Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber, Extended Composition)

25 January 2017*

(Dumping — Imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China — Definitive antidumping duty — Market Economy Treatment — Article 2(7)(b) and (c) second indent of Regulation (EC) No 384/96 — Cumulative assessment of imports subject to antidumping investigations — Article 3(4)(a) and (b) of Regulation No 384/96 — Undertaking offer — Article 8(3) of Regulation No 384/96)

In Case T-512/09 RENV,

**Rusal Armenal ZAO**, established in Yerevan (Armenia), represented by B. Evtimov, E. Borovikov, lawyers, and D. O'Keeffe, Solicitor,

applicant,

v

**Council of the European Union**, represented initially by S. Boelaert and J.-P. Hix, acting as Agents, and subsequently by J.-P. Hix, and by B. O'Connor, Solicitor, and S. Gubel, lawyer,

defendant,

supported by

**European Parliament**, represented by D. Warin and A. Auersperger Matić, acting as Agents,

and by

**European Commission**, represented by J.-F. Brakeland, M. França and A. Demeneix, acting as Agents,

interveners,

APPLICATION under Article 263 TFEU for the annulment of Council Regulation (EC) No 925/2009 of 24 September 2009 imposing a definitive antidumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China (OJ 2009 L 262, p. 1),

THE GENERAL COURT (Fourth Chamber, Extended Composition),

composed of M. Prek (Rapporteur), President, I. Labucka, J. Schwarcz, V. Tomljenović and V. Kreuschitz, Judges,

Registrar: C. Heeren, Administrator,

* * Language of the case: English.

having regard to the written part of the procedure and further to the hearing on 1 June 2016,

gives the following

## Judgment

### Background to the dispute

1 The applicant, Rusal Armenal ZAO, is a manufacturer and exporter of aluminium products that was established in 2000 in Armenia. On 5 February 2003, the Republic of Armenia acceded to the Agreement establishing the World Trade Organisation (WTO) (OJ 1994 L 336, p. 3).

2 Following a complaint lodged by Eurométaux on 28 May 2008, the Commission of the European Communities initiated an antidumping proceeding concerning imports of certain aluminium foil originating in Armenia, Brazil and the People's Republic of China ('the PRC'). The notice of initiation of that proceeding was published in the *Official Journal of the European Union* of 12 July 2008 (OJ 2008 C 177, p. 13).

3 By letters of 25 July and 1 September 2008, the applicant disputed, inter alia, the classification of Armenia amongst the non-market economy countries pursuant to Article 2(7) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1) ('the basic regulation'). In addition, in the context of the analysis relating to price undercutting / underselling, the applicant pointed to the deficiencies associated with its products, a matter on which it provided additional information in a letter dated 7 October 2008.

4 Moreover, the applicant submitted a claim to be granted market economy treatment or, failing that, individual treatment ('the MET claim'). In this regard, by letter of 19 December 2008, the Commission sent to the applicant the considerations on the basis of which the Commission concluded that the criteria relating to accounting records and production costs mentioned in the second and third indents of Article 2(7)(c) of the basic regulation were not satisfied. By letter of 5 January 2009, the applicant reiterated its complaints against the application of Article 2(7) of the basic regulation in respect of Armenia and contested the assessments made by the Commission concerning the criteria which the latter deemed not to be met. By letter of 13 March 2009, the applicant submitted to the Commission additional evidence relating to its MET claim.

5 On 7 April 2009, the Commission adopted Regulation (EC) No 287/2009 imposing a provisional antidumping duty on imports of certain aluminium foil originating in Armenia, Brazil and the [PRC] (OJ 2009 L 94, p. 17, 'the provisional regulation'). By letter of 8 April 2009, in accordance with Article 14(2) and Article 20(1) of the basic regulation, the Commission communicated the provisional regulation to the applicant, together with the considerations relating to the calculation of the dumping and injury margins applicable to the applicant.

6 Turkey was designated as an analogue country for the purposes of the calculation of a normal value for exporting producers to which market economy treatment would not be granted. A Turkish producer of the like product replied to the questionnaire sent out by the Commission (recitals 10, 12 and 52 of the provisional regulation).

7 In accordance with recital 13 of the provisional regulation, the investigation of dumping and injury covered the period from 1 July 2007 to 30 June 2008 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2005 to 30 June 2008 ('the period considered').

8 According to recital 19 of the provisional regulation, the product concerned is aluminium foil of a thickness of not less than 0.008 mm and not more than 0.018 mm, not backed, not further worked than rolled, in rolls of a width not exceeding 650 mm and of a weight exceeding 10 kg originating in Armenia, Brazil and the PRC falling within CN code ex 7607 11 19. With regard to the like product, recital 20 of the provisional regulation states that aluminium foil produced and sold by the EU industry in the EU, aluminium foil produced and sold on the domestic markets of Armenia, Brazil and the PRC and aluminium foil imported into the EU from those countries, as well as that produced and sold in Turkey, have essentially the same basic physical and technical characteristics and are intended for the same basic end uses.

9 With regard to the grant of market economy treatment, the Commission concluded that Armenia could not be regarded as a market economy, since it is mentioned in the footnote to Article 2(7)(a) of the basic regulation. Moreover, the Commission stated that the applicant did not satisfy the criteria relating to accounting records and production costs mentioned in the second and third indents of Article 2(7)(c) of the basic regulation. In this regard, the Commission noted, firstly, that the applicant's accounts for the 2006 financial year contained an adverse opinion from the auditors, and the applicant failed to provide duly audited accounts for the 2007 financial year and, secondly, that the price paid to the Armenian State to acquire shares in the undertaking operating on the former production site was around one third of their nominal value and, furthermore, the applicant obtained the land for free (recitals 24, 25 and 27 to 31 of the provisional regulation).

10 As far as the calculation of the dumping margin is concerned, the Commission explained, in an annex to its letter of 8 April 2009 (see paragraph 5 above), that the applicant satisfied the conditions to be granted individual treatment. In addition, the comparison of the weighted average normal values of each product type in question exported to the EU and originating from the Turkish manufacturer who replied to the related questionnaire with the corresponding weighted average export prices of the applicant had resulted in a dumping margin of 37% These facts are reproduced in recitals 42, 74 and 77 of the provisional regulation.

11 Furthermore, the Commission considered that the effects of the imports concerned could be assessed cumulatively, since the conditions for such an assessment laid down in Article 3(4) of the basic regulation were met (recitals 91 to 94 of the provisional regulation).

12 In addition, in the view of the Commission, the analysis relating to the EU consumption, volume and prices of the imports from the countries concerned and to the position of the EU industry made clear that that industry had suffered material injury within the meaning of Article 3(5) of the basic regulation (recitals 88 to 90 and 95 to 118 of the provisional regulation). Furthermore, following an analysis of the effects of the dumped imports and of other factors, the Commission concluded that the injury must be attributed to a surge in dumped imports from the third countries concerned by the investigation (recitals 119 to 138 of the provisional regulation).

13 Since the Commission found no compelling reasons not to introduce provisional measures, it proceeded to impose a provisional antidumping duty tied to the injury elimination level, taking into account a non-injurious price which the EU industry should obtain. Accordingly, the provisional antidumping duty was set at 20% in relation to the products manufactured by the applicant (recitals 164 to 170 of the provisional regulation).

14 By letter of 15 July 2009, the Commission sent the applicant, pursuant to Article 20(2) to (4) of the basic regulation, a final disclosure document setting out the essential facts and considerations on which the proposal to impose definitive antidumping duties was based. The Commission invited the applicant to submit its comments on the final disclosure document by 30 July 2009.

15 By letter of 22 July 2009, the applicant submitted its observations on the final disclosure document and made an offer of an undertaking within the meaning of Article 8(1) of the basic regulation; it also requested that a meeting be held for the purposes of examining that undertaking. By email of 27 July 2009, the Commission sent to the applicant an undertaking template and suggested that a meeting be organised on 29 July, at the same time pointing out that the deadline for the final submission of the undertaking would expire on 30 July. The applicant submitted its undertaking to the Commission by letter of 30 July 2009.

16 By letter of 7 August 2009, the Commission explained to the applicant the grounds on which it considered that the undertaking proposed by the applicant could not be accepted. The Commission invited the applicant to submit its observations in this regard no later than 12 August 2009, which the applicant did by email of 10 August 2009.

17 On 24 September 2009, the Council of the European Union adopted Regulation (EC) No 925/2009 imposing a definitive antidumping duty and collecting definitively the provisional duty imposed on imports of certain aluminium foil originating in Armenia, Brazil and the PRC (OJ 2009 L 262, p. 1; 'the contested regulation'). In addition, by Decision 2009/736/EC of 5 October 2009 accepting an undertaking offered in connection with the antidumping proceeding concerning imports of certain aluminium foil originating, inter alia, in Brazil (OJ 2009 L 262, p. 50), the Commission accepted the undertakings offered by Companhia Brasileira de Aluminio (CBA), a Brazilian exporting producer.

18 With regard to the applicant's MET claim, the Council confirmed, in recitals 18 to 26 and 32 of the contested regulation, the assessments made in the provisional regulation regarding Armenia's status, the criteria considered by the Commission not to have been met by the applicant and the grant of individual treatment to it (paragraphs 9 and 10 above). In these circumstances, the dumping margin applicable to the applicant was set at 33.4% (paragraph 4.4 of the contested regulation). Furthermore, in recitals 55 and 56 of the contested regulation, the Council confirmed the assessments contained in the provisional regulation regarding the cumulative assessment of the effects of the imports concerned (see paragraph 11 above). Finally, in recitals 44 to 48 and 59 to 109 of the contested regulation, the Council also confirmed the assessments contained in the provisional regulation and summarised in paragraphs 12 and 13 above; it also fixed the elimination level for the injury caused by the imports of the applicant's products at 13.4%

19 As far as the undertaking offered by the applicant is concerned, the Council explained, in recital 114 of the contested regulation, that that offer could not be accepted for reasons relating, essentially, to the risk of cross-compensation on account of the structure of the group of which the applicant is part and the nature of the resultant commercial relationships between the applicant and its customers in the European Union. In accordance with recital 115 of the contested regulation, that undertaking was likewise rejected on the basis of the findings made in recitals 21 and 22 of the same regulation regarding the applicant's accounts.

20 In those circumstances, in accordance with Article 1(2) of the contested regulation, the Council imposed a definitive antidumping duty of 13.4% on the imports of the applicant's products.

**Procedure before the General Court and the Court of Justice**

21 By application lodged at the Registry of the General Court on 21 December 2009, the applicant sought the annulment of the contested regulation.

22 Following an application to that effect, the Commission was granted leave to intervene in support of the form of order sought by the Council.

23 The applicant claimed that the General Court should:

— annul the contested regulation in so far as it concerns the applicant;

— order the Council to pay the costs;

24 The Council and the Commission contended that the Court should:

— dismiss the action;

— order the applicant to pay the costs.

25 The applicant put forward five pleas in law in support of its action. The first plea in law concerned a plea of illegality against Article 2(7) of the basic regulation, which is allegedly inter alia contrary to Article 2.7 of the Agreement on the Implementation of Article VI of the 1994 General Agreement on Tariffs and Trade (GATT) (OJ 1994 L 336, p. 103, 'the Anti-Dumping Agreement'), set out in Annex 1A to the Agreement establishing the WTO. The second plea in law alleges an infringement of Article 2(7)(c) of the basic regulation. The third plea in law concerns the infringement of Article 3(4) of the basic regulation and a failure to state reasons. The fourth plea in law alleges a breach of the principle of equal treatment and a manifest error of assessment. Lastly, by its fifth plea in law, the applicant alleges a failure to have regard to the principle of sound administration.

26 By its judgment of 5 November 2013, *Rusal Armenal* v *Council* (T-512/09, EU:T:2013:571), the General Court upheld the first plea in law in the action and, consequently, annulled the contested regulation in so far as it concerned the applicant.

27 By document lodged at the Registry of the Court of Justice on 16 January 2014, the Commission brought an appeal by which it asked that Court to set aside the judgment of 5 November 2013, *Rusal Armenal* v *Council* (T-512/09, EU:T:2013:571).

28 Following an application to that effect, the European Parliament was granted leave to intervene in support of the form of order sought by the Commission.

29 In support of its appeal, the Commission relied on three grounds of appeal alleging first, that the General Court had ruled *ultra petita*, secondly, that the General Court had erred in law in holding that Article 2(7) of the basic regulation is intended to implement the particular obligations assumed in the context of the WTO and, thirdly, that there had been an infringement of the general principle of institutional balance.

30 By its judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P; 'the judgment on appeal', EU:C:2015:494), the Court of Justice upheld the second ground of appeal and set aside the judgment of 5 November 2013, *Rusal Armenal* v *Council* (T-512/09, EU:T:2013:571).

31 First of all, the Court of Justice noted that the provisions of an international agreement to which the European Union is a party can be relied on in support of an action for annulment of an act of secondary EU legislation or an exception based on the illegality of such an act only where, first, the nature and the broad logic of that agreement do not preclude it and, secondly, those provisions appear, as regards their content, to be unconditional and sufficiently precise and that it is only when both those conditions are met that such provisions may be relied upon before the EU Courts as a criterion in order to assess the legality of an EU act. The Court of Justice also pointed out that given their nature and purpose, WTO agreements are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the EU institutions (judgment on appeal, paragraphs 37 and 38).

32 Nonetheless, the Court pointed out that it had accepted in two exceptional situations, which are the result of the EU legislature's own intention to limit its discretion in the application of the WTO rules, that it is for the Courts of the European Union, if necessary, to review the legality of an EU measure and of the measures adopted for its application in the light of the WTO agreements. The first such situation is where the European Union intends to implement a particular obligation assumed in the context of those WTO agreements and the second where the EU act at issue refers explicitly to specific provisions of those agreements (judgment on appeal, paragraphs 40 and 41).

33 The Court found, next, that Article 2(7) of the basic regulation had introduced a special regime laying down detailed rules for the calculation of normal value for imports from WTO non-market economy countries, including Armenia, and that it is the expression of the EU legislature's intention to adopt in that sphere an approach specific to the EU legal order (judgment on appeal, paragraphs 47 and 48). Since there are no specific rules relating to imports from non-market economy WTO member countries in the Anti-Dumping Agreement, a correlation cannot be established between, on the one hand, the rules in Article 2(7) of the basic regulation directed at the imports from non-market economy WTO member countries and, on the other, the rules set out in Article 2 of the Anti-Dumping Agreement. The Court of Justice concluded from this that that provision of the basic regulation cannot be considered to be a measure intended to ensure the implementation in the EU legal order of a particular obligation assumed in the context of the WTO (judgment on appeal, paragraphs 49 to 53).

34 In accordance with Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice set aside the judgment of 5 November 2013, *Rusal Armenal* v *Council* (T-512/09, EU:T:2013:571), and itself gave final judgment on the first plea in law in the action brought by the applicant, rejecting that plea (judgment on appeal, paragraphs 57 to 60). It referred the case back to the General Court for judgment on the second to the fifth pleas in law.

35 After it was referred back, the case was allocated to the Fourth Chamber, extended composition, of the General Court.

36 The parties did not exercise the option provided for in Article 217(1) of the Rules of Procedure of the General Court to submit written observations.

37 On hearing the report of the Judge-Rapporteur, the Court (Fourth Chamber, extended composition) decided to open the oral stage of the procedure.

38 At the hearing on 1 June 2016, the parties presented oral argument and their answers to the questions put by the Court. On that occasion, the parties were requested to submit their observations on the possible effects of the judgment on appeal on the second to fifth pleas of the action, formal note of which was taken in the minutes of the hearing.

## Law

39 Following the judgment on appeal, four pleas in law remain at issue; those pleas allege, respectively, the infringement of Article 2(7)(c) of the basic regulation (second plea in law), the infringement of Article 3(4) of the basic regulation and a failure to state reasons (third plea in law), the breach of the principle of equal treatment and a manifest error of assessment in the examination (fourth plea in law) and a breach of the principle of sound administration (fifth plea in law).

*The second plea in law, alleging infringement of Article 2(7)(c) of the basic regulation*

40 In the context of its second plea in law, the applicant claims that the institutions' assessment of its MET claim is vitiated by manifest errors. This plea falls into two parts. By the first part, the applicant contests the validity of the finding relating to non-compliance with the second indent of Article 2(7)(c) of the basic regulation. By the second part, the applicant contests the validity of the finding relating to non-compliance with the third indent of Article 2(7)(c) of the basic regulation.

41 The Council, supported by the Commission, contends that this plea should be rejected.

42 Pursuant to the second and third indents of Article 2(7)(c) of the basic regulation, '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 [second indent], ... 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 [third indent]'.

43 To the extent that (i) the conditions listed in Article 2(7)(c) of the basic regulation are cumulative (judgment of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 76) and (ii) by the two parts of its plea, the applicant contests the validity of the findings relating to the second and third indents of that Article 2(7)(c), the Court points out that rejection of one of those parts of the plea is sufficient for the plea to be rejected as a whole.

44 In the circumstances of the present case, it is appropriate to examine, first of all, the first part of the plea.

45 It should be recalled that, in recitals 21 and 22 of the contested regulation, the Council found that the evidence submitted by the applicant did not satisfy the conditions listed in the second indent of Article 2(7)(c) of the basic regulation and upheld the analysis set out in the provisional regulation.

46 Recital 22 of the contested regulation is worded as follows: '[t]he company is obliged to have one clear set of accounts in line with international accounting standards. The failures noted by the auditors for both the 2006 and 2007 financial years were such as to clearly show that their accounts were not prepared in line with IAS and therefore the company could not prove that the second MET criterion was met. The MET criteria actually point to international standards and WTO membership does not change this. Furthermore, WTO membership in itself is not a guarantee of the prevalence of market conditions in the economic activity of one company.'

47 In recital 27 of the provisional regulation, the Commission found that the applicant's accounts for 2006 contained an adverse opinion from their auditors, and it had not provided audited accounts for 2007.

48 In recitals 28 and 29 of that regulation, the Commission had rejected the applicant's line of argument based on, first, compliance with the auditing process in respect of 2006, second, a commitment to deliver audited accounts for 2007 in line with international accounting standards and, third, the irrelevance of the issuance of an adverse opinion by the auditor, since the audit was conducted in compliance with international auditing standards. The Commission pointed out that the accounts for 2007 had not been submitted to it despite requests to that effect. Moreover, the Commission observed that Article 2(7)(b) of the basic regulation, which provides for the grant of market economy treatment ('MET'), is an exception which must be given a strict interpretation and inferred from this that accounts should not only be audited in line with international standards but also be prepared in line with those standards.

49 The applicant's line of argument submitted against that analysis may be divided into two complaints. The first, and principal, complaint alleges an error of law in the interpretation of the second indent of Article 2(7)(c) of the basic regulation due to the application of an incorrect legal criterion. By the second complaint, submitted in the alternative, the applicant alleges a manifest error of assessment by the Council in applying the criterion that it favoured.

The complaint alleging application of an incorrect legal criterion

50 In the applicant's submission, Article 2(7)(c) of the basic regulation should be interpreted in such a way that account is taken of the Republic of Armenia's membership of the WTO and so as not to give rise to an unreasonable burden of proof. It submits that the Council applied an incorrect legal criterion in adopting an extensive interpretation of the requirement of 'independently audited in line with international accounting standards' set out in the second indent of Article 2(7)(c) of the basic regulation. That meant that the applicant had to ensure that its accounts were prepared in perfect compliance with all international accounting standards, were free of any deficiencies and qualifications, and were certified by an unqualified audit report. Such a requirement goes beyond the terms of Article 2(7)(c) second indent, which imply only that accounting records be clear, be independently audited in line with international accounting standards and be applied for all purposes.

51 Thus, the Council is wrong to contend that an interpretation of the reference to 'independently audited in line with international accounting standards', as referring solely to the conduct of an audit in line with international accounting standards, would be contrary to the logic of Article 2(7)(c) of the basic regulation.

52 First of all, the applicant observes that carrying out an audit implies not only compliance with International Standards on Auditing, but also an examination of the accounting records in accordance with International Financial Reporting Standards. The applicant infers from this, in essence, that it is not required to prepare its accounting records in accordance with International Financial Reporting Standards, since carrying out an audit is sufficient. The applicant states, in that regard, that the audit report carried out for 2007 ('the audit report for 2007') refers to a presentation of the financial performance and its cash flows by reference to International Financial Reporting Standards. Next, the applicant claims that, if auditors find that there are substantial distortions, they are not able to issue certification. Finally, the applicant submits that it would be illogical to treat it in the same way as a company that has not carried out an audit of its accounts or only on the basis of unrecognised local standards.

53 The applicant adds, in essence, that, had it been granted MET, it would, in any event, have been open to the institutions to adjust its costs, by applying Article 2(5) of the basic regulation.

54 The Commission contends that those complaints should be rejected.

55 What is at issue is the meaning to be ascribed to the requirement that firms must have 'one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes', set out in Article 2(7)(c) of the basic regulation.

56 As regards, first of all, the rules which must govern the examination of that complaint, pursuant to settled case-law, in interpreting a provision of EU law, it is necessary to consider not only its wording but also its context and the objectives pursued by the rules of which it is part (see judgment of 7 June 2005, *VEMW and Others*, C-17/03, EU:C:2005:362, paragraph 41 and the case-law cited).

57 Moreover, in so far as the interpretation of one of the conditions for granting MET provided for in Article 2(7)(b) of the basic regulation is at issue, account must also be taken of the fact that the method of determining the normal value of a product set out in that provision is an exception to the

specific rule laid down for that purpose in Article 2(7)(a) of that regulation, which is, in principle, applicable to imports from non-market economy countries. It is settled case-law that any derogation from or exception to a general rule must be interpreted strictly (see judgment of 10 October 2012, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, T-172/09, not published, EU:T:2012:532, paragraph 118 and the case-law cited). Since Article 2(7)(c) of the basic regulation specifies the conditions which must be complied with in order for that exception to apply, those conditions must be interpreted strictly.

58 It should be noted at the outset that, contrary to that principle of restrictive interpretation, the applicant claims that the interpretation of the conditions for granting MET should on the contrary take account of the Republic of Armenia's membership of the WTO.

59 It is true, according to settled case-law of the Court of Justice, that EU legislation must, so far as possible, be interpreted in a manner that is consistent with international law, in particular where its provisions are intended specifically to give effect to an international agreement concluded by the European Union (see judgment of 15 March 2012, *SCF Consorzio Fonografici*, C-135/10, EU:C:2012:140, paragraph 51 and the case-law cited).

60 However, it should be pointed out that an essential premiss of the judgment on appeal is based on the specific nature of Article 2(7) of the basic regulation, inasmuch as it results from the choice made by the EU legislature to lay down specific rules relating to imports from non-market economy WTO member countries, whereas the Anti-Dumping Agreement does not contain any specific rules on imports from such countries (see paragraph 33 above).

61 It must be stated that that emphasis by the Court of Justice of both the specific nature of the EU's approach and the absence of any corresponding provision in the Anti-Dumping Agreement renders irrelevant the fact that the Republic of Armenia is a member of the WTO as regards the interpretation of the conditions provided for in Article 2(7)(c) of the basic regulation.

62 As regards, in the second place, the interpretation of the second indent of Article 2(7)(c) of the basic regulation, it should be borne in mind that Article 2(7)(b) of that regulation permits, by way of exception, an undertaking from a non-market-economy country to have the normal value of its product determined according to the rules applicable to undertakings from countries with such an economy.

63 The purpose of the conditions set out in Article 2(7)(c) of the basic regulation is to impose on an MET applicant a number of obligations aimed at enabling the institutions to ascertain whether it operates under market economy conditions. From that point of view, it must be stated that it is particularly important that the accounting records that an undertaking uses reflect the actual costs incurred by its production, since it is on the basis of those costs that the normal value of its product will be established.

64 In the light of that objective, the reference, in the second indent of Article 2(7)(c) of the basic regulation, to having 'one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes' cannot be understood other than as being intended to enable the institutions to satisfy themselves of the accuracy of the accounting records of the undertaking concerned.

65 The applicant is therefore wrong to submit, in essence, that such a condition could be fulfilled solely on the basis of an audit procedure carried out in line with International Standards on Auditing, irrespective of the findings made in that procedure as to the compliance of the accounts of the undertaking concerned with international accounting standards. Such an approach would be contrary to the purpose of the second indent of Article 2(7)(c) of the basic regulation, in that it could result in

the grant of MET with regard to an undertaking whose accounting records are not sufficiently reliable. Moreover, such an approach would also be contrary to the principle of strict interpretation of Article 2(7)(b) and (c) of the basic regulation, recalled in paragraph 57 above.

66 It follows that the legal criterion that the Council was required to apply consisted in ascertaining whether the evidence adduced by the applicant under the second indent of Article 2(7)(c) of the basic regulation was such as to provide an assurance that its accounting records were accurate. Accordingly, the Council was obliged to take into consideration the findings of the audits carried out as to the compliance of the accounting records with international accounting standards.

67 Consequently, by finding, in recital 22 of the contested regulation, that '[t]he failures noted by the auditors for both the 2006 and 2007 financial years were such as to clearly show that their accounts were not prepared in line with IAS and therefore the company could not prove that the second MET criterion was met', the Council did not commit the error of law alleged by the applicant.

68 That finding cannot be invalidated by the applicant's reference to Article 2(5) of the basic regulation. That provision enables the institutions, with regard to an undertaking operating in a market-economy country, whose costs associated with the production and sale of the product under investigation are not reasonably reflected in its records, to adjust them or establish them on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets.

69 In essence, the applicant appears to submit that any errors in its accounting records would not preclude recognition of MET, since it would find then itself in a situation equivalent to that of an undertaking from a market-economy country to which Article 2(5) of the basic regulation is applied.

70 That line of argument cannot succeed.

71 On the one hand, it is in direct contradiction with the principle of strict interpretation of the conditions for MET specified in the case-law cited in paragraph 57 above.

72 On the other hand, the Court would point out that Article 2(5) of the basic regulation is primarily based on the principle of adjusting or establishing the costs of the undertaking concerned on the basis of a comparison with the costs of other producers or exporters in the same country. It must be stated that a comparison within the same country is possible only with respect to an undertaking from a market economy and is not possible with regard to an MET applicant, which is, by definition, from a non-market economy country. Thus, where there is doubt as to the actual costs of an MET applicant, that application must be refused and the normal value of the product determined on the basis of comparison with a market economy third country, in accordance with Article 2(7)(a) of the basic regulation.

73 The first complaint must therefore be rejected.

The complaint alleging a manifest error of assessment

74 In the alternative, the applicant submits that recital 22 of the contested regulation is vitiated by a manifest error of assessment, on the ground that the Council overestimated the effects of the qualification associated with the audit report relating to the financial statements for 2007, which remains a favourable report.

75 In the first place, the applicant submits that the reference to 'in line' with international standards does not preclude the presence of certain qualifications which do not affect the accuracy of most of the audited accounts.

76 In the second place, the applicant observes that it provided financial statements for the 2007 financial year on 12 and 13 March 2009, that is one day after they were issued by the independent auditors and three weeks before the provisional regulation was adopted. Except for a qualification with respect to the stock value as of 31 December 2006, the auditors issued a clean opinion, which demonstrates compliance with international standards, including accounting standards.

77 In the third place, the applicant submits, in essence, it was not possible for the auditors, in the audit report for 2007, to issue an unqualified opinion, since the financial statements for the 2007 financial year must be based on the closing balances from the 2006 financial year, in respect of which an adverse opinion had been issued. The applicant claims that a qualified opinion following an adverse opinion constitutes recognition that serious progress had been achieved in presenting the accounts and means that those accounts are not, for the most part, affected by the qualification and are in line with international standards. The applicant observes, in that regard, that a qualified opinion can be issued only if the qualification is not so significant that it would call in question the principle of a clean opinion and does not concern a large number of items contained in the financial statements. Accordingly, the Council is manifestly wrong to take the view that the qualification relating to the quantification of stock value had an impact on the costs during the investigation period, an impact which, moreover, would be sufficiently significant that the accounts should be regarded as not being in line with international standards.

78 In the fourth place, the applicant complains that the institutions failed to take into consideration the shutdown of its factory for almost three years between 2004 and 2006 for the purposes of replacing or modernising its equipment, which affected its bookkeeping for the 2006 financial year. It submits that it managed and succeeded, subsequently, to quantify and correct the deficiencies found in respect of that financial year, which explains the delay in the issuance of the audit report for 2007. It claims that it would be unreasonable to require it to correct all the errors relating to the 2006 financial year. In the reply, the applicant claims that the deficiencies regarding valuation and reporting of inventories were already corrected in the audit report for 2007 and that qualifications were not likely to recur in the audit report for 2008.

79 As a preliminary point, the Court observes that this complaint relates to the application of the second indent of Article 2(7)(c) of the basic regulation to the circumstances of the present case and that the extent of the review exercised must take account of the wide discretion of the institutions in the sphere of measures to protect trade, by reason of the complexity of the economic, political and legal situations which they have to examine (see judgment of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 79 and the case-law cited).

80 It follows that review by the EU judicature of assessments made by the institutions must be limited to establishing whether the relevant 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 of assessment of those facts or a misuse of power (see judgment of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 79 and the case-law cited).

81 However, it should be borne in mind that whilst, in areas giving rise to complex economic assessments, the Commission has a margin of discretion with regard to economic matters, that does not mean that the Courts of the European Union must refrain from reviewing the institutions' interpretation of information of an economic nature. The Courts of the Union must not only establish whether the evidence put forward is factually accurate, reliable and consistent but must also determine whether

that evidence contains all the relevant data that must be taken into consideration in appraising a complex situation and whether it is capable of substantiating the conclusions drawn from it (judgment of 29 January 2014, *Hubei Xinyegang Steel* v *Council*, T-528/09, EU:T:2014:35, paragraph 53).

82 Lastly, it must be pointed out that the burden of proof lies with the exporting producer wishing to claim MET. Article 2(7)(c) of the basic regulation provides that the claim 'must … contain sufficient evidence'. Accordingly, there is no obligation on the EU institutions to prove that the exporting producer does not satisfy the criteria laid down for the recognition of such status. On the contrary, it is for the EU institutions to assess whether the evidence supplied by the exporting producer is sufficient to show that the criteria laid down in Article 2(7)(c) of the basic regulation are fulfilled and for the EU judicature to examine whether the institutions' assessment is vitiated by a manifest error (see judgment of 18 March 2009, *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council*, T-299/05, EU:T:2009:72, paragraph 83 and the case-law cited).

83 In the light of the foregoing, this complaint involves ascertaining whether the Council did not commit a manifest error of assessment in finding, in essence, that the failures noted by the auditors were such as to call in question the accuracy of the applicant's accounts.

84 In the first place, it should be pointed out that the investigation period lasted from 1 July 2007 until 30 June 2008 and that the applicant was only in a position to produce an audit report for a part of that period, namely for 2007.

85 In the second place, it is apparent from the documents before the Court that the audit report for 2007 contained a qualification justified by the following consideration: '[t]he Company identified a number of differences between the physical inventory counts and the accounting records as at 31 December 2006 but was unable to satisfactorily resolve those differences at that date. It was impracticable to satisfy ourselves as to those inventory quantities by other audit procedures. Accordingly, we were unable to determine whether any adjustments might be necessary to inventories as at 31 December 2006 and cost of sales and net loss for the years ended 31 December 2006 and 2007'. That led to the formulation of the following qualification in the clean opinion provided by the auditors: '[i]n our opinion, except for the effects on the current and the corresponding figures of such adjustments, if any, that might have been determined to be necessary had it been practicable to obtain sufficient appropriate audit evidence as described in the Basis for Qualified Opinion, the financial statements present fairly, in all material respects, the financial position of the Company as at 31 December 2007, and its financial performance and its cash flows for the year then ended in accordance with International Financial Reporting Standards.'

86 The qualification thus related to three elements: inventory counts on 31 December 2006, the cost of sales and net losses for 2006 and 2007.

87 In the third place, it is true that the applicant is correct to observe that it is apparent from section (m) of that audit report that efforts were made during the 2007 financial year to correct errors identified in the audit report for 2006. However section (m) of the audit report cannot be read independently of the qualification expressed by the auditor. It follows that, although the applicant carried out a reassessment of certain incorrect data in 2006 (including the value of equipment and stock), the reliability of those corrections remains uncertain.

88 In that regard, it must be stated that the applicant admits itself in its pleadings the incomplete nature of the reassessment that it carried out, since it submits in the reply that '[t]hus it would have been an unreasonable burden on [its] management … to correct, within the course of the anti-dumping investigation, each and any misstatement in the accounts noted by the auditors for the year ended 31 December 2006'.

89 In the fourth place, it is apparent from the foregoing that the material provided by the applicant, which has the burden of proving that the conditions provided for in Article 2(7)(c) of the basic regulation are satisfied pursuant to the case-law cited in paragraph 82 above, would not enable the institutions to satisfy themselves of the accuracy of the applicant's accounts as regards three elements: inventory counts on 31 December 2006, the cost of sales and net losses for 2006 and 2007.

90 It cannot reasonably be denied that those elements concern costs of the applicant which are capable of having an effect on the determination of the normal value of its product.

91 Moreover, it necessarily follows that the applicant's accounting records did not enable the institutions to determine that normal value pursuant to the method provided for in Article 2(7)(b) of the basic regulation.

92 The Council did not therefore commit the manifest error of assessment alleged in finding that the applicant had not demonstrated that the conditions of the second indent of Article 2(7)(c) of the basic regulation were satisfied.

93 In the light of the foregoing, the second complaint and, in consequence, the first part of the plea must be rejected in its entirety. For the reasons set out in paragraph 43 above, that conclusion is sufficient for this plea to be rejected and it is unnecessary to examine its second part.

*The third plea in law, alleging infringement of Article 3(4) of the basic regulation and a failure to state reasons*

94 By this plea, the applicant complains that the Council infringed Article 3(4) of the basic regulation by cumulating imports from Armenia with those from Brazil and the PRC.

95 The Council, supported by the Commission, contends that the eighth plea should be rejected.

96 According to Article 3(4) of the basic regulation, '[w]here imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the effects of such imports shall be cumulatively assessed only if it is determined that (a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in Article 9(3) and that the volume of imports from each country is not negligible; and (b) a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product'.

97 In recitals 55 to 57 of the contested regulation, the Council rejected the applicant's line of argument that Armenian imports should not be cumulated with those from Brazil and the PRC in the following terms:

'(55) Subsequent to the provisional disclosure, the Armenian exporting producer argued that Armenian imports should be decumulated for the purpose of the injury analysis given the low import volumes, its low market share and the flat import trends as well as the allegedly significant quality differences between the product exported from Armenia and the ones exported from Brazil and the PRC.

(56) This claim could not be accepted because it was found that all conditions for cumulation as set out in Article 3(4) of the basic Regulation were met:

— as provisionally established and as confirmed above in recitals 38 to 39, the dumping margin established for Armenia was above the *de minimis* threshold as defined in Article 9(3) of the basic Regulation,

— the volume of imports from Armenia was not negligible in the sense of Article 5(7) of the basic Regulation, i.e. its market shares attained 5.26% as outlined in recital 96 (Table 4) of the provisional Regulation. It was also found that imports from Armenia grew significantly from 2006 to the end of the IP despite the re-entry of imports from the PRC and the significant imports from Brazil during the period considered,

— with regard to the conditions of competition between the imported products from the countries concerned and, in particular, with regard to the arguments made in relation to significant quality differences between the products imported, as set out above in recital 52, it was found that the products from Armenia have similar basic physical and technical characteristics and were used in the same basic applications regardless of their specific quality. It is also noted that this exporting producer stated its intention to shift production to even higher quality converter foils which indicates that the argument concerning the allegedly bad quality of products produced may be exaggerated.

(57) The claims made in this regard by the Armenian exporting producer were therefore rejected.'

98 Moreover, recital 52 of the contested regulation, relating to the rebuttal of arguments submitted by a Brazilian exporting producer, but to which the third indent of recital 56 refers, is worded as follows: '[w]ith regard to the first allegation, i.e. the difference in quality standards, the investigation revealed that despite quality differences, the aluminium foil market was mainly price driven and quality differences played only a minor role in the choice of a supplier. These findings were confirmed by the cooperating importers and users concerned. Thus, the unsubstantiated allegation of the Brazilian exporting producer, i.e. that the aluminium foil market was divided into several segments according to quality differences of the product, could not be confirmed during the present investigation and the claim made in this regard had to be rejected'.

99 The Court takes the view that the applicant's line of argument in this plea may be divided into two parts, according to whether the assessment of the conditions set out (i) in Article 3(4)(a) of the basic regulation, relating to the non-negligible nature of the imports subject to cumulation, and (ii) in Article 3(4)(b) of the basic regulation, concerning the examination of the conditions of competition, are being contested. In the context of that second part, the applicant's objection to the insufficiently reasoned nature of the contested regulation as regards the application of Article 3(4)(b) will be examined.

The first part, relating to the condition connected with the non-negligible nature of imports subject to cumulation

100 The applicant puts forward, in essence, five complaints relating to the Council's assessment of the non-negligible nature of imports subject to cumulation.

101 The first complaint concerns the interpretation of the condition that the volume of imports from each country set out in Article 3(4)(a) of the basic regulation must not be negligible. The applicant complains that the Council incorrectly took into consideration the criterion of market share of 1% referred to in Article 5(7) of the basic regulation, in order to assess whether the imports were negligible for the purposes of Article 3(4)(a) of that regulation. The applicant observes that Article 3(4) of the basic regulation makes no reference to Article 5(7) of that regulation. Moreover, the applicant submits, in essence, that the low level of import does not have the same effect in those two provisions. While it results in the termination of the proceeding the case of Article 5(7) of the basic regulation, that is not necessarily the case pursuant to Article 3(4)(a) thereof. The applicant observes, furthermore, that, as regards the interpretation of the basic regulation, the Council cannot invoke the benefit of any margin of discretion.

102 As a preliminary point, it should be pointed out that the Council, in the second indent of recital 56 of the contested regulation, for the purposes of classifying the applicant's imports as 'non-negligible', did not carry out a specific assessment of the scale of those imports, but relied on the interpretation of Article 3(4)(a) of the basic regulation in conjunction with Article 5(7) of that regulation.

103 According to the case-law, Article 3(4)(a) of the basic regulation has been interpreted as permitting account to be taken of imports from a given country in the context of cumulation only in so far as they come from an exporting producer in respect of whom it has been established that he is engaging in dumping (judgment of 28 October 2004, *Shanghai Teraoka Electronic* v *Council*, T-35/01, EU:T:2004:317, paragraph 161). It follows that the purpose of that provision is to avoid a cumulative assessment of the effects of imports being carried out by including a country whose imports from the exporting producer in question do not cause dumping, either because the dumping margin is less than *de minimis*, or because the import volumes are negligible.

104 It must be stated that, inasmuch as Article 5(7) of the basic regulation specifies that '[p]roceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3% or more of Community consumption', it is intended specifically to make explicit the circumstances in which the share of the imports in EU consumption is too low for those imports to be regarded as causing dumping.

105 There is therefore a complementary relationship between the two provisions, so that the Council did not commit the error of law alleged by the applicant in taking into account the threshold of 1% mentioned in Article 5(7) of the basic regulation, for the purposes of interpreting the condition connected with the non-negligible nature of imports set out in Article 3(4)(a) of the basic regulation.

106 The first complaint must therefore be rejected.

107 The second complaint is based on a comparison with the Council's classification of imports from Russia. The Council is criticised for having found that imports from Armenia had a significant market impact, whereas even though imports from Russia were higher, they were considered to be limited and not to have had a negative effect on the situation of the EU industry.

108 It must be stated that the applicant does not assign a legal classification to that complaint.

109 In the event that this complaint is relied on for the purposes of demonstrating that the institutions were wrong to take the view that the applicant's imports were non-negligible under Article 3(4)(a) of the basic regulation, it must be rejected at the outset, since it was found in paragraphs 103 to 105 above that the interpretation of the expression 'non-negligible' under of Article 5(7) of the basic regulation was in no way incorrect.

110 In the event that this complaint should be understood as alleging, in essence, an infringement of the principle of equal treatment to the applicant's detriment, it must also fail. Without it even being necessary to examine whether the Russian and Armenian imports are in comparable situations, it is sufficient to recall that the principle of equal treatment must be reconciled with the principle of legality and thus a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see judgment of 14 April 2011, *Visa Europe and Visa International Service* v *Commission*, T-461/07, EU:T:2011:181, paragraph 219 and the case-law cited). Thus, on the assumption that the Council was wrong to classify the Russian imports as limited, such an error would have no bearing on the validity of the classification of the Armenian imports as 'non-negligible'.

111 The second complaint must therefore also be rejected.

112 The third, fourth and fifth complaints concern the choice of the period taken into account for the purposes of assessing whether or not the applicant's imports were negligible.

113 By the third complaint, the Council is criticised for having determined the applicant's volume of imports on the basis of solely of the investigation period (July 2007 to June 2008), rather than on the basis of the period considered (January 2005 to June 2008). It is submitted, in essence, that the investigation period alone is not, with regard to the applicant, representative in that it fails to take account of the complete shutdown of its operations between 2004 and 2006. Thus, the investigation period does not reflect the absence of Armenian imports up to the end of 2006 and, in essence, results in a distorted picture of the imports. Taking into account the volume of exports during the period considered would have sufficed to demonstrate the negligible nature of its imports. The applicant adds that solely taking into account imports during the investigation period is not sufficient to determine the injury for the purposes of Article 3(2) of the basic regulation. The applicant also submits, in essence, that the Council's analysis is contradictory, since, by failing to take account of the effects of the shutdown of the applicant's factory on the calculation of average imports, the Council referred to an increase in imports caused by that shutdown period.

114 Recital 3 of the contested regulation draws a distinction between, on the one hand, the investigation period of dumping and injury (from 1 July 2007 to 30 June 2008) and, on the other, the period considered, which relates to the examination of the trends for the assessment of injury (from 1 January 2005 to 30 June 2008).

115 In the second indent of recital 56 of the contested regulation, the Council took account of the volume of imports from Armenia during the investigation period (namely 5.26%) in finding that that volume was not negligible. The Council also found that imports from Armenia grew significantly from 2006 to the end of the investigation period despite the re-entry of imports from the PRC and the significant imports from Brazil during the period considered.

116 Thus, to support its conclusion that the imports were non-negligible, the Council relied (i) on the applicant's volume of imports during the investigation period and (ii) on the evolution of imports over a longer reference period, that of the period considered.

117 To the extent that it is apparent from paragraphs 104 to 105 above that the finding, set out in the second indent of recital 56 of the contested regulation, of the existence of a market share of 5.26% is sufficient in itself to demonstrate the non-negligible nature of the applicant's imports, the Court is of the view that it is sufficient to ascertain that the Council did not commit a manifest error of assessment in establishing that market share by relying exclusively on the data relating to the investigation period, from 1 July 2007 until 30 June 2008.

118 Pursuant to Article 6(1) of the basic regulation, '[f]ollowing the initiation of the proceeding, the Commission, acting in cooperation with the Member States, shall commence an investigation at Community level. Such investigation shall cover both dumping and injury and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of dumping shall, normally, cover a period of not less than six months immediately prior to the initiation of the proceeding'.

119 According to the case-law, the investigation must be carried out on the basis of as recent information as possible in order to be able to determine the antidumping duties appropriate for protecting the EU industry against dumping (judgments of 3 October 2000, *Industrie des poudres sphériques* v *Council*, C-458/98 P, EU:C:2000:531, paragraph 92, and of 28 January 2016, *CM Eurologistik and GLS*, C-283/14 and C-284/14, EU:C:2016:57, paragraph 66).

120 It also follows from the case-law that the Council may determine the injury suffered by the EU industry over a period longer than that covered by the investigation into the existence of dumping practices (see, to that effect, judgment of 7 May 1991, *Nakajima* v *Council*, C-69/89, EU:C:1991:186, paragraph 87), as a result of the examination of the trends for the assessment of injury in the context of the period considered.

121 It is in the context of that longer period that the applicant submits that the non-negligible nature of its imports should have been assessed.

122 It is sufficient, in that regard, to point out that the Council is right to counter that that would have resulted in a distorted picture of the actual volume of exports into the EU, since a period during which the applicant's factory was shut down would then have been taken into account which cannot be regarded as reflecting its real level of production and export.

123 Thus, by determining the non-negligible nature of the applicant's imports on the basis of the data relating to the investigation period alone rather than to the period considered, the Council did not commit the manifest error of assessment alleged by the applicant.

124 That conclusion is not invalidated by the applicant's line of argument, set out in the reply, based on the obligation of the institutions to carry out an objective examination pursuant to Article 3(2) of the basic regulation. Without there being any need to consider the admissibility of that argument, which is contested by the Council, it is sufficient to point out that not taking into account a period which does not reflect the applicant's normal activity is consistent with collecting as recent information as possible and, therefore, is consistent with the logic of the objective examination to which Article 3(2) of the basic regulation refers.

125 The present complaint must, therefore, be rejected.

126 In its fourth complaint, the applicant claims that its imports were analysed in respect of an 18-month period whereas imports from other exporting countries were analysed in respect of a 42-month period, which amounts to discriminatory treatment in its regard.

127 It must be held that that complaint lacks any basis in fact. It is apparent from the second indent of recital 93 of the provisional regulation, to which recital 58 of the contested regulation refers, that volumes of imports from Armenia, Brazil and the PRC were determined by reference to the same period, namely the investigation period.

128 By its fifth complaint, the applicant complains that the Council failed to take account of import volumes subsequent to the investigation period. The applicant observes that its sales in 2008 in the EU displayed a significant downward trend, a trend which continued after the end of the investigation period. It submits that the taking into account of import volumes subsequent to the investigation period is intended to ensure that information as recent as possible is taken into account and that, since the start of their decrease pre-dated the initiation of the administrative procedure by two months, the decrease cannot have been caused by that initiation.

129 As the General Court has already had occasion to point out, the investigation period and the prohibition on consideration of factors relating to a subsequent period are intended to ensure that the results of the investigation are representative and reliable, by ensuring that the factors on which the determination of dumping and injury is based are not influenced by the conduct of the producers concerned following the initiation of the antidumping proceeding, and therefore that the definitive duty imposed as a result of the proceeding is appropriate to remedying effectively the injury caused by the dumping (see judgment of 17 December 2008, *HEG and Graphite India* v *Council*, T-462/04, EU:T:2008:586, paragraph 66 and the case-law cited).

130 Moreover, by using the term 'normally', Article 6(1) of the basic regulation does allow exceptions to the rule against taking account of information relating to a period subsequent to the investigation period. As regards circumstances favourable to the undertakings concerned by the investigation, it has been held that the EU institutions cannot be required to incorporate in their calculations factors relating to a period subsequent to the investigation period unless such factors disclose new facts which make the proposed antidumping duty manifestly inappropriate. If, on the other hand, factors

relating to a period subsequent to the investigation period justify, because they reflect the current conduct of the undertakings concerned, the imposition or increase of an antidumping duty, it is clear, on the basis of the foregoing, that the institutions are entitled, indeed obliged, to take account of them (see judgment of 17 December 2008, *HEG and Graphite India* v *Council*, T-462/04, EU:T:2008:586, paragraph 61 and the case-law cited).

131 In its comments on the disclosure of the provisional findings, the applicant highlighted a graph on import statistics from the Statistical Office of the European Union (Eurostat), from which it can be seen that its imports fell between March and April 2008, then stabilised until the end of the period studied, namely January 2009.

132 It is admittedly apparent from that document that the fall in imports occurred essentially between April and May 2008, prior not only to the initiation of the antidumping proceeding by the Commission (12 July 2008), but also to the complaint of the EU industry itself (28 May 2008), which could mean that that fall is not caused by the initiation of the antidumping investigation.

133 However, it should be pointed out that the case-law mentioned in paragraph 130 above envisages, as regards circumstances favourable to the undertakings concerned by the investigation, the incorporation of factors relating to a period subsequent to the investigation period only if such factors disclose new facts which make the proposed antidumping duty manifestly inappropriate.

134 It must be stated that that the fall in imports only slightly pre-dated the initiation of the proceeding, that fall, in actual fact, virtually coinciding with the complaint by the EU industry, and that, therefore, a causal link between those two events cannot be ruled out. Moreover, the existence of that proceeding may have influenced the applicant's conduct, by pushing it to maintain a relatively low level of import until the end of the antidumping proceeding. The explanation based on the possible conduct of the applicant because of the initiation of an antidumping investigation is not therefore manifestly irrelevant.

135 The Council did not therefore commit a manifest error of assessment by refusing to take account of import volumes subsequent to the investigation period.

136 It is therefore necessary to reject the fifth complaint and the first part of the plea in its entirety.

The second part, relating to the assessment of the conditions of competition

137 The line of argument in this part of the plea may be divided into three complaints according to whether the applicant criticises, first, the statement of reasons for the contested regulation as regards the application of Article 3(4)(b) of the basic regulation, second, the application of irrelevant criteria and, third, a manifest error of assessment in the application of that provision to the circumstances of the present case.

138 So far as concerns the first complaint, the applicant criticises the reasoning of the contested regulation as regards the rebuttal of the evidence that it adduced to demonstrate that the bad quality of its product places it in conditions of competition different from those, on the one hand, of importers from Brazil and the PRC and, on the other, from EU producers. It observes, in that regard, that the Council merely highlighted the applicant's intention to shift production to even higher quality converter foils.

139 It is settled case-law that the statement of reasons required by Article 296 TFEU must show clearly and unequivocally the reasoning of the EU institution which adopted the contested measure, so as to inform the persons concerned of the justification for the measure adopted and thus to enable them to

defend their rights and the European Union Courts to exercise their powers of review (see judgment of 11 July 2013, *Hangzhou Duralamp Electronics* v *Council*, T-459/07, not published, EU:T:2013:369, paragraph 86 and the case-law cited).

140 The statement of reasons need not give details of all relevant factual or legal aspects, and the question whether it fulfils the applicable requirements must be assessed with reference not only to the wording of the measure but also to its context, and to the whole body of legal rules governing the matter in question. It is sufficient if the Council sets out the facts and legal considerations which have decisive importance in the context of the regulation (see judgment of 11 July 2013, *Hangzhou Duralamp Electronics* v *Council*, T-459/07, not published, EU:T:2013:369, paragraph 87 and the case-law cited).

141 In particular, the institutions are not obliged to adopt a position on all the arguments relied on by the parties concerned; it is sufficient to set out the facts and the legal considerations having decisive importance in the context of the decision (see judgment of 16 December 2015, *VTZ and Others* v *Council*, T-108/13, not published, EU:T:2015:980, paragraph 157 and the case-law cited).

142 In the first place, it should be pointed out that recital 52 in conjunction with the third indent of recital 56 of the contested regulation shows clearly and unequivocally the reasoning of the Council with regard to compliance with the condition set out in Article 3(4)(b) of the basic regulation. Three elements emerge in essence from those recitals: first of all, the importance of price competition on the aluminium foil market and the minor role played by quality differences (recital 52); next, the finding that the applicant's products have similar basic physical and technical characteristics and were used in the same basic applications regardless of their specific quality (recital 56, third indent), and, lastly, the intention stated by the applicant to shift production to even higher quality converter foils, which indicates that the argument concerning the allegedly bad quality of products produced may be exaggerated (recital 56, third indent). That aspect of the statement of reasons for the contested regulation is therefore consistent with the requirements specified in paragraph 139 above.

143 In the second place and in consequence, pursuant to the case-law cited in paragraphs 140 and 141 above, it must be held that those reasons, set out in recital 52 and the third indent of recital 56 of the contested regulation, relating to compliance with the condition set out in Article 3(4)(b) of the basic regulation, are sufficient to satisfy the requirements of Article 296 TFEU as regards that aspect of its reasoning, and the Council was not required to explicitly take a position on the various items of evidence adduced by the applicant during the administrative procedure.

144 The first complaint must therefore be rejected.

145 In a second complaint, the applicant submits that the contested regulation is vitiated by a manifest error of assessment inasmuch as its line of argument relating to the conditions of competition was rejected on the basis of an irrelevant reason. The finding set out in the third indent of recital 56 of the contested regulation — that the products from Armenia have similar basic physical and technical characteristics and were used in the same basic applications regardless of their specific quality — is relevant only to the determination of like products and products concerned, under Article 1(4) of the basic regulation, and not for assessing the conditions of competition, under Article 3(4)(b) of that regulation.

146 It should be borne in mind that, in recital 56 of the contested regulation, the Council found 'that the products from Armenia have similar basic physical and technical characteristics and were used in the same basic applications regardless of their specific quality'. The applicant submits that those are criteria which are relevant in the context of Article 1(4) of the basic regulation relating to the determination of like products, but not in the context of Article 3(4)(b) of that regulation.

147 Thus, by this complaint, the applicant complains that the Council applied irrelevant criteria when assessing the conditions of competition under Article 3(4)(b) of the basic regulation. A possible error of law by the Council is therefore at issue, and not, as the applicant appears to allege, the existence of a manifest error of assessment.

148 In paragraph 103 above, it was recalled that Article 3(4)(a) of the basic regulation has been interpreted by the General Court as meaning that a cumulative assessment of the effects of the imports may not be carried out by including a country whose imports from the exporting producer in question do not cause dumping, either because the dumping margin is less than *de minimis*, or because the import volumes are negligible.

149 It must be stated that an equivalent approach must be favoured when interpreting Article 3(4)(b) of the basic regulation. Thus, the reference to the appropriateness of a cumulative assessment 'of the effects of the imports … in light of the conditions of competition between imported products' must be understood as seeking to prevent the effects of imports of products which are not sufficiently in competition with one another to cause the same injury suffered by the EU industry being cumulated. Similarly, the mention of the appropriateness of a cumulative assessment 'of the conditions of competition between imported products and the conditions of competition between the imported products and the like Community product' must be understood as having the purpose of preventing imports with an insufficient degree of competition with the product from the EU industry and, therefore, which are not capable of causing an injury to that industry being subject to a cumulative assessment with other imports.

150 The Council did not therefore err in law in applying criteria equivalent to those that are relevant for determining the like product under Article 1(4) of the basic regulation, since those criteria are aimed, in essence, at ascertaining that there is a sufficient degree of competition between the product concerned and the like product.

151 Article 1(4) of the basic regulation defines a like product as 'a product which is identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such a product, another product which although not alike in all respects, has characteristics closely resembling those of the product under consideration'. It is settled case-law that the purpose of the definition of the product concerned in an antidumping investigation is to aid in drawing up the list of the products which will, if necessary, be subject to the imposition of antidumping duties. For the purposes of that process, the institutions may take account of a number of factors, such as the physical, technical and chemical characteristics of the products; their use; their interchangeability; consumer perception of the products; distribution channels; the manufacturing process; costs of production; and quality (judgment of 10 October 2012, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, T-172/09, not published, EU:T:2012:532, paragraph 59 and the case-law cited).

152 It is apparent from the foregoing that the Council, in taking into account the circumstance 'that the products from Armenia have similar basic physical and technical characteristics and were used in the same basic applications regardless of their specific quality', did not commit the error of law alleged by the applicant.

153 The second complaint must therefore be rejected.

154 In a third complaint, the applicant submits that the Council failed to take sufficient account of the bad quality of its products in assessing the conditions of competition and the evidence that it adduced in order to demonstrate that bad quality.

155 In the context of the examination of this complaint, it is necessary to take account, pursuant to the case-law cited in paragraph 79 above, of the wide discretion of the institutions in the sphere of measures to protect trade, by reason of the complexity of the economic, political and legal situations which they have to examine.

156 The onus was therefore on the applicant to demonstrate that the bad quality of its imports placed them in a competitive situation so different from that of other imports and from the product concerned that the Council's choice to apply Article 3(4)(b) of the basic regulation is manifestly incorrect.

157 As was already observed in paragraph 142 above, the Council relied in essence on three factors in finding that the condition of Article 3(4)(b) of the basic regulation had been fulfilled: the importance of price competition on the aluminium foil market and the minor role played by quality differences; the finding that the applicant's products have similar basic physical and technical characteristics and were used in the same basic applications regardless of their specific quality, and the intention stated by the applicant to shift production to even higher quality converter foils.

158 In the first place, it must be stated that the evidence adduced by the applicant does not call in question all the evidence taken into account by the Council. Thus, it does not rebut the existence of an intention of the applicant to improve the quality of its products, an intention which is not, moreover, contested by the applicant in its pleadings.

159 In that regard, it may be observed that the General Court has already had occasion to take into account in the context of the determination of the like product not only demand-side substitutability, but also supply-side substitutability, from the point of view of the possibility of moving from producing products of a certain quality to products of another quality (see, to that effect, judgment of 10 October 2012, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council*, T-172/09, not published, EU:T:2012:532, paragraph 75). For the reasons set out in paragraphs 149 to 151 above, a line of reasoning set out in the context of the analysis of the product concerned under Article 1(4) of the basic regulation is also relevant to the determination of the conditions of competition, for the purposes of Article 3(4)(b) of that regulation.

160 It necessarily follows that the possibility, which is not contested by the applicant, of moving to higher quality production reduces considerably the scope of its line of argument based on the effect on the conditions of competition of the alleged poor quality of its products.

161 In the second place, and in any event, it must also be pointed out that the Council is right to highlight the unconvincing probative value of the evidence adduced by the applicant.

162 According to settled case-law, the prevailing principle under EU law is that evidence may be freely adduced and that the only relevant criterion for the purpose of assessing the evidence adduced relates to its credibility. Accordingly, in order to assess the probative value of an item of evidence, regard should be had first to the credibility of the account it contains. It is then necessary to take account, inter alia, of the person from whom the document originates, the circumstances in which it came into being, the person to whom it was addressed and whether, on its face, it appears sound and reliable (see, to that effect and by analogy, judgment of 29 June 2012, *GDF Suez* v *Commission*, T-370/09, EU:T:2012:333, paragraph 161 and the case-law cited).

163 First, as regards the letters by the Timos, DLR, RONCORNI, SPHERE France, FRIO COMSET, and Cogepack companies, it must be stated (i) that those letters were written at the applicant's request after the proceeding had been initiated (ii) that their wording is very broadly similar, if not identical and (iii) that they all request the termination of the antidumping proceeding initiated against the applicant. In those circumstances, the view cannot be taken that those letters are intended to provide

an objective assessment of the quality of the applicant's products. Only limited probative value may therefore be ascribed to the paragraphs of those letters relating to the alleged bad quality of the applicant's products.

164 Second, as regards the correspondence from the Achenbach company, it is apparent that it was also written at the applicant's request after the proceeding had been initiated. That correspondence states in essence that the entry into operation of the new machines provided by that company was affected by certain difficulties which had an impact on the cost of manufacturing aluminium foil. Such correspondence is not, therefore, genuinely probative in terms of demonstrating the alleged bad quality of the applicant's production.

165 Thus, third, the only item of evidence genuinely attesting to the bad quality of one batch of products of the applicant is the complaint letter from the LENZING company, terminating its supplies from the applicant. However, that complaint concerns a relatively small amount (EUR 3 176), which cannot reasonably be regarded as representative of all or of a large sample of the applicant's production.

166 In the light of all those factors, it must be held that the applicant has failed to demonstrate that the application of Article 3(4)(b) of the basic regulation to its imports was manifestly incorrect.

167 The third complaint must therefore be rejected, as, consequently, must the third plea in its entirety.

*The fourth plea in law, alleging that the refusal of the applicant's undertaking offer is vitiated by a breach of the principle of equal treatment and manifest errors of assessment*

168 The applicant submits that its undertaking offer was rejected in breach of the principle of equal treatment and on the basis of manifestly incorrect reasoning.

169 The Council, supported by the Commission, contends that the eighth plea should be rejected.

170 As provided in Article 8(1) of the basic regulation, '[u]pon condition that a provisional affirmative determination of dumping and injury has been made, the Commission may accept satisfactory voluntary undertaking offers submitted by any exporter to revise its prices or to cease exports at dumped prices, if, after specific consultation of the Advisory Committee, it is satisfied that the injurious effect of the dumping is thereby eliminated'.

171 As provided in Article 8(3) of that regulation, '[u]ndertakings offered need not be accepted if their acceptance is considered impractical, if such as where the number of actual or potential exporters is too great, or for other reasons, including reasons of general policy. The exporter concerned may be provided with the reasons for which it is proposed to reject the offer of an undertaking and may be given an opportunity to make comments thereon. The reasons for rejection shall be set out in the definitive decision.'

172 Recitals 113 to 115 of the contested regulation are worded as follows:

'(113) In the course of the investigation, the sole cooperating exporting producer in Armenia and the sole cooperating exporting producer in Brazil offered price undertakings in accordance with Article 8(1) of the basic Regulation.

(114) Both offers were examined. The Brazilian exporter's offer eliminates the injurious effects of dumping and limits to a sufficient degree the risk of circumvention. With regard to the Armenian exporter's offer, given the complex structure of the company group and its complex sales channels, a high risk of cross-compensation exists with sales of the same product to the same customers but from different origins as well as sales of different products to the same

customers from different sales companies in the same group. The Armenian exporter submitted a substantially revised undertaking offer after the deadline set out in Article 8(2) of the basic Regulation. It is noted that in addition to the fact that the revised offer was submitted after the deadline, it cannot be accepted for the following reason: although the company offered to sell only directly to the first independent customer in the EU, i.e. without including its two related companies in the sales channel, the investigation showed that the company sold other products to the same customers in the EU. Moreover, the company announced that it planned to produce and sell a new product type, namely ACF, to the EU. As it is possible that this new product type could be sold to the same customers in the EU, even the revised offer cannot limit the risk of cross-compensation to an acceptable degree.

(115) By Decision 2009/736/EC …, the Commission has accepted the undertaking offer from Companhia Brasileira de Aluminio (CBA). The Council recognises that the undertaking offer eliminates the injurious effect of dumping and limits to a sufficient degree the risk of circumvention. The offer from Rusal Armenal is rejected for the reasons set out in recital 114 and due to the problems found with their accounts, as explained in recitals 21 and 22.'

173 In the context of this plea, the applicant contests the legality of what it considers to be the four reasons for rejecting its undertaking offer, namely the alleged submission of its undertaking offer after the deadline set, the classification of that offer as 'substantially revised', the 'high risk of cross-compensation' that its acceptance would have entailed and the deficiencies affecting its accounts.

174 It must however be stated that recitals 114 and 115 of the contested regulation reveal the presence of only two reasons for rejecting the undertaking offer submitted by the applicant: (i) the finding that the revised offer did not sufficiently limit the high risk of 'cross-compensation … with sales of the same product to the same customers but from different origins as well as sales of different products to the same customers from different sales companies in the same group' (recital 114), and (ii) the deficiencies affecting the applicant's accounts (recital 115). It is not apparent from recital 114 of the contested regulation that the two other elements identified by the applicant constitute reasons on which the Council relied in order to reject that offer.

175 So far as concerns the legality of the reasons based on the deficiencies in the applicant's accounts, set out in recital 115 of the contested regulation, it should be observed that that reason was explained in more detail to the applicant by the Commission in correspondence dated 7 August 2009 in which it was stated, in essence, that monitoring compliance with the undertaking necessitated the possibility of being able to inspect the applicant's accounts and that the deficiencies observed in the manner in which the applicant's accounts were kept when its MET claim was examined called in question the possibility of such monitoring.

176 As the Court has had occasion to point out, Article 8(3) of the basic regulation shows that the EU institutions may take account of all sorts of factual circumstances in assessing the offer of undertaking (judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council*, T-249/06, EU:T:2009:62, paragraph 224). Moreover, there is no provision of the basic regulation requiring the EU institutions to accept proposed price undertakings formulated by the traders concerned by an investigation prior to the establishment of antidumping duties. On the contrary, it is apparent from that regulation that the acceptability of such undertakings is defined by the institutions in the context of their discretionary power (see judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council*, T-249/06, EU:T:2009:62, paragraph 225 and the case-law cited).

177 It follows logically that the General Court may exercise only a limited review of whether refusal of an undertaking offer is well founded. In that regard, it may be observed that the wide discretion of the institutions does not stem only from the complexity of the economic, political and legal situations

entailed by measures to protect trade. It is also the consequence of the choice made by the legislature to leave a freedom of decision to the institutions as to whether or not it is appropriate to accept an undertaking offer.

178 In the first place, it should be pointed out that the requirement to ensure appropriate monitoring of undertakings is a consideration that the institutions could reasonably take into consideration when examining the applicant's undertaking offer.

179 In the second place, and consequently, it is necessary to ascertain whether, inasmuch as it finds that the deficiencies observed in the applicant's accounts were such as to call in question the monitoring of compliance of the applicant's undertakings, the contested regulation is vitiated by a manifest error of assessment.

180 As was already stated in paragraph 89 above, it is apparent from recital 22 of the contested regulation, to which recital 115 of that regulation refers, that the institutions were only in possession of the audit reports for 2006 and 2007, which highlighted deficiencies with respect to three elements: inventory counts on 31 December 2006, the cost of sales and net losses for 2006 and 2007.

181 It must be stated that, in addition to their effects on the calculation of the normal value of the applicant's products, such deficiencies are such as to give rise to a legitimate suspicion as to the reliability of the applicant's accounts.

182 That conclusion is not invalidated by the circumstance, observed by the applicant, that it was granted individual treatment, since Article 9(5) of the basic regulation does not include any condition relating to the accounting records of the undertaking concerned. Such a circumstance is, therefore, irrelevant.

183 Moreover, the Council is right to contend that the risk of cross-compensation which the applicant's undertaking was supposed to remedy made it all the more important that the Commission monitor the applicant's accounting, purchase, production, and stock records. In the event that the applicant's proposed undertaking had been accepted, it would have been for the Commission to satisfy itself that the applicant, directly or via a company of the group to which it belongs, did not sell to one of its customers in the European Union another product by reducing its price, which would have the effect of cancelling out or limiting the effect of the increase of the price of the applicant's product entailed by its undertaking. It must be stated that the possibility of carrying out such monitoring is conditional on the reliability of the applicant's records.

184 In the light of the foregoing, it is not apparent that that recital 115 of the contested regulation is vitiated by any manifest error of assessment. Since that recital is able to justify to the requisite legal standard the institutions' refusal to accept the applicant's undertaking offer, it is not necessary to examine the criticisms made of recital 114 of that regulation.

185 The fourth plea in law must therefore be rejected.

*Fifth plea, alleging breach of the principle of sound administration*

186 In the fifth plea, the applicant refers to an article which appeared in the *Sunday Times* in the United Kingdom on 12 October 2008 highlighting the existence, on the one hand, of social contacts between the applicant's owner, Mr D., and a former Commissioner responsible for the Directorate-General (DG) 'Trade' and, on the other, of an antidumping investigation initiated against the applicant. In essence, the applicant submits that claims of favouritism emerge from that article and other subsequent articles which were reproduced in a parliamentary question. The applicant further observes that, in a letter of 16 October 2008, which was made public on 19 October 2008, the Director General

of DG 'Trade' indicated that, if dumping were established in the case of the applicant, duties would probably be levied and that 'far from receiving favourable treatment', the applicant could end up having to pay duties on its exports.

187 In essence, the applicant complains that the Commission relied publicly on the on-going proceeding against the applicant in order to defend itself against allegations of favouritism. The applicant also submits that it is probable that the letter of 16 October 2008 was understood by Commission staff as an encouragement to conduct the investigation in a manner that would obtain an unfavourable outcome for the applicant, in order to prove its independence. That amounts to a breach of the principle of 'sound administration', capable of leading to the annulment of the contested regulation.

188 The Council, supported by the Commission, contends that this plea should be rejected.

189 It is settled case-law that the Commission and the Council are required during an administrative procedure in the matter of defence against dumped imports from non-EU countries to respect the fundamental rights of the European Union, which include the right to sound administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union (see judgment of 12 December 2014, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council*, T-643/11, EU:T:2014:1076, paragraph 45 and the case-law cited). According to the case-law relating to the principle of sound administration, where the institutions of the European Union have a power of appraisal, respect for the rights guaranteed by the European Union legal order in administrative procedures is of even more fundamental importance. Those guarantees include, in particular, the duty of the competent institution to examine carefully and impartially all the relevant aspects of the individual case (judgments of 21 November 1991, *Technische Universität München*, C-269/90, EU:C:1991:438, paragraph 14, and of 10 October 2012, *Ningbo Yonghong Fasteners* v *Council*, T-150/09, not published, EU:T:2012:529, paragraph 77).

190 In the present case, it must be stated that the Commission merely referred to matters of a public nature without departing from its duty of impartiality.

191 In the first place, in so far as the applicant submits that the matters highlighted in the article of the *Sunday Times* originate from the Commission, it must be pointed out that the existence of an investigation conducted against imports of certain aluminium foil originating in Armenia was of a public nature, since that article postdates the publication in the *Official Journal of the European Union* of the notice of initiation of the proceeding, on 12 July 2008. Moreover, as regards the circumstance that Mr D. is the owner of the company which is the subject of that investigation, it is sufficient to point out that that information could easily be deduced from matters of a well-known nature. Indeed, it can reasonably be considered that both the circumstance that the applicant is the only producer of aluminium in Armenia and the fact that Mr D. is its owner are matters falling within the public domain.

192 In the second place, as regards the content of the letter of 16 October 2008, it must be stated that that letter merely draws attention to the logic of the basic regulation, namely that imports subject to dumping and causing injury to the EU industry may be subject to antidumping duties.

193 It is therefore not possible to find any breach of the principle of sound administration.

194 In the light of the foregoing, the fifth plea must be rejected and, in consequence, the action must be dismissed in its entirety.

**Costs**

195 Pursuant to Article 219 of the Rules of Procedure, in decisions of the General Court given after its decision has been set aside and the case referred back to it, it is to decide on the costs relating to the proceedings instituted before it and to the proceedings on the appeal before the Court of Justice. Given that, in the judgment on appeal, the Court of Justice reserved the costs, it is for the General Court also to decide, in the present case, on the costs relating to the appeal proceedings.

196 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and to pay those incurred by the Council in accordance with the form of order sought by the latter.

197 In accordance with Article 138(1) of the Rules of Procedure, the institutions which have intervened in the proceedings are to bear their own costs. The Parliament and the Commission are therefore ordered to bear their own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Rusal Armenal ZAO to bear its own costs and to pay those incurred by the Council of the European Union in the proceedings before the General Court and the Court of Justice;**

3. **Orders the European Parliament and the European Commission to bear their own costs.**

Prek Labucka Schwarcz

Tomljenović Kreuschitz

Delivered in open court in Luxembourg on 25 January 2017.

E. Coulon
Registrar

M. Prek
President