the total volume of export sales of the product under review to the EU. It concluded that that was the case (recital 25).
- 63 The Commission then examined whether the domestic sales of the applicants on their domestic market for each product type that is identical or comparable with the product type sold for export to the European Union were representative, namely whether the total volume of domestic sales, by product type, was at least 5% of the total volume of export sales of the identical or comparable product type to the European Union. It established that, to a large extent, the domestic sales by product type were representative during the investigation period (recital 26).
- 64 Secondly, for the product types that were sold in Ukraine in representative quantities ('the product types sold in Ukraine'), the Commission applied the OCT test (see paragraph 43 above). To that end, it calculated the proportion of profitable domestic sales to independent customers on the domestic market during the investigation period (recital 27).
- 65 For those product types sold in Ukraine where more than 80% by volume of sales on the domestic market of the product type were above cost and the weighted average sales price of that type was equal to or above the unit cost of production, normal value, by product type, was calculated as the weighted average of the actual domestic prices of all sales of the product type in question, irrespective of whether those sales were profitable or not (recital 28).
- 66 Where the volume of profitable sales of a product type represented 80% or less of the total sales volume of a product type sold in Ukraine, or where the weighted average price of that product type was below the unit cost of production, the normal value was based on the actual domestic price, which was calculated as a weighted average price of only the profitable domestic sales of that product type made during the review investigation period (recital 29).
- 67 The analysis of domestic sales showed that 35 to 55% of all domestic sales of the product types sold in Ukraine were profitable and that the weighted average sales price was higher than the cost of production. Accordingly, the normal value was calculated as a weighted average of the profitable sales only (recital 30).
- 68 Thirdly, for the product types whose sales in Ukraine constituted less than 5% of export sales to the European Union or none of which had been marketed on the Ukrainian domestic market ('the product types not sold in Ukraine'), the Commission calculated the normal value pursuant to Article 2(3) of the basic regulation, on the basis of the cost of manufacturing per product type plus an amount for SG&A costs and for profits (recital 31).

The scope of Article 2(3), (4) and (6) of the basic regulation

- 69 The applicants claim that, when calculating the normal value, the Commission wrongly took into account the SG&A costs at issue, inflating the normal value both when applying the OCT test, for the product types sold in Ukraine, and in constructing the normal value within the meaning of Article 2(3) of the basic regulation, for product types not sold in Ukraine (see paragraphs 43 to 48 above).
- 70 In order to rule on those complaints, it is necessary to determine whether the Commission was entitled to include the SG&A costs at issue in the calculation of the normal value pursuant to Article 2(3) and (4) of the basic regulation.

- 71 As was recalled in paragraphs 57 to 60 above, the basic principle governing the determination of the normal value is that that value must be based on elements relating to the ordinary course of trade.
- 72 It follows from the third subparagraph of Article 2(1) of the basic regulation that sales prices between associated parties may not, save in exceptional circumstances, be used to determine the normal value (see paragraph 59 above).
- 73 The Commission submits that that exclusion relates to a question different from the question whether, in the present case, the SG&A costs relating to sales between associated parties, such as the applicants and IPU, may be taken into account for the purposes of determining the normal value, pursuant to Article 2(3) and (4) of the basic regulation.
- 74 It should be borne in mind that, according to the case-law, the cost of production, understood as the sum of the cost of manufacturing the product in question and the SG&A costs, is taken into account by the Commission, first, in the context of the OCT test provided for in Article 2(4) of the basic regulation, in order to assess whether domestic sales are profitable and can therefore be considered to have taken place in the ordinary course of trade, and, furthermore, in the context of the construction of the normal value under Article 2(3) of that regulation, where domestic sales could not be taken into account (see, to that effect, judgment of 11 July 2017, *Viraj Profiles v Council*, T-67/14, not published, EU:T:2017:481, paragraph 163). It is also apparent from the case-law that the relevant costs in both cases must be the same in order to avoid treating exporting producers for no reason differently according to whether they sell certain product types exclusively abroad or in their own country as well (see, to that effect, judgment of 5 October 1988, *Brother Industries v Council*, 250/85, EU:C:1988:464, paragraph 19).
- 75 It follows that, in the present case, the Commission was required to use the same SG&A costs both when applying the OCT test to the product types sold in Ukraine and when constructing the normal value for product types not sold in Ukraine. That finding, which is consistent with the case-law referred to in paragraph 74 above, was, moreover, confirmed by the parties at the hearing.
- 76 In the basic regulation, the method of assessing the SG&A costs is specified in the first sentence of Article 2(6), which provides that ‘the amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product by the exporter or producer under investigation’.
- 77 In its written pleadings, the Commission submits that the first sentence of Article 2(6) of the basic regulation is applicable only to the construction of the normal value carried out in accordance with Article 2(3) of that regulation, whereas it is not relevant to the OCT test, provided for in Article 2(4) thereof.
- 78 However, it should be noted that the first sentence of Article 2(6) of the basic regulation makes no distinction according to whether the normal value at issue is assessed in accordance with Article 2(3) or another provision of that regulation. It does not restrict the application of the legal rules which it lays down to situations covered by certain specific provisions of that regulation. Consequently, the first sentence of Article 2(6) of the basic regulation does not preclude the obligation, which it lays down, to rely on data collected in the ordinary course of trade from being applied generally whenever that article refers to SG&A costs. Furthermore, since it is common ground that, as the Commission acknowledged at the hearing (see paragraph 75 above), the SG&A costs used to construct the normal value on the basis of Article 2(3) of the basic regulation are the same as those applied for the purposes of the OCT test provided for in Article 2(4) of that regulation, those costs must comply with the first sentence of Article 2(6) of that regulation and must therefore be based on data relating to sales made in the ordinary course of trade.

- 79 It is necessary to ascertain whether the Commission used such data when it applied the OCT test in the present case.
- 80 To that end, it must be borne in mind that the product types sold in Ukraine by the Interpipe Group were sold both directly and indirectly, through IPU (see paragraph 39 above). The first sentence of Article 2(6) of the basic regulation does not refer specifically to the case of transactions such as indirect sales, which take place in two stages, the first of which is internal to the single economic entity formed by that group.
- 81 In order to justify taking into account, for the calculation of the normal value, the SG&A costs incurred in the applicants' sales to IPU, which, it is not disputed, is a company related to the applicants, the Commission submits, in essence, that the normal value of the product sold to the first independent customer is calculated by taking into consideration all the costs relating to the manufacture and sale of the product, whether those costs are borne by the manufacturer or by the related party within the group.
- 82 In that regard, it is necessary to recall the meaning of the concept of a single economic entity in EU law and its consequences for the calculation of the normal value in the case of transactions such as the indirect sales in the present case.

The concept of single economic entity and its consequences

- 83 The 'single economic entity' concept was developed for the purposes of determining the normal value within the meaning of Article 2(1) of the basic regulation and the analogous provisions which preceded it. That concept is based on the need to take account of the economic reality of the relations within a group of companies (judgments of 16 February 2012, *Council and Commission v Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 55, and of 17 March 2015, *RFA International v Commission*, T-466/12, EU:T:2015:151, paragraphs 108 and 110).
- 84 According to the Court of Justice, the division of production activities and sales activities within a group made up of legally distinct companies can in no way alter the fact that those companies are a single economic entity which organises in that way activities that in other cases are carried on by what is, also from a legal point of view, a single entity (see judgment of 13 October 1993, *Matsushita Electric Industrial v Council*, C-104/90, EU:C:1993:837, paragraph 9 and the case-law cited).
- 85 As regards the prices to be taken into consideration in the case of a sale involving several companies within the same group before the product at issue is purchased by a third party, it follows from the case-law that, where a producer entrusts tasks normally falling within the responsibilities of an internal sales department to a company, responsible for the distribution of its products, which it controls financially, the use, for the purposes of determining the normal value, of the prices paid by the first independent buyer to that distribution company is warranted, given that those prices could be regarded as being those of the first sale of the product made in the ordinary course of trade, within the meaning of the first subparagraph of Article 2(1) of the basic regulation (judgment of 17 March 2015, *RFA International v Commission*, T-466/12, EU:T:2015:151, paragraph 108; see also, to that effect, judgments of 5 October 1988, *Brother Industries v Council*, 250/85, EU:C:1988:464, paragraph 15, and of 10 March 1992, *Canon v Council*, C-171/87, EU:C:1992:106, paragraphs 9 and 11). It follows that the EU institutions responsible for adopting anti-dumping duties must rely on the prices paid by the first independent buyer to related sales companies (judgment of 10 March 1992, *Matsushita Electric v Council*, C-175/87, EU:C:1992:109, paragraph 16; see also, to that effect, judgments of 5 October 1988, *TEC and Others v Council*, 260/85 and 106/86, EU:C:1988:465, paragraph 30, and of 5 October 1988, *Silver Seiko and Others v Council*, 273/85 and 107/86, EU:C:1988:466, paragraph 14).

- 86 In reaching that conclusion, which relates to prices, the Court of Justice ruled on the costs, observing that all the expenses incurred by the distribution companies controlled by the manufacturer, and likewise those incurred by the manufacturer, in marketing the products at issue on the domestic market, which would obviously be included in the selling price if the marketing was carried out by an internal sales department of the manufacturer, had to be included in the normal value (judgment of 10 March 1992, *Matsushita Electric v Council*, C-175/87, EU:C:1992:109, paragraph 15).
- 87 More generally, according to the Court of Justice, with regard to indirect sales such as those at issue in the present case, all costs which are necessarily included in the price paid by the first independent buyer must always be taken into account, in order to avoid discrimination, from the point of view of the calculation of the normal value, depending on whether a sale is made by an internal sales department of the manufacturing organisation or by a company which is legally distinct, even though economically controlled by the producer (see, to that effect, judgments of 5 October 1988, *TEC and Others v Council*, 260/85 and 106/86, EU:C:1988:465, paragraph 29, and of 10 March 1992, *Canon v Council*, C-171/87, EU:C:1992:106, paragraph 13).
- 88 In accordance with the principles set out above, it must be held that, in the present case, an indirect sale cannot be divided into its two components for the purpose of characterising the second component, which took place between IPU and an independent buyer, as ordinary course of trade, whereas the first component, which took place between one or other of the applicants and IPU, is not taken into account in calculating the normal value, on the ground that it does not constitute ordinary course of trade. It follows that it is the indirect sale which must be taken into account, as a whole, by the Commission for the purposes of that assessment.
- 89 Therefore, pursuant to both the third subparagraph of Article 2(1) of the basic regulation and the case-law referred to in paragraph 85 above, the only prices relevant to the calculation of the normal value are, as regards the indirect sales, those paid by the independent buyers. Moreover, the parties agree on that issue.
- 90 As regards the SG&A costs, in accordance with the principles set out in paragraphs 86 and 87 above and the conclusion which follows from them as set out in paragraph 88 above, the applicants are wrong to challenge the Commission's decision to rely on all the costs, including the SG&A costs at issue, which were incurred within the Interpipe Group during the two stages which make up the indirect sales.
- 91 It should be further stated that the addition of the SG&A costs relating to the two stages of an indirect sale and the taking into account only of the price charged in the second stage, for the purposes of the OCT test is consistent with the applicable provisions of the basic regulation and the abovementioned case-law and reflects the economic reality. In the present case, it may be presumed that the prices charged by IPU to independent buyers for products which it purchased from the applicants are the result of the following. First, those prices charged by IPU include the prices which IPU paid, upstream, to the applicants; those prices paid by IPU are deemed to reflect the costs of manufacturing the products, the SG&A costs incurred by the applicants when selling those products to IPU and, possibly, a profit for the applicants. Secondly, they include the SG&A costs incurred by IPU when selling those products to independent buyers, together, as the case may be, with a profit. In order to establish whether an indirect sale is profitable, the Commission must verify whether the price charged by IPU enables it to recover the price which it paid to the applicants and its SG&A costs. Since, as was pointed out above, the price paid by IPU to the applicants includes, inter alia, their SG&A costs, the Commission is required to take those costs into consideration. It should be noted that, by contrast, it cannot be presumed, and the applicants do not maintain, that the SG&A costs incurred by IPU in connection with the sale to independent buyers include the SG&A costs incurred by the applicants during the first stage of the indirect sale, between them and IPU. Therefore, if the Commission had

not included the SG&A costs at issue in its calculation, those costs would not have been taken into account in the context of the indirect sales, so that the normal value would have been established according to a method which did not reflect the economic reality.

- 92 In the light of the foregoing considerations, the first sentence of Article 2(6) of the basic regulation cannot be interpreted as precluding the Commission, in the context of the OCT test and the construction of the normal value pursuant to Article 2(3) of that regulation, from relying on SG&A costs which include those at issue in the present case.
- 93 Consequently, the applicants' complaints that the Commission, by taking the SG&A costs at issue into account in calculating the normal value, artificially increased that value, must be rejected. It is therefore necessary to examine the other complaints put forward in support of the first plea, relating to the decisions of the WTO Dispute Settlement Body, the theoretical nature of the SG&A costs at issue and the infringement of the Commission's practice.

The complaints based on the decisions of the WTO Dispute Settlement Body

- 94 The applicants submit that the WTO Appellate Body, whose reports are adopted by the WTO Dispute Settlement Body, when it interpreted the first sentence of Article 2.2.2 of the WTO Anti-Dumping Agreement, which corresponds to the first sentence of Article 2(6) of the basic regulation, stated that it was necessary to rely on actual data pertaining to production and sales in the ordinary course of trade and that sales not in the ordinary course of trade are to be excluded when calculating amounts for SG&A costs and profits.
- 95 It should be recalled that, according to the case-law, having regard to their nature and structure, the WTO agreements are not in principle among the rules in the light of which the Courts of the European Union are to review, under the first paragraph of Article 263 TFEU, the legality of measures adopted by the institutions of the European Union. However, where the European Union intended to implement a particular obligation assumed in the context of the WTO, or where the EU measure refers expressly to precise provisions of the WTO agreements, it is for the Courts of the European Union to review the legality of the EU measure in question in the light of the WTO rules (see judgment of 17 March 2015, *RFA International v Commission*, T-466/12, EU:T:2015:151, paragraph 134 and the case-law cited; see also, to that effect, judgment of 15 November 2018, *Baby Dan*, C-592/17, EU:C:2018:913, paragraphs 66 and 67).
- 96 According to recital 3 of the basic regulation, in order to ensure a proper and transparent application of the rules of the WTO Anti-Dumping Agreement, the language of that agreement should be reflected in Union legislation to the best extent possible.
- 97 The provisions of the first sentence of Article 2.2.2 of the WTO Anti-Dumping Agreement are essentially the same as those of the first sentence of Article 2(6) of the basic regulation. The same is true of (i) the provisions of Articles 2.2 and 2.2.1 of that agreement and (ii) those of Article 2(3) and (4) of that regulation.
- 98 It follows that the provisions of the basic regulation, inasmuch as they correspond to the provisions of the WTO Anti-Dumping Agreement, must be interpreted, as far as possible, in the light of the corresponding provisions of that agreement, as interpreted by the WTO Dispute Settlement Body (see, to that effect, judgments of 19 December 2013, *Transnational Company 'Kazchrome' and ENRC Marketing v Council*, C-10/12 P, not published, EU:C:2013:865, paragraph 54; of 18 October 2018, *Rotho Blaas*, C-207/17, EU:C:2018:840, paragraphs 46 to 48; and of 10 April 2019, *Jindal Saw and Jindal Saw Italia v Commission*, T-301/16, EU:T:2019:234, paragraph 134).

99 The WTO Appellate Body, in its report on the dispute ‘European Communities – Anti-dumping duties on imports of cotton-type bed linen from India’, adopted by the WTO Dispute Settlement Body on 12 March 2001 (WT/DS 141/AB/R, paragraph 82), interpreted Article 2.2.2 of the WTO Anti-Dumping Agreement as follows:

‘The first sentence of the chapeau of Article 2.2.2 refers to “actual data pertaining to production and sales in the ordinary course of trade”. Thus, the drafters of the [WTO] Anti-Dumping Agreement have made clear that sales not in the ordinary course of trade are to be excluded when calculating amounts for SG&A and profits using the method set out in the chapeau of Article 2.2.2.’

100 Similar considerations are to be found in the report of the WTO Appellate Body in the dispute ‘China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (“HP-SSST”) from the European Union’, adopted by the WTO Dispute Settlement Body on 28 October 2015 (WT/DS 460/AB/R, paragraph 5.27), and in the WTO panel report on the dispute ‘United States – Anti-Dumping Measures on certain Oil Country Tubular Goods from Korea’, adopted by the WTO Dispute Settlement Body on 18 January 2018 (WT/DS 488/R, paragraph 7.45).

101 However, in the present case, it must be held that the Commission’s taking into account of the SG&A costs at issue does not conflict with the principle arising from the decisions of the WTO Dispute Settlement Body according to which sales which do not fall within the ordinary course of trade are excluded from the calculation of the SG&A costs. As was pointed out in paragraph 88 above, it must be held that an indirect sale, as a whole, constitutes in principle ordinary course of trade. The abovementioned decisions of the WTO Dispute Settlement Body do not concern situations such as indirect sales, which are at issue in the present case.

102 Since the WTO Dispute Settlement Body has not specifically ruled on a situation such as that arising from indirect sales, it cannot be held that the Commission, by taking into account the SG&A costs at issue, infringed the first sentence of Article 2(6) of the basic regulation, read in the light of Article 2.2.2 of the WTO Anti-Dumping Agreement.

The theoretical nature of the SG&A costs at issue

103 The applicants claim that, in reality, they did not incur the SG&A cost at issue. They state that they do not dispute the principle that sales between related parties involve certain costs, but they maintain that the SG&A costs reported in their reply to the Commission’s anti-dumping questionnaire are not representative of the actual costs incurred for those transactions and that those SG&A costs should therefore have been excluded. The amounts reported by the applicants in the column of the questionnaire pertaining to the costs incurred by ‘related customers’ are theoretical and were provided only in order to comply with the Commission’s reporting requirements.

104 It should be borne in mind that, according to the first subparagraph of Article 2(5) of the basic regulation, ‘costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration’.

105 Moreover, it follows from Article 6(2) of the basic regulation that a questionnaire is prepared and sent to interested parties by the Commission’s services, for the purposes of obtaining the information necessary for the anti-dumping investigation and that those parties are required to provide those services with the information that will enable it to complete the anti-dumping investigation (judgment of 14 December 2017, *EBMA v Giant (China)*, C-61/16 P, EU:C:2017:968, paragraphs 50 and 51).

- 106 The replies of the parties to the questionnaire referred to in Article 6(2) of the basic regulation, and the subsequent on-the-spot verification visit which the Commission may carry out under Article 16 of that regulation, are essential to the operation of the anti-dumping procedure (see judgment of 30 April 2015, *VTZ and Others v Council*, T-432/12, not published, EU:T:2015:248, paragraph 29 and the case-law cited).
- 107 It also follows from Article 18(3) and (6) of the basic regulation that the information which the interested parties are required to provide to the Commission must be used by the EU institutions for the purpose of establishing the findings of the anti-dumping investigation and that those parties must not omit relevant information. Whether an item of information is necessary must be ascertained on a case-by-case basis (judgment of 14 December 2017, *EBMA v Giant (China)*, C-61/16, EU:C:2017:968, paragraph 52).
- 108 Furthermore, it is for the Commission, as the investigating authority, to establish the existence of dumping (see, to that effect, judgments of 12 October 1999, *Acme v Council*, T-48/96, EU:T:1999:251, paragraph 40, and of 30 April 2015, *VTZ and Others v Council*, T-432/12, not published, EU:T:2015:248, paragraph 29).
- 109 The verification of the material collected is intended to enable the Commission to perform its task and to ensure the accuracy of the information provided by the undertaking subject to verification which must, exhaustively and to the best of its abilities, answer the questions put by the Commission and must not omit to provide all the information and relevant explanations so as to enable the Commission to carry out the necessary cross-checking in order to verify the accuracy of the information provided and reach reasonably correct conclusions (judgment of 3 December 2019, *Yieh United Steel v Commission*, T-607/15, under appeal, EU:T:2019:831, paragraph 78).
- 110 In the present case, the applicants, by replying to the questionnaire sent to them by the Commission, provided the information relating to the SG&A costs at issue. Although they challenged the principle that those costs had to be taken into account, by relying on a change in the Commission's method as compared with the previous reviews carried out by the Commission, they did not express any doubts as to the reliability of the information which they had communicated to that institution.
- 111 Before the Court, the applicants claim that, when they filled in the Commission's questionnaire for the purpose of assessing the SG&A costs at issue, they applied to the total amount of their SG&A costs a coefficient corresponding to the proportion of turnover generated by their sales to IPU in relation to the amount of turnover generated by all their sales. In their view, in so far as, under the third subparagraph of Article 2(1) of the basic regulation, the selling prices of their products to IPU could not be used to determine the normal value, the turnover generated by those sales is also irrelevant to the determination of the SG&A costs. SG&A costs calculated according to such a method are theoretical and should have been excluded from the calculation of the normal value.
- 112 The applicants acknowledge, however, that sales between related companies entail certain SG&A costs. It should be noted that that acknowledgement on their part is not accompanied by the proposal of a method other than that resulting from the questionnaire used by the Commission to estimate the SG&A costs at issue, which the Commission was required to take into account, as is apparent from paragraph 90 above.
- 113 As regards the complaint that, by applying the method resulting from the Commission's questionnaire, the SG&A costs at issue were estimated according to a coefficient calculated on the basis of a turnover established on the basis of prices charged between related companies, such as the applicants and IPU, it must be held that Article 2(1) of the basic regulation, relied on by the applicants (see paragraph 111 above), contains no reference to the SG&A costs. It is true that the third subparagraph of that provision precludes the prices charged between related companies from being regarded as prices to be taken into account for the calculation of the normal value, which, according to the first subparagraph

of Article 2(1), ‘shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country’. However, the applicants have not shown that the exclusion provided for in respect of the prices charged between related companies entailed the exclusion of the SG&A costs incurred on sales between such companies.

- 114 Thus, the applicants’ present complaints cannot cast doubt on the principle, stemming from paragraphs 83 to 91 above, that the Commission is required to calculate the normal value by taking into account all the costs incurred during sales of the product types sold in Ukraine, including all the costs relating to the indirect sales. Consequently, those complaints must be rejected.

Infringement of the Commission’s practice

- 115 The applicants claim that the Commission, by taking into account the SG&A costs at issue for the purposes of determining the normal value, infringed its own practice.
- 116 It must be borne in mind, however, that the lawfulness of a regulation imposing anti-dumping duties must be assessed in the light of legal rules and, in particular, the provisions of the basic regulation, not on the basis of the Commission’s and the Council’s alleged previous practice in taking decisions (judgment of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler v Council*, T-351/13, not published, EU:T:2016:616, paragraph 107; see also, to that effect, judgment of 4 October 2006, *Moser Baer India v Council*, T-300/03, EU:T:2006:289, paragraph 45).
- 117 In the present case, since it has been established that the inclusion of the SG&A costs at issue in the calculation of the normal value was consistent with the basic regulation, the present complaint must be rejected as ineffective, without it being necessary to examine whether, when adopting the regulations on which the applicants rely, the institutions applied a method different from that followed in the present case.
- 118 In the light of all the foregoing considerations, it must be concluded that, by taking into account the SG&A costs at issue for the purposes of determining the normal value, the Commission did not infringe the first subparagraph of Article 2(3), the first subparagraph of Article 2(4) and the first sentence of Article 2(6) of the basic regulation, and nor did it infringe the first sentence of Article 2.2.2 of the WTO Anti-Dumping Agreement.
- 119 Accordingly, the first plea, as referred to in paragraph 33 above, must be rejected.

The second plea, alleging a manifest error of assessment in the application, to the export price, of an amount corresponding to the SG&A costs and a profit as achieved by an agent working on a commission basis

- 120 The applicants claim that the Commission committed a manifest error of assessment in its interpretation of the first to fourth sentences of Article 2(10) and Article 2(10)(i) of the basic regulation.
- 121 The applicants claim that the Commission, when calculating the export price for the purposes of the proceeding resulting in the adoption of the contested regulation, wrongly applied a downward adjustment, pursuant to Article 2(10)(i) of the basic regulation, to the prices charged by IPE for sales of the product concerned to first independent customers in the European Union (‘the adjustment at issue’). The adjustment at issue introduced a functional asymmetry between the applicants’ normal value and export price, which affected price comparability, contrary to the first to fourth sentences of Article 2(10) of that regulation. The Commission, instead of applying that adjustment, should have based its calculations on those prices, as it had done in previous reviews, in accordance with the first

Interpipe judgment, which was upheld by the Court of Justice. The arguments put forward by the Commission in the 2019 General Disclosure Document, in the contested regulation and in the letter of 2 August 2019 do not justify the adjustment at issue.

- 122 In the first place, according to the applicants, the Commission is wrong to maintain that, with the creation of IPCT (see paragraph 14 above), which was added to IPE, they had parallel channels for exporting the same products to the European Union. The Commission came to the incorrect conclusion that IPE should from then on be considered as an agent and not, like in the past, as an internal sales department of the single economic entity made up by the applicants and IPU. The Commission fails to provide any explanation to demonstrate the automaticity of the alleged link between the existence of IPCT, a related importer established in the European Union, and IPE's change of status. IPE continues to operate as before, despite the creation of IPCT, and remains the main export channel of the applicants for their sales to the European Union of the product concerned by the anti-dumping measures in question. IPCT was created to facilitate sales, primarily in Germany, of railway wheels, which do not fall within the definition of the product concerned. Moreover, neither the basic regulation nor the case-law supports the conclusion that the existence of a 'parallel' sales channel may undermine the status of a related trader as an internal sales department. The important factor with regard to the loss of such status is whether the trader achieves a large part of its turnover from the sale of products from unrelated undertakings. The applicants supply IPE with all of the product concerned that IPE sells in the European Union. That finding is not called into question by the fact, noted by the Commission, that the articles of association of IPE do not contain an exclusivity clause in favour of the applicants formally preventing IPE from obtaining supplies from other manufacturers.
- 123 Furthermore, the applicants state that IPCT was established in 2014 and that the Commission, at the time of the final review terminated in 2018, was aware of the existence of that company, but did not consider that change in factual circumstances to constitute a sufficient reason to revisit IPE's status as an internal sales department.
- 124 In the second place, the applicants, whilst accepting that IPU carried out a coordinating role as described by the Commission (see paragraph 20 above), dispute the Commission's finding that such a role is incompatible with IPE belonging to the same single economic entity as the applicants and IPU and that IPE should therefore be regarded as an agent working on a commission basis. They refer, in that regard, to the first *Interpipe* judgment.
- 125 In the third place, the applicants claim that, whilst the contracts concluded between, on the one hand, IPU and, on the other, IPE or IPCT ('the contracts at issue'), contain (i) clauses concerning complaints with regard to the non-conformity of the goods with the contract requirements and specifications, (ii) clauses concerning the responsibility of the parties in respect of quality assessment, transport damage, technical adjustments to meet the needs of final consumers and (iii) an arbitration clause, the existence of such clauses is no basis to conclude that IPE cannot be regarded as an internal sales department. Such clauses, inserted to ensure compliance with Ukrainian law, which governs those contracts, has no bearing on the economic reality that IPE is an internal sales department, and not an agent working on a commission basis.
- 126 The Commission disputes the applicants' arguments.
- 127 Before examining those arguments, it is appropriate to recall the relevant provisions and the principles established by the case-law and the history of the application to the Interpipe Group of an adjustment under Article 2(10)(i) of the basic regulation and the regulations preceding it.

- 128 Under the first sentence of Article 2(10) of the basic regulation, ‘a fair comparison shall be made between the export price and the normal value’. The third sentence of Article 2(10) of that regulation states that, ‘where the normal value and the export price as established are not on such a comparable basis, due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability’.
- 129 Article 2(10)(i) of the basic regulation provides that ‘commissions’ are one of ‘the factors for which adjustment can be made’. That provision states, in particular, that ‘an adjustment shall be made for differences in commissions paid in respect of the sales under consideration’. It specifies that ‘the term “commissions” shall be understood to include the mark-up received by a trader of the product or the like product if the functions of such a trader are similar to those of an agent working on a commission basis’.
- 130 However, it follows from the case-law that an adjustment under Article 2(10)(i) of the basic regulation cannot be made where the producer established in a third State and its related distributor responsible for exports to the European Union form a single economic entity (judgment of 26 October 2016, *PT Musim Mas v Council*, C-468/15 P, EU:C:2016:803, paragraph 39).
- 131 It has been held that the single economic entity concept, which was developed for the purposes of determining the normal value, as is apparent from paragraphs 83 and 84 above, is also applicable to the determination of the export price (see, to that effect, judgments of 16 February 2012, *Council and Commission v Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 55 and 56, and of 17 March 2015, *RFA International v Commission*, T-466/12, EU:T:2015:151, paragraphs 108 and 109).
- 132 In accordance with the principles established by the case-law referred to in paragraph 84 above, it must be noted that recognition of the existence of a single economic entity avoids costs, which are clearly included in the sale price of a product when that sale is carried out by an integrated sales department in the producer’s organisation, no longer being included where the same sales activity is carried out by a company which is legally distinct, even though economically controlled by the producer (judgment of 26 October 2016, *PT Musim Mas v Council*, C-468/15 P, EU:C:2016:803, paragraph 41).
- 133 It follows that a trader that forms a single economic entity with a producer established in a third State cannot be regarded as carrying out functions comparable to those of an agent working on a commission basis, within the meaning of Article 2(10)(i) of the basic regulation (see, to that effect, judgment of 26 October 2016, *PT Musim Mas v Council*, C-468/15 P, EU:C:2016:803, paragraph 42).
- 134 In the analysis of whether there is a single economic entity between a producer and its related trader, it is crucial to consider the economic reality of the relationship between that producer and that distributor. In view of the requirement of a conclusion reflecting the economic reality of the relationship between that producer and that distributor, the EU institutions are required to take account of all factors relevant to the determination as to whether or not that distributor carries out the functions of an integrated sales department within that producer (see, to that effect, judgment of 26 October 2016, *PT Musim Mas v Council*, C-468/15 P, EU:C:2016:803, paragraph 43 and the case-law cited).
- 135 As regards the burden of proof relating to the specific adjustments listed in Article 2(10)(a) to (k) of the basic regulation, according to the case-law, that burden must be borne by the party seeking to rely on them (see, to that effect, judgment of 26 October 2016, *PT Musim Mas v Council*, C-468/15 P, EU:C:2016:803, paragraph 83 and the case-law cited).
- 136 Thus, where the EU institutions take the view that it is appropriate to apply a downward adjustment of the export price, on the ground that a sales company affiliated to a producer carries out functions comparable to those of an agent working on a commission basis, it is the responsibility of those

institutions to adduce at the very least consistent indicia showing that that condition is fulfilled (see judgment of 26 October 2016, *PT Musim Mas v Council*, C-468/15 P, EU:C:2016:803, paragraph 84 and the case-law cited).

- 137 It follows that, where the EU institutions have adduced consistent indicia to establish that a trader affiliated to a producer carries out functions comparable to those of an agent working on a commission basis, it will be for that trader or that producer to adduce evidence that an adjustment under Article 2(10)(i) of the basic regulation is not justified (judgment of 26 October 2016, *PT Musim Mas v Council*, C-468/15 P, EU:C:2016:803, paragraph 85).

The history of the application to the Interpipe Group of an adjustment under Article 2(10)(i) of the basic regulation and the regulations which preceded it

– The adjustment applied to the Interpipe Group in Regulation No 954/2006 and the action taken following the finding in the first Interpipe judgment that that adjustment was unlawful

- 138 As was noted in paragraphs 4 and 6 above, in Regulation No 954/2006, the calculation of the anti-dumping duty applicable to the former Interpipe companies, which the applicants succeeded, included the application, to the prices charged by the Swiss company Sepco, which subsequently became IPE, of an adjustment similar to the adjustment at issue. In the first *Interpipe* judgment, the Court annulled that regulation in part, precisely because that adjustment was unlawful.
- 139 In so ruling, the Court first of all observed that the Commission had relied on three factors in order to conclude that Sepco carried out functions comparable to those of an agent working on a commission basis. First, the former Interpipe companies carried out direct sales of the product concerned in the European Union. Secondly, SPIG Interpipe, the connected sales company in Ukraine, which subsequently became IPU, intervened as a sales agent for sales of the former Interpipe companies to Sepco. Thirdly, Sepco's links with the former Interpipe companies were insufficient and did not support the conclusion that it was under those companies' control, or that there was a control common to Sepco and the former Interpipe companies (the first *Interpipe* judgment, paragraph 182).
- 140 As regards the first factor, the Court found that the direct sales in the European Union carried out by the former Interpipe companies had been destined for the new Member States during a transitional phase. Moreover, the volume of direct sales represented about 8% of those companies' total sales volume in the European Union and was thus marginal. Consequently, those companies had assumed only sales functions that were complementary to those of Sepco and for a transitional period only (the first *Interpipe* judgment, paragraph 185).
- 141 As regards the second factor, the Court observed that the Council had not explained how SPIG Interpipe's receiving a commission on the sales of the former Interpipe companies to Sepco could demonstrate that Sepco had carried out functions comparable to those of an agent working on a commission basis or prevents recognition of its status as those companies' internal sales department (the first *Interpipe* judgment, paragraph 186).
- 142 As regards the third factor, the Court observed that the evidence on file did not establish that there were insufficient connections between Sepco and one of the former Interpipe companies (the first *Interpipe* judgment, paragraph 187).
- 143 The Court concluded from this that the Council had made a manifest error of assessment in applying Article 2(10)(i) of Regulation No 384/96, as amended, in so far as it had made an adjustment on the export price charged by Sepco, in the context of transactions concerning products manufactured by one of the former Interpipe companies (the first *Interpipe* judgment, paragraph 190). As a result of an

infringement of the rights of the defence, that adjustment was considered unlawful also in so far as it had been applied to transactions involving products manufactured by the other of the former Interpipe companies (the first *Interpipe* judgment, paragraphs 209 to 211).

- 144 In recitals 12 and 13 of Implementing Regulation No 540/2012, adopted by the Council, in accordance with Article 266 TFEU, in order to give effect to the first *Interpipe* judgment, confirmed by the Court of Justice, the Council (i) noted that the General Court had found that, in comparing the normal value and the export price, the Union institutions should not have made an adjustment for commissions, in the particular case of the Interpipe Group, and (ii) stated that, consequently, the dumping margin had been re-calculated without adjusting the export price for differences in commissions.
- 145 As the Commission confirmed at the hearing, the Council did not address, in Implementing Regulation No 540/2012, the question whether factors other than those examined by the Court in the first *Interpipe* judgment could justify the application of the adjustment declared unlawful in that judgment.
- 146 Nor is it apparent from Implementing Regulation No 585/2012, by which the Council maintained the anti-dumping measures at issue (see paragraph 9 above), that such an examination was carried out. It is apparent from recitals 7, 38 and 57 of that regulation that, following the decisions of the Courts of the European Union, no adjustment should be applied to the export prices of the Interpipe Group. The same is true of Implementing Regulation No 795/2012, adopted following the interim review terminated in 2012, as is apparent from recitals 2, 27 and 28 thereof.
- 147 In Implementing Regulation 2018/1469, adopted following the final review terminated in 2018, the Commission, in recitals 4 and 5, described all the anti-dumping measures concerning the Interpipe Group. In recital 86, it stated that, when the exporting producer exported the product concerned to independent customers in the European Union through IPE, the export price was established on the basis of prices actually paid or payable for the product concerned when sold for export to the European Union, in accordance with Article 2(8) of the basic regulation. In recital 87, the Commission added that, when the exporting producers exported the product concerned to the European Union through IPCT, the export price was constructed on the basis of the price at which the imported product was first resold to independent customers in the European Union, in accordance with Article 2(9) of that regulation.
- 148 Accordingly, it was for the reasons set out in the first *Interpipe* judgment that the Commission, in Implementing Regulation 2018/1469, continued not to apply the adjustment provided for in Article 2(10)(i) of the basic regulation to the export prices of the products sold by IPE.

– *Application of the adjustment at issue*

- 149 In the interim review terminated in 2019, by contrast, the Commission, examining in more detail the issue of the relationship between the applicants and IPE, concluded that the adjustment at issue should be applied.
- 150 It follows from recitals 39 to 42 of the contested regulation that, according to the Commission, during the investigation period relating to the interim review terminated in 2019, the Interpipe Group exported to the European Union the product concerned through two different sales channels, namely IPE, the same affiliated trader, established in Switzerland, as that through which it exported its products on the date of the interim review terminated in 2012, and IPCT. The latter channel of distribution did not yet exist at the time of that interim review. Consequently, and on the basis of other material, which, in view of its confidential nature, was not set out in that regulation, but was communicated to the applicants in the letter of 2 August 2019, the Commission considered that the adjustment at issue should be applied.

- 151 It is apparent from the letter of 2 August 2019 that, according to the Commission, the adjustment at issue was justified in the light of the following four factors.
- 152 First, the Commission noted that IPE and IPCT sold the same products and offered the same services to their customers established in the European Union. Thus, IPE, which was not involved in the sales performed by IPCT, was no longer the only company responsible for distributing in the European Union products manufactured by the applicants. It added that IPCT was not only responsible for a significant share of the Interpipe Group's sales in the European Union, but that it also sold the product concerned in several Member States and even to certain buyers with which IPE was working.
- 153 Secondly, according to the Commission, IPU was an interface between, on the one hand, IPE and IPCT, and, on the other hand, the applicants, in that it collected the orders from IPE and IPCT and allocated them to one or other of the applicants, on the basis of their production capacities and production programmes.
- 154 Thirdly, the Commission found that the contracts at issue (see paragraph 125 above) established detailed procedures relating to complaints for products which did not comply with the contract specifications. Those contracts also governed the exclusive responsibilities of the seller and the buyer regarding quality assessment, transport damage and technical adjustments for the needs of end customers and provided for a detailed section on arbitration to resolve any disputes arising from the contractual arrangements between IPU, as seller, and IPE or IPCT, as buyers. The Commission added that, in most cases, IPU acted as a commissioner for the applicants and that the contracts between, on the one hand, IPU and, on the other hand, IPE or IPCT expressly mentioned the transfer of the risk from IPU to one or other of them.
- 155 Fourthly, the Commission stated that the articles of association of IPE did not contain an exclusivity clause in favour of the applicants, so that it was open to the applicants to source products from other manufacturers.

The applicants' challenging of the factors on which the adjustment at issue is based

- 156 Most of the complaints put forward by the applicants in support of the present plea have in common the fact that the Commission, by applying the adjustment at issue to them, departed from the conclusions which the institutions reached concerning the role of Sepco, now IPE, since the institutions had given effect to the first *Interpipe* judgment.
- 157 However, for the purposes of the assessment of the present plea, it is necessary merely to determine whether the Commission made a manifest error of assessment in finding that the four factors set out in paragraphs 152 to 155 above enabled the adjustment at issue to be applied. The applicants' other complaints overlap with those on which they rely in support of the second part of the third plea, alleging infringement of Article 11(9) of the basic regulation on the ground that the Commission changed methodology, without the conditions laid down for that purpose by that provision being satisfied. Those complaints will therefore be dealt with in the examination of that part of the third plea.
- 158 It should be noted that, as the Commission stated at the hearing in reply to a question from the Court, without being contradicted by the applicants, none of the four factors set out in paragraphs 152 to 155 above is connected with the three factors examined by the Court in the first *Interpipe* judgment in respect of which it had found that there had been a manifest error of assessment (see paragraphs 139 to 143 above). Consequently, the fact that, in that judgment, those three factors were not considered sufficient to justify an adjustment similar to the adjustment at issue has no bearing on the lawfulness of the latter adjustment, since the Commission relies on those four different factors in support of its decision.

- 159 As regards the absence of any exclusivity clause (see paragraph 155 above) in the articles of association of IPE in favour of the applicants, it should be recalled that, according to the case-law, the proportion of sales made by the trader of products from unrelated producers is an important factor for the purposes of determining whether that trader forms a single economic entity with the related producer. Thus, if the trader achieves a large part of its turnover from the sale of products from unrelated undertakings, that may constitute evidence that the functions of that trader are not those of an internal sales department (judgment of 25 June 2015, *PT Musim Mas v Council*, T-26/12, not published, EU:T:2015:437, paragraph 53).
- 160 In the present case, the applicants dispute the Commission's argument based on the absence of any exclusivity clause in their favour in the articles of association of IPE. They claim, without being contradicted on this point by the Commission, that, in fact, IPE has always sold only the product concerned manufactured by them.
- 161 Since the EU institutions must rely on the economic reality of the relationship between the companies concerned (see paragraphs 83 and 134 above), the absence of such an exclusivity clause is not therefore a factor which may usefully support the legality of the adjustment at issue.
- 162 As regards the content of the contracts at issue (see paragraphs 125 and 154 above), it should be borne in mind, at the outset, that, according to the case-law, the existence of written contracts between companies is a relevant factor in determining whether or not they form a single economic entity. The existence of such contracts may demonstrate that the relationship between the companies concerned is organised on the basis of normal commercial conditions (see, to that effect, judgment of 25 June 2015, *PT Musim Mas v Council*, T-26/12, not published, EU:T:2015:437, paragraph 60).
- 163 In the present case, the content of the contracts at issue as described by the Commission in its letter of 2 August 2019 and as set out in the documents produced by it in response to a measure of organisation of procedure (see paragraph 28 above) is evidence in support of its decision to apply the adjustment at issue. The presence of an arbitration clause intended to resolve contractual disputes liable to arise between the two contracting companies and the lack of solidarity between those companies, which presuppose not only the existence of two distinct legal persons, but also two economic entities with divergent interests, does not appear to be reconcilable with the existence of a single economic entity and with the classification of one of those companies as an internal sales department (see, to that effect and by analogy, judgment of 25 June 2015, *PT Musim Mas v Council*, T-26/12, not published, EU:T:2015:437, paragraphs 62 and 63).
- 164 As regards the identical nature of the activities carried out by IPE and IPCT with customers established in the European Union (see paragraph 152 above), it should be noted that the applicants have not adduced any evidence capable of calling into question the Commission's findings relating to the role of IPCT, in respect of which the Commission stated that it sold the product concerned in the European Union, in part to the same buyers as those which sourced products from IPE. The applicants merely asserted that IPCT had been created to facilitate the sale of railway wheels, which do not fall within the definition of the product concerned, mainly in Germany. Moreover, in their comments on the 2019 General Disclosure Document, the applicants acknowledged that IPCT '[sold] limited volumes of the product concerned to some EU countries'.
- 165 The Commission is justified in maintaining that, in principle, a single economic entity has a single internal sales department, with the result that the identical nature, even partial, of the sales functions within the European Union performed by IPE and IPCT is evidence capable of precluding IPE from constituting such a department.
- 166 Lastly, it should be noted that IPU's role as an interface (see paragraph 153 above) supports the Commission's finding that the role of IPCT precludes the classification of IPE as an internal sales department. As the Commission stated at the hearing in response to a question from the Court, the

fact that IPU deals with orders from both IPE and IPCT does not make it possible to rule out all possibility of competition between those two companies for the sale of the same products on the EU market. The applicants do not set out the reasons why the Interpipe Group is organised in such a way that a company which is supposed to act as an internal sales department is in competition with another company in the same group.

- 167 It follows that, with the exception of the absence of any exclusivity clause in the articles of association of IPE in favour of the applicants, the matters relied on by the Commission constitute convergent evidence capable of precluding IPE from being regarded as an internal sales department (see paragraph 137 above).
- 168 In the light of the foregoing considerations, it must be concluded that, in applying the adjustment at issue, the Commission did not commit a manifest error of assessment. Accordingly, the second plea, referred to in paragraph 34 above, must be rejected.

The third plea, alleging infringement of Article 11(9) of the basic regulation, in that the Commission changed the method for calculating the normal value and the export price

- 169 The applicants submit that, under Article 11(9) of the basic regulation, in review investigations carried out pursuant to Article 11(2) and (3) of that regulation, the Commission is required, as a general rule, to use the same methodology, in particular to determine the normal value and export price, as that which it used in the investigation which led to the imposition of the measures under review. That methodology may be changed only if the circumstances have changed. On the other hand, the Commission cannot use a new method on the sole ground that it finds it more appropriate than the previous method, provided that the latter complies with the basic regulation. In the present case, the reference method is that which was applied during the final review terminated in 2018. Furthermore, the applicants maintain that the Commission, when seeking to rely on its original investigation, contradicts its own argument that previous investigations do not constitute a point of reference.
- 170 The applicants observe that the Commission did not take account of the SG&A costs at issue during either the interim review terminated in 2012 or, following their comments (see paragraphs 13, 15 and 17 above), the final review terminated in 2018 and that, even though IPCT was established before the latter review, the export price calculated during that review was calculated without applying the adjustment at issue to the prices charged by IPE.
- 171 Thus, by the present plea, the applicants claim that the Commission infringed, in two respects, Article 11(9) of the basic regulation, in that, in the interim review terminated in 2019, it calculated the normal value (first part) and the export price (second part) using a different methodology from that which it had previously applied. They state that the changes made by the Commission to its calculations constitute a ‘methodology’ within the meaning of the abovementioned provision, and not an ‘approach’, a term used by the Commission before the Court which does not however correspond to any concept in the basic regulation.
- 172 Before examining the two parts of the present plea, it is appropriate to recall the wording of Article 11(9) of the basic regulation and the principles established by the case-law.
- 173 According to Article 11(9) of the basic regulation, in all review investigations within the meaning of that article, the Commission must, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of, inter alia, Article 2 of that regulation.

- 174 In the first place, it should be noted that the exception whereby the institutions may, in the review procedure, apply a method different from that used in the original investigation when the circumstances have changed must be interpreted strictly, for a derogation from or exception to a general rule must be interpreted narrowly (judgment of 3 December 2020, *Changmao Biochemical Engineering v Distillerie Bonollo and Others*, C-461/18 P, EU:C:2020:979, paragraph 143). The burden of proof lies with the institutions, which must prove that the circumstances have changed in order to apply, in the review investigation, a method different from that implemented during the original investigation (judgment of 19 September 2013, *Dashiqiao Sanqiang Refractory Materials v Council*, C-15/12 P, EU:C:2013:572, paragraph 18).
- 175 The requirement of a strict interpretation of the possibility, allowed exceptionally by Article 11(9) of the basic regulation, of a change of method cannot permit the institutions to continue to apply a method which does not comply with the provisions of Article 2 of that regulation (see, to that effect, judgments of 19 September 2013, *Dashiqiao Sanqiang Refractory Materials v Council*, C-15/12 P, EU:C:2013:572, paragraph 19; of 18 September 2014, *Valimar*, C-374/12, EU:C:2014:2231, paragraph 43; and of 3 December 2020, *Changmao Biochemical Engineering v Distillerie Bonollo and Others*, C-461/18 P, EU:C:2020:979, paragraph 144).
- 176 On the other hand, to warrant a change in methodology, it is not sufficient that a new method be more appropriate than the former method, on the assumption nonetheless that the former method is consistent with Article 2 of the basic regulation (see judgment of 17 March 2015, *RFA International v Commission*, T-466/12, EU:T:2015:151, paragraph 91 and the case-law cited).
- 177 In the second place, the change of circumstances referred to by the provisions of Article 11(9) of the basic regulation concerns the parameters used, in accordance with the provisions of Article 2 of that regulation, in respect of the methodology chosen, in the investigation which led to the imposition of the duty, in order to calculate the dumping margin (see, to that effect, judgment of 28 April 2015, *CHEMK and KF v Council*, T-169/12, EU:T:2015:231, paragraph 90).
- 178 In the third place, the use of the same method does not mean that the same data collected during a previous investigation or the same factual conclusions or calculations obtained from that data must be used (judgment of 7 February 2013, *Acron v Council*, T-118/10, not published, EU:T:2013:67, paragraph 115).
- 179 It is in the light of those principles that the two parts of the present plea must be examined in turn.

The first part, concerning a change by the Commission in the method of calculating the normal value

- 180 In support of the first part of the third plea, the applicants state that neither in the contested regulation nor in the letter of 2 August 2019 did the Commission refer to any change in circumstances, since the investigation relating to the final review terminated in 2018, to justify the application of a different methodology to determine whether their sales had been made in the ordinary course of trade and to establish the constructed normal value. In addition, the applicants observe that, in that letter, the Commission acknowledged that it had changed its methodology on the ground that, in the interim review terminated in 2012 and the final review terminated in 2018, the SG&A costs at issue had been mistakenly excluded and stated that the method applied from then on was consistent with Article 2(4) and (6) of the basic regulation and that the abovementioned error did not give rise to a legitimate expectation on which the applicants could rely. However, according to the applicants, those brief explanations provided by the Commission do not permit the inference that it has proved the existence of a change in circumstances, under Article 11(9) of the basic regulation, which must be interpreted strictly.

181 Nor has the Commission succeeded, according to the applicants, in proving that the exclusion of the SG&A costs at issue did not comply with Article 2 of the basic regulation. The Commission's assertion concerning the conformity of the new methodology with that article does not amount to explaining that the methodology followed in the interim review terminated in 2012 and the final review terminated in 2018 was incorrect. The applicants stress that the error which the Commission allegedly committed in the interim review terminated in 2012 – if it was really one – should have been corrected in the final review terminated in 2018. However, in the final review terminated in 2018, the Commission specifically examined, in detail, the SG&A costs at issue and finally accepted the applicants' position with regard to those costs.

182 The Commission disputes the applicants' arguments.

183 It should be borne in mind that the decision to take into account or disregard the SG&A costs at issue for the purposes of determining the normal value is not a factual matter, which the Commission could update on the basis of new data provided by the applicants, but is the result of the interpretation that the Commission chose to give to the relevant provisions of Article 2 of the basic regulation, in particular paragraphs 3, 4 and 6 thereof. Thus, the inclusion of those costs in the interim review terminated in 2019, after they had been excluded in the interim review terminated in 2012 and in the final review terminated in 2018, constitutes a change of method for the purposes of Article 11(9) of the basic regulation.

184 However, as is apparent from the examination of the first plea, the basic regulation, interpreted in the light of the relevant case-law, requires the application of the OCT test and the construction of the normal value within the meaning of Article 2(3) of that regulation on the basis of all the SG&A costs incurred during the applicants' direct and indirect sales on the Ukrainian market. As the Commission acknowledged at the hearing, the method which it applied in the interim review terminated in 2012 and the final review terminated in 2018 did not comply with Article 2 of the basic regulation, in so far as it excluded the SG&A costs at issue.

185 It follows that, in accordance with the case-law referred to in paragraph 175 above, the change in method made by the Commission is not contrary to Article 11(9) of the basic regulation.

186 In the context of this part of the plea, the applicants also put forward a complaint alleging infringement of the principle of protection of legitimate expectations, in that, when they requested that the Commission initiate (see paragraph 12 above) the interim review terminated in 2019, which led to the adoption of the contested regulation, they expected the dumping margin to be calculated using the same methodology as that used by the Commission since the interim review terminated in 2012.

187 It should be borne in mind that, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends to any person in a situation where the European Union authority has, by giving precise assurances, caused him or her to entertain expectations which are justified. The assurances given must, moreover, comply with the applicable rules (judgment of 24 March 2011, *ISD Polska and Others v Commission*, C-369/09 P, EU:C:2011:175, paragraph 123; see, also, judgment of 17 December 2010, *EWRIA and Others v Commission*, T-369/08, EU:T:2010:549, paragraph 139 and the case-law cited).

188 In the present case, even if the applicants had received from the Commission sufficiently precise assurances concerning the exclusion of the SG&A costs at issue, those assurances would have been contrary to Article 2 of the basic regulation, as is apparent from the examination of the first plea.

189 In any event, it is not apparent from the documents before the Court that such assurances were given to the applicants in the interim review terminated in 2012. As regards the assurances which allegedly resulted from the exchanges between the Commission and the applicants regarding the SG&A costs at

issue during the final review terminated in 2018, it should be noted that those exchanges began on 13 July 2018 (see paragraph 13 above). Before that date, the applicants had already requested the interim review which was terminated in 2019, which led to the adoption of the contested regulation, as is apparent from the publication on 7 May 2018 of the notice relating to the latter review (see paragraph 12 above). Thus, the applicants cannot rely on a legitimate expectation resulting from previous exchanges in the context of the final review terminated in 2018.

190 Accordingly, the applicants' complaint alleging breach of the principle of the protection of legitimate expectations is unfounded.

191 In the light of those considerations, the first part of the third plea must be rejected.

The second part, concerning a change by the Commission in the method of calculating the export price

192 By the second part of this plea, the applicants claim that the establishment of IPCT in 2014 does not represent a change in circumstances in the light of the situation prevailing during the final review terminated in 2018, which would be capable of justifying the introduction of the adjustment at issue. Thus, the Commission should have continued to apply the methodology followed in that review, unless it had been able to show that that methodology did not comply with Article 2 of the basic regulation. The applicants dispute the Commission's argument, put forward in the letter of 2 August 2019, that, since the purpose of an expiry review differs from that of an interim review, the Commission carried out a detailed analysis of the structure of the Interpipe Group during the interim review terminated in 2019, but not during the final review terminated in 2018. They also dispute the Commission's argument that the relevant question for the purposes of applying Article 11(9) of the basic regulation is whether circumstances have changed since the previous interim review. The procedural rules, other than those concerning time limits, and the scope of both expiry-review and interim-review investigations are similar, if not identical, in so far as the determination of the dumping margin is concerned, as is apparent from Article 11(5) of the basic regulation.

193 The Commission disputes the applicants' arguments.

194 As is apparent from paragraphs 143 to 148 above, after the delivery of the first *Interpipe* judgment and until the interim review terminated in 2019, the institutions, when deciding no longer to apply to the Interpipe Group the adjustment which had been declared unlawful by the Court in that judgment, did not examine the four factors, set out in paragraphs 152 to 155 above, on the basis of which the Commission made the adjustment at issue after the interim review terminated in 2019.

195 It is true that, during the final review terminated in 2018, the existence of IPCT was mentioned by the Commission. However, the Commission did not draw any conclusions therefrom as regards IPE's export prices.

196 It follows that, for the purposes of the adoption of the contested regulation, the Commission applied the adjustment at issue on the basis of factual matters which it had not previously examined or from which it had not drawn any legal conclusions.

197 It should be added that the application of an adjustment on the basis of factors which had not been examined in the past cannot be regarded as a change of method within the meaning of Article 11(9) of the basic regulation, but as a consequence of the finding that the conditions required for such an adjustment are now met (see, to that effect, judgment of 16 December 2011, *Dashiqiao Sanqiang Refractory Materials v Council*, T-423/09, EU:T:2011:764, paragraph 57).

- 198 In any event, even if the Commission had changed the method for the purposes of Article 11(9) of the basic regulation, it should be noted, in the first place, that, according to the case-law, changes in the structure of a group and in the organisation of its export sales to the European Union represent a change in circumstances within the meaning of that provision. That change in circumstances is such as to warrant the change of method used, since that change is the consequence of the emergence of a second sales channel for the group concerned and, thus, of the change which occurred in the organisation of the sales of that group (see, to that effect, judgment of 17 March 2015, *RFA International v Commission*, T-466/12, EU:T:2015:151, paragraphs 100 and 101).
- 199 The Commission's right to apply the adjustment at issue without infringing Article 11(9) of the basic regulation is not affected by the fact that the four factors on which it relied for this purpose are not all new factors, so that the Commission could have previously taken into consideration those factors which already existed. Even if it were by mistake that the Commission failed, during the previous reviews, to examine those factors or to draw the legal conclusions from them, it cannot be required to repeat the same error when adopting the contested regulation, merely in order not to infringe Article 11(9) of the basic regulation. That regulation cannot be interpreted as meaning that the Commission must continue to apply a method which does not comply with the provisions of its Article 2 (see paragraph 175 above).
- 200 In the second place, it should be noted that IPCT's role is one of the main factors justifying the adjustment at issue. It is true that that company was already active at the time of the final review terminated in 2018 and that the Commission mentioned it in Implementing Regulation 2018/1469. However, according to the case-law, for the purposes of a review of anti-dumping measures which are about to expire, carried out under Article 11(2) of the basic regulation, the institutions have only to establish whether the expiry of the measures would be likely to lead to a continuation or recurrence of dumping and injury, so that those measures would be maintained. If not, the anti-dumping measures are to be repealed. Consequently, a review of measures about to expire cannot lead to the amendment of the measures in force. On the other hand, as regards an interim review pursuant to Article 11(3) of that regulation, the Commission may, inter alia, consider whether the circumstances with regard to dumping and injury have changed significantly and it may not only repeal or maintain the anti-dumping measures, but also amend them (judgments of 11 February 2010, *Hoesch Metals and Alloys*, C-373/08, EU:C:2010:68, paragraph 76; of 18 September 2014, *Valimar*, C-374/12, EU:C:2014:2231, paragraph 52; and of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler v Council*, T-351/13, not published, EU:T:2016:616, paragraph 57).
- 201 Thus, the Commission cannot be criticised for not having examined in greater detail, during the final review terminated in 2018, IPCT's role and for not having drawn the same legal conclusions as those which it drew from it in the interim review terminated in 2019.
- 202 In the light of the foregoing considerations, the second part of the present plea must be rejected and, consequently, all the complaints put forward in the context of the second and third pleas must be rejected (see paragraphs 157 and 168 above).
- 203 The rejection of the first three pleas also entails the rejection of the applicants' complaints referred to in paragraph 36 above, since the infringements of the second subparagraph of Article 9(4) of the basic regulation and of Article 9.3 of the WTO Anti-Dumping Agreement on which they rely are based exclusively on the complaints which were rejected in the course of the examination of those pleas.

The fourth plea, alleging infringement of the rights of the defence

- 204 The applicants claim that their rights of defence were infringed on the ground that it was only in the letter of 2 August 2019, sent on the same day as publication of the contested regulation in the Official Journal, that the Commission communicated to them new arguments relating to (i) the fact that SG&A

costs would be incurred even in the event of sales to a related customer such as IPU, (ii) the admission that it committed an error in that regard during the interim review terminated in 2012 and the final review terminated in 2018, (iii) the articles of association of IPE and (iv) the contracts at issue. Those arguments are the basis of the Commission's decision, on the one hand, to include the SG&A costs at issue in the calculation of the normal value and, on the other, not to regard IPE as an internal sales department.

205 The applicants note that, for the present plea to be successful, they are not required to demonstrate that, if they had been able to submit their comments on those arguments before the adoption of the contested regulation, its content would have been different. It is sufficient that such a possibility cannot be ruled out, since the applicants would have been better able to defend themselves had there been no procedural error. According to the applicants, it is apparent from the first and second pleas that they were in a position to submit additional comments likely to call into question the validity of the Commission's choice, in the contested regulation, to apply a different method taking into account the SG&A costs at issue and applying the adjustment at issue. Accordingly, it cannot be totally ruled out that the Commission might have reached a different decision on the matters raised in those pleas if, during the administrative procedure, the applicants had received the information contained in the letter of 2 August 2019.

206 The Commission disputes the applicants' arguments.

207 Before examining the applicants' arguments relating to the alleged infringement of the rights of the defence as regards both the SG&A costs and the adjustment at issue, it is necessary to recall the basic principles relating to those rights.

208 Observance of the rights of the defence is a fundamental principle of EU law, in which the right to be heard is inherent (see judgments of 3 July 2014, *Kamino International Logistics and Datema Hellmann Worldwide Logistics*, C-129/13 and C-130/13, EU:C:2014:2041, paragraph 28 and the case-law cited, and of 12 December 2014, *Crown Equipment (Suzhou) and Crown Gabelstapler v Council*, T-643/11, EU:T:2014:1076, paragraph 38 and the case-law cited).

209 Respect for the rights of the defence, which is of crucial importance in anti-dumping investigations, presupposes that 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 dumping and the resultant injury (judgments of 27 June 1991, *Al-Jubail Fertiliser v Council*, C-49/88, EU:C:1991:276, paragraph 17; of 16 February 2012, *Council and Commission v Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 76 and 77; and of 12 December 2014, *Crown Equipment (Suzhou) and Crown Gabelstapler v Council*, T-643/11, EU:T:2014:1076, paragraph 41).

210 The existence of an irregularity in the respect of those rights can lead to the annulment of a regulation establishing an anti-dumping duty only to the extent that there is a possibility that, as a result of that irregularity, the administrative procedure might have resulted in a different result, thereby materially affecting the rights of defence of the party concerned. However, that party cannot be required to demonstrate that the Commission's decision would have been different, but simply that such a possibility cannot be totally ruled out, since that party would have been better able to defend itself if there had been no procedural error complained of (judgment of 10 April 2019, *Jindal Saw and Jindal Saw Italia v Commission*, T-301/16, EU:T:2019:234, paragraphs 66 and 67; see also, to that effect, judgment of 16 February 2012, *Council and Commission v Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 78 and 79).

211 Lastly, it should be borne in mind that the right to be heard extends to all the factual and legal material which forms the basis of the decision-making act, but not to the final position which the authority intends to adopt. Thus, that right does not require that, before taking a final position on the assessment of the evidence submitted by a party, the administration must offer that party a further opportunity to comment on that evidence (see, to that effect, judgments of 4 March 2020, *Tulliallan Burlington v EUIPO*, C-155/18 P to C-158/18 P, EU:C:2020:151, paragraph 94 and the case-law cited; of 19 May 2010, *IMI and Others v Commission*, T-18/05, EU:T:2010:202, paragraph 109; and of 9 March 2015, *Deutsche Börse v Commission*, T-175/12, not published, EU:T:2015:148, paragraph 344).

212 It is in the light of those principles that it is necessary to examine the applicants' complaints relating to the alleged infringement of the rights of the defence as regards (i) the SG&A costs and (ii) the adjustment at issue.

The complaints relating to the SG&A costs at issue

213 According to the applicants, in the 2019 General Disclosure Document, the Commission had indicated that it intended to take into account the SG&A costs at issue in the calculation of the normal value. They state that they criticised that approach of the Commission in their comments on the 2019 General Disclosure Document, maintaining that, by proceeding in that way, the Commission repeated the argument which it had already put forward in the context of the final review terminated in 2018, an argument which it had abandoned when adopting Implementing Regulation 2018/1469, following the objections which they had raised.

214 It is true that, in paragraphs 3 to 6 of the letter of 2 August 2019, the Commission stated, first, that the applicants had mentioned, in their replies to the questionnaire which it had sent to them, the existence of costs pertaining to sales between related companies within the Interpipe Group, secondly, that the sales between those companies included SG&A costs, thirdly, that the method used for the application of Article 2 of the basic regulation had to reflect all the costs borne by the undertaking concerned and, fourthly, that the SG&A costs at issue had been erroneously disregarded in the final review terminated in 2018 and in the interim review terminated in 2012, whereas it had taken them into account in the initial investigation.

215 However, those observations of the Commission which the applicants received after the adoption of the contested regulation do not contain factual or legal material of which they had not previously been aware and on which they were unable to express their views. They constitute the basis of the Commission's final position on the question of the SG&A costs at issue, so that, in accordance with the case-law referred to in paragraph 211 above, no infringement of the rights of the defence can be established in that regard.

216 Furthermore, since the applicants claim that the additional arguments which they could have raised before the Commission, had they received the material contained in the letter of 2 August 2019 earlier, are those which they have raised before the Court (see paragraph 205 above), it must be noted that all those arguments have been rejected during the examination of the other pleas put forward in the present action. Thus, it has not been shown that, if the applicants had raised those arguments during the administrative procedure, it could have had a different outcome (see, to that effect and by analogy, judgment of 30 April 2014, *Tisza Erőmű v Commission*, T-468/08, not published, EU:T:2014:235, paragraph 217).

217 These complaints must therefore be rejected.

The complaints relating to the adjustment at issue

- 218 It should be borne in mind that, in the letter of 2 August 2019, the date of which coincides with the publication in the Official Journal of the contested regulation, the Commission supplemented the statement of reasons for that regulation with information which, because of its confidential nature, could not appear in that regulation. In that letter, the Commission replied to the objections raised by the applicants in their comments on the 2019 General Disclosure Document, to which it had not replied in the additional disclosure document of 27 June 2019 (see paragraph 22 above).
- 219 The four factors, described in the letter of 2 August 2019, on which the Commission relied in order to apply the adjustment at issue (see paragraphs 151 to 155 above), had been presented to the applicants in the 2019 General Disclosure Document, in paragraphs 34 to 42. In its comments on the 2019 General Disclosure Document, the applicants addressed those four factors and adopted a position on each of them.
- 220 The applicants maintain, however, that the letter of 2 August 2019 contains additional reasons which do not appear in the 2019 General Disclosure Document. The Commission thus mentioned in that letter, for the first time, that the contracts at issue stipulated that the risk was transferred from IPU to IPE or IPCT and that the articles of association of IPE did not point to IPE working under the instructions of IPU, but foresaw that IPE could perform any financial, fiduciary or commercial transaction related to its purpose.
- 221 It should be noted that those alleged additional reasons are mere clarifications relating to the matters set out in the 2019 General Disclosure Document, which the Commission added following the applicants' comments on the latter. Those clarifications, which relate to the content of the articles of association of IPE and the contracts at issue, which were clearly known to the applicants, do not contain any new factual or legal material, but concern questions on which the applicants had expressed their views in those comments.
- 222 It must therefore be concluded that, in the letter of 2 August 2019, the Commission merely set out its final position on the adjustment at issue, adopted on the basis of material on which the applicants had had the opportunity to set out their views. Therefore, in accordance with the case-law referred to in paragraph 211 above, no infringement of the rights of the defence can be established.
- 223 Moreover, the considerations set out in paragraph 216 above also apply to the applicants' present complaints.
- 224 In the light of the foregoing considerations, the fourth plea must be rejected and, consequently, the action must be dismissed in its entirety.

Costs

- 225 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. As the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Seventh Chamber)

hereby:

- 1. Dismisses the action;**
- 2. Orders Interpipe Niko Tube LLC and Interpipe Nizhnedneprovsky Tube Rolling Plant OJSC to pay the costs.**

da Silva Passos

Truchot

Sampol Pucurull

Delivered in open court in Luxembourg on 14 July 2021.

E. Coulon
Registrar

S. Papasavvas
President

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