Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 5 December 2017 [1]

**Case C-301/16 P**

**European Commission**
**v**

**Xinyi PV Products (Anhui) Holdings Ltd**

(Appeal — Dumping — Imports of solar glass originating in China — Regulation (EC) No 1225/2009 — Third indent of Article 2(7)(c) — Market Economy Treatment (MET) — Concept of 'significant distortions carried over from the former non-market-economy system' — Tax incentives — Obligation to state reasons — Procedural irregularities)

1. The treatment in EU anti-dumping law of imports from non-market-economy countries and, more particularly, the treatment of imports from the China, are highly topical issues which are the subject of lively debate.

2. At the time of delivery of this Opinion, a dispute initiated by the People's Republic of China against the European Union concerning that issue is pending before the competent bodies of the World Trade Organisation (WTO). [2] The complaint lodged by the Chinese authorities before the WTO concerns the regime which, in EU law, currently applies to the calculation of normal value, and therefore of the dumping margin, for imports from countries designated as 'non-market-economy countries'. The complaint relates, specifically, to the provisions laid down in Article 2(7) of Regulation (EU) 2016/1036, [3] which corresponds in essence to the provisions at issue in the present case, namely those contained in Article 2(7) of Regulation No 1225/2009 [4] ('the basic regulation').

3. Furthermore, the anti-dumping regime in EU law for imports from non-market-economy countries is changing. It is only very recently that the negotiators of the European Parliament and the Council of the European Union reached agreement on a proposal submitted by the European Commission with a view to altering that regime. [5] The future legislation will introduce a new methodology for calculating dumping margins for imports from third countries which have significant market distortions or systematic State influence on the economy. [6]

1 Original language: French.

2 Procedure WT/DS516.

3 Regulation 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).

4 Council Regulation of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51). This regulation was repealed by Regulation (EU) 2016/1036.

5 Commission Proposal of 9 November 2016 for a Regulation of the European Parliament and of the Council amending Council Regulation 2016/1036 and Regulation (EU) 2016/1037 on protection against subsidised imports from countries not members of the European Community (COM(2016) 721 final).

6 See, in that regard, European Commission Press Release of 3 October 2017 (IP/17/3668) and Fact Sheet of the same date (MEMO/17/3703).

4. The present case forms part of the debate concerning the treatment in EU anti-dumping law of imports from countries designated as non-market-economy countries. More specifically, it concerns the conditions which a producer, in particular of Chinese origin, must, as the law now stands, satisfy in order to be granted market economy treatment ('MET'), in accordance with Article 2(7)(b) and (c) of the basic regulation.

5. This case involves an appeal, whereby the Commission asks the Court to set aside the judgment of the General Court of the European Union of 16 March 2016, *Xinyi PV Products (Anhui) Holdings* v *Commission*[7], whereby the General Court, upholding the action brought by Xinyi PV Products (Anhui) Holdings Ltd, a Chinese company, ('Xinyi'), annulled Implementing Regulation (EU) No 470/2014[8] ('the regulation at issue'), in so far as that regulation concerned that company. In short, the General Court held that the Commission had been wrong to refuse to grant Xinyi MET because it considered that, owing to two tax schemes provided for in the Chinese legislation from which Xinyi had benefited, its costs and its financial situation had been subject to distortion 'carried over from the former non-market-economy system'.

6. It is therefore the interpretation of the expression 'carried over from the former non-market-economy system' in the third indent of Article 2(7)(c) of the basic regulation that is at the heart of the present case and that constitutes the question in respect of which the Court is required to provide clarification.

## I. Legal context

7. In the words of Article 2(7) of the basic regulation:

'(a) In the case of imports from non-market-economy countries [including Azerbaijan, Belarus, North Korea, Tajikistan, Turkmenistan and Uzbekistan], normal value shall be determined on the basis of the price or constructed value in a market economy third country, of the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

…

(b) In anti-dumping investigations concerning imports from Kazakhstan and any non-market-economy country which is a member of the WTO at the date of the initiation of the investigation, normal value shall be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in subparagraph (c), that market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

7 T-586/14, 'the judgment under appeal', EU:T:2016:154.

8 Council Implementing Regulation of 13 May 2014 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of solar glass originating in the People's Republic of China (OJ 2014 L 142, p. 1).

(c) A claim under subparagraph (b) must … contain sufficient evidence that the producer operates under market economy conditions, that is if:

– decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

– firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

– the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market-economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

– the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

– exchange rate conversions are carried out at market rates

…'

## II. Background to the dispute and the regulation at issue

8. The background to the dispute is set out in detail in the judgment under appeal in paragraphs 1 to 18, to which I refer. For the purposes of these proceedings, I shall merely observe that on 28 February 2013 the Commission initiated an anti-dumping proceeding concerning imports of certain solar glass products originating in the People's Republic of China.[9]

9. In the course of the investigation, Xinyi — a company producing and exporting solar glass established in China, whose sole shareholder is Xinyi Solar (Hong Kong) Ltd, established in Hong Kong (China) — asked the Commission to grant it MET within the meaning of Article 2(7)(b) of the basic regulation.

10. By letter of 22 August 2013, the Commission informed Xinyi that it considered that it could not grant that request, for the sole reason that Xinyi did not satisfy the third criterion for the grant of MET laid down in Article 2(7)(c) of the basic regulation.

11. In that letter, the Commission expressed the following view:

'The MET investigation revealed that [Xinyi] benefited from various income tax breaks such as:

– The "2 Free 3 Half" programme. This tax regime allows for foreign invested companies to benefit from a two-year income tax holiday (0%) followed by three years of income tax levied at a rate of 12.5% instead of the normal tax rate, which is 25%;

– the High-Tech Enterprises tax regime. Under this scheme the company is subject to a reduced income tax rate of 15% instead of the normal 25% income tax rate. This preferential tax rate is a subsidy of a quasi-permanent open-ended character which could also serve the purpose of attracting capital at discounted rates, thereby distorting competition.

9 Notice of initiation of an anti-dumping proceeding concerning imports of solar glass originating in the People's Republic of China (OJ 2013 C 58, p. 6).

It is considered that the reduced tax rates provide significant financial benefits and the company has therefore failed to demonstrate that its costs and financial situation are not subject to distortions carried over from the former non-market-economy system …

Accordingly, the Commission proposes to reject [Xinyi's] MET request.'

12. Next, in a letter of 13 September 2013 in response to the observations submitted by Xinyi, the Commission confirmed the rejection of the latter's request for MET, and expressed the following view:

'An income tax system that treats favourably certain companies and/or economic sectors deemed strategic by the government implies that the tax system is not one of market economy but still heavily influenced by state planning and may therefore be assessed under criterion 3 [of the third indent of Article 2(7)(c) of the basic regulation]. The application of a preferential tax rate scheme changes the amount of pre-tax profits the company has to achieve in order to be attractive to investors …

In this regard, it is recalled the lower tax-rate for [Xinyi] (14.01%) was possible as [it] could combine the High Tech Enterprise tax regime with another scheme, the "2 Free 3 Half" programme. The combined effect was hence a significantly lower tax rate than that normally applied (25%) which could, inter alia, serve the purpose of attracting capital at discounted rates and thus affect the overall financial and economic situation of the company. …'

13. On 26 November 2013, the Commission adopted Regulation (EU) No 1205/2013 imposing a provisional anti-dumping duty on imports of solar glass from the People's Republic of China.[10] In that regulation, the Commission considered that, having benefited in particular from preferential tax regimes, Xinyi, had failed to demonstrate that it was not subject to significant distortions carried over from the non-market-economy country system and that, accordingly, it did not fulfil MET criterion 3.[11] The Commission thus imposed a provisional anti-dumping duty of 39.3% on imports of the product concerned manufactured by Xinyi.

14. On 13 May 2014, the Commission adopted the regulation at issue, in which it confirmed the findings set out in Regulation No 1205/2013, according to which the requests for MET, in particular that submitted by Xinyi, must be rejected.[12] In those circumstances, a definitive anti-dumping duty of 36.1% was imposed on imports of certain solar glass products manufactured by Xinyi.[13]

## III. The procedure before the General Court and the judgment under appeal

15. By application lodged at the Registry of the General Court on 7 August 2014, Xinyi sought annulment of the regulation at issue, relying on four pleas in law in support of its action.

16. In the judgment under appeal, the General Court examined only the first plea, alleging infringement of the third indent of Article 2(7)(c)) of the basic regulation, and upheld the first part of that plea.

10 OJ 2013 L 316, p. 8.

11 See recitals 34 to 47 of the Regulation No 1205/2013 and, specifically, recitals 41 and 43.

12 See recital 34 of the regulation at issue.

13 See Article 1(2) of the regulation at issue. That rate of 36.1% was subsequently replaced by a rate of 75.4% pursuant to Commission Implementing Regulation (EU) 2015/1394 of 13 August 2015 amending Regulation (EU) No 470/2014, as amended by Regulation (EU) 2015/588, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of solar glass originating in the People's Republic of China following an absorption reinvestigation pursuant to Article 12 of Regulation No 1225/2009 (OJ 2015 L 215, p. 42).

17. In that part of its plea, Xinyi had taken issue with the Commission for having vitiated the regulation at issue with illegality by considering, in particular, that the tax advantages from which Xinyi had benefited — referred to in point 11 above — constituted distortions 'carried over from the former non-market-economy system', within the meaning of the third indent of Article 2(7)(c) of the basic regulation.

18. In that regard, the General Court first of all considered that the benefits 'carried over from' a non-market-economy system, within the meaning of that provision, could not refer to any incentive at all without calling into question the practical effect and illustrative scope of the examples set out in that provision. According to the General Court, the expression 'carried over' should be interpreted as meaning that the former non-market-economy system must have caused or led to the distortions at issue. Therefore, only the incentives stemming from the former non-market-economy system are relevant for the application of that provision. [14]

19. On the basis of those premisses, the General Court held that, in this instance, it could not be held that the tax incentives at issue had been 'carried over' from a former non-market-economy system, in the sense that they resulted from it or were a consequence of it. According to the General Court, it is common knowledge that market-economy countries also give tax incentives to undertakings in the form of tax exemptions for a defined period or a reduced tax, as is apparent from this Court's case-law in relation to State aid. [15]

20. The General Court then considered that that assessment could not be called into question by the various arguments put forward by the Commission in the course of the proceedings. [16]

21. First, in paragraph 69 of the judgment under appeal, the General Court considered that the argument, put forward by the Commission, alleging a connection between the tax incentives at issue and the five-year plans implemented by China was based on an overly formal approach. In the General Court's view, the continued existence of those plans did not necessarily imply that those schemes were carried over from the former non-market-economy system in China, unless the view were taken that all the measures taken in China and connected to a plan are carried over from its former non-market-economy system, which would deprive Article 2(7)(b) and (c) of the basic regulation of any practical effect.

22. Second, in paragraphs 75 and 76 of the judgment under appeal, the General Court rejected the Commission's argument that the tax schemes at issue did not pursue legitimate objectives. First, according to the General Court, it cannot be disputed that the support of certain business sectors, such as the high-tech sector, considered strategic by a given country, constitutes a legitimate objective in a market economy, irrespective of the legality of the measures at issue with regard, in particular, to EU law on State aid. Second, the objective of attracting foreign investment is pursued by several countries with a market economy and seems inconsistent with a form of economic organisation based on collective or State ownership of enterprises subject to production objectives defined in a central plan which characterises a non-market-economy system.

23. Third, in paragraphs 77 and 78 of the judgment under appeal, the General Court rejected the Commission's argument that the tax incentives at issue had had an impact not only on costs directly connected to the objective pursued but on Xinyi's financial results and therefore on its overall economic situation. According to the General Court, such an argument could be validly adduced only

14 Paragraphs 63 and 64 of the judgment under appeal.

15 Paragraphs 65 and 66 of the judgment under appeal.

16 See paragraphs 68 to 78 of the judgment under appeal.

in respect of the extent of any distortion of production costs and Xinyi's financial situation, within the meaning of the third indent of Article 2(7)(c) of the basic regulation, but not in order to hold that such distortion is 'carried over' from the former non-market-economy system within the meaning of that provision.

24. On the basis of those considerations, the General Court concluded that the Commission had made a manifest error of assessment in refusing, on the basis of the third indent of Article 2(7)(c) of the basic regulation, to grant MET to Xinyi. It therefore annulled Article 1 of the regulation at issue in so far as it concerned Xinyi, without examining the other pleas in law which that undertaking had put forward.

## IV. Procedure before the Court and forms of order sought

25. By its appeal, the Commission asks the Court to set aside the judgment under appeal, reject as unfounded in law the first part of the first plea in the action at first instance, refer the case back to the General Court for reconsideration of the second part of the first plea and also the second, third and fourth pleas in the action at first instance and reserve the costs of both sets of proceedings.

26. Xinyi requests the Court to dismiss the appeal and order the Commission and the interveners to pay the costs.

27. By order of the President of the Court of 13 October 2016, GMB *Glasmanufaktur Brandenburg GmbH ('GMB')* was granted leave to intervene in support of the form of order sought by the Commission.

28. The Court put a number of questions to the parties, to be answered in writing. The Commission, Xinyi and GMB replied within the prescribed period and presented oral argument at the hearing on 21 June 2017.

## V. Analysis

29. In support of its appeal, the Commission puts forward three pleas in law. The first plea alleges an error of law in the interpretation of the third indent of Article 2(7)(c) of the basic regulation. By its second and third pleas, the Commission takes issue with the General Court for having failed to fulfil its obligation to state reasons and for having committed procedural irregularities.

### *A. First plea, alleging an error of law in the interpretation of the third indent of Article 2(7)(c) of the basic regulation*

#### *1. Preliminary observations*

30. By its first plea, the Commission, supported by GMB, claims that in the judgment under appeal the General Court erred in law in its interpretation of the provision laid down in the third indent of Article 2(7)(c) of the basic regulation.

31. That provision establishes the third of the five criteria that must be satisfied by a producer originating in a non-market-economy country in order to be able to benefit from MET.

32. In that regard, it should be borne in mind at the outset that, by means of Article 2(7) of the basic regulation, the EU legislature intended to adopt a special regime laying down detailed rules for the calculation of normal value for imports from non-market-economy countries. [17]

33. More specifically, according to Article 2(7)(a) of the basic regulation, in the case of imports from non-market-economy countries, in order to ensure that prices and costs which are not the normal result of market forces are not taken into consideration, normal value is not determined in accordance with the general rules laid down in paragraphs 1 to 6 of that article, but, in principle, is determined according to the 'analogue country' method, that is to say, on the basis of the price or constructed value in a market-economy third country [18] (in this instance Turkey was chosen).

34. However, under Article 2(7)(b) of the basic regulation, in anti-dumping investigations concerning imports from, in particular, China, normal value may, if certain conditions are satisfied, be determined not according to the analogue country method but on the basis of the actual prices and costs of the producer (exporter) concerned. To that end, the producer concerned must, however, submit a properly substantiated claim capable of showing, in accordance with the five criteria and the procedures set out in Article 2(7)(c), that market conditions prevail for that producer in respect of the manufacture and sale of the like product concerned. [19]

35. Under the latter provision, it is therefore for each producer wishing to benefit from those rules to produce sufficient evidence that it satisfies the five criteria laid down in that provision and may thus be considered to operate under market economy conditions. [20] Accordingly, there is no obligation on the Union institutions to prove that the producer does not satisfy the conditions laid down for the recognition of such status. [21]

36. On the contrary, it is for the Council and the Commission to assess whether the evidence supplied by the producer concerned is sufficient to show that the criteria laid down in Article 2(7)(c) of the basic regulation are satisfied in order to grant it MET and it is for the Courts of the European Union to examine whether that assessment is vitiated by a manifest error. [22]

37. In this case, the Commission refused to grant MET to Xinyi on the sole ground that, as it had benefited from the two tax regimes described in point 11 of this Opinion, it had not proved that it satisfied the criterion laid down in the third indent of Article 2(7)(c) of the basic regulation. The four remaining criteria laid down in Article 2(7)(c) of the basic regulation, on the other hand, were considered by the Commission to be satisfied.

38. Under the third indent of Article 2(7)(c) of the basic regulation, a producer originating in China can be regarded as acting under market economy conditions, and therefore be granted MET, only if it submits sufficient evidence that '[its] production costs and [its] financial situation … are not subject to significant distortions carried over from the former non-market-economy system'.

17 See judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraph 47).

18 See, to that effect, judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 66).

19 See, to that effect, judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471 paragraph 67).

20 Judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 69).

21 Judgment of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53, paragraph 32).

22 Judgments of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53 paragraph 32), and of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 70).

39. In the judgment under appeal, the General Court held that the Commission had made a manifest error of assessment in considering that the distortion resulting from the tax advantages granted to Xinyi by the Chinese authorities had been 'carried over from the former non-market-economy system'. On the other hand, the General Court did not express a view on whether the Commission had been entitled to consider that the tax advantages in question had given rise to distortion that could be described as significant.

*2. Brief summary of the parties' arguments*

40. In its first plea, which consists of five parts, the Commission disputes the General Court's interpretation in the judgment under appeal of the expression 'carried over from the former non-market-economy system' as set out in the third indent of Article 2(7)(c) of the basic regulation.

41. According to the Commission, first, contrary to the General Court's findings, first, it is sufficient to show that a measure is aimed at implementing a five-year plan in China for that measure to be considered to have been 'carried over from the former non-market-economy system' and, second, such an interpretation would not deprive the third indent of Article 2(7)(c) of the basic regulation of all practical effect. [23]

42. Second, it is not true that the support given to certain business sectors considered strategic by a country constitutes a legitimate objective in a market economy. [24] In fact, State intervention authorised in a social market economy always has as its objective the pursuit of the general interest and not picking 'winners' or promoting an economic sector declared to be 'strategic' by comparison with another sector.

43. Third, the tax regimes at issue cannot be compared with aid granted in a market economy. [25] Those schemes are not, like such aid, targeted and limited to a particular category of costs linked with an investment, nor are they limited in time.

44. Fourth, the General Court was wrong to consider that the State aid schemes found to be unlawful in the judgments cited in paragraph 66 of the judgment under appeal are comparable with the tax measures at issue.

45. Fifth, the concept of 'non market-economy country' that underlies the analysis carried out in the judgment under appeal is flawed. In particular, that concept is much wider than the one whose characteristics were noted in paragraph 76 of the judgment under appeal, corresponding to the traditional definition of a 'State-trading country'.

46. Xinyi contends, first, that the first part of this plea is based on a new claim and is therefore inadmissible. Nor has the Commission adduced any evidence with respect to the nature and the objectives of the five-year plans concerned or explained why any link between a measure and such a plan would automatically entail rejection of the requests for MET.

47. Second, the purpose of the third MET criterion is not to assess what is lawful in a market economy, but to assess what constitutes a distortion carried over from the former non-market-economy system. Xinyi provided the General Court with numerous examples of subsidies granted by market-economy countries and it is for the General Court alone to assess the value of the evidence adduced before it and made available to it. The Commission does not claim that there has been any distortion of the evidence in that regard.

23 Paragraphs 63 and 69 of the judgment under appeal.

24 See paragraphs 74 to 76 of the judgment under appeal.

25 See paragraphs 77 and 78 of the judgment under appeal.

48. Third, the Commission adduces no evidence to show that the only subsidies that exist in market economies are targeted and limited to the public funding necessary to attain the objective pursued. Moreover, the third indent of Article 2(7)(c) of the basic regulation does not concern whether a distortion is a type that would be permissible in market economies, but whether it is a type of distortion that existed in the former non-market-economy system.

49. Fourth, Xinyi maintains that the assertions made by the General Court in paragraphs 66 and 67 of the judgment under appeal concerning the tax advantages granted in market economies are findings of fact that cannot be examined in an appeal, as the Commission has neither alleged nor proved a manifest distortion of the evidence.

50. Fifth, in Xinyi's submission, the word 'former' in the third indent of Article 2(7)(c) of the basic regulation leaves no doubt whatsoever as to the fact that, in order to assess the requests for MET submitted by Chinese producers after 1 July 1998, the date of entry into force of Regulation (EC) No 905/98,[26] which introduced the possibility of obtaining such status, the Commission must examine where there are distortions carried over from the former non-market-economy system that was in force before that date, namely when the People's Republic of China was still a traditional State-trading country. The General Court was therefore correct, in paragraph 76 of the judgment under appeal, to interpret the expression 'non-market-economy system' in the third indent of Article 2(7)(c) of the basic regulation as corresponding to the definition of a 'State-trading economy'.

*3. Legal appraisal*

51. The question of the General Court's interpretation in the judgment under appeal of the expression 'carried over from the former non-market-economy system' in the third indent of Article 2(7)(c) of the basic regulation, which is central to the Commission's first plea, is purely a question of law, which is fully subject to review by the Courts of the European Union and for which the EU institutions cannot claim a margin of appreciation.[27]

52. In order to be able to interpret that expression and to be able to respond to the Commission's arguments, I consider it necessary to begin with an analysis of the underlying rationale for the introduction of MET in EU law. That analysis will make it possible to identify the characterisation of the Chinese economic system in EU anti-dumping law.

*(a) The rationale for the introduction of MET and the characterisation of the Chinese economic system in EU anti-dumping law*

53. The special treatment of imports from non-market-economy countries in the EU anti-dumping rules goes back to the 1950s.[28]

26 Council Regulation of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community (OJ 1998 L 128, p. 18).

27 See, to that effect, as regards the provision in the first indent of Article 2(7)(c) of the basic regulation, Opinion of Advocate General Kokott in *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:22, point 42).

28 In that regard, the statement of reasons and paragraphs 4 to 6 of the Commission's Communication to the Council and the European Parliament of 12 December 1997 on the treatment of former non-market economies in anti-dumping proceedings and Proposal for a Council Regulation amending Council Regulation (EC) No 384/96 (COM(97) 677 final).

54. It was only in 1979, however, that, with the adoption of Regulation (EEC) No 1681/79,[29] specific rules were introduced in EU law in order to codify the practice which had developed with regard to such imports.

55. The possibility for producers originating, in particular, in China to request MET, as provided for by the basic regulation in force at the time of the facts relevant in the present case, was introduced in EU law by Regulation No 905/98.

56. That regulation had been proposed with the express objective of introducing adjustments to the EU anti-dumping practice associated with non-market-economy country status in order to recognise the efforts undertaken by China and Russia to reform their economies.[30]

57. In that regard, as the Court has already had occasion to observe,[31] it is clear from the fourth and fifth recitals of Regulation No 905/98 that Article 2(7)(b) and (c) was inserted into the basic regulation because the process of reform in particular in China fundamentally modified its economy and led to the emergence of firms for which market economy conditions prevail, so that China moved away from the economic system which had inspired use of the analogue country method as a matter of course.

58. The Court has also observed, however, that, in so far as, in spite of that process of reform, the People's Republic of China is still not a market economy country to whose exports the general rules for determining normal value laid down Article 2(1) to (6) of the basic regulation would apply automatically, the EU legislature decided that it is, in accordance with Article 2(7)(c) of the basic regulation, for each producer wishing to benefit from those rules to produce sufficient evidence, as laid down in that provision, that it operates under market economy conditions.[32]

59. In that regard, it is apparent from the reference in the fourth and fifth recitals of Regulation No 905/98 to 'the emergence of *firms* … where market economy rules prevail' that, when it inserted the provisions contained in Article 2(7)(b) and (c) of the basic regulation, the EU legislature was perfectly aware that, in spite of the reforms introduced in China, market economy conditions did not universally prevail in the Chinese economic system. In introducing MET in EU law, however, the legislature wished to recognise[33] that, following those reforms, in certain sectors and fields, there were in China *firms* that operated in conditions specific to a market economy, that is to say, reacting to the principles of supply and demand, in an environment not distorted by State influence.

60. In such a context, as use of the analogue country method *as a matter of course* is no longer permissible for imports from China, the legislature, in introducing the abovementioned provisions, created an instrument that offered such firms, in duly substantiated cases, the possibility of relying on their own prices and costs for the purposes of determining normal value in the anti-dumping investigations concerning them.

29 Council Regulation of 1 August 1979 amending Regulation (EEC) No 459/68 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (OJ 1979 L 196, p. 1), which amended a number of provisions of Council Regulation (EEC) No 459/68 of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (OJ, English Special Edition 1968(I), p. 80). See, specifically, the sixth recital of Regulation No 1681/79.

30 In that regard, see Communication (COM(97) 677 final) and the Proposal for a regulation referred to in footnote 28 of this Opinion. See also the Proposal for a Council Regulation amending Regulation (EC) No 384/96 on the protection against dumped imports from countries not members of the European Community (COM(2000) 363 final).

31 See, to that effect, judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 68).

32 See, to that effect, judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 69).

33 Also for political reasons designed to encourage the processes of reform taking place, in particular, in China. In that regard, see paragraph 5 of the statement of reasons for Commission communication (COM(97) 677 final) and the proposal for a regulation referred to in footnote 28 of this Opinion.

61. It follows from those considerations that when it inserted the provisions concerning MET in the basic regulation the EU legislature had no intention of recognising generally that market economy conditions prevailed in the Chinese economic system, in which, outside specific sectors, State intervention, applied in particular by the adoption of mandatory five-year plans of general application, continued to be a distinctive element.

62. Furthermore, while the EU legislature wished to open the possibility for Chinese producers to be recognised as acting in market economy conditions and thus to have their normal value determined on the basis of their real prices and costs, in the system which it created, as is apparent from points 34 and 35, and also from point 58, of this Opinion, the burden of proving the existence of such conditions was nevertheless placed clearly on the producers wishing to benefit from MET.

63. Thus, in place of using the analogue country method as a matter of course, the EU legislature introduced a system that allows a case-by-case analysis of the economic circumstances of each dumping investigation. In that system, however, in the absence of evidence from the producers concerned showing that they satisfy the five conditions laid down in Article 2(7)(c) of the basic regulation and that they may thus be regarded as operating in market economy conditions, the analogue country method is applied 'by default'. The Court has also recognised that the provisions laid down in Article 2(7)(b) and (c), of the basic regulation are of an exceptional nature. [34]

64. It follows that, in the legislature's view, while the Chinese economic system is no longer that of a State-trading country, nor is it, strictly speaking, a market economy system either. [35] It is an economic system that might be defined as 'hybrid' or 'in transition', [36] in which it is considered that the distorting intervention of the State is generally still present, so that the system is treated 'by default' as not having the features of a market economy, but in which, in certain sectors and for certain firms, market economy conditions prevail. That system is therefore characterised by the coexistence of the specific elements of a non-market-economy system and, prevailing in certain sectors of the economy, the specific elements of a market economy.

*(b) The interpretation of the expression 'carried over from the former non-market-economy system'*

65. It is by reference to the foregoing considerations that the provision laying down the third condition to be satisfied by a producer in order to obtain MET, namely the third indent of Article 2(7)(c) of the basic regulation and, more specifically, the expression 'carried over from the former non-market-economy system', must be interpreted.

66. In that regard, as concerns, first of all, the expression 'carried over', the General Court, in paragraph 64 of the judgment under appeal, considered that it must be interpreted as meaning that 'the former non-market-economy system must have *caused* or *led to* the distortions' and that, accordingly, the provision at issue refers solely to an advantage which '*stems from* the former non-market-economy system'. [37]

67. Although the Commission has not expressly disputed the General Court's interpretation of the expression 'carried over' — an interpretation that might be characterised as 'causal' —, the parties have discussed at length during the proceedings another possible interpretation of that expression, which emerged following certain observations put forward by Xinyi.

34 See, to that effect, judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 93) and points 75 and 76 of the Opinion of Advocate General Kokott in the same case, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:22).

35 In that regard, see paragraph 12 of the Commission's Communication (COM(97) 677 final) referred to in footnote 28 of this Opinion.

36 This is the expression used by Advocate General Kokott in her Opinion in *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:22, points 1, 61, 63 and 68).

37 Emphasis added.

68. According to that approach, in consideration of the fact that the third indent of Article 2(7)(c) of the basic regulation refers to the '*former*' non-market-economy system and that the words used in certain language versions,[38] corresponding to the expression 'carried over' used in the English version', refer to the concept of 'heritage', it might be envisaged that the provision at issue should be interpreted as referring exclusively to 'historical' distortions. From that aspect, only distortions having their origin in measures adopted before 1 July 1998, the date on which Regulation No 905/98 entered into force, might be considered to be '*inherited*' from the former non-market-economy system. In that context, any 'new' distortions, having their origin in a measure adopted after 1 July 1998, might possibly be taken into consideration in the context of the provision set out in the first indent of Article 2(7)(c) of the basic regulation.

69. While such an approach might undoubtedly have a basis in the wording of the provision at issue as drafted in certain language versions, I find that interpretation unconvincing.

70. In that regard, I must first of all point out that, as follows from a thorough analysis carried out by the Commission, the various language versions of the provision at issue, in most of the language versions (12 versions[39]) the expressions corresponding to the English expression '*carried over*' do not in any way refer to the concept of '*heritage*', but assume the existence of a causal link between the distortion and the non-market-economy system, without any implication of a temporal connection. Only in three language versions[40] is such an indication of a temporal connection, referring to the concept of 'heritage', to be found.[41]

71. Nonetheless, according to the case-law, where there is divergence between the various language versions of a provision, it must be interpreted by reference to the purpose and general scheme of the rules of which it forms part.[42]

72. In that regard, it should observed that it does not follow from either the wording of Regulation No 905/98 or its recitals, or from the drafting history of that regulation, that when the EU legislature introduced Article 2(7)(c) of the basic regulation it intended to regard 1 July 1998 as marking a watershed after which the Chinese economic system suddenly changed its nature.

73. As I stated in points 56 and 57 of this Opinion, the rationale for the insertion of the provisions relating to MET was recognition of the results achieved by the People's Republic of China in its reforms towards a market economy. That is a process which stretched over several years, and even several decades, and which on 1 July 1998 had certainly not been completed. While, by Regulation No 905/98, the legislature recognised that the People's Republic of China had made a certain amount of progress in its transformation into a market economy in certain sectors, it did not recognise a major event that would have removed the Chinese economic system from a non-market-economy system on a specific date, or fully recognise the People's Republic of China as a market economy.

74. Furthermore, the provision set out in the first indent of Article 2(7)(c) of the basic regulation, is to my mind a different condition from that set out in the third indent. The two provisions do not cover the same situations and their scope is not distinguished solely by a temporal element.

38 See, in particular, the English version, which uses the expression 'carried over', and, more clearly still, the Spanish and Portuguese versions, which use the expressions 'heredadas'and 'herdadas', respectively.

39 In particular, the French, German, Italian, Dutch, Czech, Maltese, Romanian, Swedish, Polish, Croat, Estonian and Finnish versions.

40 The Spanish, Portuguese and Latvian versions.

41 Nine other versions (the English, Hungarian, Bulgarian, Slovakian, Slovenian, Danish, Greek, Lithuanian and Irish versions) also lend themselves equally well to a temporal reading as to a causal reading.

42 Judgment of 25 March 2010, *Helmut Müller* (C-451/08, EU:C:2010:168, paragraph 38 and the case-law cited). In that regard, see also my Opinion in *British Airways* v *Commission* (C-122/16 P, EU:C:2017:406, points 40 and 41).

75. In that regard, it should be borne in mind that, under the first indent of Article 2(7)(c) of the basic regulation, in order to be granted MET the producer concerned must produce sufficient evidence to show that its decisions regarding prices, costs and inputs are made in response to market signals reflecting supply and demand, without significant State interference in that regard and that costs of major inputs substantially reflect market values.

76. That provision thus refers to the commercial decisions of the producer concerned and to the costs of major inputs.[43] The provision contained in the third indent, on the other hand, relates to 'structural' distortions resulting from the economic system in which the producer operates. The two provisions therefore relate to different situations. That interpretation, which is based on the absence of overlap between the material scope of the two provisions, also ensures that the full effectiveness of each of those two provisions is retained.[44]

77. It follows that in my view the interpretation — which I have defined as 'causal' — of the expression 'carried over' adopted by the General Court in paragraph 64 of the judgment under appeal is correct.

78. As regards the concept of 'former non-market-economy system', I would observe that, throughout the proceedings, the parties have employed considerable efforts to present categorisations of the different economic systems which in their submission were taken into consideration in the basic regulation.[45]

79. However, as the Commission acknowledges, in the judgment under appeal the General Court did not really define the concept of 'former non-market-economy system', as set out in the third indent of Article 2(7)(c) of the basic regulation.[46] In those circumstances, I am not sure that the Court needs to adopt a position on those categorisations in order to determine the scope of the provision at issue.

80. In fact, to my mind all of the foregoing considerations make it possible to define precisely the interpretation to be given to the provision set out in the third indent of Article 2(7)(c) of the basic regulation. That provision relates to significant distortions in relation to the production costs and the financial situation of the producers concerned which are caused by — or result from — measures deriving from the non-market-economy system which, at present, is regarded in EU law as still existing 'by default' in China outside the sectors in which market economy conditions prevail.

81. It is therefore in the legal context outlined in the preceding points that the complaints put forward by the Commission in its appeal against the analysis carried out by the General Court in the judgment under appeal should be examined.

43 See judgments of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraph 73) and of 11 September 2014, *Gem-Year Industrial and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (C-602/12 P, not published, EU:C:2014:2203, paragraph 56).

44 In that regard, according to settled case-law, when a provision of Community law can be construed in different ways, the interpretation which ensures that the provisions retain their effectiveness must be favoured (see, inter alia, judgment of 14 December 2016, *Mercedes Benz Italia* (C-378/15, EU:C:2016:950, paragraph 39 and the case-law cited).

45 Thus, according to Xinyi, the basic regulation divides all the countries in the world into three categories: (i) non-market economies, or State trading countries, listed in the footnote in Article 2(7)(a) of that regulation; (ii) non-market economies in transition, including the People's Republic of China, governed by Article 2(7)(b) and (c) of the basic regulation; (iii) market economies, consisting of all countries except from those covered by Article 2(7) of that regulation. The Commission disputes that classification and considers that there are in fact four categories: (i) State trading countries; (ii) non-market-economy countries; (iii) 'special market economy' countries; and (iv) market economies.

46 The question of the definition of the concept of 'non-market-economy system' in the words of the provision at issue has its origin in the fifth part of the first plea, where the Commission disputes paragraph 76 of the judgment under appeal. On that point, see, more specifically, point 102 of this Opinion.

*(c) The legal consequences of the existence of a link between measures conferring an advantage and five-year plans adopted by the Chinese Government.*

82. In the first part of its first plea, the Commission takes issue with the General Court for having erred in law when it held, in paragraphs 63 and 69 of the judgment under appeal, that it is not sufficient for a measure to be intended to implement a five-year plan in China for it to be regarded as being 'carried over from the former non-market-economy system'. In the Commission's contention, contrary to the General Court's finding, the interpretation which it proposes would not deprive the third indent of Article 2(7)(c) of the basic regulation of any practical effect.

83. In the judgment under appeal, the General Court held, in essence, that in spite what it describes as their 'indirect' connection with five-year plans adopted by the Chinese Government, the tax incentives at issue could not be considered to have been carried over from the former non-market-economy system since it is common knowledge that market-economy countries also give comparable tax incentives to undertakings.[47] The General Court considered that the argument which the Commission bases on the five-year plans was overly formalistic, as the continued existence of those plans does not necessarily imply that those tax schemes were carried over from the former non-market-economy system in China, unless the view were taken that all the measures taken in China and connected to a plan were carried over from its former non-market-economy system, which would deprive Article 2(7)(b) and (c) of the basic regulation of any practical effect.[48]

84. First of all, in that regard, Xinyi's argument that the first part of the first plea is inadmissible, in that it is based on a new claim, must be rejected.

85. Under the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union, an appeal to the Court of Justice is to be limited to points of law and is to lie on grounds including infringement of EU law by the General Court. Court of First Instance. Furthermore, Article 170 of the Rules of Procedure of the Court of Justice provides that the subject matter of the proceedings before the General Court may not be changed in the appeal.

86. However, it must be stated that, in paragraph 69 of the judgment under appeal, the General Court expressly rejected the argument which the Commission based on the connection between the tax incentives at issue and the five-year plans implemented in China. The General Court expressly precluded the possibility that there was a relationship of necessity between the existence of a connection between a measure and those plans and also fact that such a measure was 'carried over' from the former non-market-economy system. It is precisely that reasoning that is targeted by the first part of the Commission's first plea. In those circumstances, Xinyi cannot properly claim that that part is based on a new claim which was not part of the subject matter of the dispute before the General Court.

87. As regards the substance, it should be observed that, as the General Court itself stated in paragraph 76 *in fine* of the judgment under appeal, the use of centralised multi-year plans for the organisation of the economy is the distinguishing characteristic of any non-market-economy system.

88. It is common ground that in China, in spite of the reforms referred to in points 57 and 58 of this Opinion that led the legislature to introduce MET, the Chinese Government continues to adopt five-year plans designed to lay down guidance for economic development for the entire country.

47 Paragraphs 65 and 66 of the judgment under appeal.

48 Paragraph 69 of the judgment under appeal.

89. Although those five-year plans have changed over time and no longer lay down defined production targets, it is not disputed that those plans still play a fundamental role in the organisation of the Chinese economy.

90. It is apparent from the written pleadings submitted by the Commission and by GMB, and also from their oral submissions at the hearing, that those five-year plans operate at all levels of the Chinese economy and cover a wide range (if not all) of the sectors of the economy. Those plans are not confined to merely setting out the Chinese Government's vision with regard to the national economic development, but contain precise objectives and are, in principle, binding on all levels of the Chinese Government. Those plans are supplemented by specific policy instruments used to steer economic operators towards the objectives pre-established at central level.

91. Xinyi has not disputed the characterisation of the five-year plans resulting from the assertions of the Commission and GMB, but has merely asserted that the Commission has not adduced proof of the nature of the present five-year plans.

92. In a regulatory system such as that put in place by the EU legislature for the grant of MET, in which an economic system in transition, such as the Chinese system, is considered 'by default' not to have the nature of a market economy, when a measure is adopted in order to implement five-year plans, such as those characterised in the preceding points, and contributes to the pursuit of the policies and objectives pre-established at central level, it may in my view be presumed, in the absence of proof to the contrary, that the distortions resulting from such measures are 'carried over from the former non-market-economy system'.

93. In fact, while in an economic system in transition certain elements specific to a market economy may co-exist with the elements specific to a non-market-economy system, the fact nonetheless remains that the adoption of plans such as those described in points 88 to 90 of this Opinion continues to be the characteristic element of any non-market-economy system. In those circumstances, the mere fact that a measure is adopted in order to implement such a plan is sufficient to substantiate the presumption that it is 'carried over from the former non-market economy', that is to say, as is clear from point 80 of this Opinion, carried over from the non-market-economy system which has remained in place in China, outside the sectors in which, following the reforms undertaken by the Chinese Government, market-economy conditions prevail.

94. Furthermore, as is apparent from the case-law referred to in points 34 to 36 of this Opinion, in the system created by the EU legislature it is for the producer interested in benefiting from MET and not for the institutions to prove that, in spite of the fact that he benefits from advantages stemming from the element characterising any non-market-economy system, namely the five-year plan, those advantages are not capable of altering the market-economy conditions that should prevail for him.

95. The fact, regarded as decisive by the General Court in the judgment under appeal, that measures analogous to those adopted in order to implement the five-year plan may also be applied in market economies, even on the assumption that it is correct in this case, does not in my view suffice in itself to preclude the possibility that distortions resulting from the measures adopted in order to implement a five-year plan may be carried over from the former non-market-economy system.

96. In fact, it is not possible to consider measures taken in order to implement a five-year plan in isolation and to disregard the broader context in which they were adopted. It is clear that more or less similar measures adopted in market economies will never be adopted in the context of plans such as those adopted by the Chinese Government, and which are wholly alien to a market-economy system.

97. The error which may be attributed to the General Court is, to my mind, a failure to take account of the context — the five-year plan — in which the measures entailing distortions were adopted. It is possible that the binding economic objectives the achievement of which is fixed centrally by the Chinese Government might be attained by means of different measures, some of which may be more or less similar to measures adopted in market economies. That, however, does not alter the fact that those similar measures are adopted in a context — that of the five-year plan — which is fundamentally different from the context of a market economy.

98. For that reason, I have serious doubts as to the relevance of the examples from the EU case-law on State aid mentioned by the General Court in paragraph 66 of the judgment under appeal, the relevance of which is disputed by the Commission in the fourth part of the first plea. In fact, the economic and legal context of EU law in which such aid measures are adopted and evaluated is *fundamentally* different from the economic and legal context in China.

99. The same reasoning applies to the arguments put forward by the Commission in the second and third parts of its first plea. In the light of the fundamentally different context, the State interventions and the aid granted in the context of a social market economy are not comparable with interventions or schemes deriving from five-year plans such as those described in points 88 to 90 of this Opinion.

100. Furthermore, contrary to the General Court's assertion in paragraph 69 of the judgment under appeal, the interpretation to the effect that the existence of a connection between a measure and the five-year plan gives rise to a presumption that the distortions resulting from the measure are carried over from the former non-market-economy system is not capable of depriving the provision contained in the third indent of Article 2(7)(c) of the basic regulation of any practical effect.

101. First, the producer concerned who wishes to benefit from MET still has the possibility of rebutting the presumption by proving that, although the measure conferring the advantages on him was adopted in the context of the five-year plan or its implementation, it does not cause a distortion incompatible with a market economy. Second, even if the distortion is carried over from the former non-market-economy system, in order for the condition laid down in the third indent of Article 2(7) of the basic regulation not to be satisfied, the distortion must also be significant. Thus, distortions which are not significant cannot preclude the grant of MET, even if they result from a five-year plan and it is therefore presumed that they are carried over from the former non-market-economy system. Third, State measures which confer advantages, by establishing, for example, favourable tax schemes, but which have no connection with a five-year plan do not come within the scope of the provision at issue and therefore do not constitute a barrier to the grant of MET to the producers who seek to benefit from it.

102. Furthermore, the argument put forward by the General Court in paragraph 76 of the judgment under appeal, that, in essence, policies designed to attract foreign investment are, at least in theory, inconsistent with a form of economic organisation based on collective ownership of enterprises subject to production objectives defined in a central plan, cannot undermine the preceding analysis. Irrespective of the semantic and taxonomic points made by the Commission to Xinyi regarding the question whether the characteristics put forward by the General Court relate more to a State-trading economic system than a planned economic system, as clear from point 64 of this Opinion, there is no doubt that the Chinese economic system is a system in transition. It follows that, in such a context, the fact, on the assumption that it is correct, that certain measures are theoretically or generally inconsistent with a planned economy or a State-trading economic system cannot have the necessary consequence that they are not carried over from the non-market-economy system — as understood in 80 of this Opinion — which has continued to exist in China.

*(d) Application to the present case*

103. In the present case, it is not disputed that the tax measures at issue were adopted in the context of the implementation of five-year plans adopted by the Chinese Government.[49] Furthermore, the General Court itself acknowledges that situation in paragraph 69 of the judgment under appeal, although it describes as 'indirect' the connection between the measures at issue and the plans implemented in China. Nor does Xinyi dispute that situation.

104. Consequently, as the tax measures at issue have a connection with the element characteristic of non-market economies, namely the five-year plan which continues to be a fundamental element in the Chinese economic organisation, the Commission was entitled to presume that they were 'carried over from the former non-market economy'.

105. In those circumstances, the General Court in my view made an error of law when it held that, in spite of the fact that the tax measures at issue were adopted in the context of the implementation of five-year plans adopted by the Chinese Government, the Commission had made a manifest error of assessment by refusing to grant MET to Xinyi on the ground that the distortions resulting from those measures were not 'carried over from the former non-market-economy system'.

*(e) Conclusion*

106. In the light of all of the foregoing considerations, I propose that the Court should uphold the Commission's first plea and set aside the judgment of the General Court.

107. It is therefore in the alternative, in case the Court should not follow my proposal, that I shall also analyse the second and third pleas put forward by the Commission against the judgment under appeal.

## *B. Second plea, alleging breach of the obligation to state reasons*

*1. Brief summary of the parties' arguments*

108. By its second plea, the Commission takes issue with the General Court for having breached the obligation to state reasons. This plea contains, in essence, two parts.

109. In the first part, the Commission alleges failure to state reasons with regard to certain assertions made in the judgment under appeal. The Commission refers, first, to paragraph 66 of that judgment, where the General Court stated — without providing reasons, in the Commission's submission — that 'it is common knowledge that market-economy countries also give tax incentives to undertakings in the form of tax emptions'. Nor does the General Court explain why the State aid schemes referred to in the same paragraph of the judgment under appeal are comparable with the measures at issue.

110. Second, the Commission alleges failure to state reasons when, in paragraph 75 of the judgment under appeal, the General Court states that 'it cannot be disputed that the support of certain business sectors, such as the high-tech sector, considered strategic by a given country, constitutes a legitimate objective in a market economy'.

49 More specifically, as regards the '2 Free 3 Half' programme, that programme was devised in order to favour the industrial policies resulting from the five-year plans of the People's Republic of China, as expressly stated in 'Decision No 40 of the Council for State Affairs promulgating and implementing the "temporary provisions concerning the maintenance and adaptation of the industrial structures"'. The tax arrangements for high technology undertakings was adopted in order to implement the 12th Five Year Plan 2011-2015, which considers photovoltaic solar energy to be an 'emerging strategic sector' for the purposes of that plan (see Chapter 10 of the 12th Five-year Plan 2011-2015).

111. Third, the Commission claims that the General Court also failed to explain, in paragraph 69 of the judgment under appeal, how the Commission's view that all the measures taken in China and connected to a plan are carried over from its former non-market-economy system would deprive Article 2(7)(b) and (c) of the basic regulation of any practical effect.

112. In the second part, the Commission maintains that the judgment under appeal is vitiated by contradictory reasoning. On the one hand, the General Court acknowledges, in paragraph 76 of the judgment under appeal, that a centralised plan characterises a non-market-economy system, but, on the other hand, in paragraphs 63 and 69 of the judgment under appeal, it asserts that such a plan is irrelevant when it is necessary to evaluate whether a measure is or is not carried over from a former non-market-economy system.

113. Xinyi contends that the argument directed against paragraphs 66 and 75 of the judgment under appeal is inadmissible in so far as it does not relate to a failure to state reasons, but to the absence of evidence in support of the matters of common knowledge or the indisputable facts to which the General Court refers in those paragraphs. Next, it contests the substance of both the first part and the second part of the second plea.

*2. Analysis*

114. It should be borne in mind, as a preliminary point, that, according to the case-law, the statement of reasons on which a judgment is based that is required by Article 296 TFEU must clearly and unequivocally disclose the reasoning of the General Court, in such a way that the persons concerned can ascertain the reasons for the decision taken and the Court of Justice can exercise its power of review.[50] Thus, the obligation to state reasons borne by the General Court under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union is satisfied where, even though it is implicit, the reasoning applied enables the persons concerned to know why the General Court has not upheld their arguments and provides the Court of Justice with sufficient material for it to exercise its power of review.[51]

115. As regards the first part of the second plea, I consider, first of all, that the plea of inadmissibility put forward by Xinyi must be rejected. An analysis of the arguments which the Commission directs against paragraphs 66 and 75 of the judgment under appeal shows that those arguments do not seek to criticise the General Court for having failed to prove to the requisite legal standard the facts which the General Court describes in the judgment under appeal as 'common knowledge' or which it claims are not disputed. On the contrary, those arguments are clearly directed against the General Court's reasoning in the strict sense, which in the Commission's contention is flawed.

116. As regards the substance, first, I do not believe that the complaints directed against paragraph 66 of the judgment under appeal can succeed. It is clear from that paragraph that, in the General Court's view, the reasoning underlying the assertion that it is 'common knowledge' that market-economy countries also give tax incentives to undertakings in the form of tax emptions is to be found in the reference, in the same paragraph, to the judgments of the Court of Justice on State aid. Those judgments all elate to tax schemes granted by the Member States which the General Court clearly implicitly considered to be comparable to the schemes at issue.

117. Irrespective of whether that position is well founded, which I called into question in point 98 of this Opinion, to my mind there is no doubt that the interested parties and the Court are perfectly capable of understanding the underlying reasoning of the General Court.

50 See judgment of 26 January 2017, *Maxcom* v *City Cycle Industries* (C-248/15 P, C-254/15 P and C-260/15 P, EU:C:2017:62, paragraph 87).

51 See, in particular, to that effect, judgment of 10 April 2014, *Areva and Others* v *Commission* (C-247/11 P and C-253/11 P, EU:C:2014:257, paragraphs 54 and 55).

118. A comparable analysis may in my view be applied, second, to the General Court's reasoning in paragraph 75 of the judgment under appeal, although here an understanding of the General Court's reasoning, which is indeed rather succinct, requires a greater deductive exercise.

119. Nonetheless, when read in the light of paragraphs 66, 67, 74 and 76 of the judgment under appeal, it is possible to understand that, in inferring the well-known ('indisputable') nature of its assertions concerning the lawfulness, in market economies, of the objective of maintaining certain sectors that are considered to be strategic, the General Court is relying on the existence, in such economies, of measures aimed at that objective, independently of the lawfulness of the measures at issue under EU law, in the present case of State aid.

120. Here too, independently of whether that analysis is well founded or whether the supporting evidence adduced is sufficient, I consider that, with a certain deductive effort, it is possible to understand the General Court's underlying reasoning. The complaint relating to the reasoning in paragraph 75 of the judgment under appeal must therefore in my view also be rejected.

121. Likewise, I consider, third, that the complaint relating to the reasoning in paragraph 69 of the judgment under appeal must also be rejected, irrespective of whether the analysis set out in that paragraph is well founded.

122. In fact, on reading paragraph 69 of that judgment, it is possible to understand clearly that the General Court considered that, if the Commission's position were upheld, the provision set out in the third indent of Article 2(7)(c) of the basic regulation would be deprived of all meaning, since all producers benefiting from an incentive granted by the Chinese authorities and originating in a five-year plan would always be denied MET. I disputed the merits of that analysis in points 100 and 101 of this Opinion. However, that does not alter the fact that the General Court's reasoning, which in my view is flawed, is comprehensible.

123. As regards the second part of the second plea, the Commission maintains that there is a contradiction between paragraph 69 and paragraph 76 of the judgment under appeal.

124. In essence, the General Court's reasoning in those paragraphs is as follows: in paragraph 76, the General Court considers that the presence of a centralised plan characterises any non-market-economy system; in paragraph 69, however, read in the light of paragraphs 66 and 67 of the judgment under appeal, the General Court considers that any measure connected to a plan is not necessarily 'carried over from the former non-market-economy system'. According to the General Court, measures comparable to those adopted in market economies, even if they are connected with a plan, cannot be considered to have been carried over from the former non-market-economy system.

125. As is clear from points 87 to 97 of this Opinion, I do not share the General Court's approach. However, from the viewpoint of the General Court, which, I repeat, I consider to be substantively flawed, there is no contradiction in the reasoning between the assertions in paragraph 76 and those in paragraphs 66, 67 and 69 of the judgment under appeal.

126. It follows that, to my mind, both the first part and the second part of the second plea must be rejected. Accordingly, the second plea in its entirety must be rejected.

### *C. Third plea, alleging procedural irregularities*

127. By its third plea, which relates to paragraphs 66, 67 and 76 of the judgment under appeal, the Commission maintains that the General Court committed procedural irregularities that constitute a ground for setting aside the judgment under appeal. This plea consists of three parts.

*1. The first and second parts, concerning the judgments of the Court of Justice referred to in paragraph 66 of the judgment under appeal*

128. By the first part, the Commission claims that the General Court introduced a new substantive argument which had not been put forward by Xinyi into the proceedings and relied on that argument in order to annul the regulation at issue. The Commission contends, in fact, that Xinyi never put forward the argument based on the case-law on State aid cited in paragraph 66 of the judgment under appeal. More specifically, Xinyi never maintained that State aid considered to be unlawful was of any relevance for the purpose of establishing whether the measures at issue are or are not carried forward from a former non-market-economy system. In the Commission's submission, Xinyi's argument was based solely on authorised aid.

129. It follows, according to the Commission, that the General Court rules on a matter on which it had no jurisdiction (*ultra vires*), breached the principle that the subject matter of an action is defined by the parties and infringed Article 21 of the Statute of the Court of Justice of the European Union and Articles 44(1) and 48(2) of the Rules of Procedure of the General Court, as they were in force at the time of the introduction of the case at first instance

130. In the second part of the third plea, the Commission takes issue with the General Court for not having heard its views on the alleged comparability between the measures at issue and the State aid forming the subject matter of the judgments cited in paragraph 66 of the judgment under appeal. By proceeding without hearing the Commission's views on that new factual element, the General Court breached the Commission's rights of defence and its right to be heard.

131. Xinyi disputes the Commission's arguments.

132. As regards the first part of the third plea, it should first of all be borne in mind that it follows from the rules governing the procedure before the Courts of the European Union, in particular Article 21 of the Statute of the Court of Justice of the European Union and Article 44(1) of the Rules of Procedure of the General Court in force at the time when the case at first instance was brought,[52] that the dispute is in principle determined and circumscribed by the parties and that the Courts of the European Union may not rule *ultra petita*.[53]

133. As the Court has made clear, while certain pleas may, and indeed must, be raised by the courts of their own motion, such as the question whether a statement of reasons for the decision annulment of which is sought is lacking or is inadequate, which falls within the scope of essential procedural requirements, a plea going to the substantive legality of that decision, which falls within the scope of infringement of the Treaties or of any rule of law relating to their application, within the meaning of Article 263 TFEU, can, by contrast, be examined by the Courts of the European Union only if it is raised by the applicant.[54]

134. In those circumstances, it is necessary to ascertain whether, in relying, for the purpose of annulling the regulation at issue, on the judgments of the Court of Justice cited in paragraph 66 of the judgment under appeal, the General Court ruled *ultra petita*.

52 Now Article 76(1) of the Rules of Procedure of the General Court currently in force.

53 Judgment of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraph 27). For a more extensive survey of the *ne ultra petita* principle, see my Opinion in *British Airways* v *Commission* (C-122/16 P, EU:C:2017:406 point 82 et seq.).

54 Judgment of 10 December 2013, *Commission* v *Ireland and Others* (C-272/12 P, EU:C:2013:812, paragraph 28). See, in that regard, my Opinion in *British Airways* v *Commission* (C-122/16 P, EU:C:2017:406, specifically points 91 and 92).

135. In that regard, it should be observed that the first plea put forward by Xinyi before the General Court alleged infringement of the third indent of Article 2(7)(c) of the basic regulation. As is apparent from paragraph 49 of the judgment under appeal, in the first part of that plea, Xinyi relied for the substance of its argument on the Commission's practice in State aid matters. Its reliance on that practice was intended to demonstrate its argument, upheld by the General Court, that market-economy countries, including the Member States of the Union, adopt tax schemes analogous to those at issue.

136. It must be stated that reliance on the Commission's practice in State aid matters, as apparent both from its decisions and from the Court's case-law, was indeed part of the arguments put forward by Xinyi in the context of its plea.

137. In those circumstances, the Commission cannot validly maintain that the General Court went beyond the limits of the subject matter of the dispute in basing its reasoning on examples taken from the judgments of the Court of Justice in State aid matters.

138. Nor can the Commission claim that there has been a breach of its rights of defence, and the right to be heard, solely because the General Court did not hear its views on the specific judgments concerning the Commission's practice in State aid matters which the General Court cited in the judgment under appeal, when that practice was the subject of discussion between the parties in their written pleadings. In that regard, it should also be pointed out that Xinyi asserts, and the Commission has not disputed, that at the hearing before the General Court the parties discussed at length the relevance from a factual viewpoint of the Commission's practice and the case-law of the Court of Justice on fiscal aid.

139. In the light of those considerations, I consider that the first and second parts of the third plea must be rejected.

*2. Third part, concerning the failure to respond to the arguments put forward by the Commission*

140. The third part of the third plea relates to paragraph 76 of the judgment under appeal and what the Commission maintains is the incorrect concept of 'planned economy' applied by the General Court in that paragraph.

141. The Commission takes issue with the General Court for having disregarded arguments which it put forward with respect to that concept and for having merely adopted the concept proposed by Xinyi. It maintains that, in doing so, the General Court failed to respond to an argument submitted by the Commission, which constitutes a procedural irregularity that should lead to the judgment under appeal being set aside. To that end, the Commission refers to paragraph 112 of the judgment of 24 October 2013, *Land Burgenland and Others* v *Commission* (C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682).

142. Xinyi disputes the Commission's arguments.

143. In that regard, it should be borne in mind that, according to the settled case-law of the Court of Justice, the duty incumbent upon the General Court under Article 36 and the first paragraph of Article 53 of the Statute of the Court of Justice of the European Union to state reasons for its judgments does not require the General Court to provide an account that follows exhaustively and one by one all the arguments articulated by the parties to the case. [55]

55 See, inter alia, judgment of 26 July 2017, *Continental Reifen Deutschland* v *Compagnie générale des établissements Michelin* (C-84/16 P, not published, EU:C:2017:596, paragraph 83).

144. The General Court may therefore implicitly reject certain arguments put forward, in particular by the defendant, in order to rebut arguments put forward by the applicant.

145. It follows that, in the reasoning set out in paragraph 76 of the judgment under appeal, the General Court was fully entitled to reject implicitly certain arguments put forward by the Commission without committing procedural irregularities.

146. The judgment of 24 October 2013, *Land Burgenland and Others* v *Commission* (C-214/12 P, C-215/12 P and C-223/12 P, EU:C:2013:682) on which the Commission relies, concerned a situation quite different from that at issue in the present case. In that judgment, the Court of Justice held that the General Court had failed to respond to an argument put forward by the applicant and stated unequivocally in the action at first instance.

147. In light of all of the foregoing, in my view the third part of the third plea must also be rejected. Consequently, the third plea must be rejected in its entirety.

## VI. The action before the General Court

148. According to the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the latter may, where the decision of the General Court has been annulled, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court for judgment.

149. In the present case, I consider that the Court is in a position to give final judgment on the first part of the first plea in law put forward by Xinyi before the General Court.

150. In fact, as is apparent from points 103 and 104 of this Opinion, the measures introducing the tax schemes at issue, referred to in point 11 of this Opinion, from which Xinyi benefited, were adopted by the Chinese Government in the context of the implementation of various five-year plans.

151. In those circumstances, the Commission was entitled to presume that the distortions resulting from such measures were 'carried over from the former non-market-economy system' within the meaning of the third indent of Article 2(7)(c) of the basic regulation.

152. In those circumstances, the first part of Xinyi's first plea must be rejected.

153. On the other hand, the General Court did not examine the second part of the first plea, or the second, third and fourth pleas put forward by Xinyi.

154. As the state of the proceedings does not permit the Court to give final judgment, as regards that part and those pleas, I therefore consider that the present case should be referred back to the General Court so that it can examine that part and those pleas and the arguments developed in support of them.

155. In those circumstances, the costs must also be reserved.

## VII. Conclusion

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

(1) set aside the judgment of the General Court of the European Union of 16 March 2016, *Xinyi PV Products (Anhui) Holdings* v *Commission* (T-586/14, EU:T:2016:154);

(2) reject the first part of the first plea in law in the action brought by Xinyi PV Products (Anhui) Holdings Ltd before the General Court of the European Union;

(3) refer the case back to the General Court of the European Union for the remainder;

(4) reserve the costs.