Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

28 April 2022*

(Appeal – Dumping – Imports of aspartame originating in the People's Republic of China – Regulations No 1225/2009 and 2016/1036 – Temporal scope – Article 2(7) – Market economy treatment – Denied – Article 2(10) – Adjustments – Burden of proof – Article 3 – Determination of injury – Duty of care of the European Commission)

In Case C-666/19 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 9 September 2019,

**Changmao Biochemical Engineering Co. Ltd**, established in Changzhou (China), represented by K. Adamantopoulos, dikigoros, and P. Billiet, avocat,

appellant,

the other parties to the proceedings being:

**European Commission**, represented initially by T. Maxian Rusche and N. Kuplewatzky, subsequently by T. Maxian Rusche and A. Demeneix and, finally, by T. Maxian Rusche and K. Blanck, acting as Agents,

defendant at first instance,

**Hyet Sweet SAS,**

intervener at first instance,

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: E. Tanchev,

Registrar: A. Calot Escobar,

having regard to the written procedure,

* Language of the case: English.

after hearing the Opinion of the Advocate General at the sitting on 6 October 2021,

gives the following

## Judgment

1 By its appeal, Changmao Biochemical Engineering Co. Ltd ('Changmao') seeks to have set aside the judgment of the General Court of the European Union of 28 June 2019, *Changmao Biochemical Engineering* v *Commission* (T-741/16, not published; 'the judgment under appeal', EU:T:2019:454), by which the General Court dismissed its action for annulment of Commission Implementing Regulation (EU) 2016/1247 of 28 July 2016 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of aspartame originating in the People's Republic of China (OJ 2016 L 204, p. 92; 'the regulation at issue').

## I. Legal context

### A. International law

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 ('the Anti-Dumping Agreement').

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

4 Article 6 of that agreement is entitled 'Evidence'.

5 Article 12 of that agreement is entitled 'Public Notice and Explanation of Determinations'.

### B. European Union law

#### *1. The basic regulation and Regulation (EU) 2016/1036*

6 At the time of the facts giving rise to the dispute, the provisions governing the adoption of anti-dumping measures by the European Union were set out 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), as amended by Council Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 (OJ 2014 L 18, p. 1) ('the basic regulation').

7 However, at the date of adoption of the regulation at issue, the provisions governing the adoption of anti-dumping measures by the European Union were set out in Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped

imports from countries not members of the European Union (OJ 2016 L 176, p. 21). That regulation entered into force, pursuant to Article 25 thereof, on 20 July 2016. According to the first paragraph of Article 24 of that regulation, '[the basic regulation] is repealed'.

8 Article 2 of the basic regulation and Article 2 of Regulation 2016/1036 relate to the 'determination of dumping'. Point A of those articles, entitled 'Normal value', contains paragraphs 1 to 7 thereof. Point C of those articles, for its part, contains paragraph 10 thereof and is entitled 'Comparison'.

9 Under Article 2(7)(a) to (c) of the basic regulation, corresponding, in essence, to Article 2(7)(a) to (c) of Regulation 2016/1036:

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

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

…

(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:

…

– 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,

…'

10 Article 2(10) of the basic regulation and Article 2(10) of Regulation 2016/1036 provide:

'A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at, as closely as possible, the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. Any duplication when making adjustments shall be avoided, in particular in relation to discounts, rebates, quantities and level of trade. When the specified conditions are met, the factors for which adjustment can be made are listed as follows …'

11 Article 3 of the basic regulation and Article 3 of Regulation 2016/1036 are entitled 'Determination of injury'.

12 Under Article 3(2) and (3) of the basic regulation, which corresponds, in essence, to Article 3(2) and (3) of Regulation 2016/1036:

'2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both:

(a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and

(b) the consequent impact of those imports on the Community industry.

3. With regard to the volume of the dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Community. With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Community industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree. No one or more of those factors can necessarily give decisive guidance.'

13 Article 6 of the basic regulation and Article 6 of Regulation 2016/1036 are entitled 'The investigation' and provide, in paragraph 8 thereof:

'Except in the circumstances provided for in Article 18, the information which is supplied by interested parties and upon which findings are based shall be examined for accuracy as far as possible.'

14 Article 9 of the basic Regulation and Article 9 of Regulation 2016/1036 are entitled 'Termination without measures; imposition of definitive duties'.

15 According to the last sentence of Article 9(4) of the basic regulation and the second subparagraph of Article 9(4) of Regulation 2016/1036:

'The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Union industry.'

16 Article 18 of the basic regulation and Article 18 of Regulation 2016/1036 relate to 'non-cooperation'.

17 Article 20 of the basic regulation and Article 20 of Regulation 2016/1036 relate to 'disclosure'.

### *2. Regulation (EC) No 1126/2008*

18 The annex to Commission Regulation (EC) No 1126/2008 of 3 November 2008 adopting certain international accounting standards in accordance with Regulation (EC) No 1606/2002 of the European Parliament and of the Council (OJ 2008 L 320, p. 1), as amended by Commission Regulation (EU) No 1255/2012 of 11 December 2012 (OJ 2012 L 360, p. 78), contains a list of the International Accounting Standards ('the IAS').

19 Among those standards is IAS 36, entitled 'Impairment of assets'. That standard sets out the procedures which an entity is to apply in order to ensure that its assets are carried at no more than their recoverable amount.

## II. Background to the dispute

20 The background to the dispute is set out in paragraphs 1 to 10 of the judgment under appeal. For the purposes of the present appeal, the following should be noted.

21 On 30 May 2015, following a complaint lodged by Ajinomoto Sweeteners Europe SAS (now Hyet Sweet SAS), an aspartame producer in the European Union, the European Commission initiated, on the basis of the basic regulation, an anti-dumping investigation in respect of imports into the European Union of aspartame originating in China.

22 The investigation of dumping and injury covered the period from 1 April 2014 to 31 March 2015 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from January 2011 to the end of the investigation period.

23 On 25 February 2016, the Commission adopted Implementing Regulation (EU) 2016/262 imposing a provisional anti-dumping duty on imports of aspartame originating in the People's Republic of China (OJ 2016 L 50, p. 4; 'the provisional regulation').

24 The product concerned corresponded both to aspartame (N-L-α-Aspartyl-L-phenylalanine-1-methyl ester, 3-amino-N-(α-carbomethoxy-phenethyl)-succinamic acid-N-methyl ester), bearing reference CAS RN 22839-47-0, originating in China, currently falling within CN code ex 2924 29 98 ('aspartame') and to aspartame contained in preparations or mixtures also comprising other sweeteners or water.

25 On 1 April 2016, Changmao submitted written observations to the Commission concerning the provisional conclusions of the investigation.

26 On 12 May 2016, Changmao attended a hearing with the Commission and the hearing officer, where it presented its observations.

27 On 2 June 2016, the Commission notified Changmao of the definitive conclusions of the investigation.

28 On 13 June 2016, Changmao submitted written observations to the Commission concerning the definitive conclusions of the investigation.

29 On 5 July 2016, Changmao attended a hearing with the Commission and the hearing officer, where it presented its observations.

30 On 28 July 2016, the Commission adopted the regulation at issue.

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

31 By application lodged at the Registry of the General Court on 21 October 2016, Changmao brought an action for annulment of the regulation at issue.

32 By orders of the President of the Second Chamber of the General Court of 21 March 2017, *Changmao Biochemical Engineering* v *Commission* (T-741/16, not published), and of 27 September 2017, *Changmao Biochemical Engineering* v *Commission* (T-741/16, not published, EU:T:2017:700), Hyet Sweet was granted leave to intervene in support of the form of order sought by the Commission and the request for confidential treatment submitted by Changmao vis-à-vis Hyet Sweet was granted in part.

33 In support of its action, Changmao put forward five pleas in law. The first plea, alleging infringement of Article 2(7)(b) and (c) of Regulation 2016/1036 and of the principles of the protection of legitimate expectations and sound administration, concerned the Commission's assessment of the conditions for granting market economy treatment ('MET'). The second plea in law, alleging infringement of Article 2(7)(a) of that regulation, concerned the determination of the normal value. The third plea in law, alleging infringement of Article 2(10), Article 3(2)(a) and (3) and Article 9(4) of that regulation and disregard of the principle of sound administration, related to adjustments for the purpose of determining the dumping and injury margins. The fourth plea alleged infringement of Article 3(2) and (6) of that regulation and, in the alternative, of Article 6(7) of that regulation. The fifth plea alleged infringement of Article 2(7)(a) and Article 3(2), (3) and (5) of Regulation 2016/1036.

34 By the judgment under appeal, the General Court rejected each of those pleas and therefore dismissed the action in its entirety.

## IV. The procedure before the Court of Justice and the forms of order sought

35 By its appeal, Changmao claims that the Court should:

– set aside the judgment under appeal; and

– principally, uphold the action at first instance, annul the regulation at issue in so far as it relates to the applicant, and order the Commission and Hyet Sweet to pay the costs incurred for the proceedings at first instance and on appeal; or

– in the alternative, refer the case back to the General Court for it to rule on the second part of the first plea of the action for annulment or, in the further alternative, refer the case back to the General Court for it to rule on any other plea in law it raised in support of its action if justified by the state of the proceedings, and reserve the costs.

36 The Commission contends that the Court should:

– dismiss the appeal; and

– order Changmao to pay the costs.

37 Hyet Sweet, in respect of which it was decided, by orders of the President of the Court of 22 October 2019, *Changmao Biochemical Engineering* v *Commission* (C-666/19 P, not published, EU:C:2019:1097), and of 17 March 2020, *Changmao Biochemical Engineering* v *Commission* (C-666/19 P, not published, EU:C:2020:213), that confidential treatment should be granted to certain information in the file, did not lodge a statement in the present appeal.

38 In accordance with Article 61(1) of its Rules of Procedure, the Court requested the parties to reply in writing to a question concerning the respective temporal scope of the provisions of the basic regulation and of Regulation 2016/1036 for the purposes of the present appeal. The parties complied with that request within the period prescribed.

## V. The application for the reopening of the oral procedure

39 Following the delivery of the Advocate General's Opinion, Changmao, by document lodged at the Court Registry on 20 October 2021, applied, in essence, for the oral part of the procedure to be reopened.

40 In support of that request, Changmao claims that, in points 146 and 150 of his Opinion, the Advocate General considers that it did not provide proof that the adjustments which it requested for the purposes of the fair comparison of the normal value and the export price were necessary, while acknowledging that it did indeed list the evidence demonstrating the need for those adjustments. Changmao submits that that matter is of fundamental importance to the assessment of its third ground of appeal and wishes to be able to address it in greater detail at a hearing.

41 It must be recalled that the Statute of the Court of Justice of the European Union and the Rules of Procedure of the Court of Justice make no provision for the parties to submit observations in response to the Advocate General's Opinion (judgments of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 26 and the case-law cited, and of 10 September 2015, *Bricmate*, C-569/13, EU:C:2015:572, paragraph 39).

42 Pursuant to the second paragraph of Article 252 TFEU, it is the duty of the Advocate General, acting with complete impartiality and independence, to make, in open court, reasoned submissions on cases which, in accordance with the Statute of the Court of Justice of the European Union, require his or her involvement. The Court is not bound either by the Advocate General's Opinion or by the reasoning on which it is based (judgments of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 27 and the case-law cited, and of 10 September 2015, *Bricmate*, C-569/13, EU:C:2015:572, paragraph 40).

43 Consequently, a party's disagreement with the Opinion of the Advocate General, irrespective of the questions examined in the Opinion, cannot in itself constitute grounds justifying the reopening of the oral procedure (judgment of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 28 and the case-law cited).

44 That said, the Court may, at any time, after hearing the Advocate General, order the reopening of the oral part of the procedure, under Article 83 of its Rules of Procedure, in particular if it considers that it lacks sufficient information or where the case must be decided on the basis of an argument which has not been debated between the parties or the interested persons referred to in Article 23 of the Statute of the Court of Justice of the European Union (judgments of 9 July 2015, *InnoLux* v *Commission*, C-231/14 P, EU:C:2015:451, paragraph 29 and the case-law cited, and of 10 September 2015, *Bricmate*, C-569/13, EU:C:2015:572, paragraph 41).

45 That is not the case here. The parties were able to exchange arguments on all of the grounds of appeal raised by Changmao during two exchanges of written pleadings. In particular, Changmao was able effectively to put forward its arguments, inter alia, on the General Court's assessment of the Commission's refusal of its requests for adjustments for the purposes of the fair comparison of the normal value with the export price.

46 Accordingly, the Court considers, after hearing the Advocate General, that it has all the information necessary to give judgment and that that information has been the subject of debate before it.

47 In the light of the foregoing considerations, there is no need to order the reopening of the oral part of the procedure.

## VI. The appeal

### A. Preliminary observations

48 According to the Court's case-law, although the legal basis of an act and the applicable procedural rules must be in force at the time of adoption of that act, compliance with the principles governing the temporal application of the law and the requirements relating to the principles of legal certainty and the protection of legitimate expectations require the substantive rules in force at the time of the facts at issue to be applied even though those rules are no longer in force at the time when the act at issue was adopted by the EU institution (see, to that effect, judgments of 14 June 2016, *Commission* v *McBride and Others*, C-361/14 P, EU:C:2016:434, paragraph 40, and of 15 March 2018, *Deichmann*, C-256/16, EU:C:2018:187, paragraph 76).

49 It is in the light of that case-law that it is necessary to determine the respective temporal scope of the basic regulation and of Regulation 2016/1036 for the purposes of the present appeal.

50 By virtue of Articles 24 and 25 of Regulation 2016/1036, that regulation repealed the basic regulation and entered into force on 20 July 2016.

51 In the present case, the regulation at issue was adopted on 28 July 2016, that is to say a few days after the entry into force of Regulation 2016/1036. However, it should be noted that the investigation period ran from 1 April 2014 to 31 March 2015. At the time of the facts concerned by the anti-dumping investigation, following which the regulation at issue was adopted, the basic regulation was therefore still applicable.

52 It follows that, although the regulation at issue had to be adopted on the basis of Regulation 2016/1036 and in accordance with the procedural rules defined in that regulation, it is, on the contrary, subject to the substantive rules of law defined by the basic regulation.

53 Therefore, in order to avoid that the Court base its decision on erroneous legal considerations in the light of the temporal scope of those regulations (see, by analogy, order of 27 September 2004, *UER* v *M6 and Others*, C-470/02 P, not published, EU:C:2004:565, paragraph 69, and judgment of 21 September 2010, *Sweden and Others* v *API and Commission*, C-514/07 P, C-528/07 P and C-532/07 P, EU:C:2010:541, paragraph 65), and since, as the Advocate General pointed out in point 21 of his Opinion, the substantive rules relevant to the present appeal are materially identical in the basic regulation and Regulation 2016/1036, the references made to the latter regulation in the context of the present appeal must be understood as being made to the corresponding provisions of the basic regulation.

## B. Substance

### *1. The first ground of appeal*

#### *(a) Arguments of the parties*

54 By its first ground of appeal, directed against paragraphs 54, 64 to 67, 69, 70, 78 to 80, 87, 97 and 98 of the judgment under appeal, Changmao claims that the General Court distorted the facts and made errors of law in its application of Article 2(7)(c) of the basic regulation.

55 In the first place, Changmao claims that it fulfils the second MET criterion, set out in the second indent of Article 2(7)(c) of the basic regulation ('the second MET criterion'), since it uses, for all purposes, one clear set of basic accounting records prepared in accordance with the Hong Kong Financial Reporting Standards ('the HKFRS'), which are equivalent to the International Financial Reporting Standards. The company Price Waterhouse Cooper ('PWC'), which is responsible for auditing its accounts, confirmed this without reservation.

56 According to Changmao, the provisional regulation makes reference, in recitals 26 and 36 thereof, to 'shortcomings' regarding compliance with the second MET criterion while acknowledging, in recital 28 of that regulation, that Changmao's accounts were prepared in accordance with the HKFRS. It is merely stated, in recital 20 of the regulation at issue, that Changmao did not provide any new evidence or arguments regarding that criterion, which is moreover incorrect in the light of the documents it submitted after the provisional disclosure.

57 Accordingly, the provisional regulation and the regulation at issue do not contain any specific finding of unreliability or inaccuracy of Changmao's accounts or indeed of material errors under the IAS. On the contrary, the Commission acknowledged, at the hearing before the Hearing Officer on 6 January 2016, that, in a letter of 22 December 2015, PWC had issued an opinion without reservation as to the accuracy and reliability of those accounts.

58 The General Court therefore distorted the facts by holding, in paragraphs 69 and 87 of the judgment under appeal, that the Commission had rightly concluded that the failures noted by the auditors were such as to call into question the accuracy of Changmao's accounts. It could not therefore reject the latter's complaint in paragraph 70 of that judgment.

59 In addition, in paragraphs 60 to 68 of the judgment under appeal, the General Court disregarded the detailed observations, resulting from an audit conducted by PWC, on Changmao's accounting practices regarding tangible and intangible asset impairment. According to Changmao, those practices comply with the requirements of IAS 36.

60 First, Changmao claims that the conical hybrid dryer does not generate cash inflows independently, such that it could establish the recoverable amount of that asset by reference to the production unit of which it forms part. Under paragraphs 22, 66 and 67 of IAS 36, it is not necessary to register the recoverable amount of that asset separately, contrary to what the General Court held in paragraph 66 of the judgment under appeal. The findings in paragraphs 64 and 65 of that judgment are also incorrect, as is apparent from the additional evidence that Changmao provided to the Commission at the hearing in January 2016.

61 Second, Changmao observes that it continuously assesses the recoverable amount of the patent on the production technology for fumaric acid and DL malic acid ('the patent') and revises that amount when the conditions of paragraph 10 of IAS 36 are met, as is apparent from the documents produced before the Commission. The General Court thus distorted the facts in paragraph 67 of the judgment under appeal.

62 In the second place, Changmao claims that the General Court distorted the facts in paragraph 54 of the judgment under appeal. In paragraph 7 of its application at first instance, it maintained only that the Commission could not rely on simple 'mistakes' in order to deny MET where the audit carried out under the IAS unequivocally established the accuracy and reliability of the accounts.

63 In the third place, Changmao claims that the General Court failed to take account of the fact that all the assets subject to verification had been acquired by it before 2003 and that the Commission had already obtained and verified detailed information on those assets in earlier anti-dumping investigations in which Changmao was granted MET. Therefore, contrary to what the General Court held in paragraphs 78 to 80 of the judgment under appeal, it was not impossible for the Commission to verify the information on those assets obtained on the last day of the verification visit.

64 For all of those reasons, Changmao submits that the General Court could not, in paragraph 93 of the judgment under appeal, reject the first part of its first plea for annulment.

65 Consequently, the rejection, in paragraphs 97 and 98 of that judgment, of the second part of that plea, which concerned, for its part, the third MET criterion, set out in the third indent of Article 2(7)(c) of the basic regulation, is therefore also vitiated by illegality and the General Court erred in law in refusing to examine that second part.

66 The Commission contends that the first ground of appeal must be rejected as, in part, ineffective and, in any event, unfounded in its entirety.

### *(b) Findings of the Court*

67 By its first ground of appeal, Changmao disputes, in essence, the General Court's assessments relating to the Commission's rejection of its MET claim pursuant to Article 2(7)(b) and (c) of the basic regulation.

68 In that regard, it should be borne in mind, as a preliminary point, that, according to 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 paragraphs 1 to 6 of that article, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country (judgments of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53, paragraph 30, and of 2 December 2021, *Commission and GMB Glasmanufaktur Brandenburg* v *Xinyi PV Products (Anhui) Holdings*, C-884/19 P and C-888/19 P, EU:C:2021:973, paragraph 56).

69 However, pursuant to Article 2(7)(b) of the basic regulation, in anti-dumping investigations concerning imports from, inter alia, China, the normal value is to be determined in accordance with Article 2(1) to (6) of that regulation 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 (see, to that effect, judgments of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53, paragraph 31, and of 2 December 2021, *Commission and GMB Glasmanufaktur Brandenburg* v *Xinyi PV Products (Anhui) Holdings*, C-884/19 P and C-888/19 P, EU:C:2021:973, paragraph 57).

70 In that regard, 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 (see, to that effect, judgments of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council*, C-249/10 P, EU:C:2012:53, paragraph 32, and of 2 December 2021, *Commission and GMB Glasmanufaktur Brandenburg* v *Xinyi PV Products (Anhui) Holdings*, C-884/19 P and C-888/19 P, EU:C:2021:973, paragraph 59).

71 Included among those criteria, in the second indent of Article 2(7)(c) of the basic regulation, is the second MET criterion, which is at issue in the present ground of appeal. That criterion requires that the producer concerned have one clear set of basic accounting records which are independently audited in line with international accounting standards and which are applied for all purposes.

72 In the first place, Changmao claims, in essence, that it fulfils that criterion since its accounts comply with the HKFRS and it correctly applies IAS 36. In deciding the contrary, the General Court infringed Article 2(7)(c) of the basic regulation and distorted the facts.

73 In that regard, however, it should first be recalled that, according to the settled case-law of the Court, it follows from Article 256 TFEU and from the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction (i) to establish the facts, except where the substantive inaccuracy of its findings is apparent from the documents submitted to it, and (ii) to assess those facts. When the General Court has established or assessed the facts, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them. The Court of Justice thus has no jurisdiction to establish the facts or, in principle, to examine the evidence which the General Court accepted in support of those facts. Save where the clear sense of the evidence has been distorted, that assessment does not therefore constitute a point of law which is subject as such to review by the Court of Justice (see, to that effect,

judgments of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 29, and of 14 December 2017, *EBMA* v *Giant (China)*, C-61/16 P, EU:C:2017:968, paragraph 33).

74 Where an appellant alleges such a distortion by the General Court, that appellant must, under Article 256 TFEU, the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union and Article 168(1)(d) of the Rules of Procedure of the Court of Justice, indicate precisely the evidence alleged to have been distorted by the General Court and show the errors of appraisal which, in its view, led to such distortion. In addition, in accordance with the Court of Justice's settled case-law, distortion must be obvious from the documents in the Court's file, without there being any need to carry out a new assessment of the facts and the evidence (see, to that effect, judgments of 3 September 2009, *Moser Baer India* v *Council*, C-535/06 P, EU:C:2009:498, paragraph 33, and of 29 April 2021, *Fortischem* v *Commission*, C-890/19 P, not published, EU:C:2021:345, paragraph 70).

75 In the present case, it should be noted that Changmao's line of argument, referred to in paragraph 72 above, does not call into question either the General Court's interpretation, in paragraphs 51 to 53 of the judgment under appeal, of the second indent of Article 2(7)(c) of the basic regulation or that set out in paragraphs 59 to 63 of that judgment of IAS 36.

76 That line of argument relates in reality to the conformity of its accounting records and to compliance with IAS 36 and is thus essentially aimed at challenging the General Court's assessment of the validity of those records and of that accounting. That assessment is factual in nature and cannot, therefore, be called into question at the appeal stage, except in the event of distortion. While Changmao has referred to a distortion of the facts by the General Court, it does not specify either the facts which the General Court allegedly distorted or the manner in which they were distorted.

77 Accordingly, that line of argument is inadmissible.

78 Second, in so far as, by the line of argument set out in paragraph 56 above, Changmao seeks to reproach the General Court for not having found the Commission to have made an error in basing its conclusions relating to the second MET criterion on mere unsubstantiated 'shortcomings', it should be recalled that, in an appeal, the jurisdiction of the Court of Justice is, in principle, confined to the assessment of the findings of law on the pleas argued at first instance (judgment of 9 November 2017, *SolarWorld* v *Council*, C-204/16 P, EU:C:2017:838, paragraph 62 and the case-law cited).

79 Changmao not having raised such an argument before the General Court, it is therefore inadmissible.

80 In any event, that argument is unfounded. It is unequivocally apparent from the documents in the file before the Court that the second MET criterion was the subject of extensive discussions between the Commission and Changmao during the procedure leading to the adoption of the regulation at issue and that, in that context, the Commission clearly identified the reasons why it considered that Changmao did not fulfil that criterion.

81 In the second place, as regards the allegation of a distortion of the facts vitiating paragraph 54 of the judgment under appeal, it must be noted that, in that paragraph, the General Court observed that Changmao seemed to be claiming that any 'accounting errors' would not preclude

recognition of MET. It is true that, in so doing, the General Court used different terminology from that in paragraph 7 of the application at first instance, in which Changmao claimed that, even assuming that 'accounting mistakes' had occurred, the Commission had misused its powers by finding that simple accounting errors could serve as a basis for denying MET. However, it should be noted that the General Court did indeed grasp the substance of that line of argument and examined it on its merits. The terminological variation does not therefore support the conclusion that it distorted the arguments put forward by Changmao.

82 In the third place, as regards the arguments directed against paragraphs 78 to 80 of the judgment under appeal, it should be noted that those paragraphs form part of the General Court's examination of the Commission's conclusion that Changmao had failed to produce certain documents in good time for their analysis during the verification visit at its premises. In paragraph 79 of the judgment under appeal, the General Court found that the Commission's decision to reject the MET claim had not been based on the fact that Changmao had provided certain documents belatedly.

83 Changmao not having specifically challenged that finding of the General Court, its arguments that, thanks to previous investigations, the Commission was in a position to carry out the necessary checks must, therefore, be rejected as ineffective.

84 Moreover, assuming that, by those arguments, Changmao seeks to claim that the General Court was wrong to hold, in paragraph 87 of the judgment under appeal, that that party could not rely on the earlier Commission decisions to call into question the findings made in the regulation at issue, those arguments are unfounded. According to the settled case-law of the Court, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the Commission enjoys a broad discretion by reason of the complexity of the economic and political situations which it has to examine (see, to that effect, judgment of 2 December 2021, *Commission and GMB Glasmanufaktur Brandenburg* v *Xinyi PV Products (Anhui) Holdings*, C-884/19 P and C-888/19 P, EU:C:2021:973, paragraph 117 and the case-law cited). Economic agents cannot have a legitimate expectation that an existing situation, which may be altered by decisions taken by an EU institution in the exercise of its discretion, will be maintained (see, by analogy, judgments of 7 May 1991, *Nakajima* v *Council*, C-69/89, EU:C:1991:186, paragraphs 113 and 120, and of 10 March 1992, *Canon* v *Council*, C-171/87, EU:C:1992:106, paragraph 41).

85 In the last place, as regards the arguments directed against paragraphs 97 and 98 of the judgment under appeal, it should be noted that, in those paragraphs, the General Court rejected as ineffective the second part of Changmao's first plea in law in support of its action at first instance, by which Changmao called into question the Commission's conclusions concerning the third MET criterion, set out in the third indent of Article 2(7)(c) of the basic regulation. The General Court observed, in paragraph 96 of that judgment – which is not contested by Changmao in the present appeal – that the conditions for granting MET set out in Article 2(7)(c) of the basic regulation are cumulative. It is in that respect that, after having noted, in paragraph 97 of that judgment, that Changmao had not succeeded in demonstrating that the Commission had erred in finding that the second MET criterion was not fulfilled, the General Court, in paragraph 98 of the same judgment, decided that it was necessary to reject that second part as ineffective.

86 Changmao having also failed to establish, before the Court, that the General Court's decision to reject its line of argument regarding the Commission's infringement of the provisions relating to the second MET criterion was vitiated by an error of law, its arguments challenging paragraphs 97 and 98 of the judgment under appeal must be rejected as unfounded.

87 As a result, the first ground of appeal must be rejected as being in part inadmissible and in part unfounded.

### *2. The second ground of appeal*

#### *(a) Arguments of the parties*

88 By its second ground of appeal, Changmao claims that, in paragraphs 113, 115 to 118, 125, 126 and 128 to 130 of the judgment under appeal, the General Court made errors of law and distorted the facts in that it held that the Commission had neither infringed Article 2(7)(a) of the basic regulation, Article 6(8) of Regulation 2016/1036 and Article 9(4) of the basic regulation nor breached its duty of care and the principle of sound administration by failing to ask the analogue country producer for the detailed list of its export transactions.

89 In the first place, Changmao claims that the General Court misapplied Article 2(7)(a) of the basic regulation. In its view, according to that provision, in order to determine the normal value, the Commission must take into account the sales of the analogue country producer on the domestic market or, where this is not possible, the export sales of that producer. It is only as a last resort that it can use prices actually paid or payable in the European Union.

90 According to Changmao, in the present case, the Commission considered that it could not rely on either the domestic sales or the export sales of the Japanese producer, as the analogue country producer, and therefore it determined the normal value on the basis of the sales of the EU producer, which is a wholly owned subsidiary of that Japanese producer. The Commission asked that producer for detailed, transaction-by-transaction lists of sales for domestic sales alone. Although it considered those lists to be unreliable, it was satisfied with a summary of the financial performance of that producer's exports, provided in Table 15 of the same producer's reply to the anti-dumping questionnaire. According to Changmao, that table is insufficiently detailed. Contrary to the General Court's finding in paragraph 113 of the judgment under appeal, it does not show that 'all' export sales were clearly loss making, but only that, 'considered collectively', they were loss making. Paragraph 113 is therefore vitiated by a distortion of the facts.

91 According to Changmao, in the absence of a transaction-by-transaction list of export sales, it cannot be ruled out that certain export transactions of the Japanese producer to third countries or to the European Union were sufficiently reliable to serve as a basis for determining normal value. The Commission should therefore have asked that producer for such a list.

92 Changmao deduces from this that the Commission, contrary to what the General Court held in paragraphs 115, 116, 128 and 129 of the judgment under appeal, infringed Article 2(7)(a) of the basic regulation and acted without due care and in disregard of the principle of sound administration.

93 In the second place, referring to paragraph 125 of the judgment under appeal, Changmao maintains that the General Court erred in law in finding that the Commission had not failed to fulfil its obligations under Article 6(8) of Regulation 2016/1036.

94 In the third place, Changmao claims that, in the absence of the errors committed by the Commission, its dumping margin would in all likelihood have been lower and, potentially, lower than the injury margin. In that regard, the General Court erred in law in holding, in paragraphs 117 and 118 of the judgment under appeal, that it was for Changmao to provide evidence establishing that the dumping margin would have been lower than the injury margin. That approach is based on a misreading of Article 2(7)(a) of the basic regulation and runs counter to the case-law of the Court of Justice requiring the Commission to consider on its own initiative all available information.

95 The Commission contends that the second ground of appeal is ineffective and must, in any event, be rejected as in part inadmissible, in part ineffective and in part unfounded.

### *(b) Findings of the Court*

96 In the first place, Changmao claims that, in paragraphs 115, 116, 128 and 129 of the judgment under appeal, the General Court misapplied Article 2(7)(a) of the basic regulation and erroneously held that the Commission had acted with due care and in observance of the principle of sound administration.

97 Article 2(7)(a) of the basic regulation sets out the method applicable, by way of derogation from the rules laid down in paragraphs 1 to 6 of that article, for the purpose of determining the normal value in the case of imports from non-market economy countries.

98 In the light of the wording and scheme of that provision, the main method of determining the normal value in the case of imports from non-market economy countries is the analogue country method, namely that 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 [European Union]'. Otherwise, 'where those are not possible', an alternative method is set out, according to which the normal value is to be determined 'on any other reasonable basis, including the price actually paid or payable in the [European Union] for the like product, duly adjusted if necessary to include a reasonable profit margin'. It follows that the discretion enjoyed by the Commission in the choice of an analogue country does not authorise it to disregard the requirement to choose a market economy third country where such a choice is possible (see, to that effect, judgment of 22 March 2012, *GLS*, C-338/10, EU:C:2012:158, paragraphs 24 and 26).

99 Under the second subparagraph of Article 2(7)(a) of the basic regulation, an appropriate market economy third country is to be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. It is for the Commission, whilst taking account of the possible alternatives, to try to find a third country in which the prices for a like product are formed in circumstances which are as similar as possible to those in the country of export, provided that it is a market economy country (see, to that effect, judgment of 22 March 2012, *GLS*, C-338/10, EU:C:2012:158, paragraph 21).

100 In the context of judicial review of the exercise of the discretion enjoyed by the Commission as regards the choice of analogue country, it is desirable, in particular, to verify that the Commission has not neglected to take account of essential factors for the purpose of establishing

the appropriate nature of the country chosen and that the information contained in the documents in the case was considered with all the care required for the view to be taken that the normal value was determined in an appropriate and not unreasonable manner (judgments of 22 October 1991, *Nölle*, C-16/90, EU:C:1991:402, paragraphs 12 and 13, and of 22 March 2012, *GLS*, C-338/10, EU:C:2012:158, paragraph 22).

101 In the present case, in paragraphs 112 to 114 of the judgment under appeal, the General Court stated that it was apparent both from the regulation at issue and from the explanations provided by the Commission that, first, the data provided by the Japanese producer were not reliable in so far as, inter alia, its profit margins varied greatly and unjustifiably between types and sizes of customers, second, while all domestic sales were highly profitable, all export sales were loss-making and, third, interested parties, including Changmao, raised concerns, following the provisional disclosure, as to the choice of Japan as an analogue country.

102 It is in the light of those circumstances – the first and third of which are not disputed by Changmao – that the General Court considered, in paragraphs 115 and 116 of the judgment under appeal, that the Commission had not infringed Article 2(7)(a) of the basic regulation by using EU industry data for the determination of the normal value of the product concerned, in so far as the information available at the time of the choice was not reliable and was likely to lead to an inappropriate and unreasonable choice of analogue country.

103 In that same context, in paragraphs 128 and 129 of the judgment under appeal, the General Court held that the Commission could not be criticised for not having exercised due care. The General Court reached that conclusion in view of a set of facts presented in paragraphs 120 to 124 and 127 of that judgment, which are not disputed by Changmao. Those facts relate to the limited number of aspartame-producing countries, to the conduct of the Commission's investigation and to the comments that the latter was able to obtain.

104 In doing so, General Court did not commit any error of law.

105 It is true, as Changmao claims, that it is only if it is impossible to use the analogue country method that the Commission may determine the normal value on any other reasonable basis under Article 2(7)(a) of the basic regulation, the scope of which has been set out in paragraph 98 above.

106 However, contrary to what Changmao claims, it does not follow from this that the Commission was, in the circumstances of the present case, required to request detailed information on the Japanese producer's export transactions.

107 In those circumstances and in view of the unreliability of the detailed information provided by that producer concerning its import sales and the more summary information provided concerning its export sales, it was neither inappropriate nor unreasonable for the Commission to determine the normal value on any other reasonable basis, in accordance with Article 2(7)(a) of the basic regulation and the case-law of the Court cited in paragraphs 99 and 100 above. The Commission was entitled to proceed in that way without first requesting more detailed information on those export sales.

108 Accordingly, the General Court did not err in law in holding, in essence, in paragraphs 115 and 116 of the judgment under appeal, that the Commission had not infringed Article 2(7)(a) of the basic regulation by using EU industry data for the purpose of determining the normal value of the product concerned, even without having first requested detailed information on the Japanese producer's export sales.

109 The circumstance that, in paragraph 113 of the judgment under appeal, the General Court found, in general terms, that, according to the Commission's explanations, it was apparent from the table produced by the Japanese producer that 'all [that producer's] export sales were loss-making', whereas, as Changmao rightly states, according to those explanations, those sales 'considered collectively' were loss making, is not, in itself, capable of invalidating the conclusion drawn in the preceding paragraph. That imprecision in paragraph 113 of the judgment under appeal in no way alters the finding that the data produced by the Japanese producer were not, on the whole, reliable. It is in the light of that consideration that, in the circumstances referred to by the General Court, the Commission was entitled to determine the normal value on the basis of the EU data.

110 In the second place, in addition to the fact that, in paragraph 125 of the judgment under appeal, the General Court expressed no view whatsoever on Article 6(8) of Regulation 2016/1036, it is at the appeal stage that Changmao is alleging an infringement of that provision for the first time. In accordance with the case-law cited in paragraph 78 above, that claim is therefore inadmissible.

111 In the third place, it should be pointed out that paragraphs 117 and 118 of the judgment under appeal set out a ground expressed for the sake of completeness in support of the rejection, by the General Court, of the second plea in law in the action at first instance. First, that ground is introduced by the word 'furthermore'. Second, by that ground, the General Court, in essence, rejected as ineffective Changmao's argument that the Commission should have given priority to the use of the export prices of the analogue country producer, that argument having already been rejected as unfounded in paragraph 116 of the judgment under appeal.

112 It follows that Changmao's arguments directed against paragraphs 117 and 118 of the judgment under appeal are ineffective.

113 In the light of the foregoing, the second ground of appeal must be rejected as in part inadmissible, in part unfounded and in part ineffective.

### *3. The third ground of appeal*

#### *(a) Arguments of the parties*

114 By its third ground of appeal, Changmao criticises paragraphs 141 to 144, 152, 153 and 155 to 162 of the judgment under appeal. In its view, the General Court wrongly held in those paragraphs that, by refusing the requests for adjustments that Changmao had submitted for the purpose of calculating the dumping margin, the Commission had infringed neither Article 2(10) and Article 9(4) of the basic regulation nor Article 2.4 of the Anti-Dumping Agreement. This ground of appeal is divided into three parts.

*(1) The first part*

115 By the first part of its third ground of appeal, Changmao claims that the General Court '[distorted] the facts relating to the concept of evidence'.

116 Changmao maintains that, during the investigation procedure, it requested the Commission to make price adjustments pursuant to Article 2(10)(a), (b), (e) to (h) and (k) of the basic regulation, since the comparability of the EU prices used to determine the normal value and the export price was affected by differences in the production process of aspartame, regulatory requirements, after-sales services, the cost of energy, access to raw materials, patent and know-how royalties, packaging costs, ocean freight, insurance, handling, bank charges and credit costs.

117 The Commission rejected all the adjustments requested – which would have led to increased export prices or a decreased normal value – on the ground that Changmao had not demonstrated 'that customers consistently pay different prices on the domestic market because of the difference in such factors'. On the contrary, it made adjustments which, to Changmao's detriment, led to decreased export prices and an increased normal value without requiring such evidence, thereby making an arbitrary differentiation.

118 Contrary to what the General Court held in paragraphs 141 to 144 of the judgment under appeal by distorting the facts, Changmao submits that it did indeed provide evidence in support of the adjustments requested. It identified and relied on all of the factors affecting price comparability and demonstrated that each of those factors had an impact on prices.

119 The evidence provided by Changmao also coincides with the Commission's findings in recital 80 of the provisional regulation and in recital 76 of the regulation at issue, according to which, during the investigation period, the weighted average of the EU industry's prices by aspartame type was 21.1% higher than the prices of comparable imported product types.

120 In addition, Changmao was unable to provide the evidence that was necessary according to the approach adopted by the General Court, since it involved confidential documents not accessible to it. By contrast, the Commission was able to access that evidence.

121 The Commission considers that those arguments, which essentially relate to the administrative procedure, are not relevant at the appeal stage. In its view, the first part of the third ground of appeal is in part inadmissible and in part unfounded.

*(2) The second part*

122 The second part of Changmao's third plea comprises two complaints, each alleging a different error of law committed by the General Court.

123 By the first complaint, it claims that the General Court, in paragraphs 151 and 153 of the judgment under appeal, misinterpreted Article 2(10) of the basic regulation by disregarding the fact that, according to the WTO Dispute Settlement Body, an exporter not granted MET must prove as constructively as possible the facts which necessitate an adjustment, whereas the Commission must assess and grant the requested adjustments by means of undistorted market data sources.

124 In the present case, Changmao did not base its request for adjustments on its own production costs in China, contrary to what the General Court stated in paragraph 151 of the judgment under appeal while wrongly associating the evidence provided by it – according to which the differences in costs affected price comparability – with the fact that costs were distorted in China. The Commission should have sought to obtain from the EU producer the data necessary to make the adjustments requested and to assess the differences in the costs, in the European Union, of raw materials, production processes, regulatory compliance, freight and insurance as well as the cost of import duties, patent royalties and packaging.

125 In that regard, Changmao is of the opinion that the circumstances of the present case differ fundamentally from those of the case which gave rise to the judgment of 29 July 2019, *Shanxi Taigang Stainless Steel* v *Commission* (C-436/18 P, EU:C:2019:643).

126 Relying on Article 2.4 of the Anti-Dumping Agreement, Changmao adds that a fair comparison must always be made between the normal value and the export price, including when the normal value is determined on the basis of a market economy third country and the exporter concerned has been denied MET. Requiring an exporter such as Changmao to prove that customers consistently pay different prices on the domestic market because of alleged differences in production costs would prevent any adjustment in that respect. That incorrect approach of the Commission and the General Court is contrary to WTO law, to the case-law of the EU Courts and to the practice of the EU institutions.

127 By the second complaint, Changmao claims that the General Court was wrong to hold that Article 2(10) of the basic regulation makes adjustments subject to the condition that customers consistently pay different prices on the domestic market because of the differences in the relevant factors. Such a condition is provided for specifically only in Article 2(10)(k) of that regulation, but not generally in Article 2(10)(a) to (j) of that regulation. That condition is not required by Article 2.4 of the Anti-Dumping Agreement, according to which the burden of proof imposed on interested parties must not be unreasonable. That condition places an unreasonable burden of proof on non-market economy exporters, since they do not have at their disposal the data used by the analogue country producer to determine the normal value.

128 In its reply, Changmao states that it did indeed rely on WTO law before the General Court, as is apparent from paragraphs 31 and 33 and footnotes 24 to 26 of the reply lodged at first instance.

129 The Commission contends that all of those arguments should be rejected. The first complaint, which seeks to challenge paragraphs 151 to 153 of the judgment under appeal in the light of WTO law, is inadmissible and, in any event, unfounded. The second complaint is unfounded.

*(3) The third part*

130 By the third part of its third ground of appeal, Changmao criticises, in the first place, paragraphs 155 to 160 of the judgment under appeal. In its view, the findings of the General Court in those paragraphs are vitiated by procedural errors and errors relating to its rights of defence and the Commission's duties of sound administration and due care. In that context, the General Court also infringed Article 20(2) and (4) of Regulation 2016/1036 and Articles 6.2, 6.4, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement.

131 According to Changmao, in the light of those provisions, paragraph 155 of the judgment under appeal is vitiated by an error, since the Commission did not provide it with the reasoning justifying the rejection of the evidence on the differences in the physical characteristics of the EU producer's products due to differences in regulatory requirements. Moreover, contrary to Article 6.4 of the Anti-Dumping Agreement, the Commission gave it a period of only 10 days to comment on the change in the choice of analogue producer, which occurred at a late stage in the procedure. The EU producer provided insufficient information.

132 In the second place, Changmao takes issue with paragraph 207 of the judgment under appeal, by which, in its view, the General Court wrongly refused to grant the measures of organisation of procedure or inquiry it had requested in connection with its plea concerning the adjustments and which were necessary for its effective judicial protection.

133 Lastly, referring to the second subparagraph of Article 9(4) of the basic regulation, Changmao states that the adjustments requested would have reduced its dumping margin to levels below the injury margin.

134 The Commission contends that this third ground of appeal should be rejected as in part inadmissible and in part unfounded.

### *(b) Findings of the Court*

135 As regards the third ground of appeal, which alleges distortion of the facts and errors of law and of procedure, it is appropriate to examine, first, the first part and the second complaint of the second part, then the third part and, lastly, the first complaint of the second part.

#### *(1) The first part and the second complaint of the second part*

136 By this part and this complaint, Changmao claims, in essence, that the General Court distorted the facts and erred in law in the examination, in paragraphs 141 to 144 of the judgment under appeal, of its arguments seeking to challenge the Commission's rejection of the adjustments that it had requested under Article 2(10) of the basic regulation.

137 In that regard, it must be recalled that that provision provides that, where a fair comparison cannot be made between the normal value and the export price, due allowance is to be made, in the form of adjustments, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability.

138 In accordance with the case-law of the Court, it is apparent from the wording and broad scheme of Article 2(10) of the basic regulation that an adjustment to the export price or to the normal value may be made only to take account of differences in relation to factors which affect both prices, and which thus affect their comparability, in order to ensure that the comparison is made at the same level of trade (see, to that effect, judgments of 16 February 2012, *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraph 53, and of 4 May 2017, *RFA International* v *Commission*, C-239/15 P, not published, EU:C:2017:337, paragraph 42).

139 It is also apparent from the case-law of the Court that, if a party claims adjustments under Article 2(10) of the basic regulation in order to make the normal value and the export price comparable for the purpose of determining the dumping margin, that party must prove that its claim is justified. Accordingly, the burden of proving that the specific adjustments listed in Article 2(10)(a) to (k) of the basic regulation must be made lies with those who wish to rely on them, irrespective of who they are (see, to that effect, judgment of 16 February 2012, *Council* v *Interpipe Niko Tube and Interpipe NTRP*, C-191/09 P and C-200/09 P, EU:C:2012:78, paragraphs 58 and 60). It follows that it is for the party wishing to rely on such an adjustment to demonstrate that the factor in respect of which that adjustment is requested is capable of affecting prices and price comparability.

140 In the present case, in paragraphs 139 and 141 to 143 of the judgment under appeal, the General Court, in essence, held that it was for Changmao to prove that its request for adjustments under Article 2(10) of the basic regulation was justified and that the differences in costs alleged by it translated into differences in prices, while noting that Changmao did not dispute the finding, in recital 49 of the regulation at issue, that it had not produced any evidence in support of its request for adjustments. As a result, the General Court held, in paragraph 144 of the judgment under appeal, that Changmao could not complain that the Commission had infringed Article 2(10) of the basic regulation by refusing to make the adjustments requested for the purposes of determining the dumping margin.

141 Those findings are not vitiated by any error of law.

142 First, contrary to Changmao's claims, the General Court was fully entitled to hold that, in accordance with both the wording and scheme of Article 2(10) of the basic regulation and with the case-law of the Court of Justice cited in paragraphs 138 and 139 above, it was for Changmao to establish, in support of its request for adjustments, that the alleged differences in costs were such as to affect prices and price comparability.

143 Second, in so far as, by its arguments summarised in paragraphs 116 and 117 above, Changmao appears to claim that, contrary to what the General Court held, it had indeed provided evidence demonstrating that its requests for adjustments under Article 2(10) of the basic regulation were justified, its line of argument amounts, in reality, to requesting the Court of Justice to carry out a new assessment of the facts and evidence. In the absence of any demonstration – or even allegation – of a distortion of those facts and that evidence, that line of argument is inadmissible, in accordance with the settled case-law of the Court cited in paragraph 73 above.

144 Moreover, in so far as Changmao appears to claim that the General Court misconstrued the very concept of 'evidence', its line of argument stems from confusion between, on the one hand, a claim or an assertion of the factual circumstances, supported by mere suppositions, and, on the other hand, proof of the materiality of those circumstances. Aside from the fact that, before the Court of Justice, Changmao merely makes claims without substantiating them with evidence that would allow the reality of the alleged differences in costs and their impact on price comparability, within the meaning of Article 2(10) of the basic regulation, to be verified and established, that party identifies no evidence which the General Court failed to take into account or which it distorted.

145 Third, Changmao is wrong to seek to justify its requests for adjustments on the basis of recital 76 of the regulation at issue, according to which the Commission found that the weighted average of the EU industry prices per aspartame type was 21.1% higher than the prices of comparable

imported product types. That price difference reflects the undercutting margin and forms part of the determination of material injury suffered by the EU industry. However, as the Advocate General observed in point 151 of his Opinion, that recital does not in any way suggest that that margin of undercutting was caused by differences in production costs.

146 In the light of the foregoing, the first part and the second complaint of the second part of the third ground of appeal must be rejected as in part inadmissible and in part unfounded.

*(2) The third part*

147 By the third part of its third ground of appeal, Changmao takes issue with paragraphs 155 to 160 and 207 of the judgment under appeal, on the ground that, by rejecting its arguments alleging an unreasonable burden of proof, the General Court disregarded its rights of defence and the Commission's duties of sound administration and due care, and infringed Articles 6.2, 6.4, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement and Article 20(2) and (4) of Regulation 2016/1036.

148 At the outset, it should be pointed out that it is at the stage of the appeal that Changmao is alleging for the first time infringement of Articles 6.2, 6.4, 12.2.1 and 12.2.2 of the Anti-Dumping Agreement and of Article 20(2) and (4) of Regulation 2016/1036. It follows that, as the Advocate General observed in points 124 and 125 of his Opinion, in accordance with the case-law cited in paragraph 78 above, the third part is inadmissible in so far as it is based on an alleged infringement of those provisions.

149 With regard to the substance, in the first place, Changmao claims, in essence, that, in paragraphs 155 to 160 of the judgment under appeal, the General Court placed an unreasonable burden of proof on it, thereby infringing Changmao's rights of defence and disregarding the duty of care incumbent on the Commission and the principle of sound administration.

150 In those paragraphs, the General Court considered that, in the light of the data communicated by the Commission during the investigation and the burden of proof borne by Changmao in the context of its requests for adjustments, Changmao could not complain that the Commission placed an unreasonable burden of proof on it.

151 Contrary to what Changmao appears to argue, the mere fact that, in the present case, the normal value was established, in accordance with Article 2(7)(a) of the basic regulation, on the basis of the price actually paid or payable in the European Union is not such as to require a relaxation of the rule on the allocation of the burden of proof, as it stems from Article 2(10) of that regulation and from the case-law cited in paragraphs 138 and 139 above. As the Advocate General stated in point 140 of his Opinion, that rule, according to which it is for the party requesting an adjustment in respect of one of the factors referred to in Article 2(10) of the basic regulation to demonstrate that that factor is such as to affect prices and price comparability, applies irrespective of the method used to determine the normal value.

152 Moreover, Changmao claims that, where the normal value is determined on the basis of the price paid or payable in the European Union, an exporting producer from the country under investigation is prevented from fully exercising its rights of defence since it does not have access to EU industry data, which has been its situation in the present case. It is expressly clear from the General Court's findings in paragraphs 155 and 156 of the judgment under appeal that it was apparent from the regulation at issue that the Commission had disclosed to the Chinese exporting producers data relating to the EU producer and that Changmao had been able to

comment on those data. On the basis of those findings, which are not called into question by Changmao in the context of the present appeal as such, the General Court could deduce, without committing an error of law, in paragraph 159 of the judgment under appeal, that Changmao could not validly complain that the Commission had failed to act in accordance with the principle of sound administration and infringed its rights of defence by placing an unreasonable burden of proof on it.

153 Accordingly, it is necessary to reject as unfounded the arguments put forward by Changmao in support of the third part of its third ground of appeal, alleging that paragraphs 155 to 160 of the judgment under appeal are vitiated by errors relating to the rights of the defence, the duty of care incumbent on the Commission and the principle of sound administration.

154 In the second place, Changmao takes issue with paragraph 207 of the judgment under appeal in so far as, by that paragraph, the General Court wrongly refused to adopt the measures of organisation of procedure or inquiry it had requested.

155 In that paragraph of the judgment under appeal, the General Court dismissed the action brought by Changmao at first instance 'without it being necessary to grant [Changmao's] requests for measures of organisation of procedure and inquiry'.

156 It should be recalled that, according to the settled case-law of the Court of Justice, the General Court is the sole judge of whether the information available to it concerning the cases before it needs to be supplemented (judgments of 10 July 2001, *Ismeri Europa* v *Court of Auditors*, C-315/99 P, EU:C:2001:391, paragraph 19, and of 22 October 2020, *Silver Plastics and Johannes Reifenhäuser* v *Commission*, C-702/19 P, EU:C:2020:857, paragraph 28).

157 Accordingly, Changmao cannot reasonably challenge, at the stage of the present appeal, the General Court's decision not to adopt the measures of organisation of procedure and inquiry the adoption of which it had suggested in its written pleadings before that court.

158 It follows that the third part of the third ground of appeal must be rejected as in part inadmissible and in part unfounded.

*(3) The first complaint of the second part*

159 By this complaint, Changmao claims that the General Court erred in law in paragraphs 151 to 153 of the judgment under appeal.

160 In those paragraphs, the General Court stated that, 'in any event', since Changmao did not benefit from MET, the data concerning it could not be taken into account in respect of adjustments within the meaning of Article 2(10) of the basic regulation, which cannot be used in order to render Article 2(7)(a) of that regulation ineffective.

161 It is clear from the words 'in any event' that the considerations set out in those paragraphs of the judgment under appeal were included for the sake of completeness.

162 It is apparent from the analysis of the first and third parts and of the second complaint of the second part of the present ground of appeal that Changmao has not succeeded in demonstrating that the principal ground of the judgment, set out in particular in paragraphs 141 and 144 of the judgment under appeal, read in conjunction with paragraphs 155 to 160 thereof, is vitiated by an error of law.

163 It follows that, as the Advocate General observed in points 186 and 187 of his Opinion, the present complaint must be rejected as ineffective, without there being any need to rule on its admissibility.

164 In the light of all the foregoing considerations, the third ground of appeal must be rejected in its entirety.

### *4. The fourth ground of appeal*

#### *(a) Arguments of the parties*

165 By its fourth ground of appeal, Changmao claims that the General Court erred in law and distorted the facts in so far as it held, in paragraphs 148 and 150 of the judgment under appeal, that the Commission was not required to make the adjustments provided for in Article 2(10) of the basic regulation for the purpose of determining the existence of injury and, on that ground, rejected its arguments alleging infringement of Article 3(2) and (3) and Article 9(4) of that regulation and disregard of the principle of sound administration and of the duty of care.

166 Changmao deduces from the case-law of the General Court that the determination of injury to the EU industry, pursuant to Article 3(2) of the basic regulation, requires a fair comparison to be made between the export price and the price that was or should have been obtained by the EU industry in sales in the territory of the European Union. In order to ensure a fair comparison, prices should be compared at the same level of trade, including all the costs relating to the levels of trade which must be taken into account.

167 According to Changmao, in respect of the adjustments provided for in Article 2(10) of the basic regulation, it is necessary to take into consideration the cost differences between the EU industry and exporters resulting from after-sales services provided solely by the former, from packaging and from patent and know-how royalties. The Commission's practice is to grant such adjustments by reducing the sales prices or costs of the EU industry to the extent necessary.

168 Those adjustments may thus be granted under Article 2(10)(f) and (h) of the basic regulation as well as under Article 3(2) of that regulation.

169 The General Court thus erred in law by validating, in paragraphs 148 and 150 of the judgment under appeal, the Commission's refusal to make the adjustments that Changmao had thus requested, with supporting evidence, for the purpose of determining the existence of injury. It was also wrong to hold that the Commission had not disregarded the principle of sound administration and had acted with due diligence. According to Changmao, if the adjustments requested had been made, the Commission would not have been able to establish the existence of injury or, at least, would have concluded that there was a lower injury margin. Therefore, the General Court also erred in law in holding that the Commission's approach did not infringe Article 9(4) of the basic regulation.

170 The Commission contends that all those arguments should be rejected as either inadmissible or ineffective and, in any event, unfounded.

### *(b) Findings of the Court*

171 By its fourth ground of appeal, Changmao claims that the General Court erred in law in paragraphs 148 and 150 of the judgment under appeal.

172 In those paragraphs, the General Court held that Article 3(2) and (3) and Article 9(4) of the basic regulation did not require the Commission to make, for the purpose of determining the existence of injury, the adjustments provided for in Article 2(10) of that regulation, such that Changmao cannot complain that the Commission infringed that provision by refusing to make the adjustments requested for the purpose of determining injury.

173 Changmao claims, in essence, that the determination of injury in accordance with Article 3(2) of the basic regulation means that adjustments analogous to those provided for in Article 2(10) of that regulation must be made where they are necessary in order to make a fair comparison, that is to say a comparison made at the same level of trade, between the export price and the price that was or should have been obtained by the EU industry.

174 However, even if, as Changmao claims, Article 3(2) of the basic regulation implies, despite its wording, an obligation for the Commission, when determining the existence of injury, to make such adjustments, it would then be appropriate to consider, as the Advocate General did in point 206 of his Opinion and by analogy with the case-law cited in paragraph 139 above, that it would be for the party requesting an adjustment to provide evidence justifying it.

175 First, it is common ground that Changmao seeks, in essence, the same adjustments for the purposes of both the determination of the existence of dumping and that of injury. Those adjustments were, moreover, addressed in a single plea before the General Court. As is apparent from paragraphs 140 and 142 to 146 above, the General Court held, in the exercise of its exclusive jurisdiction to assess the facts and without committing an error of law, that Changmao had not provided evidence that those adjustments were necessary.

176 Second, the Commission rejected the requests for adjustments for the purpose of determining the existence of injury on the ground, set out in recital 70 of the regulation at issue, that the investigation ‘had not revealed any quality or other difference between the product concerned and the like product that would be systematically reflected in prices’. As the Advocate General observed in point 207 of his Opinion, the General Court, in essence, endorsed that ground. Changmao criticises that paragraph only in the context of the third complaint of the third ground of appeal, which has been rejected in paragraph 164 above.

177 In those circumstances, the fourth ground of appeal must be rejected as ineffective, without it being necessary to determine whether, when determining the existence of injury pursuant to Article 3(2) of the basic regulation, the Commission may, or even must, make adjustments in order to ensure a comparison of prices at the same level of trade.

### *5. The fifth ground of appeal*

#### *(a) Arguments of the parties*

178 By its fifth ground of appeal, Changmao claims that paragraphs 187, 189 to 191, 194, 200, 201 and 203 to 206 of the judgment under appeal are vitiated by errors of law and a distortion of the facts.

179 That ground is based on the premiss that the EU producer and its suppliers of raw materials, namely the Japanese producer and suppliers in the European Union, which are wholly owned subsidiaries of the Japanese producer, belonged to a single corporate and economic entity. Changmao deduces from this that the prices paid by the EU producer for the purchase of raw materials were prices between related parties and that they affected that producer's production costs and selling prices.

180 In its view, it follows from Article 2(7)(a) and Article 3 of the basic regulation that, for the purpose of determining whether there is dumping and injury, the Commission is under an obligation to ensure, relying on evidence, that the prices used are reliable and not distorted. Article 6(8) of Regulation 2016/1036 requires that it use the data of the cooperating parties as far as possible. It is nevertheless for suppliers to provide evidence that the prices of their raw materials sold to related parties in the European Union are market prices.

181 Contrary to the approach taken by the General Court in paragraphs 187, 200, 201 and 203 to 206 of the judgment under appeal, the Commission's usual practice involves requesting cooperating interested parties, such as the EU industry, to submit questionnaires for their related suppliers outside and within the European Union. Changmao disputed the price of the raw materials used by the Commission.

182 The General Court also made an error in paragraph 191 of the judgment under appeal, in which it considered that the Commission had observed the principle of sound administration and relied on evidence in order to find that the prices of raw materials charged by suppliers to the related producer in the European Union complied with market conditions. According to Changmao, the Commission did not verify the accuracy and reliability of the information which it derived, in that regard, from a general report prepared by a Chinese company on the prices of raw materials in China, in order to ensure that it constituted positive and objective evidence. That evidence is not sufficient to ensure that the prices charged by those suppliers were in fact market prices. The Commission could have asked the EU producer to complete a detailed questionnaire on those prices and verified the responses.

183 That duty to verify exists regardless of the evidence or requests of the interested parties. Paragraph 206 of the judgment under appeal is therefore erroneous.

184 Changmao adds that the judgment of 23 September 2015, *Hüpeden* v *Council and Commission* (T-206/14, not published, EU:T:2015:672), cited in paragraphs 187 and 203 of the judgment under appeal, is not relevant because the case which gave rise to that judgment did not concern the exercise, by the Commission, of its discretion in the assessment as to the existence of dumping and injury in the light of the principle of sound administration and the duty of care.

185 The Commission contends that the present ground of appeal is inadmissible and, in any event, unfounded.

### *(b) Findings of the Court*

186 Under Article 169(2) of the Rules of Procedure of the Court of Justice, the pleas in law and legal arguments relied on must identify precisely those points in the grounds of the decision of the General Court which are contested. Consequently, according to settled case-law, an appeal must indicate precisely the contested elements of the judgment which the appellant seeks to have set aside and also the legal arguments specifically advanced in support of the appeal, failing which the appeal or the relevant ground of appeal will be declared inadmissible (judgment of 20 September 2018, *Agria Polska and Others* v *Commission*, C-373/17 P, EU:C:2018:756, paragraph 33 and the case-law cited).

187 Inter alia, a ground of appeal supported by an argument that is not sufficiently clear and precise to enable the Court to exercise its powers of judicial review, in particular because essential elements on which the ground of appeal is based are not indicated sufficiently coherently and intelligibly in the text of the appeal, which is worded in a vague and ambiguous manner in that regard, does not satisfy those requirements and must be dismissed as inadmissible (judgment of 10 July 2014, *Telefónica and Telefónica de España* v *Commission*, C-295/12 P, EU:C:2014:2062, paragraph 30 and the case-law cited, and order of 29 June 2016, *Ombudsman* v *Staelen*, C-337/15 P, not published, EU:C:2016:670, paragraph 22).

188 Although Changmao identifies precisely the paragraphs of the judgment under appeal which it seeks to criticise by its fifth plea, it has failed to explain precisely and specifically the errors of law allegedly made by the General Court.

189 Moreover, it does not appear that, by the arguments put forward in the context of the present ground of appeal, Changmao disputes the reasoning of the judgment under appeal. On the contrary, those arguments appear, in essence, to seek to criticise the Commission's conduct in the procedure leading to the adoption of the regulation at issue.

190 It follows that the fifth ground of appeal is inadmissible.

191 Since none of the grounds of appeal put forward by Changmao in support of its appeal can succeed, the appeal must be dismissed in its entirety.

## Costs

192 Under Article 138(1) of the Rules of Procedure of the Court of Justice, applicable to appeal proceedings by virtue of Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

193 Since the Commission has applied for costs to be awarded against Changmao and the latter has been unsuccessful, Changmao must be ordered to bear its own costs and to pay those incurred by the Commission.

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

**1. Dismisses the appeal;**

**2. Orders Changmao Biochemical Engineering Co. Ltd to bear its own costs and to pay those incurred by the European Commission.**

Jürimäe Rodin Piçarra

Delivered in open court in Luxembourg on 28 April 2022.

A. Calot Escobar
Registrar

K. Lenaerts
President