



Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

2 December 2021 *

(Appeal – Dumping – Imports of solar glass originating in China – Regulation (EC) No 1225/2009 – Article 2(7)(b) and (c) – ‘Undertaking operating under market economy conditions’ status – Denied – Concept of ‘significant distortions carried over from the former non-market economy system’, within the meaning of the third indent of Article 2(7)(c) – Tax incentives)

In Joined Cases C-884/19 P and C-888/19 P,

TWO APPEALS under Article 56 of the Statute of the Court of Justice of the European Union, brought on 3 and 4 December 2019, respectively,

European Commission, represented initially by L. Flynn and T. Maxian Rusche and by A. Demeneix, and subsequently by L. Flynn and T. Maxian Rusche, acting as Agents,

applicant,

the other parties to the proceedings being:

Xinyi PV Products (Anhui) Holdings Ltd, established in Anhui (China), represented by Y. Melin and B. Vigneron, lawyers,

applicant at first instance,

GMB Glasmanufaktur Brandenburg GmbH, established in Tschernitz (Germany), represented by R. MacLean, solicitor,

intervener at first instance (C-884/19 P),

and

GMB Glasmanufaktur Brandenburg GmbH, established in Tschernitz (Germany), represented by R. MacLean, solicitor,

applicant,

the other parties to the proceedings being:

* Language of the case: English.

Xinyi PV Products (Anhui) Holdings Ltd, established in Anhui (China), represented by Y. Melin and B. Vigneron, lawyers,

applicant at first instance,

European Commission, represented initially by L. Flynn and T. Maxian Rusche and by A. Demeneix, and subsequently by L. Flynn and T. Maxian Rusche, acting as Agents,

defendant at first instance (C-888/19),

THE COURT (Fourth Chamber),

composed of K. Jürimäe (Rapporteur), President of the Third Chamber, acting as President of the Fourth Chamber, S. Rodin and N. Piçarra, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 8 July 2021,

gives the following

Judgment

- 1 By their respective appeals, the European Commission and GMB Glasmanufaktur Brandenburg GmbH ('GMB') seek to have set aside the judgment of the General Court of the European Union of 24 September 2019, *Xinyi PV Products (Anhui) Holdings v Commission* (T-586/14 RENV, 'the judgment under appeal', EU:T:2019:668), by which the General Court annulled Commission Implementing Regulation (EU) No 470/2014 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; 'the contested regulation').

Legal context

The Anti-Dumping Agreement

- 2 By Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1), the Council of the European Union approved the Agreement establishing the World Trade Organization (WTO), signed in Marrakesh on 15 April 1994, and also the agreements in Annexes 1 to 3 to that agreement, which include the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103; 'the Anti-Dumping Agreement').

- 3 Article 2 of the Anti-Dumping Agreement sets out the rules governing the ‘determination of dumping’.

European Union law

- 4 At the time of the facts underlying the dispute in the main proceedings, the provisions governing the adoption of anti-dumping measures by the European Union were laid down in 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, and corrigendum OJ 2010 L 7, p. 22; ‘the basic regulation’).

- 5 According to recital 6 of the basic regulation:

‘When determining normal value for non-market economy countries, it appears prudent to set out rules for choosing the appropriate market-economy third country to be used for such purpose and, where it is not possible to find a suitable third country, to provide that normal value may be established on any other reasonable basis.’

- 6 Article 2(1) to (6) of that regulation sets out the rules applicable to the determination of normal value.

- 7 Article 2(7) of that regulation provides:

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

...

(b) In anti-dumping investigations concerning imports from the People’s Republic of China, Vietnam and 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.

(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 the market rate.
- ...

Background to the dispute

- 8 The background to the dispute, as set out in the judgment under appeal, may be summarised as follows.
- 9 Xinyi PV Products (Anhui) Holdings Ltd ('Xinyi PV'), a company established in China, manufactures there and exports solar glass covered by the contested regulation to the European Union. Its sole shareholder is Xinyi Solar (Hong Kong) Ltd, a company established in Hong Kong (China) which is listed on the Hong Kong Stock Exchange.
- 10 In the procedure leading to the adoption of the contested regulation, Xinyi PV submitted, on 21 May 2013, a request for market economy treatment ('MET'), within the meaning of Article 2(7)(b) and (c) of the basic regulation.
- 11 After receiving Xinyi PV's replies to the anti-dumping questionnaire and a request for additional information, the Commission carried out a verification of the information sent to that company's Chinese headquarters between 21 and 26 June 2013. At the end of June and in July 2013, Xinyi PV produced additional information in agreement with the Commission and in accordance with the latter's requests.
- 12 By letter of 22 August 2013, the Commission informed Xinyi PV that it considered that it could not grant its request for MET on the ground that, although Xinyi PV met the conditions set out in the first, second, fourth and fifth indents of Article 2(7)(c) of the basic regulation, it did not, however, satisfy the condition set out in the third indent of Article 2(7)(c) of that regulation ('the letter of 22 August 2013'). The Commission invited Xinyi PV to submit its observations.
- 13 On 1 September 2013, Xinyi PV submitted its observations challenging the Commission's assessments.
- 14 By letter of 13 September 2013, the Commission informed Xinyi PV of its final decision to reject that company's request for MET ('the letter of 13 September 2013').
- 15 It is apparent from the letters of 22 August and 13 September 2013, as set out in extracts from paragraphs 63 to 65 of the judgment under appeal, that that rejection was based on the view that Xinyi PV did not satisfy the criterion for the grant of MET laid down in the third indent of

Article 2(7)(c) of the basic regulation, according to which the production costs and financial situation of firms must not be subject to any significant distortions carried over from the former non-market economy system ('the third criterion for the grant of MET'). According to the Commission, Xinyi PV benefited from two advantageous tax regimes, namely, first, the '2 Free 3 Halve' programme, allowing foreign invested companies to benefit from a total tax exemption (0%) for two years and, during the three following years, a tax rate of 12.5%, instead of the standard rate of tax of 25%, and, second, the tax regime applicable to high-technology undertakings, pursuant to which a company is subject to a tax rate of 15%, instead of the normal rate of 25%.

16 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 (OJ 2013 L 316, p. 8; 'the provisional regulation').

17 In recitals 34 to 47 of that regulation, the Commission set out the reasons why four companies or groups of companies which had cooperated in the investigation, including Xinyi PV, had been refused MET. Recital 43 was, in particular, worded as follows:

'... all four exporting producers, either individually or as a group [of companies], failed to demonstrate that they were not subject to significant distortions carried over from the non-market economy system. Accordingly, these companies, or group of companies, did not fulfil MET criterion 3. More specifically, all four exporting producers, or groups of exporting producers, benefitted from preferential tax regimes.'

18 On 13 May 2014, the Commission adopted the contested regulation by which it imposed a definitive anti-dumping duty on imports of solar glass products manufactured by Xinyi PV.

19 In recital 34 of that regulation, it confirmed the findings set out in recitals 34 to 47 of the provisional regulation, according to which all requests for MET were to be denied. In particular, recital 33 of the contested regulation stated the following:

'[Xinyi PV] claimed that the benefits received from preferential tax regimes and grants do not represent a significant proportion of their turnover. In this respect, it is recalled that this argument, along with other arguments, was already addressed in the [letter of 13 September 2013] in which the Commission notified the party with regard to its MET determination. In particular, it was stressed that due to the nature of this advantage, the absolute benefit received during the IP is irrelevant for assessing whether the distortion is "significant". This claim is therefore rejected.'

The proceedings prior to the appeal and the judgment under appeal

20 By application lodged at the Registry of the General Court on 7 August 2014, Xinyi PV sought annulment of the contested regulation in so far as it concerns it. In support of its action, it relied on four pleas in law, the first of which was divided into two parts, alleging infringement of the third indent of Article 2(7)(c) of the basic regulation.

21 By judgment of 16 March 2016, *Xinyi PV Products (Anhui) Holdings v Commission* (T-586/14, EU:T:2016:154), the General Court upheld the first part of that first plea, on the ground, in essence, that the Commission had made a manifest error of assessment in finding that the

distortion resulting from tax incentives granted by the Chinese authorities to Xinyi PV had been ‘carried over from the former non-market economy system’. Accordingly, without examining the second part of that plea, the General Court annulled the contested regulation in so far as it concerned Xinyi PV.

- 22 That judgment was set aside by the judgment of the Court of Justice of 28 February 2018, *Commission v Xinyi PV Products (Anhui) Holdings* (C-301/16 P, EU:C:2018:132), on the ground that the General Court had made several errors of law in the interpretation of the condition relating to the existence of a distortion ‘carried over from the former non-market economy system’ laid down in the third indent of Article 2(7)(c) of the basic regulation. The Court of Justice referred the case back to the General Court and reserved the costs.
- 23 Following the referral of the case back to the General Court, that court resumed the proceedings. Xinyi PV, the Commission and GMB submitted their observations on the inferences to be drawn from the judgment of 28 February 2018, *Commission v Xinyi PV Products (Anhui) Holdings* (C-301/16 P, EU:C:2018:132) for the resolution of the dispute and replied in writing to questions put by the General Court. A further hearing was held.
- 24 By the judgment under appeal, the General Court upheld the second part of the first plea in law raised by Xinyi PV on the ground that the Commission’s rejection of its request for MET was vitiated by a manifest error of assessment as regards the existence of a significant distortion in the production costs and financial situation of Xinyi PV. The General Court accordingly annulled the contested regulation without examining the three other pleas in law raised by Xinyi PV.

Procedure before the Court of Justice and forms of order sought

- 25 In its appeal lodged in Case C-884/19 P, the Commission claims that the Court of Justice should:
- set aside the judgment under appeal;
 - dismiss the first plea in the action at first instance as unfounded;
 - refer the case back to the General Court to rule on the second to fourth pleas in that action; and
 - reserve the costs of the present proceedings and of the earlier proceedings connected therewith, namely those at first instance and in the previous appeal.
- 26 In its appeal lodged in Case C-888/19 P, GMB claims that the Court should:
- set aside the judgment under appeal;
 - dismiss the second part of the first plea in the action at first instance as unfounded;
 - refer the case back to the General Court for judgment on the other pleas in the action at first instance; and
 - order Xinyi PV to pay its legal costs and expenses in the present case as well as the costs and expenses incurred in the proceedings at first instance and in the previous appeal.

- 27 In its response to both appeals, Xinyi PV claims that the Court should:
- dismiss both appeals; and
 - order the Commission and GMB to pay the costs.
- 28 By decision of the President of the Court of 11 March 2020, Cases C-884/19 P and C-888/19 P were joined for the purposes of the oral procedure and judgment.

The appeals

- 29 In support of their respective appeals, the Commission and GMB each rely on three grounds of appeal which essentially overlap. Those grounds of appeal allege, the first, errors of law vitiating the interpretation of the third indent of Article 2(7)(c) of the basic regulation and the allocation of the burden of proof, the second, errors of law in the application of that provision, and the third, procedural irregularities.
- 30 It is appropriate to begin by examining the first pleas raised in support of the present appeals.

Arguments of the parties

- 31 By the first ground of appeal in Case C-884/19 P and the first part of the first ground of appeal in Case C-888/19 P, the Commission and GMB claim, respectively, in essence that, in paragraphs 55 to 61, 67 and 68 of the judgment under appeal, the General Court erred in law in its interpretation of the third indent of Article 2(7)(c) of the basic regulation and, according to the Commission, of Article 2(7)(b) thereof. By the second part of the first ground of appeal in Case C-888/19 P, GMB also claims that the General Court made an error of law, in paragraphs 68, 69 and 72 of that judgment, in the allocation of the burden of proof for the application of the third indent of Article 2(7)(c) of that regulation.
- 32 First of all, the Commission, by its first ground of appeal, and GMB, by the first part of its first ground of appeal, claim that the General Court erred in taking into account, for the purposes of interpreting the third indent of Article 2(7)(c) of the basic regulation, the factors listed for the purposes of calculating the normal value in Article 2(1) to (6) of that regulation and established a link between the significant distortion of the financial situation of the undertaking and the factors linked to the manufacture and sale of the like product concerned.
- 33 In the first place, the Commission and, in essence, GMB observe that the General Court incorrectly reversed the logical order of the stages of determination of normal value in an investigation concerning China. Contrary to the approach adopted by the General Court, Article 2(1) to (6) of the basic regulation is irrelevant for the purposes of interpreting Article 2(7)(b) and the third indent of Article 2(7)(c) of that regulation. Its application, in the context of an investigation concerning China, is the consequence of the fact that the conditions laid down in Article 2(7)(c) of that regulation, which combines indicators at the macroeconomic and microeconomic levels, are satisfied. Of these, only the criterion referred to in the first part of the first indent of Article 2(7)(c) of that regulation requires an actual impact on prices and costs.

- 34 Moreover, the Court of Justice has already held, in the judgment of 16 July 2015, *Commission v Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraphs 47 to 50 and 53), that Article 2(7) of the basic regulation reflects an approach specific to the EU legal order. No correspondence can therefore be established between that provision and Article 2 of the Anti-Dumping Agreement, which was transposed into the EU legal order by Article 2(1) to (6) of the basic regulation.
- 35 In the second place, the Commission and GMB submit that, in paragraphs 58 and 59 of the judgment under appeal, the General Court wrongly justified its interpretation in the light of the list in the third indent of Article 2(7)(c) of the basic regulation, which refers to distortions ‘in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts’.
- 36 As the General Court pointed out in paragraph 59 of the judgment under appeal, that list is purely indicative.
- 37 In any event, according to the Commission, only barter trade is mentioned in the second subparagraph of Article 2(3) of the basic regulation among the items on that list, without, moreover, being one of the factors entering into the calculation of normal value under the method laid down in Article 2(1) to (6) of that regulation.
- 38 In its response to the appeal in Case C-884/19 P, GMB adds that the elements on the indicative list refer to factors which have a direct bearing on the financial situation of an undertaking rather than on its production costs, with the result that those factors could not support the link with Article 2(1) to (6) of the basic regulation. The General Court is further alleged to have failed to provide an adequate statement of reasons for its comparison between that provision and the third indent of Article 2(7)(c) of that regulation.
- 39 In the third place, the Commission and GMB submit that the General Court erred in law in paragraphs 59 to 61 of the judgment under appeal, in so far as it applied, by analogy, the judgment of 19 July 2012, *Council v Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471, paragraphs 79 to 82). In that judgment, the Court confined itself to interpreting the first part of the first indent of Article 2(7)(c) of the basic regulation. The wording, purpose and object of that provision differ from those of the third indent of Article 2(7)(c) of that regulation.
- 40 In the fourth place, the Commission and GMB observe, in essence, that the interpretation adopted by the General Court deprives the third indent of Article 2(7)(c) of the basic regulation of part of its effectiveness. The EU legislature adopted, in that provision, two separate criteria, namely, first, the existence of significant distortions in the costs of production of an MET company and, second, the existence of significant distortions in its financial situation. The General Court’s interpretation amounts to making the existence of a significant distortion of the financial situation conditional upon demonstrating that that distortion leads to a significant distortion of production costs.
- 41 The Commission states, in that context, that the criterion relating to the financial situation is broad and covers an overall assessment which does not necessarily relate closely to production costs or to prices. The EU legislature thus assumed that, if the financial situation is subject to significant distortions, the undertaking does not operate under market economy conditions and, therefore, its costs or prices are capable of being subject to overall distortion. That is the case where the undertaking is exempt from tax.

- 42 In the fifth place, the Commission submits that the fourth and fifth indents of Article 2(7)(c) of the basic regulation support its interpretation of the third indent of Article 2(7)(c) of that regulation. First, the criteria referred to in those fourth and fifth indents are abstract and do not require any assessment of the real impact on the possibility of calculating normal value on the basis of paragraphs 1 to 6 of that article. Second, taking into account the ‘tax exemption/turnover’ ratio would lead to unjustified discrimination between the beneficiaries of the same tax measure.
- 43 GMB also relies on the structure of Article 2(7)(c) of the basic regulation to emphasise that the five indents of that provision set out specific criteria. It follows that the financial situation is a factor linked to the manufacture and sale of the like product concerned.
- 44 Secondly, by the second part of the first ground of appeal in Case C-888/19 P, GMB claims that the General Court erred in law in paragraphs 68, 69 and 72 of that judgment, in so far as it held that the Commission should have given more detailed explanations in its decision to reject Xinyi PV’s request for MET by addressing the specific impact of the distortions in Xinyi PV’s financial situation. In so doing, the General Court incorrectly transferred to the Commission the burden of proving that the conditions for granting MET were satisfied, whereas that burden is, according to the case-law of the Court of Justice, on the party seeking MET. According to GMB, contrary to what is suggested by paragraphs 72 and 73 of the judgment under appeal, it was for Xinyi PV to establish that the preferential tax schemes at issue did not entail significant distortions of its financial situation, and not for the Commission to establish the contrary, since the Commission is required only to assess the evidence produced by Xinyi PV, which, moreover, it did in the present case.
- 45 Xinyi PV disputes all those arguments.
- 46 In the first place, Xinyi PV understands the Commission’s line of argument as stating that, according to that institution, the words ‘in respect of the manufacture and sale of the like product concerned’ in Article 2(7)(b) of the basic regulation concern only the first part of the first criterion for the grant of MET, referred to in the first indent of Article 2(7)(c) of that regulation. Such an interpretation would be incompatible with the very wording of the third indent of Article 2(7)(c) of that regulation, which relates specifically to the production costs of the like product. In addition, the Commission failed to explain what the purpose of the other four criteria for the grant of MET could be, if not to permit the use of the domestic costs and sale prices in China during the investigation period in cases where those costs and sale prices are suitable for use in the calculation of the normal value. The Commission is alleged to proceed to an interpretation of those other criteria which is disconnected from the purpose of Article 2(7)(b) and (c) of that regulation.
- 47 In the second place, Xinyi PV submits, in essence, that the General Court was entitled, in the present case, to draw a parallel with the case giving rise to the judgment of 19 July 2012, *Council v Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471). In both cases, the EU institutions allegedly refused to examine the evidence adduced in support of a request for MET.
- 48 Furthermore, as in the context of the application of the first indent of Article 2(7)(c) of the basic regulation, the Commission must, in the context of the third indent of that provision, always assess the effect of the distortion or non-distortion on the prices or costs of the producer. It cannot rely on an abstract and imprecise assessment.

- 49 In the third place, as regards the argument based on the practical effect of the words ‘financial situation’ in the third indent of Article 2(7)(c) of the basic regulation, Xinyi PV contends that, although a significant distortion in the financial situation of a company has an effect on its prices rather than on its costs, the General Court’s interpretation would not deprive those terms of their effectiveness.
- 50 In the fourth place, as regards the fourth and fifth indents of Article 2(7)(c) of the basic regulation, it is clear that the fact, which is relevant in the context of the fourth indent of that provision, that a company is not subject to insolvency proceedings distorts its costs and prices. Similarly, any profit, which is relevant in the context of the fifth indent of that provision, from a more advantageous exchange rate than the market rate at the time of the purchase or sale of foreign currency would have an impact on the company’s costs and prices, respectively.
- 51 In their replies and rejoinders lodged in Case C-884/19 P, respectively, the Commission and GMB contend that there is no general requirement common to the five criteria for the grant of MET set out in the five indents of Article 2(7)(c) of the basic regulation, requiring the demonstration of a real distortion of production costs.
- 52 In that regard, the Commission states, *inter alia*, that, in the light of the wording of Article 2(7)(b) and (c) of the basic regulation, the requirement that market economy conditions must prevail for the producer concerned, as regards the manufacture and sale of the like product, makes no reference to production costs or to the absence of any real distortion of those costs. The Commission and GMB submit, in essence, that that requirement is therefore directed simply at the context in which the producer operates, whereas the five criteria listed in Article 2(7)(c) of that regulation address various aspects of that context. Xinyi PV acknowledges, moreover, that the fourth and fifth criteria automatically entail an impact on costs. In the view of the Commission and GMB, the same should apply to the third criterion.
- 53 The Commission also observes that no other interpretation can be inferred from the purpose of Article 2(7) of the basic regulation, which is to prevent account being taken of prices and costs in non-market economy countries which are not the normal result of market forces. It is therefore a preliminary provision, whereas the criteria set out in Article 2(7)(c) of that regulation seek to determine whether a company applying for MET is subject only to the usual laws governing market forces. That preliminary nature would be distorted if the General Court were to be followed in its finding that all those criteria are to be made subject to proof of a real impact on the production costs for each specific product produced and exported by the company for each investigation period.
- 54 GMB adds that the Commission’s decision-making practice confirms the possibility of refusing MET under the third indent of Article 2(7)(c) of the basic regulation on account of distortions which have an effect solely on the financial situation of the operator concerned, for example because of the existence of a preferential tax regime. In addition, it is apparent from the case-law of the General Court that Article 2(1) to (6) and Article 2(7) of that regulation form two distinct sets of rules.

Findings of the Court

Preliminary observations

- 55 Article 2(7) of the basic regulation, which follows on from recital 6 of that regulation, introduces a special regime laying down detailed rules for the calculation of normal value for imports from non-market economy countries (see, by analogy, judgment of 16 July 2015, *Commission v Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraph 47).
- 56 Thus, in accordance with Article 2(7)(a) of the basic regulation, in the case of imports from non-market economy countries, in derogation from the rules set out in Article 2(1) to (6) of that regulation, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country, that is to say, according to the analogue country method. The aim of that provision is to prevent account being taken of prices and costs in non-market-economy countries which are not the normal result of market forces (see judgment of 28 February 2018 in *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraph 64 and the case-law cited).
- 57 However, pursuant to Article 2(7)(b) of the basic regulation, in anti-dumping investigations concerning imports from, inter alia, China, normal value is to be determined in accordance with Article 2(1) to (6) of that regulation, and not, consequently, in accordance with the analogue country method, 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 Article 2(7)(c) of that regulation, that market economy conditions prevail for that producer or those producers in respect of the manufacture and sale of the like product concerned (judgment of 28 February 2018 in *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraph 65 and the case-law cited).
- 58 As is apparent from the various regulations from which Article 2(7)(b) of the basic regulation stems, that wording is intended to enable producers subject to market economy conditions having emerged, inter alia, in China to obtain treatment corresponding to their individual situation, rather than to the overall situation of the country in which they are established (judgment of 28 February 2018 in *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraph 66 and the case-law cited).
- 59 Accordingly, the burden of proof lies with the producer wishing to claim MET under Article 2(7)(b) of the basic regulation. To that end, the first subparagraph of Article 2(7)(c) of that regulation provides that the claim submitted by such a producer must contain sufficient evidence, as laid down in that provision, that the producer operates under market economy conditions. Accordingly, there is no obligation on the EU institutions to prove that the producer does not satisfy the conditions laid down for the recognition of such status. By contrast, it is for the EU institutions to assess whether the evidence supplied by the producer concerned is sufficient to show that the criteria laid down in the first subparagraph of Article 2(7)(c) of the basic regulation are fulfilled in order to grant it MET and it is for the EU judicature to examine whether that assessment is vitiated by a manifest error (see, to that effect, judgment of 2 February 2012, *Brosmann Footwear (HK) and Others v Council*, C-249/10 P, EU:C:2012:53, paragraph 32, and of 28 February 2018, *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraph 67 and the case-law cited).

- 60 In the present case, it is common ground that Xinyi PV's request for MET was rejected on the sole ground that that company had not established that it satisfied the third criterion for the grant of MET, which is set out in the third indent of Article 2(7)(c) of the basic regulation.
- 61 Under that provision, the producer concerned must provide sufficient evidence to establish that its production costs and financial situation 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.
- 62 It is apparent from the wording of that provision that it imposes two cumulative conditions, relating, first, to the existence of a significant distortion in production costs and in the financial situation of the firm in question and, secondly, to the fact that the distortion proves to have been carried over from the former non-market economy system (judgment of 28 February 2018, *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraph 70).
- 63 The judgment under appeal concerns only the first of those conditions, the General Court having held that the Commission had made a manifest error in its assessment on that point.
- 64 In that regard, the General Court held, in paragraph 55 of the judgment under appeal, that, in the light of the wording of Article 2(7)(b) of the basic regulation, the criteria set out in Article 2(7)(c) of that regulation relate to the manufacture and sale of the like product concerned. Taking the view that that clarification was made in the context of Article 2 of that regulation, which lays down the rules relating to the calculation of normal value, the General Court held, in paragraph 57 of the judgment under appeal, that all the criteria set out in Article 2(7)(c) of that regulation 'reflect the intention to ascertain that the operator requesting MET operates, as regards the manufacture and sale of the like product concerned, in a manner consistent with principles enabling normal value to be calculated'.
- 65 It is in that context that, in paragraphs 58 to 61 of the judgment under appeal, the General Court interpreted the third indent of Article 2(7)(c) of the basic regulation as meaning that, as regards circumstances or measures concerning the financial situation of the undertaking from a general point of view, the Commission must still assess, in the light of the evidence produced during the administrative procedure, whether those circumstances or measures actually give rise to significant distortion of the factors determining the elements relating to the manufacture and sale of the like product concerned.
- 66 In the present case, the General Court considered, in essence, in paragraphs 66 to 72 of the judgment under appeal, that the Commission could not rely solely on the tax benefit enjoyed by Xinyi PV and on the fact that that benefit could attract capital investors in order to reject the third criterion for the grant of MET. To that end, it noted, in paragraph 67 of that judgment, that those grounds related at most to the financial situation of that company from an eminently abstract point of view, unconnected to the elements expressly mentioned in the third indent of Article 2(7)(c) of the basic regulation or to other elements linked to the manufacture and sale of the like product concerned, whose significant distortion as a consequence of the advantage at issue would call into question the possibility of calculating normal value properly pursuant to Article 2(1) to (6) of the basic regulation.

- 67 It follows from those reminders that the General Court, in essence, interpreted the third indent of Article 2(7)(c) of the basic regulation as meaning that the existence of a significant distortion of the overall financial situation of the producer concerned may lead to the Commission's rejection of a request for MET made by that producer only if that distortion affects the production or sale of the like product concerned, which it is for the Commission to assess.
- 68 By the first ground of appeal in Case C-884/19 P and by the first part of the first ground of appeal in Case C-888/19 P, the Commission and GMB challenge that interpretation, which is vitiated, in their view, by several errors of law. By the second part of the first ground of appeal in Case C-888/19 P, GMB also claims that the General Court incorrectly reversed the burden of proof.
- 69 Those two claims must be examined in turn.

The alleged errors of law as regards the interpretation of the third indent of Article 2(7)(c) of the basic regulation

- 70 Pursuant to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording, but also the context in which it occurs and the objectives pursued by the rules of which it is part (judgment of 12 September 2019, *Commission v Kolachi Raj Industrial*, C-709/17 P, EU:C:2019:717, paragraph 82 and the case-law cited).
- 71 It is in the light of that case-law that it is necessary to interpret the third indent of Article 2(7)(c) of the basic regulation, which sets out the third criterion for the grant of MET, and, more specifically, of the condition relating to the existence of a significant distortion of production costs and the financial situation of the undertaking in question.
- 72 In the first place, as regards the literal interpretation of that condition, it should be recalled that, as is apparent from the third indent of Article 2(7)(c) of the basic regulation and from paragraph 61 of the present judgment, the producer concerned must present sufficient evidence to establish that '[its] production costs and financial situation ... are not subject to significant distortions'.
- 73 The use of the conjunction 'and' unequivocally implies that it is for that producer to establish, first, that there is no significant distortion of its production costs and, second, that there is no significant distortion of its financial situation. That condition is therefore based on two cumulative and distinct subconditions.
- 74 That circumstance entails that MET cannot be granted if one of those subconditions is not satisfied, whether that relating to the absence of significant distortions carried over from the former non-market economy system of the production costs of the producer concerned or that relating to the absence of significant distortions of the producer's financial situation.
- 75 By making the possibility of rejecting a request for MET because of a significant distortion of the financial situation of the producer concerned, within the meaning of the third indent of Article 2(7)(c) of the basic regulation, subject to the finding that that distortion affects the manufacture and sale of the like product concerned, the General Court's interpretation, as set out in paragraphs 64 to 67 of the present judgment, amounts to conflating those cumulative and distinct subconditions and renders the reference to the significant distortion of the financial situation of the producer concerned irrelevant.

- 76 The fact that that provision sets out a list of parameters liable to give rise to distortions falling within its scope, ‘in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts’, does not contradict that interpretation.
- 77 Apart from the fact that, as the General Court rightly pointed out in paragraph 59 of the judgment under appeal, the use of the adverb ‘in particular’ highlights the purely indicative nature of that list, it does not establish any express link between the parameters it sets out and the factors taken into account for the purposes of calculating normal value under Article 2(1) to (6) of the basic regulation.
- 78 It follows that, in the light of its wording, the third indent of Article 2(7)(c) of the basic regulation does not contain any indication intended to link the assessment of the existence of a significant distortion of the financial situation of the producer concerned to its production costs or to the relevant factors for the purposes of determining normal value in accordance with Article 2(1) to (6) of that regulation.
- 79 On the contrary, that wording suggests that the third criterion for the grant of MET refers to the financial situation in the broad sense of the producer concerned and does not necessarily relate closely to production costs or prices.
- 80 Therefore, as the Commission and GMB in essence claim, the General Court’s interpretation contradicts the clear wording of the third indent of Article 2(7)(c) of the basic regulation.
- 81 In the second place, the context and general scheme of the third indent of Article 2(7)(c) of the basic regulation further invalidate the General Court’s interpretation and support that set out in paragraph 79 of the present judgment.
- 82 First, as regards the close link which the General Court established between that provision and Article 2(1) to (6) of the basic regulation, it should be recalled that, according to the case-law cited in paragraphs 55 to 57 of the present judgment, Article 2(7) of that regulation establishes a specific regime which derogates from the general rules for calculating normal value laid down in Article 2(1) to (6) of that regulation. That specific regime applies to imports from non-market economy countries.
- 83 It is based, in principle, on the analogue country method, in accordance with Article 2(7)(a) of the basic regulation, which continues to apply by default, pursuant to Article 2(7)(b) and (c) of that regulation, also in anti-dumping investigations concerning imports from, inter alia, China. It is only if a Chinese producer shows, to the requisite legal standard, that it satisfies all of the five conditions laid down in Article 2(7)(c) of that regulation that that method will not be applied to it and that the Commission will be required to calculate the normal value, in the case of that producer, in accordance with the method laid down in Article 2(1) to (6) of that regulation for imports from market economy countries (see, to that effect, judgment of 28 February 2018, *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraph 80).
- 84 Thus, in the case of an anti-dumping investigation concerning imports from China, the application of the general rules in Article 2(1) to (6) of the basic regulation is based on the premiss that all the conditions laid down in Article 2(7) (b) and (c) of that regulation are satisfied.

- 85 By making the application of Article 2(7)(c) of the basic regulation subject, in paragraphs 57 and 61 of the judgment under appeal, to an analysis, at the level of the producer concerned, aimed at ascertaining whether that producer operates in accordance with principles enabling normal value to be calculated or whether the application of those general rules would lead to artificial results, the General Court conflated the schemes set out, respectively, in Article 2(1) to (6) and in Article 2(7) of the basic regulation, and in so doing, misconstrued the general scheme of those provisions.
- 86 Furthermore, contrary to what the General Court held in paragraph 61 of the judgment under appeal, such an interpretation cannot be based on an analogy with paragraph 82 of the judgment of 19 July 2012, *Council v Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471), in which the Court held, as regards the first indent of Article 2(7)(c) of the basic regulation, which sets out the first criterion for the grant of MET, that the significance or otherwise of State interference in the relevant producer's decisions on input prices and costs must be assessed against the purpose of that provision, which is to ensure that the producer operates under market economy conditions and, in particular, that the costs to which it is subject and the prices it charges are the result of market forces.
- 87 The first criterion for the grant of MET, set out in the first indent of Article 2(7)(c) of the basic regulation, expressly refers to decisions of the producer concerning prices, costs and inputs (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 79), unlike the third criterion for the grant of MET at issue in the present cases. In any event, in the judgment of 19 July 2012, *Council v Zhejiang Xinan Chemical Industrial Group* (C-337/09 P, EU:C:2012:471), the Court did not establish a direct link between the conditions for granting MET laid down in Article 2(7)(c) of the basic regulation and the provisions of Article 2(1) to (6) of that regulation.
- 88 Secondly, it is true, as the General Court noted in paragraph 54 of the judgment under appeal, that it follows from Article 2(7)(b) of the basic regulation that the grant of MET is subject to the demonstration, on the basis of properly substantiated claims submitted by the producer concerned and in accordance with the criteria and procedures set out in Article 2(7)(c) of that regulation, that 'market economy conditions prevail for [that producer] in respect of the manufacture and sale of the like product concerned'.
- 89 However, contrary to what the General Court held in paragraphs 55 and 57 of the judgment under appeal, it cannot be inferred from this that all five criteria set out in Article 2(7)(c) of the basic regulation relate to the manufacture and sale of the like product concerned, to the extent that the third indent of that provision requires, as is suggested in paragraph 60 of that judgment, that, in the event of measures concerning the financial situation of the undertaking from a general point of view, the Commission must still assess whether those measures actually do give rise to a significant distortion affecting the production or sale of the like product concerned.
- 90 There is nothing in the structure of Article 2(7)(c) of the basic regulation to suggest that each of the five criteria set out in that provision must be assessed explicitly by reference to factors directly affecting the manufacture and sale of the like product concerned. Thus, it must be observed, as noted by the Advocate General in point 67 of his Opinion, that those criteria include, for example, in the fourth and fifth indents of that provision, criteria pertaining to the fact of being subject to laws governing insolvency and property and pertaining to exchange rate conversions. Those criteria, by definition, are not directly related to the manufacture and sale of

the like product concerned, even if, as all the parties to the present appeals agree, it may be presumed that those factors may indirectly be reflected in the costs or prices of the producer concerned.

- 91 Similarly, as the Advocate General observed, in essence, in point 68 of his Opinion, the criterion relating to the existence of a significant distortion in the financial situation of the producer concerned must, having regard to its general wording and taking into account the general scheme of Article 2(7)(c) of the basic regulation, be understood as referring, in the broad sense, to all measures, even if they are general measures, such as preferential tax regimes, resulting in a significant distortion of the financial situation of that producer. That is all the more so since it may be presumed, in the case of such measures, that they are liable to distort the costs and prices of that producer, without prejudice to the possibility for the producer concerned to adduce evidence to the contrary.
- 92 In the third place, such an interpretation is also consistent with the purpose of the special regime established by Article 2(7) of the basic regulation and recalled in paragraphs 56 and 58 above.
- 93 The aim of that provision is to prevent account being taken of prices and costs in non-market economy countries, in so far as those parameters are not the normal result of market forces, and, as the Advocate General rightly pointed out in point 69 of his Opinion, is regardless of whether the consequences for the prices and costs of the like product concerned wrought by measures which alter the parameters of a market economy are direct or indirect.
- 94 In the light of the foregoing, it must be held that the General Court's interpretation of the third indent of Article 2(7)(c) of the basic regulation is vitiated by errors of law in so far as it contradicts the clear wording of that provision and fails to have regard to the regulatory context, the general scheme and the purpose of that provision.
- 95 Accordingly, the first ground of appeal in Case C-884/19 P and the first part of the first ground of appeal in Case C-888/19 P must be upheld.

The alleged error of law as regards the allocation of the burden of proof

- 96 By the second part of the first ground of appeal, GMB claims that the General Court erred in law as regards the allocation of the burden of proof with respect to satisfying the third criterion for the grant of MET.
- 97 In that regard, it should be noted that, in paragraph 60 of the judgment under appeal, the General Court held that, as regards measures which concern the financial situation of the producer concerned from a general point of view, it is for the Commission to assess, in the light of the evidence submitted during the administrative procedure, whether those measures actually do give rise to distortion of that situation in relation to the production or sale of the like product concerned.
- 98 In so doing, the General Court places on the Commission the burden of establishing that a significant distortion of the financial situation of the producer concerned affects the production or sale of the like product concerned.

- 99 According to the case-law cited in paragraph 59 of the present judgment, the burden of proving that all the criteria set out in Article 2(7)(c) of the basic regulation are satisfied lies with the producer wishing to request MET in accordance with Article 2(7)(b) of that regulation. The Commission does not have to prove that the producer does not satisfy the conditions laid down for that treatment, but must rather 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 fulfilled in order to grant it MET.
- 100 Accordingly, the General Court incorrectly reversed the burden of proof, as a result of which the second part of the first ground of appeal in Case C-888/19 P must also be upheld.
- 101 In those circumstances, since the first grounds of the appeals are well founded, the judgment under appeal must be set aside, without it being necessary to examine the other grounds raised in support of the present appeals.

The dispute at first instance

- 102 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the decision of the General Court is set aside, the Court of Justice may itself give final judgment in the matter, where the state of the proceedings so permits.
- 103 In the present case, in support of its action, Xinyi PV raised four pleas in law, alleging (i) infringement of the third indent of Article 2(7)(c) of the basic regulation, (ii) infringement of Article 2(10)(i) of that regulation, (iii) infringement of Article 2(8) and (9) of that regulation and (iv) infringement of the rights of the defence.
- 104 In the light, in particular, of the fact that the first plea in law was the subject of an exchange of arguments before the General Court and that the examination of those pleas does not require any further measure of organisation of procedure or inquiry to be taken in the case, the Court of Justice considers that the state of the proceedings is such that it may give final judgment on that plea and that it should do so (see, to that effect, judgments of 8 September 2020, *Commission and Council v Carreras Sequeros and Others*, C-119/19 P and C-126/19 P, EU:C:2020:676, paragraph 130, and of 16 September 2021, *Commission v Belgium and Magnetrol International*, C-337/19 P, EU:C:2021:741, paragraph 158).

Infringement of the third indent of Article 2(7)(c) of the basic regulation

- 105 By this first plea, Xinyi PV criticises the Commission for having infringed the third indent of Article 2(7)(c) of the basic regulation.
- 106 In that regard, it should be recalled that, as is apparent from paragraphs 61 and 62 above, in accordance with the third indent of Article 2(7)(c) of the basic regulation, the producer concerned must provide sufficient evidence to establish that its production costs and financial situation are not subject to any significant distortions carried over from the former non-market economy system. That provision therefore imposes two cumulative conditions, relating, first, to the existence of a significant distortion of the production costs and financial situation of the undertaking in question and, second, to the fact that that distortion proves to be carried over from the former non-market economy system.

- 107 By the first part of its first plea, Xinyi PV criticises the Commission for having rendered the contested regulation unlawful in that it found that the tax incentives from which it benefited 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.
- 108 In the present case, in the letter of 13 September 2013, the Commission took the view, in essence, that the income tax regime covering the tax incentives at issue, which favourably treats certain companies or certain economic sectors regarded by the Chinese Government as strategic, entails that that scheme is based not on a market economy but also largely on State planning.
- 109 In that regard, it should be recalled that, according to the case-law of the Court of Justice, the third indent of Article 2(7)(c) of the basic regulation must be understood as requiring the producer to establish, to the requisite legal standard, that its production costs and its financial situation are not subject to any significant distortions arising from an economic system without a market economy, whether it be a State-trading system or a system, already in transition, as regards certain sectors, to a market economy system (judgment of 28 February 2018, *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraphs 85 and 95).
- 110 In addition, in view of the burden of proof on the producer, the connection of a measure consisting in granting tax incentives to foreign investments in sectors considered strategic, such as the high-technology sector, with various five-year plans implemented in China is sufficient for it to be presumed that that measure constitutes a distortion ‘carried over from the former non-market economy system’ within the meaning of that provision. Even supposing that, from now on, the Chinese five-year plans no longer lay down, for all sectors of the economy, defined production objectives, contrary to what was the case when China was still a State-trading country, it is nevertheless well known that those plans still play, even after the reforms which the Chinese economic system has known, a fundamental role in the organisation of that economy, in so far as they contain, for a great number of sectors, precise objectives which are binding on all levels of government (see, to that effect, judgment of 28 February 2018, *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraphs 94 and 95).
- 111 In the present case, it is not disputed that the tax incentives at issue may be connected with various plans implemented in China, and that that country, despite the reforms to its economic model, is still considered, as is apparent from the wording set out in Article 2(7)(b) and (c) of the basic regulation, to be, in principle, a non-market economy, so that the context in which those tax incentives exist is radically different from that in which potentially similar measures operate in market economy countries (see, to that effect, judgment of 28 February 2018, *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraph 104).
- 112 It follows that, in the present case, the Commission was entitled to presume that the measures at issue, consisting in tax incentives implementing a five-year plan, a characteristic feature of a planned economy system and fundamental to the organisation of the Chinese economy, had been carried over from the former non-market economy system.
- 113 That assessment is not called into question by the arguments which Xinyi PV derives from a comparison of the tax incentives at issue in the present case with the Commission’s practice in State aid matters.

- 114 In that regard, as regards the Member States of the European Union, it should be noted that such tax incentives are, in principle, incompatible with the internal market and thus prohibited if they may be classified as ‘State aid’, within the meaning of Article 107(1) TFEU, which requires that the four conditions laid down in that provision are fulfilled (see, to that effect, judgment of 28 February 2018, *Commission v Xinyi PV Products (Anhui) Holdings*, C-301/16 P, EU:C:2018:132, paragraph 105).
- 115 Accordingly, the first part of the first plea in law must be rejected as unfounded.
- 116 By the second part of its first plea, Xinyi PV claims that, in any event, the Commission made a manifest error of assessment of the facts and an error of law in stating that the distortions were significant with regard to its production costs and its financial situation, within the meaning of the third indent of Article 2(7)(c) of the basic regulation.
- 117 In that regard, it should be observed that, according to the settled case-law of the Court of Justice, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the institutions of the European Union enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine. Judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (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 63, 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 48).
- 118 It is moreover apparent from paragraphs 79, 91 and 92 of the present judgment that, having regard to the wording, context, general scheme and purpose of the third indent of Article 2(7)(c) of the basic regulation, the criterion relating to the existence of a significant distortion of the financial situation of the producer concerned is understood as referring, in the broad sense, to all measures, even if of a general nature, entailing a significant distortion of the financial situation of that producer.
- 119 In the present case, as is apparent from the letters of 22 August and 13 September 2013, referred to in paragraphs 12, 14 and 15 above, the Commission based its conclusion that Xinyi PV had not succeeded in demonstrating that its financial situation was not subject to significant distortions on the finding that it enjoyed two preferential tax regimes. First, in the context of the ‘2 Free 3 Halve’ programme, foreign invested companies benefited from a total tax exemption (0%) for two years and, during the three following years, a tax rate of 12.5%, instead of the standard rate of tax of 25%. Second, in accordance with the tax regime for high-technology undertakings, a company is subject to a reduced tax rate of 15%, instead of the normal rate of 25%. According to the Commission, the application of those tax regimes affects the amount of pre-tax profits which the undertaking must make in order to attract investors; their combination results in the application of a tax rate which is significantly lower than the normal rate, which may, inter alia, pursue the objective of attracting capital at reduced rates and, thus, impair the overall financial and economic situation of the company.

- 120 In that regard, it should be noted, as observed by the Advocate General in point 84 of his Opinion and as the Commission has pointed out, that capital constitutes one of the inputs of a company, so that measures having an impact on its cost are, by definition, likely to give rise to significant distortions in its financial situation. That is the case, in particular, where the producer concerned benefits from preferential tax regimes.
- 121 None of the arguments put forward by Xinyi PV, which bore the burden of proof in accordance with the case-law referred to in paragraph 59 above, is capable of establishing that, despite those preferential tax regimes, its financial situation was not significantly distorted.
- 122 First, Xinyi PV claims that the tax incentives at issue represented only 1.34% of its total production costs and 1.14% of its turnover during the investigation period. However, it should be noted that that party has failed to explain why its production costs and turnover constitute the relevant analytical framework for measuring the impact of the preferential tax regimes on its financial situation.
- 123 Second, Xinyi PV submits that the two preferential tax schemes at issue are not permanent. In that regard, it should be noted that, as the Commission submits, it is apparent from the statements made by Xinyi PV during the investigation procedure that, although the ‘2 Free 3 Halve’ programme is limited to a period of five years and the admission to the tax regime of high-technology undertakings is initially fixed at three years, the fact remains that admission to that scheme is renewable at the request of the beneficiary. In those circumstances, the Commission was entitled, without committing a manifest error of assessment, to take the view that the benefit of at least one of the two regimes, namely the tax regime for high-technology undertakings, is virtually permanent.
- 124 It follows from the foregoing that Xinyi PV has not succeeded in demonstrating that the Commission’s assessments are vitiated by a manifest error of assessment.
- 125 The second part of the first plea and, therefore, the first plea in its entirety must therefore be rejected as unfounded.

The other pleas in law

- 126 Contrary to what was stated in relation to the first plea in the action at first instance, the state of the proceedings does not permit final judgment to be given in relation to the second, third and fourth pleas in that action.
- 127 The General Court did not rule on those pleas either in the judgment of 16 March 2016, *Xinyi PV Products (Anhui) Holdings v Commission* (T-586/14, EU:T:2016:154), or in the judgment under appeal; it confined itself, in each of those judgments, to annulling the contested regulation on the basis, respectively, of the first and second parts of the first plea in law raised before it, without it having considered it necessary to rule on the other pleas in law. In the light of the documents in the file relating to the proceedings before the General Court, it is apparent that those pleas were not the subject of any in-depth investigation or discussion during the proceedings which led to those two judgments. Moreover, those pleas involve complex factual assessments, in respect of which the Court of Justice considers that it does not have available to it all the necessary facts.
- 128 Consequently, the case must be referred back to the General Court for a ruling on the second, third and fourth pleas in the action before it.

Costs

129 Since the case is being referred back to the General Court, it is appropriate to reserve the costs.

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

- 1. Sets aside the judgment of the General Court of the European Union of 24 September 2019, *Xinyi PV Products (Anhui) Holdings v Commission* (T-586/14 RENV, EU:T:2019:668);**
- 2. Refers the case back to the General Court of the European Union for a ruling on the second to fourth pleas in law raised before it;**
- 3. Reserves the costs.**

Jürimäe

Rodin

Piçarra

Delivered in open court in Luxembourg on 2 December 2021.

A. Calot Escobar
Registrar

K. Lenaerts
President