Reports of Cases

JUDGMENT OF THE COURT (Second Chamber)

28 February 2018 *

(Appeal — Commercial policy — Dumping — Imports of solar glass originating in China — Regulation (EC) No 1225/2009 — Article 2(7)(b) and (c) — Market Economy Treatment (MET) — Concept of 'significant distortions carried over from the former non-market economy system', within the meaning of the third indent of Article 2(7)(c) — Tax incentives)

In Case C-301/16 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 26 May 2016,

European Commission, represented by L. Flynn and T. Maxian Rusche, acting as Agents,

appellant,

supported by:

GMB Glasmanufaktur Brandenburg GmbH, established in Tschernitz (Germany), represented by A. Bochon, avocat, and R. MacLean, Solicitor,

intervener in the appeal,

the other party to the proceedings being:

Xinyi PV Products (Anhui) Holdings Ltd, established in Anhui (China), represented by Y. Melin and V. Akritidis, avocats,

applicant at first instance,

THE COURT (Second Chamber),

composed of M. Ilešič, President of the Chamber, A. Rosas, C. Toader, A. Prechal (Rapporteur) and E. Jarašiūnas, Judges,

Advocate General: P. Mengozzi,

Registrar: V. Giacobbo-Peyronnel, Administrator,

having regard to the written procedure and further to the hearing on 21 June 2017,

after hearing the Opinion of the Advocate General at the sitting on 5 December 2017,

* Language of the case: English.

gives the following

Judgment

1 By its appeal, the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 16 March 2016, *Xinyi PV Products (Anhui) Holdings* v *Commission* (T-586/14, 'the judgment under appeal', EU:T:2016:154), by which the General Court annulled Commission Implementing Regulation (EU) No 470/2014 of 13 May 2014 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of solar glass originating in the People's Republic of China (OJ 2014 L 142, p. 1) ('the regulation at issue'), in so far as that regulation concerned Xinyi PV Products (Anhui) Holdings Ltd ('Xinyi PV').

Legal context

2 At the time of the facts underlying the dispute in the main proceedings, the provisions governing the adoption of anti-dumping measures by the European Union were laid down in Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, and corrigendum OJ 2010 L 7, p. 22) ('the basic regulation'). That regulation was repealed by Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21).

3 Article 2(7) of the basic regulation provided:

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

...

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

(c) A claim under subparagraph (b) must … contain sufficient evidence that the producer operates under market economy conditions, that is if:
— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant state interference in this regard, and costs of major inputs substantially reflect market values,
– firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

– the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,
– the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and
– exchange rate conversions are carried out at the market rate.

...'

Background to the dispute

4 The background to the dispute, as set out in the judgment under appeal, may be summarised as follows.

5 Xinyi PV is a company established in China which manufactures and exports solar glass. Its sole shareholder is Xinyi Solar (Hong Kong) Ltd, a company established in Hong Kong (China) which is listed on the Hong Kong Stock Exchange.

6 Following a complaint lodged on 15 January 2013, the Commission, on 28 February 2013, initiated an anti-dumping investigation concerning imports of certain solar glass products originating in China.

7 On 21 May 2013, Xinyi PV submitted an application to the Commission for the purpose of claiming Market Economy Treatment ('MET'), within the meaning of Article 2(7)(b) of the basic regulation, so that the normal value would be determined, in so far as concerns it, in accordance with Article 2(1) to (6) of that regulation and not in accordance with the 'analogue country' method, covered by the rules set out in Article 2(7)(a) of that regulation.

8 By letter of 22 August 2013, the Commission informed Xinyi PV that it considered that that claim could not be granted. In that letter, the Commission, in particular, stated the following:

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

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

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

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

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

9 On 1 September 2013, Xinyi PV presented its observations on that letter, to which the Commission responded by letter of 13 September 2013, which confirmed the rejection of the MET claim made by that company.

10 In that letter, the Commission, in particular, stated the following:

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

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

...

Finally, you argue that the Commission's finding that the tax regime is of quasi-permanent open-ended character is unsubstantiated. Your arguments that the two tax regimes are limited in time are duly noted. The fact that the two regimes do not have a permanent character does however not change the fact ... that they served to distort the financial and economic situation of the firm.'

11 On 26 November 2013, the Commission adopted Regulation (EU) No 1205/2013 imposing a provisional anti-dumping duty on imports of solar glass from the People's Republic of China (OJ 2013 L 316, p. 8) ('the provisional regulation'). In accordance with the analogue country method, the Republic of Turkey was used for the purposes of calculating the normal value for all Chinese exporting producers, including Xinyi PV. A provisional anti-dumping duty of 39.3% was imposed on imports of the product concerned, manufactured by that producer.

12 Recitals 34 to 47 of the provisional regulation concern MET claims. Recitals 40, 41, 43 and 45 to 47 of that regulation read as follows:

'(40) … the MET claims of 4 exporting producers (groups of companies), comprised of 11 legal entities, were investigated.

(41) The investigation established that all four exporting producers (groups of companies) claiming MET failed to demonstrate that they fulfilled all of the criteria laid down in Article 2(7)(c) of the basic Regulation.

...

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

...

(45) The Commission disclosed the results of the MET investigation to the companies concerned, the Chinese authorities and the complainant and invited them to comment.

(46) The comments received were not such as to alter the Commission's preliminary findings. After having consulted the Member States in accordance with Article 2(7)(c) [of the basic regulation], all applicants were individually and formally notified, on 13 September 2013, of the Commission's final determination with regard to their respective MET claim.

(47) Accordingly, neither of the four cooperating exporting producers or groups of exporting producers in [China] that had requested MET could show that they fulfilled all the criteria set out in Article 2(7)(c) of the basic regulation and their MET claims were therefore rejected.'

13 On 13 May 2014, the Commission adopted the regulation at issue, by which it confirmed, inter alia, in recital 34 thereof, the findings set out in recitals 34 to 47 of the provisional regulation, to the effect that all MET claims were to be rejected. By virtue of the regulation at issue, a definitive anti-dumping duty of 36.1% was imposed on imports of solar glass products manufactured by Xinyi PV.

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

15 In parallel with the anti-dumping investigation, an anti-subsidy investigation was opened, on 23 April 2013, which resulted in the adoption of Commission Implementing Regulation (EU) No 471/2014 of 13 May 2014 imposing definitive countervailing duties on imports of solar glass originating in the People's Republic of China (OJ 2014 L 142, p. 23). Under Article 1(2) of that regulation, a countervailing duty of 3.2% was imposed on imports of solar glass manufactured by Xinyi PV.

The procedure before the General Court and the judgment under appeal

16 By application lodged at the General Court Registry on 7 August 2014, Xinyi PV sought the annulment of the regulation at issue.

17 In support of its action, Xinyi PV raised four pleas in law. Only the first of those pleas in law, alleging infringement of the third indent of Article 2(7)(c) of the basic regulation, was examined by the General Court in the judgment under appeal and is therefore of interest for the purposes of the present appeal.

18 By that plea in law, Xinyi PV claimed that the Commission had erred, in the regulation at issue, in considering that Xinyi PV's production costs and financial situation were subject to significant distortions carried over from the former non-market economy system, within the meaning of the third indent of Article 2(7)(c) of the basic regulation.

19 In that regard, the General Court held, in paragraph 62 of the judgment under appeal, on that point, that it was necessary to hold that the Commission's assessment was manifestly wrong.

20 First of all, in paragraphs 63 to 67 of the judgment under appeal, the General Court based that finding, in essence, on the ground that it cannot be held that the tax incentives at issue are carried over from a former non-market economy system, in the sense that they result from it or are a consequence of it, since it is common knowledge that market economy countries, such as Member States of the European Union, also give tax incentives to undertakings in the form of tax exemptions for a defined period or a reduced tax rate, as is, moreover, apparent from the case-law of the Court of Justice in relation to State aid.

21 In paragraphs 68 to 78 of the judgment under appeal, the General Court, secondly, rejected the Commission's arguments alleging that, because of their special characteristics, the tax incentives at issue are unrelated to a market economy, since, inter alia, they are connected to various plans implemented in China.

22 Accordingly, the General Court upheld the first plea in law in the action and, consequently, annulled Article 1 of the regulation at issue, in so far as it concerned Xinyi PV, without examining the other pleas for annulment relied on by Xinyi PV.

Forms of order sought and procedure before the Court of Justice

23 The Commission claims that the Court of Justice should:

– set aside the judgment under appeal;

– reject, as unfounded in law, the first limb of the first plea in law in the action at first instance;

– refer the case back to the General Court for reconsideration of the second limb of the first plea in law and also the second to fourth pleas in law in the action at first instance, and

– reserve the costs of the proceedings at first instance and on appeal.

24 Xinyi PV contends that the Court should:

– dismiss the appeal and

– order the appellant and intervener to pay the costs.

25 By order of the President of the Court of 13 October 2016, *Commission* v *Xinyi PV Products (Anhui) Holdings* (C-301/16 P, not published, EU:C:2016:796), GMB Glasmanufaktur Brandenburg GmbH ('GMB') was granted leave to intervene in support of the form of order sought by the Commission.

The appeal

26 In support of its appeal, the Commission relies on three grounds of appeal, alleging, first, an error in law in interpreting the words 'carried over from the former non-market economy system' in the third indent of Article 2(7)(c) of the basic regulation, secondly, an infringement of the obligation to state reasons, and, thirdly, procedural irregularities.

The first ground of appeal, alleging infringement of the third indent of Article 2(7)(c) of the basic regulation, in so far as the General Court erred in law in interpreting the words 'carried over from the former non-market economy system'

Arguments of the parties

27 The Commission's first ground of appeal is divided into five limbs.

– *The first limb*

28 By the first limb of its first ground of appeal, the Commission takes issue with the General Court on the ground that it erred in law in holding, in paragraphs 63 and 69 of the judgment under appeal, that it is not sufficient to show that a measure is aimed at implementing a five-year plan in China for that measure to be considered to have been carried over from the former non-market economy system, within the meaning of the third indent of Article 2(7)(c) of the basic regulation, as otherwise that provision would be deprived of any practical effect.

29 The third indent of Article 2(7)(c) of the basic regulation should, it submits, be interpreted as meaning that tax incentives aimed at implementing a five-year plan are always carried over from the former non-market economy system.

30 Xinyi PV maintains, in response to that first limb, that it is apparent from paragraph 57 of the judgment under appeal that the Commission's argument that tax incentives aimed at implementing a five-year plan are always carried over from the former non-market economy system was not discussed at any time before the General Court. This, it argues, is therefore a new claim which, as such, should be rejected by the Court of Justice as inadmissible.

31 From a substantive point of view, in paragraph 69 of the judgment under appeal, the General Court held, rightly, that the rejection of a MET claim on the ground that there is an indirect connection between the tax incentives at issue and various plans implemented by the People's Republic of China today would deprive the words 'carried over from the former non-market economy system' of any practical effect.

– *The second limb*

32 By the second limb of its first ground of appeal, the Commission submits that the General Court erred in law, in paragraphs 74 to 76 of the judgment under appeal, when it considered that the support given to certain business sectors considered strategic by a given country, such as the high-tech sector, constitutes a legitimate objective in a market economy.

33 In this regard, the Commission maintains that, although the concept of a market economy permits certain forms of state intervention, such forms aim to pursue objectives of common interest and not to 'pick winners', which involves favouring one economic sector deemed 'strategic' over another by means of different tax rates or other forms of subsidies. In a market economy, it submits, State aid is justified only if it aims to correct market failures or if it pursues equity objectives.

34 Xinyi PV claims that this line of argument, in so far as it is directed at paragraphs 75 and 76 of the judgment under appeal, relates to assessments of the General Court that, as a general rule, are not subject to review, in respect of evidence submitted to it by Xinyi PV, which cannot be the subject of an appeal, the Commission having neither claimed nor demonstrated any manifest distortion of any of that evidence.

35 Paragraphs 75 and 76, it submits, serve merely to illustrate the fact that the tax incentives at issue are not distortions of a type granted by state-trading economies, for the purpose of applying the criterion set out in the third indent of Article 2(7)(c) of the basic regulation.

– *The third limb*

36 By the third limb of its first ground of appeal, the Commission claims that the General Court erred in law in holding, in paragraphs 77 and 78 of the judgment under appeal, that the Commission's argument that the tax incentives at issue had an impact not only on costs directly connected to the

objective pursued, but on all of Xinyi PV's financial results and, therefore, on its overall economic situation, is relevant only for the purpose of assessing whether a distortion is significant, within the meaning of the third indent of Article 2(7)(c) of the basic regulation, but not for the purpose of assessing whether that distortion is carried over from the former non-market economy system, within the meaning of that provision.

37 The Commission argues that, as it has shown in the administrative procedure and before the General Court, one of the common features of subsidy programmes, in a market economy, is that the assistance is targeted and limited to the public funding necessary to attain the objectives pursued. By contrast, the measures examined in the present case are not so limited to a particular category of costs linked with an investment, nor are they limited in time.

38 Xinyi PV maintains that the Commission provides no evidence in support of its assertion that the only subsidies that exist in market economies are those which are targeted and limited to the public funding necessary to attain the objective pursued and that it does not refer to any evidence adduced before the General Court.

39 That line of argument, moreover, has no legal basis, since the third indent of Article 2(7)(c) of the basic regulation is not about whether a distortion is of a type acceptable in market economies, but about whether it is of a type that existed under the former non-market economy system.

– *The fourth limb*

40 By the fourth limb of its first ground of appeal, the Commission criticises the General Court for having held, in paragraphs 66 and 67 of the judgment under appeal, that the State aid programmes held to be illegal and incompatible with the internal market in the judgments of 29 January 1998, *Commission* v *Italy* (C-280/95, EU:C:1998:28); of 21 March 2002, *Spain* v *Commission* (C-36/00, EU:C:2002:196); and of 28 July 2011, *Diputación Foral de Vizcaya and Others* v *Commission* (C-471/09 P to C-473/09 P, not published, EU:C:2011:521) are comparable to the tax measures under examination in the present case, with the result that the mere existence of those measures is not sufficient for them to be regarded as carried over from a non-market economy system.

41 First, it submits, the State aid schemes at issue in those three judgments of the Court were all targeted and limited to the amount necessary to reach the strategic objective pursued and thus shared a characteristic of a market economy. By contrast, the two measures under examination in the present case are not limited to a particular category of costs and, furthermore, the reduced tax rate for high-tech enterprises is not limited in time.

42 Next, those three aid schemes relied on pursued a strategic objective characteristic of a market economy, namely environmental protection, restructuring undertakings in difficulty, and regional development. By contrast, the measures under examination in the present case aim to promote strategic sectors and do not, therefore pursue a policy objective characteristic of a market economy.

43 Finally, according to the Commission, the beneficiaries of the State aid found to be illegal and incompatible with the internal market in the three judgments cited in paragraph 66 of the judgment under appeal were not entitled, unlike Xinyi PV, to keep that aid, since its recovery had been ordered.

44 Xinyi PV maintains that the findings of the General Court in paragraphs 66 and 67 of the judgment under appeal are findings of fact that cannot be examined in an appeal, since the Commission has neither alleged nor proved a manifest distortion of any evidence.

45 As regards the substance, it submits, the Commission does not specify how the tax incentives at issue are not limited to the amount necessary for achieving the objective pursued. In any event, the criterion set out in the third indent of Article 2(7)(c) of the basic regulation does not require it to be established that the subsidies received are limited to the amount necessary for achieving the objectives pursued by those subsidies. Moreover, the tax incentives at issue do indeed concern environmental objectives.

46 GMB criticises, first, paragraph 66 of the judgment under appeal, claiming that the General Court confuses two different concepts. The concept of 'significant distortions carried over from the former non-market economy system', in the present case the People's Republic of China, is a matter of EU anti-dumping legislation and policy, consisting of knowing whether a Chinese exporter is entitled to receive MET. By contrast, the concept of 'subsidies or State aid' forms part of a set of rules governing a different matter, consisting of knowing whether State aid granted in a market economy country is permissible.

47 Next, it argues, the General Court misunderstood the distinction between the centralised control of an economy and the limited and targeted interventions which may be observed in a market economy, which seek to attract foreign investment and to promote economic activity.

48 Finally, GMB criticises the reasoning in paragraph 67 of the judgment under appeal, maintaining that, since the tax incentives at issue are expressly and purposefully designed to organise the economic structure of the Chinese economy in a certain way, they cannot be seen in simple isolation from the overall planning of the Chinese economy with a view to manipulating the market forces operating therein.

– *The fifth limb*

49 By the fifth limb of its first ground of appeal, the Commission claims that the General Court erred in law in relying, in paragraphs 75 and 76 and in paragraphs 66 and 67 of the judgment under appeal, on an incorrect interpretation of the concept of 'non-market economy', within the meaning of the third indent of Article 2(7)(c) of the basic regulation.

50 The Commission submits, in the first place, that, when the General Court held, in paragraph 76 of the judgment under appeal, that a non-market economy system is characterised by a 'form of economic organisation based on collective or state ownership of enterprises subject to production objectives defined in a central plan', it referred incorrectly to the definition of a state-trading country.

51 The concept of 'non-market economy system', it is argued, is broader than that of 'state-trading country', in that it encompasses, inter alia, the countries listed in the footnote accompanying Article 2(7)(a) of the basic regulation, some, if not most, of which are economies in transition to a market economy.

52 Similarly, the People's Republic of China, even when it was included on that list, before being moved, following the adoption of Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community (OJ 1998 L 128, p. 18), to the category of countries covered by the provision corresponding to Article 2(7)(b) of the basic regulation, was, as from 1979, already an economy 'in transition'.

53 Thus, the People's Republic of China introduced, in 1986, measures for attracting foreign direct investment, which included the '2 Free 3 Halve' programme, in particular for foreign companies in the high-tech sector.

54 Accordingly, the General Court, in finding, in paragraph 76 of the judgment under appeal, that the objective of attracting foreign direct investment is inconsistent with the concept of 'non-market economy', erred in law, since it is based on an incorrect interpretation of that concept. Most, if not all, non-market economies have tried to attract foreign direct investment once they have embarked upon economic reforms, often by relying on tax exemptions such as those at issue in the main proceedings.

55 In the second place, in paragraphs 66, 67, 75 and 76 of the judgment under appeal, the General Court relied on the premiss that anything that can be observed in a market economy cannot, by definition, be carried over from a non-market economy system.

56 Such a premiss, it is submitted, is incorrect, since, first, most non-market economies are economies in transition, moving towards a market economy, and, second, distortions caused by State aid may also be observed in market economies. The key question is not whether certain features can also be observed in a market economy, but whether they are characteristic of such an economy.

57 Xinyi PV submits that the word 'former' in the third indent of Article 2(7)(c) of the basic regulation leaves no doubt whatsoever as to the fact that, in order to assess the MET claims submitted by Chinese producers as from 1 July 1998, the date of entry into force of Regulation No 905/98, which introduced the possibility of obtaining such status, the Commission must examine whether there are distortions carried over from the former non-market economy system that was in force before that date, namely when the People's Republic of China was still a traditional state-trading country.

58 The General Court, it contends, was therefore correct, in paragraph 76 of the judgment under appeal, to interpret the expression 'non-market economy', in the third indent of Article 2(7)(c) of the basic regulation, as meaning 'state-trading economy'.

59 GMB submits that paragraphs 65 and 67 of the judgment under appeal are vitiated by an error of law. It submits that a distortion may be considered to be 'carried over', within the meaning of the third indent of Article 2(7)(c) of the basic regulation, so long as the Chinese economy has not fully abandoned the non-market economy in switching to a market economy.

60 The Chinese economy still remains, in many respects, an unreformed economy, where the currents of state control still play an orchestrating role. The consecutive five-year plans reflect a mandatory set of instructions from the Chinese central government, implemented at national, regional and local levels, for organisation of the Chinese economy along the lines of central planning. The Chinese economic model has not changed, since 1998, significantly enough to allow it to be described as a market economy.

61 GMB considers the approach of the General Court to be excessively formal with regard to the concept of 'distortion carried over from the former non-market economy system', in that it implies that any post-1998 distortion introduced by the People's Republic of China into its economy would prevent the Commission from refusing to grant MET.

62 That company takes the view that the General Court also erred in law, since a proper analysis of the distortions relates not simply to the 'existence' of the measures at issue as economic incentives, but rather to the role they play as extensions of Chinese central government policy objectives. The history of the anti-dumping duty of 36.1%, and then 75.4%, imposed on Xinyi PV shows that the distortions from which it was able to benefit in pursuit of the Chinese Government's non-market economy objectives greatly helped it to reduce its prices to the floor, in total disregard of its production costs. This complete price inelasticity would not have existed in the absence of the distortions in question.

63 GMB submits, finally, that paragraph 65 of the judgment under appeal, is, in any event, vitiated by an error, in so far as the '2 Free 3 Halve' programme was introduced by the Chinese Government in 1986 and, therefore, dates back to a time when China did not yet have any of the characteristics of a market economy.

Findings of the Court

– Preliminary observations

64 At the outset, it should be noted that, in accordance with Article 2(7)(a) of the basic regulation, in the case of imports from non-market economy countries, in derogation from the rules set out in Article 2(1) to (6) of that regulation, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country, that is to say, according to the analogue country method. The aim of that provision is thus to prevent account being taken of prices and costs in non-market-economy countries which are not the normal result of market forces (see, inter alia, judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 66).

65 However, pursuant to Article 2(7)(b) of the basic regulation, in anti-dumping investigations concerning imports from, inter alia, China, normal value is to be determined in accordance with Article 2(1) to (6) of that regulation, and not, consequently, in accordance with the analogue country method, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation, and in accordance with the criteria and procedures set out in Article 2(7)(c) of that regulation, that market economy conditions prevail for that producer or those producers in respect of the manufacture and sale of the like product concerned.

66 As is apparent from the various regulations from which Article 2(7)(b) of the basic regulation stems, that wording is intended to enable producers subject to market economy conditions having emerged, inter alia, in China to obtain treatment corresponding to their individual situation, rather than to the overall situation of the country in which they are established (judgment of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74, paragraph 108).

67 In application of the powers conferred on it by the basic regulation, it is for the Commission to assess whether the evidence supplied by the producer concerned is sufficient to show that the criteria laid down in Article 2(7)(c) of the basic regulation are fulfilled in order to grant it MET, referred to in Article 2(7)(b) of that regulation, and it is for the EU Courts to examine whether that assessment is vitiated by a manifest error (see, to that effect, inter alia, judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 70).

68 It is common ground that, in the present case, Xinyi PV's MET claim was rejected on the sole ground that that company had not established that it satisfied the criterion laid down in the third indent of Article 2(7)(c) of the basic regulation.

69 Under that provision, the producer concerned must provide sufficient evidence to establish that its production costs and financial situation are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts.

70 It follows from the wording of that provision, as the General Court also noted in paragraph 46 of the judgment under appeal, that it imposes two cumulative conditions, relating, first, to the existence of a significant distortion in production costs and in the financial situation of the firm in question and, secondly, to the fact that the distortion proves to have been carried over from the former non-market economy system.

71 The judgment under appeal relates only to the second of those conditions, as the General Court limited itself to examining, then upholding, the part of the first plea in law relied on by Xinyi PV, alleging that the Commission had committed a manifest error of assessment in considering that the tax incentives provided for by Chinese legislation from which Xinyi PV had benefited should be considered a distortion 'carried over from the former non-market economy system', within the meaning of the third indent of Article 2(7)(c) of the basic regulation.

– *The fifth limb*

72 By the fifth limb of its first ground of appeal, which must be examined in the first place, the Commission disputes the General Court's interpretation, in paragraph 76 of the judgment under appeal, of the second condition laid down in the third indent of Article 2(7)(c) of the basic regulation, claiming, in essence, that the General Court was wrong to hold that the words 'former non-market economy system', within the meaning of the third indent of Article 2(7)(c) of the basic regulation, refer to a 'form of economic organisation based on collective or state ownership of enterprises subject to production objectives defined in a central plan'.

73 In that context, it must be recalled that, before the General Court, Xinyi PV had maintained, inter alia, that the tax incentives from which it had benefited could not be considered to be part of a system in which trade is subject to a complete, or substantially complete, monopoly and in which internal prices are fixed by the state, that is to say a state-trading country.

74 It follows, as, moreover, has not been disputed by any of the parties before the Court of Justice, that, for the purposes of the definition of the words 'former non-market economy system', in the third indent of Article 2(7)(c) of the basic regulation, the General Court referred specifically, in paragraph 76 of the judgment under appeal, to an economic system of a state-trading country.

75 In that regard, it must be observed that the wording set out in the fourth and fifth recitals of Regulation No 905/98, which was subsequently reproduced in, inter alia, Article 2(7)(b) and (c) of the basic regulation, was inserted owing to the fact that the process of reform in China had fundamentally altered its economy and had led to the emergence of firms for which market economy conditions prevailed, with the result that China had moved away from the economic circumstances which inspired use of the analogue country method as a matter of course (judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 68).

76 However, in so far as, despite those reforms, the People's Republic of China is still not a market economy country to whose exports the rules set out in Article 2(1) to (6) of the basic regulation apply automatically, it is, in accordance with Article 2(7)(c) of that regulation, for each producer wishing to benefit from those rules to produce sufficient evidence, as laid down by that provision, that it operates under market economy conditions justifying the granting of MET (judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 69).

77 Accordingly, the view must be taken that the words 'former non-market economy system', as set out in the third indent of Article 2(7)(c) of the basic regulation, refer to the former economic system which had justified the systematic use of the analogue country method with regard to Chinese producers, but from which the People's Republic of China has moved away.

78 It is a matter of common knowledge that, well before 1 July 1998, the date of entry into force of Regulation No 905/98, which introduced the wording subsequently reproduced in, inter alia, Article 2(7)(b) and (c) of the basic regulation, the economic system prevailing in China was already no longer that of a state-trading country. It was that of a country which, although still not a market

economy, had already undergone certain reforms reducing state control, but the economy of which, in a great number of sectors, remained characterised, in particular, by the central role played by five-year plans.

79 It is, moreover, common ground, as also observed by the Advocate General in point 59 of his Opinion, that the objective pursued by the insertion of that wording was to recognise the reforms already accomplished in certain sectors of the Chinese economy and to encourage more fundamental reform, so that, in the near future, in all sectors of that economy, costs to which producers are subject and the prices that they charge would no longer be determined or significantly influenced by the State, but would, in the main, be the result of the free operation of supply and demand.

80 However, in the meantime, by virtue of Article 2(7)(b) and (c) of the basic regulation, the analogue country method continues to apply by default to the calculation of normal value, since it is only if a producer demonstrates to the requisite legal standard that it fulfils all five of the conditions laid down in Article 2(7)(c) of the basic regulation that that method will not be applied to it and the Commission will be required to calculate the normal value, as regards that producer, in accordance with the method laid down in Article 2(1) to (6) of the basic regulation for imports from market economy countries.

81 The finding that the words 'former non-market economy system', as set out in the third indent of Article 2(7)(c) of the basic regulation, do not refer necessarily and specifically to the historic economic system of a state-trading country, but, more generally, to a non-market economy system, which, as the case may be, has already experienced some reform, is supported by the fact that, in several language versions of that provision, various expressions are used, such as 'former economic system in which the economy is not subject to market forces' ('*sistema anterior de economia no sujeta a las leyes del mercado*' in Spanish), 'former non-market-economy system' (in English) or 'former centralised economic system' ('*antigo sistema de economia centralizada*' in Portuguese).

82 Likewise, that finding is corroborated by the fact that, as the Advocate General also pointed out, in essence, in points 70 to 73 of his Opinion, the words 'carried over' which precede the words 'from the former non-market economy system', must, given the *ratio legis* of the provisions on MET status, be understood as meaning that that earlier system must have caused or led to the distortions at issue or, in other words, as meaning that the incentives in question must stem from such a system, as, moreover, the General Court found in paragraph 64 of the judgment under appeal, in the light of a comparison of certain language versions of the basic regulation.

83 Finally, that finding is supported by the purpose of Article 2(7)(c) of the basic regulation, which is to ensure that a producer operates under market economy conditions and, in particular, that the costs to which it is subject and the prices which it charges are the result of market forces (judgment of 19 July 2012, *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 82).

84 In relation to that purpose, it is irrelevant, for the purposes of the third indent of Article 2(7)(c) of the basic regulation, whether the economic system in question is a state-trading economy or another type of non-market economy.

85 It follows that the third indent of Article 2(7)(c) of the basic regulation must be understood as meaning that it requires the producer to establish, to the requisite legal standard, that its production costs and its financial situation are not subject to significant distortions arising from a non-market economy system which, as the case may be, is a system already in transition, as regards certain sectors, to a market economy system.

86 In the light of the foregoing, it must be held that, in referring in paragraph 76 of the judgment under appeal, for the purposes of the definition of the words 'former non-market economy system', in the third indent of Article 2(7)(c) of the basic regulation, to an economic system of a state-trading country, the General Court erred in law.

87 The fifth limb of the first ground of appeal must therefore be upheld.

– *The first limb*

88 By the first limb of its first ground of appeal, which must be examined in the second place, the Commission takes issue with the General Court on the ground that it erred in law in holding, in paragraphs 63 and 69 of the judgment under appeal, that it is not sufficient to show that a measure is connected to a plan implemented in China for that measure to be considered to have been carried over from the former non-market economy, within the meaning of the third indent of Article 2(7)(c) of the basic regulation, as otherwise that provision would be deprived of any practical effect.

89 In that regard, it is necessary, at the outset, to reject the objection raised by Xinyi PV, to the effect that the Commission's argument is inadmissible as constituting a new claim which was not discussed before the General Court.

90 The Commission is in fact entitled to lodge an appeal relying, before the Court of Justice, on pleas arising from the judgment under appeal itself which seek to criticise, in law, its merits (see, to that effect, inter alia, judgment of 10 April 2014, *Commission and Others* v *Siemens Österreich and Others*, C-231/11 P to C-233/11 P, EU:C:2014:256, paragraph 102). Furthermore, it follows from paragraphs 52 and 53 of the judgment under appeal that the argument in question was raised by the Commission before the General Court, with the result that the General Court was required to respond.

91 As regards the substance, it should be noted, first of all, that, contrary to what Xinyi PV claims, the General Court did not rely, in paragraph 69 of the judgment under appeal, on the finding that the five-year plans drawn up by the present-day People's Republic of China are not comparable to those implemented when that country was still a state-trading economy.

92 In that paragraph, the General Court rejected the Commission's argument alleging an 'indirect connection between the tax incentives at issue and various plans implemented in China', on the ground that it is 'based on an overly formal approach, the continued existence of those plans not necessarily implying that those schemes were carried over from the former non-market economy in China, unless the view were taken that all the measures taken in China and connected to a plan are carried over from its former non-market economy, which would deprive Article 2(7)(b) and (c) of the basic regulation of any practical effect'.

93 Moreover, in paragraph 76 of the judgment under appeal, the General Court stated that the use of central plans defining production objectives characterises a non-market economy system.

94 In that regard, it must be held that, even assuming, from now on, that the Chinese five-year plans no longer provide, for all sectors of the economy, defined production objectives, as was the case when the People's Republic of China was still a state-trading country, the fact nonetheless remains that, as the Advocate General also observed in points 89 and 99 of his Opinion, it is common knowledge that those plans still play, even after the reforms to the Chinese economic system, a fundamental role in the organisation of that economy, in so far as they contain, for a great number of sectors, precise objectives which are binding on all levels of government.

95 Consequently, to the extent to which, as already stated in paragraph 85 of the present judgment, the criterion set out in the third indent of Article 2(7)(c) of the basic regulation requires the producer to establish, to the requisite legal standard, that its production costs and its financial situation are not subject to significant distortions arising from a non-market economy system, whether a state-trading system or a system in transition towards a market economy, the connection of a measure such as that at issue in the present case, which consists of granting tax incentives to foreign investments in sectors

deemed to be strategic, such as the high-tech sector, to different plans implemented in China is sufficient for the assumption that that measure constitutes a distortion 'carried over from the former non-market economy system', within the meaning of that provision.

96 Moreover, contrary to what the General Court held in paragraph 69 of the judgment under appeal, that presumption does not deprive the third indent of Article 2(7)(c) of the basic regulation of any practical effect.

97 In addition to the fact that it applies only to measures which are in fact connected with a five-year plan, the producer concerned may rebut that presumption if it demonstrates, to the requisite legal standard, that the measure in question is not inherently contrary to a market economy.

98 In any event, that producer retains the possibility of demonstrating that that measure, as it has been applied to it, does not involve a distortion which could be regarded as 'significant', within the meaning of that provision.

99 It follows that the findings set out in paragraph 69 of the judgment under appeal are vitiated by an error of law.

100 Consequently, it must be concluded that the first limb of the first ground of appeal is also well founded.

– *The second and fourth limbs*

101 By the second and fourth limbs of the first plea in law, which must be examined together in the third place, the Commission criticises the General Court for having erred in law in finding, in paragraphs 66, 67, 75 and 76 of the judgment under appeal, that it cannot be held that the tax incentives at issue are carried over from a former non-market economy system, within the meaning of the third indent of Article 2(7)(c) of the basic regulation, since, first, it is common knowledge that market economy countries, such as the Member States of the European Union, also give tax incentives to undertakings in order to attract foreign investment in sectors deemed to be strategic, such as the high-tech sector, and, secondly, such a policy proves, at least in theory, to be inconsistent with a form of economic organisation based on collective or state ownership of enterprises subject to production objectives defined in a central plan, which characterises a planned economy system.

102 Although, as Xinyi PV submits, it is true that it is not for the Court of Justice to confirm, at the stage of the appeal, the essentially factual finding, made in those paragraphs of the judgment under appeal, that tax incentives of the same type as those enjoyed by that producer also exist in market economy countries, such as the Member States of the European Union, the Commission is, by contrast, entitled to criticise, in its appeal, the General Court's finding, in the form of the legal characterisation of those facts, that it cannot be held that those advantages constitute a distortion 'carried over from the former non-market economy system', within the meaning of the third indent of Article 2(7)(c) of the basic regulation.

103 It must be held that that criticism is well founded.

104 As the Advocate General also noted in points 95 to 99 of his Opinion, since it is not disputed that the tax incentives at issue may be connected with various plans implemented in China, and since that country, despite the reforms of its economic model, is still considered, as is apparent from the wording set out in Article 2(7)(b) and (c) of the basic regulation, to be, in principle, a non-market economy, the context in which those tax incentives exist is radically different from that in which potentially similar measures operate in market economy countries.

105 In that regard, as regards the Member States of the European Union, it should be noted that such tax incentives are, in principle, incompatible with the internal market and thus prohibited if they may be classified as 'State aid', within the meaning of Article 107(1) TFEU, which requires that the four conditions laid down in that provision are fulfilled (see, to that effect, judgment of 21 December 2016, *Commission* v *World Duty Free Group and Others*, C-20/15 P and C-21/15 P, EU:C:2016:981, paragraph 53).

106 Moreover, as the Commission has also submitted, without being contradicted on that point, the three judgments referred to by the General Court in paragraph 66 of the judgment under appeal concerned tax aid which had been held to be illegal and incompatible with EU law, in respect of which recovery from the beneficiaries had been ordered, even though it had been granted subject to certain limitations, for the purpose of achieving specific objectives. By contrast, in the present case, the tax incentives in question were granted to broadly defined strategic sectors and are not limited in time; it is not apparent that the provision of the aid is subject to state control exposing the beneficiaries to the risk that it might be recovered from them.

107 In so far as concerns the particular economic system prevailing in China, as referred to in the wording set out in Article 2(7)(b) and (c) of the basic regulation, namely an economic system in transition to a market economy but which is still regarded, by default, as a non-market economy system, if, as in the present case, the tax incentives at issue are connected to various plans implemented in China, it cannot be held that those incentives are inconsistent with such a system.

108 On the contrary, as the Advocate General also observed in point 104 of his Opinion, provided that the tax incentives concerned implement a five-year plan, a characteristic feature of non-market economies which is fundamental to the organisation of the Chinese economy, the Commission was entitled to presume that those measures had been 'carried over from the former non-market economy system'.

109 It must therefore be held that the second and fourth limbs of the Commission's first ground of appeal are well founded.

110 It follows, without there being any need to examine the third limb of the first ground of appeal, that the General Court erred in law in holding that the Commission had committed a manifest error of assessment by refusing to grant MET to Xinyi PV, on the basis of the finding that the distortions arising from those measures had not been 'carried over from the former non-market economy system' within the meaning of the third indent of Article 2(7)(c) of the basic regulation.

111 Consequently, since the first, second, fourth and fifth limbs of the Commission's first ground of appeal are well founded, the judgment under appeal must be set aside, without it being necessary to examine the second and third grounds of appeal.

The action before the General Court

112 In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, if the Court sets aside the decision of the General Court, it may itself give final judgment in the matter, where the state of the proceedings so permits.

113 That is not the position in the present case, the General Court having upheld Xinyi PV's application for annulment without examining the second part of the first plea in law or the second to fourth pleas in law invoked before it. Consequently, the case must be referred back to the General Court.

Costs

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

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

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

2. **Refers the case back to the General Court of the European Union;**

3. **Reserves the costs.**

Ilešič Rosas Toader

Prechal Jarašiūnas

Delivered in open court in Luxembourg on 28 February 2018.

A. Calot Escobar
Registrar

M. Ilešič
President of the Second Chamber