Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 1 July 2021[1]

Case C‑891/19 P

European Commission
v

Hubei Xinyegang Special Tube Co. Ltd

(Appeal – Dumping – Implementing Regulation (EU) 2017/804 – Imports of certain seamless pipes and tubes of iron or steel – Regulation (EU) 2016/1036 – Article 3(2), (3) and (6) and 17 – Determination of injury – Analysis of price undercutting – Obligation of the Commission to consider market segments relating to the product under consideration and all sales of like products by the sampled Union producers)

1. Establishing that injury has been caused to the Union industry by the dumped imports is an essential requirement in order for anti-dumping measures to be adopted. As part of the analysis which it performs in order to establish the existence of such injury, the European Commission must, inter alia, carry out an objective examination of the effect of the dumped imports on prices in the Union market for like products, in particular, by determining whether there has been price undercutting.

2. As part of that complex examination, is the Commission required – and if so in which cases – to take account of market segments relating to the product under consideration? In the course of that examination, is the Commission required to take account of all sales of like products by the Union producers that have been sampled for the purposes of the investigation? In that context, what is the standard of the judicial review which the EU judicature must carry out of such an analysis performed by the Commission, which involves the assessment of complex economic situations?

3. Those are, in essence, the main questions raised in the present case, which concerns the appeal by which the European Commission asks the Court to set aside the judgment of the General Court of the European Union of 24 September 2019, *Hubei Xinyegang Special Tube* v *Commission* ('the judgment under appeal'),[2] by which the General Court annulled Commission Implementing Regulation (EU) 2017/804 of 11 May 2017, which established an anti-dumping duty on certain types of pipes and tubes originating in the People's Republic of China ('the regulation at issue').[3]

[1] Original language: Italian.

[2] T‑500/17, not published, EU:T:2019:691.

[3] Commission Implementing Regulation imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes of iron (other than cast iron) or steel (other than stainless steel), of circular cross-section, of an external diameter exceeding 406.4 mm, originating in the People's Republic of China (OJ 2017 L 121, p. 3).

I. Legal framework

4. Article 3 of 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 ('the Basic Regulation'), [4] entitled 'Determination of injury', provides as follows:

'1. Pursuant to this Regulation, the term "injury" shall, unless otherwise specified, be taken to mean material injury to the Union industry, threat of material injury to the Union industry or material retardation of the establishment of such an industry and shall be interpreted in accordance with the provisions of this article.

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

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

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

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

…

5. The examination of the impact of the dumped imports on the Union industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry …

6. It must be demonstrated, from all the relevant evidence presented in relation to paragraph 2, that the dumped imports are causing injury within the meaning of this regulation. Specifically, that shall entail demonstrating that the volume and/or price levels identified pursuant to paragraph 3 are responsible for an impact on the Union industry as provided for in paragraph 5, and that that impact exists to a degree which enables it to be classified as material.

7. Known factors, other than the dumped imports, which at the same time are injuring the Union industry shall also be examined to ensure that the injury caused by those other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in that respect shall include: the volume and prices of imports not sold at dumping prices; contraction in demand or changes in the patterns of consumption; restrictive trade practices of, and competition between, third country and Union producers; developments in technology and the export performance; and productivity of the Union industry.'

[4] OJ 2016 L 176, p. 21.

II. The facts and the regulation at issue

5. On 13 February 2016, following a complaint, the Commission initiated an anti-dumping proceeding concerning imports of certain seamless pipes and tubes of iron (other than cast iron) or steel (other than stainless steel), of circular cross-section, of an external diameter exceeding 406.4 mm ('the product under consideration') originating in the People's Republic of China.

6. In the course of the investigation, Hubei Xinyegang, a company with registered offices in China that produces and exports to the European Union seamless pipes and tubes, was selected for inclusion in the sample of Chinese exporting producers, in accordance with Article 17 of the Basic Regulation.

7. On 11 November 2016, the Commission adopted Regulation (EU) 2016/1977 imposing a provisional anti-dumping duty on imports of the product under consideration originating in the People's Republic of China ('the provisional regulation'). [5]

8. On 11 May 2017, the Commission adopted the regulation at issue, Article 1 of which provides for the imposition of a definitive anti-dumping duty on all Chinese exporting producers of the product under consideration. In so far as concerns the products manufactured and exported by Hubei Xinyegang, the rate of anti-dumping duty was set at 54.9%.

III. Procedure before the General Court and the judgment under appeal

9. On 7 August 2017, Hubei Xinyegang brought an action before the General Court in which it sought the annulment of the regulation at issue. It put forward four pleas in law in support of that action.

10. The General Court analysed only (i) the first plea, which was divided into two parts and alleged infringement of Article 3(2) and (3) of the Basic Regulation and Articles 3.1 and 3.2 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 ('the Anti-Dumping Agreement') [6] and (ii) the second plea, which alleged infringement of Article 3(6) of the Basic Regulation and Article 3.5 of the Anti-Dumping Agreement.

11. In the judgment under appeal, the General Court, after dismissing the first part of the first plea, [7] a point which is not challenged in the present case, upheld the second part of the first plea put forward by Hubei Xinyegang, which concerned the method which the Commission had used, in the context of establishing the existence of injury, to compare the prices of the dumped imports with those of the products sold by the Union industry. The General Court held that the Commission had failed to take account of all the relevant data in the case at hand in its analysis of price undercutting and of the effect of the dumped imports on prices in the Union market for like products, in breach of Article 3(2) and (3) of the Basic Regulation. In reaching that conclusion, the General Court referred, in particular, to (i) a report prepared by the appellate body set up by the Dispute Settlement Body of the World Trade Organisation (WTO) ('the WTO Appellate Body') in the dispute 'China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan' (WT/DS 454/AB/R and

[5] OJ 2016 L 305, p. 1.

[6] OJ 1994 L 336, p. 103.

[7] See paragraphs 48 to 52 of the judgment under appeal.

WT/DS 460/AB/R, report of 14 October 2015) (‘the Appellate Body’s HP-SSST report’) and (ii) to its own judgment of 28 October 2004, *Shanghai Teraoka Electronic* v *Council* (T-35/01, EU:T:2004:317, ‘the judgment in *Shanghai Teraoka*’).

12. The General Court found, first of all, that although the Commission had noted the existence of three market segments relating to the product under consideration, it had failed to take that segmentation into account in its analysis of price undercutting and, more generally, in its analysis of the effect of the dumped imports on prices in the Union market for like products.[8] Secondly, the General Court also upheld the argument put forward by Hubei Xinyegang that, in its analysis of price undercutting, the Commission had failed to take account of 17 types of products out of the 66 sold by the sampled Union producers. Lastly, the General Court held that the conclusion which it had reached could not be called into question by the evidence which the Commission put forward after the hearing, and thus at a late stage in the proceedings.

13. The General Court then upheld the second plea raised by Hubei Xinyegang, alleging infringement of Article 3(6) of the Basic Regulation and Article 3.5 of the Anti-Dumping Agreement.[9] The General Court essentially held that, having concluded, in its analysis of the first plea, that the Commission had not taken into account all the relevant data for the purpose of determining price undercutting and the effect of the imports on prices in the Union market for like products, it also had to hold that the Commission’s conclusion as to the existence of a causal link, for the purposes of Article 3(6) of the Basic Regulation, was founded on an incomplete factual analysis.[10]

14. The General Court therefore annulled the regulation at issue in so far as it concerned Hubei Xinyegang, without examining the other pleas which it had put forward in support of its action.

IV. Forms of order sought by the parties

15. In its appeal, the Commission asks the Court of Justice to set aside the judgment under appeal, reject as unfounded the first and second pleas in the application at first instance, refer the case back to the General Court for reconsideration of the remaining pleas and reserve the costs of the proceedings at first instance and on appeal.

16. Hubei Xinyegang asks the Court of Justice to dismiss the appeal or, in the alternative, refer the case back to the General Court for reconsideration of the remaining pleas, and to order the Commission to pay the costs of the appeal and of the proceedings before the General Court.

17. ArcelorMittal Tubular Products Roman SA, Válcovny trub Chomutov a.s. and Vallourec Deutschland GmbH (‘ArcelorMittal and others’), interveners before the General Court in support of the form of order sought by the Commission,[11] ask the Court of Justice to set aside the judgment under appeal, dismiss the first and second pleas raised at first instance as unfounded in law, refer the case back to the General Court for reconsideration of the third and fourth pleas raised at first instance, order Hubei Xinyegang to pay the costs of the appeal, and reserve the costs as to the remainder.

[8] See paragraphs 59 to 67 of the judgment under appeal.

[9] See paragraphs 82 to 89 of the judgment under appeal.

[10] See, in particular, paragraph 88 of the judgment under appeal.

[11] Order of 24 January 2018 of the President of the Seventh Chamber of the General Court: see paragraph 12 of the judgment under appeal.

V. Analysis of the appeal

18. In support of its appeal, the Commission, supported by ArcelorMittal and others, puts forward six grounds of appeal, which may be divided into three groups.

19. The first three grounds of appeal seek to challenge the part of the judgment under appeal in which the General Court found the Commission at fault for having failed to take account, in its analysis of price undercutting, of the various market segments relating to the product under consideration.[12]

20. The fourth and fifth grounds of appeal seek to challenge the part of the judgment under appeal in which the General Court concluded that, in its analysis of price undercutting, the Commission had failed to take account of the prices of 17 types of products out of the 66 sold by the Union producers.[13]

21. Lastly, by its sixth ground of appeal, the Commission submits that the General Court applied the wrong standard of judicial review.

22. Before analysing the grounds of appeal raised by the Commission, I consider it appropriate to make several observations of a preliminary nature.

A. Preliminary observations

23. The present case concerns the analysis of price undercutting which the Commission carries out, in the context of anti-dumping proceedings, in order to establish the existence of injury to the Union industry. Establishing such injury is an essential requirement in order for anti-dumping measures to be adopted.[14] The provisions which govern the determination of injury are those of Article 3 of the Basic Regulation.

24. In that connection, I must first of all observe that, as the General Court pointed out,[15] paragraphs 1, 2 and 3 of Article 3 of the Basic Regulation contain provisions that are substantially the same as those of Articles 3.1 and 3.2 of the Anti-Dumping Agreement. It may, therefore, be presumed that the EU legislature intended to implement in EU law, by way of such provisions, a particular obligation undertaken in the context of the WTO agreements.[16] In those circumstances, and within those limits, it falls to the EU judicature to review the legality of the regulation at issue in the light of those provisions of the Anti-Dumping Agreement.[17] In the context of that review of legality, the EU judicature must also take into account the interpretations of the various provisions of that agreement that have been given by the WTO Dispute Settlement Body.[18]

[12] See paragraphs 59 to 67 and 77 to 79 of the judgment under appeal.

[13] See paragraphs 68 to 76 of the judgment under appeal.

[14] Indeed, it is clear from Article 1(1) of the Basic Regulation that an anti-dumping duty may be imposed on a dumped product only if the release for free circulation in the Union of such a product causes injury.

[15] See paragraphs 30 and 54 of the judgment under appeal.

[16] On that point, see judgment of 16 July 2015, *Commission* v *Rusal Armenal* (C-21/14 P, EU:C:2015:494, paragraphs 44 to 46 and the case-law cited).

[17] See, by analogy, judgment of 9 January 2003 *Petrotub and Republica* (C-76/00 P, EU:C:2003:4, paragraph 56).

[18] See, by analogy, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C-66/18, EU:C:2020:792, paragraph 92).

25. Secondly, I must point out that it is clear from Article 3(2) of the Basic Regulation that a determination of injury must be based on positive evidence and involves an objective examination, on the one hand, of the volume of the dumped imports and of the effect of the dumped imports on prices in the Union market for like products and, on the other, of the consequent impact of those imports on the Union industry.

26. As regards, specifically, the analysis of the effect of the dumped imports on prices in the Union market for like products, it is clear from the second sentence of Article 3(3) of the Basic Regulation that it is necessary to consider, in particular, whether there has been significant price undercutting by the dumped imports as compared with the price of a like product in the Union or, in other words, whether the dumped imports have been imported at significantly lower prices.[19]

27. The determination of the effect of the dumped imports on prices in the Union industry for like products and, more specifically, the determination of whether there is price undercutting, involves an examination of the relationship between the prices of the dumped imports and the prices of the like product, which presupposes that a comparison is made between the two.[20]

28. However, neither Article 3 of the Anti-Dumping Agreement nor, consequently Article 3 of the Basic Regulation, prescribes any specific methodology for determining whether there has been injury or, more specifically, price undercutting.[21] The analysis must, however, be based on positive evidence and an objective examination, which is thus impartial and fair and takes into account all the relevant evidence.[22]

29. In that connection, it must also be borne in mind that, as is apparent from the settled case-law of the Court of Justice, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy a broad discretion by reason of the complexity of the economic and political situations which they have to examine.[23] The Court of Justice has expressly acknowledged that that broad discretion extends, in particular, to the determination of the existence of injury caused to the Union industry.[24]

30. As the General Court rightly observed, the analysis of price undercutting and, more generally, the analysis of the effect of the dumped imports on prices in the Union industry for like products unquestionably involve the appraisal of complex economic situations,[25] which, as I shall explain in more detail in my analysis of the sixth ground of appeal, has an effect on the standard of review carried out by the EU judicature.

31. Thirdly, in so far as specifically concerns the present case, I must mention certain factual elements established by the General Court and not disputed by the parties.

[19] As is clear from the wording of the relevant provisions which I have mentioned, the analysis of the effect on prices may, in addition to determining price undercutting, establish that the dumped imports have had the effect of depressing prices to a significant degree or preventing price increases, which would otherwise have occurred, to a significant degree.

[20] See, to that effect, the Appellate Body's HP-SSST report, paragraphs 5.158 and 5.161 (where further references are given). Those principles are taken up, in substance, in paragraphs 32 and 56 of the judgment under appeal.

[21] See the Appellate Body's HP-SSST report, paragraph 5.141 (where further references are given in footnote 340). See also paragraph 33 of the judgment under appeal.

[22] See the Appellate Body's HP-SSST report, paragraph 5.180.

[23] See, inter alia, judgment of 19 September 2019, *Trace Sport* (C-251/18, EU:C:2019:766, paragraph 47 and the case-law cited).

[24] Judgment of 10 July 2019, *Caviro Distillerie and Others* v *Commission* (C-345/18 P, not published, EU:C:2019:589, paragraph 15 and the case-law cited).

[25] See paragraph 33 of the judgment under appeal.

32. The first of these is that, in its anti-dumping investigation, the Commission found that the product under consideration was certain seamless pipes and tubes of iron (other than cast iron) or steel (other than stainless steel), of circular cross section and with an external diameter exceeding 406.4 mm, originating in the People's Republic of China.[26] The Commission noted the existence of three market segments relating to that product: oil and gas, power generation and construction.[27] The definitions of the product under consideration and of the like product, although disputed in the course of the administrative procedure, were not challenged by Hubei Xinyegang before the General Court and must, therefore, be regarded as definitive.

33. Next, I must observe that, in the present case, the Commission conducted an analysis to determine price undercutting by the Chinese imports by comparison with prices in the Union industry, comparing the prices of those imports with the prices in the Union industry using the Product Control Number (PCN) system ('the PCN method').

34. Using that method, each type of product produced and sold by the Chinese exporting producers sampled and each type of product produced and sold by the sampled Union producers was attributed a unique PCN, depending on the principal characteristics of the product.[28] The types of products imported from China were thus compared on a PCN basis with the products produced and sold by the Union industry that had the same or similar characteristics.[29] In its calculation of price undercutting, the Commission compared the prices of products sold by the sampled Union producers with those of the products sold by the Chinese exporting producers sampled, PCN by PCN. For every PCN for which there were matching sales, the Commission established an undercutting margin. It then calculated a weighted average undercutting margin for the product under consideration for each of the Chinese exporting producers sampled. That method resulted in the determination of price undercutting margins of between 15.2% and 29.1%.[30] The use of the PCN method of comparison was not disputed, as such, by Hubei Xinyegang.[31]

35. Lastly, it was established and not disputed by the parties that all the Chinese imports were analysed in the context of the determination of price undercutting.[32]

B. The first three grounds of appeal, concerning the complaint regarding the failure to take into consideration, in the examination of price undercutting and of the effect of the imports on prices, the various market segments relating to the product under consideration

36. By its first three grounds of appeal, the Commission challenges the part of the judgment under appeal, paragraphs 59 to 67, in which the General Court found that it had wrongly omitted to take account, in its analysis of price undercutting, of the various market segments relating to the product under consideration. By the third ground of appeal, the Commission takes issue, in particular, with paragraphs 77 to 79 of the judgment under appeal, in which the General Court rejected certain evidence produced by the Commission, at that court's request, after the hearing at first instance.

[26] Recital 19 of the provisional regulation, confirmed by recital 28 of the regulation at issue.

[27] See recitals 22, 25 and 108 of the regulation at issue.

[28] In this case, the following characteristics were taken into account: product type, external diameter, wall thickness, quenching and tempering, length, tube extremity, and testing. See recital 24 of the regulation at issue.

[29] See recital 24 of the regulation at issue.

[30] Recital 69 of the regulation at issue and paragraph 37 of the judgment under appeal.

[31] Paragraph 37 of the judgment under appeal.

[32] See paragraph 38 of the judgment under appeal.

1. The judgment under appeal

37. In paragraphs 59 to 67 of the judgment under appeal, the General Court held it to be common ground that although the Commission had noted the existence of three market segments relating to the product under consideration, it had not taken account of that segmentation in its analysis of price undercutting.

38. On that point, the General Court did, however, note that the present case is characterised by four matters (addressed in paragraphs 61, 62, 63 and 64 of the judgment under appeal respectively): first, not all the types of products included within the 'like product' were directly interchangeable on the demand side, although producers were able to adapt their offer; secondly, the use of different raw materials in the manufacture of product types had an effect on price variations between the market segments and those differences were, as could be inferred from the Appellate Body's HP-SSST report, a relevant factor to be taken into account for the purposes of the analysis of price undercutting; thirdly, the Commission had confirmed that 75.1% of the Chinese imports sampled were concentrated in the construction sector, which, as was apparent from the judgment in *Shanghai Teraoka*, should have been analysed separately; and fourthly, it was apparent from the provisional regulation that more than 60% of the sales made by the largest Union producer sampled were connected with the oil and gas industry.

39. The General Court then pointed out, in paragraph 65 of the judgment under appeal, that, in the regulation at issue, the Commission had established a link between the analysis of the price undercutting of the dumped imports and the development of the Union industry's prices, that development, however, having been determined globally, without any distinction being drawn between different market segments.

40. In those circumstances, the General Court concluded in paragraph 66 of the judgment under appeal that, by failing to take account of the segmentation of the market for the product under consideration in its analysis of price undercutting and, more generally, of the effect of the dumped imports on prices in the Union market for like products, the Commission had not based its analysis on all the relevant data in the case. The General Court went on to add, in paragraph 67 of the judgment under appeal, that, in view of the four matters which I mentioned in point 38 above, the Commission should at the very least have assured itself that the decrease in the prices of the Union industry had not come from a segment in which the Chinese imports had a weak presence or a level of undercutting – assuming there was one – which could not be considered 'significant' within the meaning of Article 3(3) of the Basic Regulation. The General Court considered that that conclusion was without prejudice to the use by the Commission, as in the present case, of the PCN method, where that method formed part of an analysis which took account of market segmentation.

41. Lastly, in paragraphs 77 and 79 of the judgment under appeal, the General Court held that the conclusions which it had reached were not called into question by the evidence put forward by the Commission after the hearing, at a late stage of the proceedings. According to the General Court, in fact, the Commission could not properly rely, in support of the regulation at issue, on reasons which were not contained in that regulation and were raised by it only after the bringing of the action.

2. *Arguments of the parties*

(a) The first ground of appeal, alleging that the Commission is under no obligation to carry out an analysis of injury by market segment

42. By its first ground of appeal, which is divided into three parts, the Commission, supported by ArcelorMittal and others, takes issue with the General Court's conclusion that, even though all the pipes and tubes covered by the investigation indisputably constituted a single 'like product', it should nevertheless have carried out an analysis of injury by market segment.

43. In the first part of the ground, the Commission maintains that, by concluding that it was required to carry out a separate examination of price undercutting for each market segment relating to the product under consideration, the General Court misconstrued Article 1(2) and (4), Article 3(2), (3) and (8) and Article 4 of the Basic Regulation. It is, the Commission submits, clear from those provisions that it is sufficient for it to carry out the price undercutting analysis at the level of the 'like product', within the meaning of Article 1(4) of the Basic Regulation. Those provisions do not require any more detailed analysis or impose any obligation to carry out a separate price undercutting analysis for each market segment. Since the definitions of 'like product' and of 'Union industry' given in the regulation at issue were not challenged before the General Court, those definitions cannot be called into question by pleas which relate to a finding of the existence of injury. The General Court introduced an analysis based on the concept of 'relevant market' in competition law, which is, however, a different concept from that of 'like product' in anti-dumping law.

44. In the second part of the first ground of appeal, the Commission maintains that the General Court misinterpreted the two authorities on which it based its analysis (the Appellate Body's HP-SSST report and the judgment in *Shanghai Teraoka*) or, alternatively, wrongly characterised or distorted the facts addressed by those authorities, which were completely different from the relevant facts of the present case. Neither of those two authorities can in fact provide a basis for the conclusion that the Commission was obliged to carry out a price undercutting analysis for each market segment in addition to an analysis carried out at the level of the like product.

45. By the third part of the first ground of appeal, the Commission argues that the General Court misinterpreted the regulation at issue or, in the alternative, legally characterised the facts erroneously by holding, in paragraph 67 of the judgment under appeal, that the facts found in paragraphs 59, 61, 62 (first part) and 64 of the judgment under appeal constituted exceptional circumstances that called for an analysis of price undercutting by market segment.

46. Hubei Xinyegang argues, as a preliminary point, that the Commission describes the judgment under appeal incorrectly. The General Court did not create a general obligation for the Commission to carry out an undercutting analysis for each market segment, but merely held that, given the facts of the case, the Commission had wrongly omitted to take into consideration, in the regulation at issue, the segmentation of the market in its analysis of price undercutting. The arguments relating to an alleged obligation to carry out a price undercutting analysis for each market segment are, therefore, ineffective. In addition, the implicit challenge of certain facts, without any allegation of distortion of those facts, is inadmissible, and the additional information which the Commission provided was new information and, therefore, inadmissible.

47. With regard to the first part of the first ground of appeal, Hubei Xinyegang maintains that the reference in Article 4(1) and Article 3(2) of the Basic Regulation to 'like products' in the plural shows that the concept of 'like product' can encompass various types of products and therefore various segments of the market. That is confirmed by the Court of Justice's case-law. In addition, the WTO Appellate Body emphasised the importance of examining the existence of various market segments in the price undercutting analysis, and the judgment under appeal is consistent with that position. According to Hubei Xinyegang, while there is no obligation to establish the existence of price undercutting for each product type or market segment, the Commission is, however, under an obligation to examine all the relevant evidence, including the question of how the existence of various market segments might have an overall effect on the analysis of the effect on prices, in this case the undercutting of prices.

48. As regards the second part of the first ground of appeal, Hubei Xinyegang maintains that the legal basis for the annulment of the regulation at issue is to be found in the obligation to base findings on positive evidence, under Article 3(2) and (3) of the Basic Regulation. The references to the Appellate Body's HP-SSST report and to the judgment in *Shanghai Teraoka* were merely to support the proposition that, when various market segments exist on which there are substantial price differences, the impact of such segmentation on the price undercutting analysis must be considered. In addition, some of the Commission's assertions regarding those two authorities are inaccurate. Lastly, the claim that, in the present case, both the Chinese imports and the products sold by the Union industry were concentrated in the same market segment is not contained in the regulation at issue, as the General Court noted.

49. According to Hubei Xinyegang, the third part of the first ground of appeal should also be dismissed. First, the interested parties raised the issue of the existence of various market segments not in the context of the definition of the product under consideration, but in the context of injury and causation. Secondly, as regards the adjustment which the Commission made to the injury margin on account of the economic situation and the profitability of the largest company among the sampled Union producers, those factors clearly had a significant impact on the injury analysis.

(b) The second ground of appeal, relating to the PCN method

50. By its second ground of appeal, the Commission takes issue with paragraphs 60 and 67 of the judgment under appeal, in which the General Court, in substance, held that the PCN method was not apt to take account of the market segmentation. In that way, the General Court misinterpreted recital 24 of the regulation at issue, as well as the explanations given during the course of the administrative procedure and in the Commission's oral and written submissions before the General Court. In the alternative, the Commission maintains that the General Court distorted the evidence produced in that regard.

51. According to the Commission, the PCN method is the most detailed analysis that can be performed to compare the product under consideration with the like product. That method, which, moreover, is not used by the Union's main trading partners, is a much more detailed analysis than an analysis at the level of the market segments for the like product. The composition of the PCN in fact takes account of all the characteristics of the product and thus enables the Commission to match each product of the Chinese producers sampled with the most comparable product of a sampled Union producer. The first digit of the PCN represents the market segment into which the type of product falls. There is nothing to support the conclusion

that, by using PCNs, the Commission failed to take account of certain product-specific or market-specific features (including price variations). By its design and functioning, the PCN method ensures an analysis by market segment.

52. Hubei Xinyegang maintains that, in the judgment under appeal, the General Court merely stated that, in the present case, applying the PCN method was in itself insufficient to take account of market segmentation. Admittedly, that method enabled the Commission to determine whether Chinese imports falling under a given PCN or product type within a specific market segment undercut the sale prices of the sampled Union producers for the same PCN or product type belonging to the same market segment. However, the PCN method did not enable the Commission to establish the effect of the imports in a given segment on the sale prices of the Union industry for products belonging to other segments.

(c) The third ground of appeal, alleging misinterpretation of the duty to state reasons and distortion of the evidence

53. By its third ground of appeal, which is divided into two parts, the Commission takes issue with paragraphs 77 to 79 of the judgment under appeal, in which the General Court rejected the evidence which it had produced after the hearing at first instance and which showed, first, that price undercutting existed in all three of the market segments concerned and, secondly, that the sales by the Union producers were concentrated in the construction segment.

54. In the first part of the third ground of appeal, the Commission maintains that, by so doing, the General Court interpreted too narrowly the duty to state reasons which is incumbent on the institution in anti-dumping cases. Its interpretation was contrary to the case-law and Article 296 TFEU. The Commission submits that it was not necessary for it to explain specifically in the regulation at issue that price undercutting had been found in all three market segments or that sales by the Union producers were concentrated in the construction segment. That information was, in any event, communicated, in approximate terms, to Hubei Xinyegang in the course of the investigation.

55. In the second part of the third ground of appeal, the Commission argues that the General Court distorted the evidence that was available to it by holding, in paragraph 78 of the judgment under appeal, that an analysis by market segment had only been performed *ex post*. The distinction between the various market segments had been deliberately internalised in the analysis carried out using the PCN method, the functioning of which the General Court simply ignored, misunderstood or misconstrued.

56. Regarding the first part of the third ground of appeal, Hubei Xinyegang submits that the judgment on which the Commission bases its argument [33] concerned the particular situation in which a company that had not participated in the administrative procedure complained of a breach of the duty to state reasons in connection with claims which it had never itself made. Hubei Xinyegang’s own position, however, is fundamentally different in that, from the start of the administrative procedure, it had emphasised the importance of the existence of various market segments in the price undercutting analysis. Next, it is clear from the case-law that the institutions are under an obligation to set out the facts and the legal considerations having decisive importance in the context of a decision and that the reasons for a measure must appear in the actual body of the measure. In addition, it is not true that it was aware that price

[33] Judgment of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573).

undercutting had been found in all three market segments and that sales by the Union producers were concentrated in the construction segment, since, for reasons of confidentiality, it was not given access to the undercutting calculations relating to the other Chinese producers.

57. As regards the second part of the third ground of appeal, Hubei Xinyegang maintains that the General Court did not criticise the Commission for not applying the PCN method by segment, but for not carrying out an analysis by segment. The General Court found fault with the fact that the PCN method had only enabled the Commission to establish price undercutting in a given segment, and had not enabled it to analyse the effect of the undercutting found in one segment on the sale prices of Union producers in another segment.

3. Analysis

(a) The criticism formulated by the General Court in the judgment under appeal

58. In order to analyse the first, second and third grounds of appeal raised by the Commission, it is, in my view, necessary first of all to clarify the exact scope of the criticism formulated by the General Court in the judgment under appeal. Indeed, the parties disagree as to the scope that should be ascribed to the judgment under appeal. [34]

59. It is, in my view, clear on reading paragraphs 65, 66 and 67 of the judgment under appeal, summarised in points 39 and 40 above, that the General Court took note in the judgment under appeal of the Commission's use of the PCN method in analysing the existence of price undercutting, but considered that using that method was not sufficient, in the light of the four matters mentioned in point 38 above which characterise the present case, to take adequate account of the segmentation of the market for the purposes of analysing the effect of the dumped imports on prices in the Union industry. The General Court therefore criticised the Commission for not having based its analysis on all the relevant data of the case at hand.

60. According to the General Court, given that the Commission established a link between the analysis of the price undercutting and the development of the Union industry's prices, which had been determined globally, with no account being taken of the market segmentation, [35] and given the circumstances of the case, the Commission should at the very least have assured itself that the development of the prices of the Union industry (or rather the decrease in those prices) had not 'come from' a segment in which the Chinese imports had a weak presence or a level of undercutting that was not 'significant'. In other words, the General Court considered that, notwithstanding the use of the PCN method, the Commission should have established that that decrease in prices for the like product of the Union industry, considered as a whole, was not the result of dynamics at play in a segment of the market in which the dumped imports had not had a significant effect, either because their volume was not great or because the level of undercutting was not significant. Indeed, if that were the case, the decrease in prices would not have been the consequence (of the effect on prices) of the dumped imports.

61. In that context, the purpose of the analysis which follows will be to determine, first of all, the scope of the obligations incumbent on the Commission when it examines price undercutting in a case where various market segments can be identified for the products under examination in the

[34] As explained in points 43 and 46 above, the parties offer different interpretations of the judgment under appeal.

[35] See paragraph 65 of the judgment under appeal and point 37 of this Opinion.

investigation. Following that, it will be necessary to determine whether the General Court was right to hold that, in the light of the matters characterising the present case, the analysis performed by the Commission was vitiated by an infringement of Article 3(2) and (3) of the Basic Regulation.

(b) Is there any obligation on the Commission to carry out a segment-by-segment analysis of price undercutting?

62. First of all, it is necessary to consider whether Article 3(2) and (3) of the Basic Regulation – interpreted in the light of the other provisions of that regulation and of the corresponding provisions of the Anti-Dumping Agreement – presupposes a general obligation upon the Commission to carry out a price undercutting analysis segment by segment whenever various market segments can be identified for the product under consideration.[36]

63. I do not believe that to be the case, and I would point out in that connection that the parties are agreed that there is no such general obligation upon the Commission.

64. As the Commission rightly argues, it is clear from the very wording of Article 3(2) and (3) of the Basic Regulation that the analysis of the effect of the dumped imports on the prices in the Union market for the like products, and in particular the examination of whether there has been price undercutting by the dumped imports as compared with like products of the Union industry (whether the dumped imports have been imported at significantly lower prices), must be carried out with reference to the 'like product', as defined in Article 1(4) of the Basic Regulation. It is not apparent from those provisions, or from any other provision of the Basic Regulation, that there is any general obligation upon the Commission to carry out an analysis of the existence of price undercutting at any more detailed a level than that of the like product.

65. That interpretation is, moreover, confirmed by the interpretation of Article 3.2 of the Anti-Dumping Agreement given in the Appellate Body's HP-SSST report, which expressly confirmed that the authority responsible for the investigation is not required under that provision to establish the existence of price undercutting for each of the product types under investigation or with respect to the entire range of goods making up the like product.[37]

66. It follows that, once the product under consideration and the like product have been identified, and provided that the definitions of the two are not disputed, it is in principle sufficient for the Commission to carry out an analysis of the effect of the dumped imports on prices in the Union market for like products at the level of the 'like product' thus defined, rather than at any more detailed a level.

67. That said, it is nevertheless clear from Article 3(2) of the Basic Regulation that the Commission is required to carry out an *objective examination* of the effect of the imports on prices in the Union market for like products. The objective examination required by that provision, understood in the light of the interpretation given by the WTO Appellate Body of the corresponding provision of Article 3.1 of the Anti-Dumping Agreement, requires that all the relevant evidence be taken into account, including, where appropriate, the relative market share of each product type covered by the investigation.[38]

[36] The question of whether an obligation of that sort exists is discussed by the Commission in the first part of its first ground of appeal.

[37] See the Appellate Body's HP-SSST report, paragraph 5.180, first sentence.

[38] See the Appellate Body's HP-SSST report, paragraph 5.180.

68. It follows that, in certain circumstances, in order to ensure that the examination of the existence of significant price undercutting at the level of the like product is 'objective',[39] it will be appropriate to take account of the market shares of the various types of products in question, and thus it may be necessary to take account of the various market segments for the product under consideration.

(c) In which cases is it necessary to carry out a price undercutting analysis for each market segment?

69. I must, therefore, now consider the cases in which it will be appropriate, or even necessary, in order to ensure the objectivity of the examination of whether there has been price undercutting, to carry out a segment-by-segment analysis and to take account of the market share of each type of product. Following that, on the basis of that analysis, it will be necessary to ascertain whether the General Court was right to conclude that the present case fell into that category of cases.

70. In order to establish that it was necessary for an examination of price undercutting to be carried out segment by segment in the present case, the General Court referred in the judgment under appeal to two authorities, about which there has been extensive debate between the parties: the General Court's own judgment in *Shanghai Teraoka* and the Appellate Body's HP-SSST report.

71. The first of those two authorities, the judgment in *Shanghai Teraoka*, concerned a case in which three distinct market segments could be identified in respect of the product at issue and in which the imports at issue were concentrated, as to 97%, in just one of those three segments.

72. In the course of the anti-dumping investigation, the Council of the European Union had carried out an examination of price undercutting with regard to that segment alone and had then extrapolated its conclusions as to the effect on prices in that segment to the entirety of the like product.[40] Before the General Court, the applicant in *Shanghai Teraoka* had argued that, by so doing, the Council had infringed Article 3 of the Basic Regulation, in that it had carried out the analysis of the effect of the dumped imports by reference to only some of the products in the like-product range.[41]

73. In that factual context, the General Court held, first, that, when determining injury under Article 3 of the Basic Regulation, the EU institutions may make assessments on a segment-by-segment basis in order to evaluate the various injury indicators, particularly if the results obtained using another method prove to be distorted for one reason or another, provided that account is properly taken of the relevant product as a whole.[42] Secondly, the General Court concluded that, in the situation where 97% of the imports were concentrated in a particular segment, it was logical, and indeed essential, in order for the result of the investigation to be accurate, that that segment be assessed separately.[43] On the basis of those considerations, the General Court rejected the applicant's argument.

[39] See point 28 above.

[40] See recital 96 of Council Regulation (EC) No 2605/2000 of 27 November 2000 imposing definitive anti-dumping duties on imports of certain electronic weighing scales (REWS) originating in the People's Republic of China, the Republic of Korea and Taiwan (OJ 2000 L 301 p. 42), which was at issue in the judgment in *Shanghai Teraoka*.

[41] See paragraph 121 of the judgment in *Shanghai Teraoka*.

[42] See paragraph 127 of the judgment in *Shanghai Teraoka*.

[43] See paragraph 129 of the judgment in *Shanghai Teraoka*.

74. In my view, the legal implication of that judgment is that, in a case where imports are highly concentrated in one of several market segments for the product in question, the EU institutions may, in the exercise of the broad discretion which they enjoy in the sphere of trade-protection measures, which I mentioned in point 29 above, confine themselves to analysing price undercutting with reference to that segment where that is apt to ensure the objectivity of the examination of the effect of the dumped imports on prices in the Union market for like products and provided that proper account is taken of the product concerned as a whole. In addition, depending on the circumstances of the case, a separate assessment of one segment may be appropriate or indeed essential in order to ensure the objectivity of that examination.

75. In so far as concerns the second authority, the Appellate Body's HP-SSST report, that concerned a case in which three segments (Grade A, Grade B and Grade C) could be identified for the like product, as defined by the Chinese authorities responsible for the anti-dumping investigation. In that case, the dumped imports and the domestic sales were concentrated in different segments of the market: the domestic sales were concentrated in the Grade A market segment, in which the proportion of dumped imports was negligible (1.45%), while the dumped imports were concentrated in the Grade B and Grade C market segments. In addition, the prices of Grade B and Grade C products were respectively double and triple those of Grade A products. In that context, the Chinese authorities had found there to be price undercutting in the Grade B and Grade C segments, in which the imports were concentrated, but had not established any undercutting in the Grade A segment, in which the domestic production was concentrated.[44] The Chinese authorities had therefore not established undercutting at the level of the like product, but only for Grade B and Grade C.[45]

76. In that factual context, the WTO Appellate Body concluded, first, that an objective examination of whether there had been significant price undercutting by the dumped imports as compared with the domestic like product (encompassing all three product types) should have taken into account the relevant market shares of the various product types and, secondly, that a proper analysis of price effects ought to have taken into account the fact that there were significant differences between the prices of the various product types. The WTO Appellate Body also found that an investigating authority may not disregard evidence suggesting that the dumped imports have no effect or only a limited effect on domestic prices.[46]

77. It is, therefore, clear from the Appellate Body's HP-SSST report that, in a situation where there is a high concentration of domestic sales in one segment and a high concentration of dumped imports in another segment and where there are rather significant price differences between those segments, account must be taken of the market shares of each product type and of the significant price differences in order to ensure the objectivity of the examination of the existence of price undercutting required by Article 3.1 of the Anti-Dumping Agreement (and Article 3(2) of the Basic Regulation).

78. The two authorities I have mentioned provide guidance in relation to particular situations in which it appears appropriate or even essential that account be taken of market segmentation in order to ensure an objective examination of price undercutting. It is, therefore, in the light of all the foregoing considerations that it is necessary to analyse whether the General Court was right

[44] See the Appellate Body's HP-SSST report, paragraphs 5.179 to 5.181.

[45] See the Appellate Body's HP-SSST report, paragraph 5.178.

[46] See the Appellate Body's HP-SSST report, paragraph 5.181.

to conclude that, in the present case, it was necessary for the Commission to take account of the market segmentation for the product under consideration and that, having failed to do so, the Commission had not based its analysis on all the relevant evidence in the case.

(d) The obligation on the Commission to take account of market segmentation in the present case

(1) The duty to state reasons for the regulation at issue and the evidence put before the General Court by the Commission after the hearing at first instance

79. In order to be able to carry out the analysis mentioned in the previous point, it is, however, necessary first to ascertain whether the General Court was entitled to refuse to take account of the evidence produced by the Commission after the hearing at first instance, as set out in paragraphs 77 to 79 of the judgment under appeal, or whether, as the Commission maintains in its third ground of appeal, the General Court erred in law by doing so. That point is in fact of fundamental importance in understanding the precise context of the present case.

80. It is apparent from the case file that, following the discussion that took place at the hearing before the General Court, that court itself gave the Commission a deadline within which to provide it with certain information in order to clarify the proportions of the sales by the sampled Union producers in the three market segments in question, as well as additional data concerning the imports from the Chinese exporting producers sampled.

81. The Commission complied with that request and provided data resulting from the application of the PCN method to sales by the sampled Chinese and Union producers. The data showed, first, that in each of the three segments in question there was a correspondence between the dumped imports and sales by the Union industry, which were at very similar levels. More specifically, the data showed that both imports and domestic sales were mainly concentrated in the construction segment (75.1% and 71.6% respectively), that both were at a not insignificant level in the oil and gas segment (17.3% and 15.3%) and that both figured, to a lesser but not insignificant extent, in the power generation segment (7.4% and 13.1%). Secondly, the data showed that there had been price undercutting in all three of the segments in question.

82. The General Court found that data to be irrelevant, holding, in substance, in the paragraphs of the judgment under appeal that I have mentioned, that the Commission could not supplement the statement of reasons for the regulation at issue with reasons put forward after the action had been brought before the General Court.

83. In that connection, however, it must be borne in mind that, according to the settled case-law of the Court of Justice, the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must be appraised by reference to the circumstances of each case and with regard to its context and all the legal rules governing the matter in question.[47]

[47] See, to that effect, judgment of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573, paragraphs 75 and 76).

84. In particular, in the case of a measure of general application, such as a regulation imposing anti-dumping duties, the duty to state reasons must be understood as not requiring the EU institutions to set out the various facts, often very numerous and complex, on the basis of which the measure was adopted or, a fortiori, to provide a more or less complete evaluation of those facts.[48]

85. It should be noted in that connection that the General Court did not find that the statement of reasons for the regulation at issue was insufficient, but refused to take into account certain data provided by the Commission at its request, which, in response to arguments raised by the applicant, offered a more detailed view of the conclusions set out in the regulation at issue. Specifically, in response to the arguments raised by Hubei Xinyegang, the data gave further details of the conclusion – the adequacy of the statement of reasons for which was not called into question – that the analysis based on the PCN method had shown that, in the present case, there was price undercutting at the level of the like product.[49]

86. In such a context I consider that the Commission should be allowed the opportunity of responding to arguments raised in an action challenging a regulation imposing anti-dumping duties, by providing supplemental data to enable the EU judicature – if and when that is necessary in order for it to carry out its review of the measure – to understand fully the analysis carried out by the Commission before reaching the conclusions set out in the measure of general application, that analysis involving the assessment of complex economic situations and being based on extensive economic data. I would point out in that connection that the General Court's own practice in anti-dumping matters seems to suggest this.[50]

87. In addition, if it considers it necessary, the EU judicature may, as the General Court did in the present case, ask the institution in question for information and clarification, so that a concise but adequate statement of reasons for the adoption of a measure of general application may be further elucidated.[51]

88. It follows from the foregoing that, in my view, the General Court should have taken account of the data resulting from the application of the PCN method, mentioned in point 81 of this Opinion, with which the Commission – at the General Court's own request and in order to counter an argument raised by Hubei Xinyegang in its action at first instance – substantiated the conclusion in the regulation at issue regarding the finding in the present case that there was price undercutting at the level of the like product.

89. It follows from this, in my view, that the judgment under appeal is vitiated by an error of law in that regard and that the Commission's third ground of appeal should be upheld. Consequently, the evidence mentioned in point 81 above must be taken into consideration in the analysis which follows.

[48] See judgment of 10 September 2015, *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:573, paragraph 77). The principles expressed in that judgment and in the case-law cited therein are, in my view, of general application and cannot be called into question by the arguments concerning the allegedly special nature of Hubei Xinyegang's position in the present case.

[49] See recitals 63 to 79 of the regulation at issue, read in conjunction with recitals 60 to 62 of the provisional regulation.

[50] See, for example, judgments of 1 June 2017, *Changmao Biochemical Engineering* v *Council* (T-442/12, EU:T:2017:372, paragraph 52), and of 9 June 2016, *Growth Energy and Renewable Fuels Association* v *Council* (T-276/13, EU:T:2016:340, paragraph 282).

[51] See also on that point the considerations set out in points 113 to 118 of the Opinion of Advocate General Sharpston in *Fliesen-Zentrum Deutschland* (C-687/13, EU:C:2015:349).

(2) Use of the PCN method in the present case

90. In order fully to understand the examination which the Commission conducted in the present case so as to determine whether there was price undercutting by the dumped imports as compared with the prices in the Union industry for like products, and which the General Court criticised in the judgment under appeal, it is necessary to consider in greater depth the PCN method use by the Commission for that purpose, which I mentioned in points 33 and 34 above.

91. It is apparent from recital 24 of the regulation at issue and from the information in the case file that PCNs are alphanumeric codes each of which corresponds to a particular category of product. Those codes are defined shortly after the initiation of the investigation, on the basis of the specific product characteristics. [52]

92. In the present case, applying that method, the various products under examination in the investigation were divided into five categories, identified by the first digit of the code, which indicates the product type. It is common ground that products designated by a PCN corresponding to categories 1 and 2 were for the oil and gas segment, that category 3 products were used in the construction sector and that category 4 and 5 products were for the power generation segment.

93. As I mentioned in point 34 above, in order to determine whether there was significant price undercutting, using the PCN method, the Commission compared, PCN by PCN, the prices of the imports with the prices of the Union producers. It thus compared the sales of each product designated by a PCN that had been made by the sampled Chinese producers with those of the corresponding product of the Union industry. Given that, as I mentioned in the previous point, the products were divided into different PCNs on the basis of criteria which enabled account to be taken of the various segments into which the product under consideration fell, the Commission did take account of those segments in its analysis of price undercutting.

94. The information in the case file [53] supports the conclusion that the use of that method enabled account to be taken of the relative volumes of the various sales at the level of the various segments. Moreover, that is demonstrated by the fact that that analysis made it possible to determine, as the Commission did, the various proportions of the sales for each segment. As I explained in point 81 above, that determination made it possible to establish that there was a substantial correspondence in the various segments between the Chinese imports and domestic sales in the Union and, more specifically, that both were concentrated in the same segment, the construction segment, while, in the other two segments, imports and domestic sales were present to a not insignificant degree.

95. The use of that method also enabled account to be taken of the levels of undercutting in the various market segments, as is demonstrated by the fact that the Commission was able to establish that there was undercutting in each of them.

96. It follows from the foregoing considerations, in my view, that the assertion, made in paragraphs 60 and 66 of the judgment under appeal, that, despite having used the PCN method, the Commission had not taken account of the segmentation corresponding to the various typologies of the product under consideration, in its examination of price undercutting, and had

[52] Mentioned in footnote 28 above.

[53] See, in particular, the annex produced by the Commission explaining the calculation of Hubei Xinyegang's undercutting margins.

thus failed to take account of all the relevant data, is incorrect. Indeed, the design of that method and its application in practice ensured in the present case an analysis by market segment of the products covered by the investigation.

97. As regards Hubei Xinyegang's argument that the PCN method did not enable the Commission to establish the effect of the imports in a given segment on the sale prices of the Union industry for products belonging to other segments, I do not consider that any such additional analysis is necessary, given that the imports and the domestic sales were at substantially the same level in the three existing segments and price undercutting was established in all three segments.

98. It follows from the foregoing that, in my view, the Commission's second ground of appeal should also be upheld.

(3) The matters characterising the present case which the General Court took into account in concluding that the Commission's analysis was insufficient

99. In paragraph 67 of the judgment under appeal, the General Court found that, notwithstanding the use of the PCN method, in the light of the four circumstances characterising the present case – which it addressed in paragraphs 61 to 64 of the judgment under appeal and which I mentioned in point 38 of this Opinion – the Commission should at the very least have assured itself that the development of the prices of the Union industry (or rather the decrease in those prices) had not 'come from' a segment in which the Chinese imports had a weak presence or a level of undercutting that was not significant. Thus, as I noted in point 60 above, as far as the General Court was concerned, the presence of those circumstances meant that, notwithstanding the use of the PCN method, in order to ensure an objective examination of price undercutting and, more generally, of the effect of the prices of the dumped imports on the prices of like products on the Union market, the Commission should have carried out an additional analysis to establish that the decrease in prices for the like product of the Union industry, considered as a whole, was indeed the consequence (of the effect on prices) of the dumped imports. The General Court held that, since the Commission had not carried out that supplemental analysis, its examination was incomplete.

100. It is, therefore, necessary to ascertain whether, given the situation in the present case, those four circumstances meant that, despite the examination which it conducted using the PCN method, the Commission should have carried out the analysis which the General Court held in paragraph 67 of the judgment under appeal to be necessary.

101. As regards the first of those circumstances, namely the low degree of interchangeability of the various product types included within the 'like product', as defined,[54] I would observe that, while substitutability on the demand side is certainly a fundamental analytical criterion in the definition of the relevant market in competition matters, it does not play so important a role in anti-dumping matters. The criteria used to define the 'like product' in an anti-dumping matter, in accordance with Article 1(4) of the Basic Regulation, are different and it is not unusual in an anti-dumping investigation for a product which encompasses various types of products which, in the framework of competition law, would be included in different relevant product markets, to be defined as a 'like product'. It should also be noted in that connection that Hubei Xinyegang did not

[54] See paragraph 67 of the judgment under appeal, in relation to the analysis in paragraph 61 thereof.

contest the definition of the like product before the General Court, with the result that that definition must be regarded as established and incapable of being called into question in the context of the analysis to determine the existence of injury.[55]

102. It follows that the low degree of interchangeability of the products covered by the investigation on the demand side does not appear to be a relevant factor indicating that, in the present case, the Commission was required to carry out the supplemental analysis which the General Court held in paragraph 67 of the judgment under appeal to be necessary in addition to the analysis carried out using the PCN method.

103. As regards the second of the circumstances referred to above, namely the existence of price differences between the various segments, the General Court referred to the Appellate Body's HP-SSST report and held that the existence of those price differences was a factor to be taken into account for the purposes of the price undercutting analysis and that those price variations between the market segments was a further factor rendering the supplemental analysis mentioned in paragraph 67 of the judgment under appeal necessary.[56]

104. However, while it is true that, as I mentioned in point 76 above, the WTO Appellate Body took the view in that report that, in that case, a proper analysis of price effects should have taken into account the significant differences between the prices of the various product types, I do not consider that it can be inferred from that authority that, in the present case, in order to ensure an objective examination of price undercutting in accordance with Article 3(2) of the Basic Regulation, the Commission was required to carry out the analysis mentioned in paragraph 67 of the judgment under appeal.

105. Indeed, as I explained in points 75 to 77 above, in the case examined by the WTO Appellate Body, the dumped imports and the domestic sales were concentrated in different market segments and undercutting was found in only two of the three segments in question, those in which the imports were concentrated, and not in the segment in which the domestic sales were concentrated. In the present case, by contrast, as is clear from the information mentioned in point 81 above, the dumped imports and the domestic sales were concentrated in the same segment, while in the other segments both figured at comparable levels. In addition, in the present case, undercutting was found in all the segments into which the product under consideration fell. Moreover, it is apparent from the case file that the comparison made using the PCN method enabled account to be taken of the price differences between the various product types for the various segments. In such a context, it must be concluded that the second circumstance to which the General Court pointed, considered in the light of the Appellate Body's HP-SSST report, equally did not require the Commission to carry out in the present case the supplemental analysis found necessary in paragraph 67 of the judgment under appeal.

106. As regards the third of the circumstances considered by the General Court, namely the fact that 75.1% of the imports from the sampled Chinese producers were concentrated in the construction segment, the General Court referred to the judgment in *Shanghai Teraoka* and held that that made it logical, if not essential, for a separate analysis of that segment to be carried out.[57] However, that authority is not, in my view, such as to establish an error in the Commission's analysis in the present case. First of all, as I explained in points 71 to 74 above, that authority

[55] I would also note, incidentally, that the General Court acknowledged that there was substitutability on the supply side, inasmuch as producers could easily adapt their production facilities in order to produce various types of products for one or other segment.

[56] See paragraph 67 of the judgment under appeal, in relation to the analysis in paragraph 62 thereof.

[57] See paragraph 67 of the judgment under appeal, in relation to the analysis in paragraph 63 thereof.

concerns a different situation from the one in the present case. By contrast with that judgment, in the present case the Commission did not confine itself to an examination of price undercutting solely with regard to the segment in which the imports were concentrated, but extended its examination to the entirety of the product under consideration. Secondly, by using the PCN method, the Commission did take account of market segmentation, as is required by that authority.[58] In any event, in view of the fact that the dumped imports and the domestic sales were concentrated in the same segment, and figured at *comparable levels* in the other segments, and given that undercutting was found *in all the segments* into which the product under consideration fell, the third circumstance to which the General Court pointed is also not such as to demonstrate any analytical error on the Commission's part.

107. Lastly, as regards the fourth circumstance identified by the General Court, namely that it was apparent from the provisional regulation that more than 60% of the sales made by the largest company among the sampled Union producers were connected with the oil and gas industry, that too fails to support the General Court's conclusion that, in the present case, the supplemental analysis contemplated in paragraph 67 of the judgment under appeal was necessary. Indeed, the relevance of that circumstance, by reference to which the General Court meant to suggest that it was plausible that the dumped imports and the sales of the Union industry were concentrated in different segments, is nevertheless clearly contradicted by the finding, resulting from the information mentioned in point 81 above, that both the dumped imports and the Union sales were concentrated in the same segment, namely the construction segment.

108. It follows from all the foregoing that none of the four matters to which the General Court pointed was such as to establish the need for additional analysis, such as that mentioned in paragraph 67 of the judgment under appeal, to be carried out. More specifically, in a situation where the Commission has used the PCN method to determine price undercutting and, first, the dumped imports and the domestic sales were concentrated in the same segment, while figuring at comparable levels in the other segments, and, secondly, there was price undercutting in all the segments into which the product under consideration fell, the Commission cannot be criticised for not having carried out the supplemental analysis mentioned in paragraph 67 of the judgment under appeal.

(e) Conclusion regarding the first, second and third grounds of appeal

109. In the light of all the foregoing considerations, it must be concluded that the judgment under appeal is vitiated by various errors in the part in which the General Court held that, having omitted to take account of the market segmentation in its analysis of price undercutting and, more generally, of the effect on prices, the Commission did not base its analysis on all the relevant data in the case and that, despite its use of the PCN method, the Commission should at the very least have assured itself, in the present case, that the development of the prices of the Union industry (or rather the decrease in those prices) had not 'come from' a segment in which the Chinese imports had a weak presence or a level of undercutting that was not significant.

110. Consequently, in my view, the first, second and third grounds of appeal raised by the Commission must be upheld.

[58] See points 71 to 74 above.

C. The fourth and fifth grounds of appeal, concerning the complaint that the Commission failed to take account of 17 product types not exported by the Chinese exporting producers sampled

111. By its fourth and fifth grounds of appeal, the Commission, supported by ArcelorMittal and others, challenges the part of the judgment under appeal, paragraphs 68 to 76, in which the General Court held that the Commission had wrongly omitted to take account, in its analysis of price undercutting, of a certain volume of the like product produced by the sampled Union producers.

1. The judgment under appeal

112. In those paragraphs of the judgment under appeal the General Court stated that 17 product types out of the 66 sold by the sampled Union producers, accounting for 8% of the volume of sales of those producers, had not been taken into account in the analysis of price undercutting, since those products had not been exported by the sampled Chinese exporting producers and no comparison could therefore be made.

113. On the basis of the Appellate Body's HP-SSST report, the General Court concluded, in paragraph 71 of the judgment under appeal, that there was nothing to indicate that the analysis provided for in Article 3(2) and (3) of the Basic Regulation need not take account of a certain volume of the like product which is not the subject of price undercutting. It also held, in paragraphs 72 to 74 of the judgment under appeal, that the link established by the Commission in the regulation at issue between the analysis of price undercutting of the dumped imports and the development of the Union industry's prices necessarily rested on an incorrect factual basis, since it had been established with no account being taken of the 17 product types that were not the subject of price undercutting. The General Court therefore concluded that, in the absence of a specific statement of reasons in that regard in the regulation at issue, it could not be ruled out that those 17 types of products had contributed, to a not insignificant degree, to the decrease in the prices of the sampled Union producers. The General Court inferred from that that the Commission had not taken account of all the relevant data in the case in its analysis of price undercutting and of the effect of the dumped imports on prices in the Union market for like products, in breach of Article 3(2) and (3) of the Basic Regulation.

2. Arguments of the parties

(a) The fourth ground of appeal, alleging misinterpretation of Article 3(2) and (3) of the Basic Regulation

114. By the fourth ground of appeal, which is divided into two parts, the Commission, supported by ArcelorMittal and others, submits that the General Court misconstrued Article 3(2) and (3) of the Basic Regulation.

115. In the first part of the fourth ground of appeal, the Commission submits that the General Court's conclusion that the price undercutting analysis must be carried out with reference to all the types of products sold by the Union industry is based on an incorrect understanding of the price undercutting examination. It is, it submits, clear from the very wording of Article 3(3) of the Basic Regulation that that examination need not be carried out for each product type or each

PCN sold by the Union industry, but that price undercutting must be established at the level of the like product. First, the Commission calculates undercutting for each PCN and then the weighted average of undercutting for all PCNs produced by the sampled Union producers. If, for a given PCN, no undercutting, or negative undercutting, is found, that does not mean that no anti-dumping duty can be imposed in respect of that PCN also.

116. In the second part of the fourth ground of appeal, the Commission submits that, by taking the view that the price effect analysis under Article 3(2) and (3) of the Basic Regulation called for an assessment to be made even of the 17 PCNs not produced by the sampled Chinese producers, the General Court confused that examination with the ‘non-attribution’ analysis under Article 3(7) of the Basic Regulation. Indeed, it is clear from the very wording of those provisions that they presuppose the assessment of price undercutting between a dumped imported product, on the one hand, and the like product, on the other, and not of the effect of PCNs sold by the Union industry but not by Chinese exporting producers. In the regulation at issue, the Commission determined price effects with reference to those PCNs for which the sample of Chinese sales showed PCNs that matched with the sample of Union sales. It was not possible for it to determine undercutting for the 17 PCNs sold by the sampled Union producers but not exported by the sampled Chinese producers. The issue identified in paragraphs 72 to 74 of the judgment under appeal, which is that the Commission should have assessed the risk that the Union industry could have suffered significant losses in connection with sales in the Union of the 17 NCPs not exported by the Chinese exporting producers, pertains to the non-attribution analysis under Article 3(7) of the Basic Regulation. However, Hubei Xinyegang did not rely on infringement of that provision in support of its action. Moreover, the Appellate Body’s HP-SSST report in no way supports the General Court’s conclusions.

117. Hubei Xinyegang contends, first of all, that the Commission is mischaracterising the judgment under appeal. The General Court did not hold that price undercutting must be determined for each PCN; it merely took issue with the fact that the Commission had extrapolated its findings of price undercutting for certain product types to other product types for which no undercutting was established, and did so without providing any explanation.

118. Regarding the first part of the fourth ground of appeal, Hubei Xinyegang argues that the General Court was right to hold that the concerns identified in the case-law [59] with regard to the exclusion from the calculation of the dumping margin of exports to the Union of certain types of the product under consideration were valid, even in the context of the undercutting and price effects analyses. There would also be a risk of manipulation if it were held that the Commission is not required to take account of all sales by the sampled Union producers. Indeed, that could enable it to find price undercutting with reference to only a limited proportion of the sales made by the Union industry and then extrapolate that finding to the remaining sales, without having to explain the effect on prices of the latter sales.

119. As regards the second part of the fourth ground of appeal, Hubei Xinyegang contends that the Commission’s argument that the price effects analysis and the causation determination are totally independent steps is ineffective, since the Commission has not taken issue with paragraph 86 of the judgment under appeal, in which the General Court found there to be a relationship between the determination of price undercutting and the establishment of a causal link. In any event, the reference in Article 3(2) of the Basic Regulation to the impact of the dumped imports on the Union industry incorporates the requirement of a causal link and the

[59] Hubei Xinyegang refers to the judgment of 5 April 2017, *Changshu City Standard Parts Factory and Ningbo Jinding Fastener* v *Council* (C-376/15 P and C-377/15 P, EU:C:2017:269, ‘the judgment in *Changshu City*’).

requirement for non-attribution set out in more detail in Article 3(6) and (7) of the Basic Regulation. In addition, the General Court was right to refer to the Appellate Body's HP-SSST report, from which it may be inferred that it is necessary to establish the effect on prices for the product as whole, without excluding types of products for which no undercutting has been found.

(b) The fifth ground of appeal, alleging infringement of Article 17 of the Basic Regulation

120. By its fifth ground of appeal, the Commission submits that the General Court misconstrued Article 17 of the Basic Regulation[60] by holding that the Commission had wrongly omitted to take account of the effects of the 17 product types not sold by the Chinese exporting producers sampled but sold by the sampled Union producers. The absence of imports for the 17 PCNs in question is, it submits, an inherent effect of the use in the present case of the sampling method, in which the Commission has a margin of discretion. In addition, since the sample is regarded as being representative, the finding of price undercutting on the basis of the weighted average of the undercutting margins established for the PCNs sold by the sampled Chinese exporting producers is representative of all PCNs, and therefore also for the product under consideration. The General Court's interpretation deprives sampling of its effectiveness and unduly limits the discretion which the Commission enjoys in that regard.

121. Hubei Xinyegang replies, first, that, while the Commission does have a margin of discretion in selecting the sample, that does not mean that, once the sample has been selected, it need no longer observe all of the legal obligations laid down in the Basic Regulation, which include the obligation to carry out a correct price effects analysis. Secondly, the judgment under appeal does not impinge on the Commission's entitlement to resort to sampling or on the flexibility which it has in that regard. The judgment under appeal merely held it to be necessary, once the sample has been selected, for account to be taken of the effects of all the dumped imports of the exporting producers sampled on the prices of all the types of products sold by the sampled Union producers.

3. Analysis

(a) The complaint formulated by the General Court in the judgment under appeal

122. In order to analyse the fourth and fifth grounds of appeal, it is first necessary to clarify, as in the case of the first three grounds of appeal, the scope of the complaint formulated by the General Court. Indeed, the parties disagree as to the scope to be attributed to the General Court's complaint in the part of the judgment under appeal with which the present grounds of appeal take issue.

123. The Commission and ArcelorMittal and others maintain that, in the judgment under appeal, the General Court held the Commission to be under an obligation to carry out a price undercutting analysis for each type of product, which is to say each PCN, sold by the Union

[60] Article 17 of the Basic Regulation, headed 'Sampling', provides, in paragraphs 1 and 2 thereof, as follows: '1. In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the time of the selection, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available. 2. The final selection of parties, types of products or transactions made under these sampling provisions shall rest with the Commission, though preference shall be given to choosing a sample in consultation with, and with the consent of, the parties concerned, provided that such parties make themselves known and make sufficient information available, within three weeks of initiation of the investigation, to enable a representative sample to be chosen.'

industry. They also maintain that the General Court's fundamental complaint pertains not to the analysis of the effect of the dumped imports on the prices of the Union industry, but to the so-called 'non-attribution' analysis under Article 3(7) of the Basic Regulation, which was not relied on before the General Court.

124. Hubei Xinyegang, on the other hand, contends that the General Court complained that the Commission had simply extrapolated its findings of price undercutting for certain product types to other product types for which no undercutting was established, and did so without providing any explanation. Therefore, by excluding the 17 product types from its analysis, the Commission failed to demonstrate the effect of the imports on prices for the like product as a whole, in breach of Article 3(2) and (3) of the Basic Regulation.

125. In that connection, I would point out, in the first place, that, in the judgment under appeal, the General Court first of all held, in paragraph 69, that, using the PCN method, the Commission had not been in a position to calculate a price undercutting margin for the 17 product types of the Union industry for which there were no matching types of imported products. Then, in paragraph 71, referring to the Appellate Body's HP-SSST report, the General Court held that there was, however, nothing in the relevant provisions to indicate that the analysis provided for in Article 3(2) and (3) of the Basic Regulation need not take account of a certain volume of the like product which was not the subject of price undercutting, which was to say the 17 product types for which it had not been possible to establish an undercutting margin using the PCN method.

126. By that last assertion, the General Court, in my view, expressed the principle that, in the analysis of the effect on prices, the Commission is required to take account of all sales of the like product by the Union industry. The General Court then applied that principle to the present case and held that, since that analysis had been carried out in this case by determining price undercutting using the PCN method, the Commission was necessarily required to take into account all the PCNs of the sampled Union producers, so as to base its analysis on all the relevant data.

127. In the second place, in paragraphs 73 and 74 of the judgment under appeal, the General Court essentially criticised the Commission for having based the link which it had established between the price undercutting analysis and the development of the Union industry's prices on an incorrect factual basis, since it had not taken account of the 17 product types in question and since it could not be ruled out that those product types had 'contributed, to a not insignificant degree, to the decrease in the prices of the sampled EU producers'.

128. It follows that the fundamental criticism which the General Court levelled against the Commission was that it had not taken account in its analysis of the possible contribution which (the prices of) *those 17 product types* – for which it was not possible to establish any undercutting margin – might have made to the development of the prices of the Union producers, which the Commission had calculated with reference to the like product considered as a whole.

(b) Is the Commission under an obligation always to take account, in its analysis of the effect on prices, of all the types of products of the Union industry included in the definition of the 'like product'?

129. In this context, it is necessary first of all to consider whether, as might be inferred from paragraph 71 of the judgment under appeal, the Commission is under an obligation always to take account of all the types of products sold by the Union industry in its examination of the effect of the dumped imports on prices, in particular, where that examination is carried out by establishing price undercutting.

130. To support the statement of principle which it made in paragraph 71 of the judgment under appeal, the General Court referred to paragraph 5.180 of the Appellate Body's HP-SSST report, in which the view was expressed that, in that case, the Chinese authorities were 'required to assess the significance of [the] price undercutting by the dumped imports in relation to "the proportion of domestic production for which no price undercutting was found"'.

131. The General Court extended by analogy the scope of that assertion to the present case and, having first noted, in paragraph 70 of the judgment under appeal, that the prices of the 17 product types in question had not been undercut, drew from it, in paragraph 71, the principle that part of the 'like product' could not be excluded from the examination of the effect on prices.

132. I am not, however, convinced that any general principle such as that which the General Court assumed to exist may in fact be inferred from that paragraph of the Appellate Body's HP-SSST report. Indeed, the paragraph in question must be read in the context of the case that was examined by the WTO Appellate Body. As is apparent from point 75 above, that case concerned a situation in which the Chinese authorities had omitted to analyse, and had therefore not established, price undercutting by the products for the Grade A segment, in which the domestic sales were concentrated, but had merely extrapolated to that segment their findings of undercutting in the Grade B and Grade C market segments, in which the dumped imports were concentrated.

133. It follows that what the appellate body meant by that paragraph is that, in that very particular situation, where the domestic sales were highly concentrated in one segment (the Grade A segment) and the dumped imports were concentrated in other segments (the Grade B and Grade C segments), the Chinese authorities were not entitled merely to extrapolate the findings which they made concerning undercutting in relation to Grade B and Grade C to products for the Grade A segment.

134. By contrast with that case, in the present case the Commission did not exclude a 'proportion of domestic production' from its finding of price undercutting for reasons of expediency: it was not in a position, as the General Court itself acknowledged, to calculate an undercutting margin for those products, because of the sample and the analytical method which it chose in the exercise of its discretion.[61]

135. It follows that, in my view, the paragraph in question of the Appellate Body's HP-SSST report provides no basis for any general principle, such as that implied by the assertion made in paragraph 71 of the judgment under appeal, according to which it is necessary for the

[61] On that point, see also point 152 of this Opinion.

Commission always to take account, in its analysis of price undercutting and of the effect on prices, of all the types of products sold by the Union industry and included within the 'like product', as defined.

136. Hubei Xinyegang nevertheless argues that such a principle is consistent with the approach taken by the Court of Justice in the judgment in *Changshu City*. It should be recalled that, in that judgment, the Court held that, in the light of its wording, objective and context, Article 2(11) of the Basic Regulation could not be interpreted as allowing export transactions to the European Union relating to certain types of the product under consideration to be excluded from the calculation of the dumping margin and that, on the contrary, it followed from that provision that the EU institutions were required to take into account all those transactions for the purposes of that calculation.[62]

137. I do not, however, consider that the interpretation of Article 2(11) of the Basic Regulation, for the purposes of the calculation of the dumping margin, which the Court gave in that judgment can automatically be transposed to the price undercutting examination under Article 3(2) and (3) of that regulation. In so far as the wording is concerned, it should be noted that the two provisions are formulated in a fundamentally different way. Article 2(11) of the Basic Regulation in fact expressly provides for the obligation to take account of the 'prices of *all* export transactions'.[63] It may therefore be assumed that, since the provisions of Article 3(2) and (3) of the Basic Regulation are worded differently, they do not *necessarily* require that the analysis take account of *all* sales of the like product by the Union industry.

138. Moreover, that also appears to fit with the differing logic underlying the calculation of the dumping margin and the determination of undercutting. Indeed, while the dumping margin is normally[64] calculated by taking account of the domestic sales and exports of the same undertaking, which is to say the exporting producer, the determination of price undercutting, on the other hand, presupposes a comparison between the sales made by different producers (that is, the dumped imports from the exporting producers and the domestic sales of the Union industry).

139. It follows from the foregoing analysis that neither the Appellate Body's HP-SSST report, on which the General Court relied, nor the judgment in *Changshu City*, on which Hubei Xinyegang relied, can provide the basis for any principle that the Commission is always and in all circumstances required to take account of all sales by Union producers of all types of like products in its analysis of price undercutting or, more generally, of the effect of the dumped imports on prices.

140. That said, I do consider it necessary to make the following observations.

141. In the first place, as I observed in points 28 and 67 above, it is clear from Article 3(2) of the Basic Regulation that the Commission is required to carry out an *objective examination* of the effect of the imports on prices in the Union market for like products. It therefore cannot be ruled out that, in certain circumstances, in order to ensure the objectivity of that examination, it will indeed be necessary to take account of all sales of the products made by the Union industry.

[62] Paragraph 61 of the judgment in *Changshu City*.

[63] Article 2(11) reads: '… the existence of margins of dumping during the investigation period shall normally be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of *all* export transactions to the Union'. My italics.

[64] This will obviously not be the case where the normal value is determined on the basis of data relating to a country of reference, in accordance with Article 2(7) of the Basic Regulation.

142. In the second place, as may be understood from the wording itself of Article 3(2) and (3) of the Basic Regulation, the analysis in question calls for examination of the effect *of the imports* on prices in the Union market for like products. In the present case, as I noted in point 35 above, it is common ground that that examination was carried out with reference to *all the imports* of the product under consideration from the exporting Chinese producers sampled.

143. In the third place, as I observed in points 28 and 29 above, Article 3 of the Basic Regulation does not prescribe any specific analytical methodology for determining whether there has been injury or, more specifically, price undercutting and, in that regard, the EU institutions enjoy a broad discretion, by reason of the complexity of the economic and political situations which they have to examine. In that context, provided that the objectivity of the examination is ensured, it will be for the EU institutions to select the analytical method they consider most appropriate, in accordance with the particular features of the investigation in question, in order to determine the effect on prices.

144. In the fourth place, in the present case, first, it is clear from the regulation at issue that the Commission decided to use sampling, in accordance with Article 17 of the Basic Regulation,[65] with regard to both the Chinese exporting producers and the Union producers. That sampling, with regard to which some discretion has been acknowledged in the case-law,[66] was not challenged in this instance.

145. Secondly, as I observed in points 33 and 34 and point 90 et seq. above, in the present case the Commission decided, in the exercise of the discretion which I have mentioned, to use the PCN method to determine price undercutting. That method, which equally was not disputed, was, inter alia, designed to ensure the comparability of the prices of the products of various undertakings which needed to be compared. In order to ensure such comparability, various PCNs were specified, as I have already mentioned, on the basis of the physical and technical characteristics of the products. However, as ArcelorMittal and others rightly argue, where that system is used, a compromise has to be made between the requirements of ensuring price comparability and of ensuring that the largest possible number of imports and domestic sales are compared, so that the most representative result possible can be obtained: the more detailed the PCNs, the more comparable will be the imported and domestic products covered by each PCN, yet the greater the risk will be that certain products (PCNs) will have no equivalents and will consequently be excluded from the analysis. In the present case, it has been established that the use of the PCN method designed by the Commission resulted in a very high degree of comparability: 100% of the dumped imports were compared with 92% of the domestic sales by the sampled undertakings. As I have already mentioned, the method was not challenged.

146. It is in the light of those considerations that it is necessary to analyse the error which the General Court found the Commission to have made.

(c) The error which the General Court found the Commission to have made

147. It is clear from paragraph 76 of the judgment under appeal that the General Court criticised the Commission for failing to take account of all the relevant data in the case in its examination of price undercutting and of the effect of the dumped imports on prices in the Union for like products.

[65] See recitals 6 to 13 of the provisional regulation and recitals 6 to 11 of the regulation at issue.

[66] See judgment of 15 June 2017, *T.KUP* (C-349/16, EU:C:2017:469, paragraph 31).

148. It may be seen from paragraphs 73 and 74 of the judgment under appeal, to which I referred in points 113 and 127 above, that, in so far as the second complaint is concerned, the relevant data which the Commission failed to take into account were the data regarding the effect that the sale prices of the 17 types of products for which no price undercutting could be found might have had on the decrease in the sale prices of the sampled Union producers for the 'like product' considered as a whole. As I noted in point 128 above, the fundamental criticism which the General Court levelled against the Commission was that it had not taken account in its analyses of price undercutting and of the effect on prices of the possible contribution which the sales of the 17 product types might have made to the development of the prices of the Union producers, with reference to the like product considered as a whole.

149. However, I must emphasise in that connection, first, that, as I observed in point 142 above, the wording of Article 3(2) and (3) of the Basic Regulation expressly states that the analysis of the effect on prices addresses the effect of the *dumped imports* on prices in the Union market for like products, not the effect of the prices of part of the like product. In the present case, however, the General Court found the Commission to have infringed those provisions by having failed to take account *not* of the effect of the *imports* (100% of which were considered in the analysis), but of the *effect of the sales* of 17 types of products of the Union producers.

150. Secondly, the complaint concerns the supposed omission to check whether the decrease in the prices of the like product considered as a whole was not due, to a 'not insignificant' degree, to the decrease in the prices of the 17 product types in question. That amounts to stating that the Commission ought to have established whether the prices of those 17 product types had contributed disproportionately to the decrease in the prices of the like product considered as a whole, by comparison with the consequences for the like product considered as a whole of the decrease in the prices of the remaining 49 product types, for which price undercutting had been established.

151. However, as Arcelor Mittal and others have rightly pointed out, any such disproportionate decrease in the prices of the 17 product types in question could have occurred for one of only two reasons: either because the dumped imports had a disproportionate effect on those product types or because of other factors, domestic or external, other than the dumped imports. Nevertheless, both possibilities lead to the same result. In the first case, the disproportionate decrease would mean that the dumped imports had had an effect on the prices of the 17 product types even greater than that which the Commission found for the other product types, in relation to which it had established undercutting. Yet, if that were the case, the conclusion as to the existence of harmful effects on the prices of the like product resulting from the imports into the Union market could certainly not be challenged as incorrect. In the second case, the disproportionate decrease in the prices of those product types would instead be due to the impact of 'factors [other than the imports] which at the same time [were] injuring the Union industry'. Yet, as the Commission argues, the examination of such other factors pertains to the 'non-attribution' analysis under Article 3(7) of the Basic Regulation, the infringement of which was not alleged by Hubei Xinyegang and cannot, therefore, provide grounds for its action to be upheld.[67]

[67] That conclusion is not called into question by Hubei Xinyegang's argument, which I summarised in point 119 of this Opinion, that the Commission has not taken issue with paragraph 86 of the judgment under appeal. Indeed, in paragraph 76 of the judgment under appeal, the General Court criticised the Commission for having failed to take account of all the relevant data in its analysis of price undercutting and of the effect on prices, and thus for having infringed Article 3(2) and (3) of the Basic Regulation. The General Court's complaint must, therefore, be assessed by reference to those provisions.

152. With regard to those 17 product types, I must also observe that, in my view, the conclusion which the General Court reached at the end of paragraph 71 of the judgment under appeal – on the basis of its finding in paragraph 70 of the judgment under appeal – that the 17 product types in question had not been undercut, is incorrect. Indeed, it was because sampling was chosen, along with the PCN method, that – as the General Court itself noted in paragraph 69 of the judgment under appeal – it was not possible to calculate a price undercutting margin for those types of products.[68] That does not mean, however, that the 17 product types were not themselves undercut. Indeed, it cannot be ruled out that other Chinese exporters not included in the sample had exported those 17 types of products for import at significantly lower prices that those of the Union producers.[69] It is only because of the Commission's choice of method, which it made in the exercise of its discretion and which, moreover, has not been challenged, that it was impossible to make such a finding.

153. It follows from the foregoing that the General Court's analysis in paragraphs 68 to 76 of the judgment under appeal is, in my view, also vitiated by errors of law, the General Court having based that part of that judgment on an incorrect interpretation of Article 3(2) and (3) of the Basic Regulation.

D. The sixth ground of appeal, alleging an incorrect determination of the standard of judicial review

1. Arguments of the parties

154. The sixth ground of appeal raised by the Commission, which is supported by ArcelorMittal and others, is divided into three parts. In the first part, the Commission submits that the General Court ruled *ultra petita*, re-characterising the first and second pleas in law in the action at first instance and thus broadening the scope of the dispute beyond the strict bounds established by the application itself. Hubei Xinyegang did not in fact dispute the establishment of the facts, but challenged the manner in which the Commission exercised its discretion and thus challenged the appraisal of the facts.

155. In the second part of the sixth ground of appeal, the Commission submits that, in paragraphs 34, 35 and 45 of the judgment under appeal, the General Court wrongly determined the standard of the review which it was to carry out. In the judgment under appeal, it adopted a broad interpretation of the concept of 'establishment of the facts' that has no foundation in the case-law and departs from the standard of review established in settled case-law. The General Court considered full review to be applicable, whereas the criterion of manifest error applied.

156. In the third part of the sixth ground of appeal, the Commission submits that the General Court erred in its legal characterisation of the facts. Even if the standard of review which it identified were the correct one, *quod non*, the Commission met that standard, inasmuch as it collected, during the investigation, all the data it needed to carry out a market segment analysis and to assess the 17 disputed PCNs.

[68] That is how I understand the Commission's assertion, summarised in paragraph 70 of the judgment under appeal, that 'the prices of those 17 product types were, by definition, "not undercut by the sampled Chinese export sales".'

[69] This further distinguishes the present case from that decided in the Appellate Body's HP-SSST report, in which the Chinese authorities had not found there to be undercutting for Grade A products because there were no imports for that segment, not because of any decision to use sampling or because of the choice of particular analytical methods.

157. As regards the first part of the present ground of appeal, Hubei Xinyegang argues that a simple reading of the application at first instance shows that the General Court did not re-characterise the pleas it put forward, but simply upheld them. As regards the second part of that ground, Hubei Xinyegang maintains that the General Court applied the correct standard of review, consistently with the case-law of the Court of Justice. Regarding the third part of the ground, it maintains that, even if it were true that the Commission had collected all the data necessary for the analysis, that is not apparent from the regulation at issue or from the evidence put before the General Court.

2. Analysis

158. As regards, first of all, the first part of the present ground of appeal, I agree with Hubei Xinyegang that it is clear on reading the application at first instance that, in the judgment under appeal, the General Court did in fact uphold the pleas alleging infringement of Article 3(2), (3) and (6) of the Basic Regulation which it put forward, without re-characterising them. In my view, therefore, the first part of the present ground of appeal should be dismissed.

159. That does not, however, exclude the possibility that, as the Commission argues in the second part of the present ground of appeal, the General Court may have applied a standard of review that was incorrect.

160. On that point, it should be recalled that it is settled case-law that the determination of the existence of injury caused to the Union industry requires an appraisal of complex economic situations and the judicial review of such an appraisal must therefore be limited to verifying whether relevant procedural rules have been complied with, whether the facts relied on have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers. That is particularly the case as regards the determination of the factors injuring the Union industry in an anti-dumping investigation.[70]

161. The Court of Justice has also held that the General Court's review of the evidence on which the EU institutions based their findings does not constitute a new assessment of the facts replacing that made by the institutions. That review does not encroach on the broad discretion of the institutions in the field of commercial policy, but is restricted to showing whether that evidence was able to support the conclusions reached by the institutions. The General Court must, therefore, not only establish whether the evidence put forward is factually accurate, reliable and consistent, but also ascertain whether that evidence contained all the relevant information which had to be taken into account in order to assess a complex situation and whether it was capable of substantiating the conclusions reached.[71]

162. Moreover, in reviewing the legality of acts under Article 263 TFEU, the Court of Justice and the General Court cannot under any circumstances substitute their own reasoning for that of the author of the contested act.[72]

[70] Judgments of 10 September 2015, *Bricmate* (C-569/13, EU:C:2015:572, paragraph 46 and the case-law cited), and of 10 July 2019, *Caviro Distillerie and Others* v *Commission* (C-345/18 P, not published, EU:C:2019:589, paragraph 15).

[71] Judgment of 18 October 2018, *Gul Ahmed Textile Mills* v *Council* (C-100/17 P, EU:C:2018:842, paragraph 64 and the case-law cited).

[72] Judgment of 10 July 2019, *Caviro Distillerie and Others* v *Commission* (C-345/18 P, not published, EU:C:2019:589, paragraph 17 and the case-law cited).

163. In so far as the present case is concerned, I would point out, in the first place, that, in paragraph 34 of the judgment under appeal, the General Court used a form of words that may be found in settled case-law [73] and which states, in substance, the principles expressed in the case-law of the Court of Justice which I mentioned in points 160 and 161 of this Opinion. However, it also inserted a sentence which is not to be found in that case-law of the Court of Justice: 'that limited judicial review does not however mean that the EU judicature must refrain from reviewing the institutions' interpretation of information of an economic nature'. That sentence has clearly been borrowed from the case-law concerning the extent of judicial review in competition matters. [74] However, I do not believe that the Court of Justice's determination of the scope of judicial review in competition matters can automatically be transposed to anti-dumping matters. The two fields, while both concerning economics and the conduct of undertakings, and falling within areas of exclusive EU competence, nevertheless have some profoundly different characteristics. In particular, first of all, the investigatory powers of the institutions are very different in the two fields, and in anti-dumping matters, by contrast with competition matters, the Basic Regulation does not confer on the Commission any power of investigation allowing it to compel companies to participate in the investigation or to provide information. [75] Secondly, the breadth of discretion which the institutions enjoy in anti-dumping matters must in principle be wider since, as is expressly stated in the case-law, it stems from the requirement to consider not only complex economic situations, as in competition matters, but also complex political situations. [76]

164. In the second place, it must be borne in mind that, as the General Court pointed out, and as I noted in point 28 of the present Opinion, Article 3 of the Basic Regulation does not prescribe any specific methodology for determining whether there has been injury or, more specifically, price undercutting. In the absence of any specification of the precise method to be used when conducting that analysis, which entails the assessment of complex economic situations, there is all the more reason for the Commission to enjoy a margin of discretion.

165. In that context it is necessary, in my view, to emphasise that, even though, as is clear from the settled case-law of the Court of Justice mentioned in point 161 above, the General Court is required to ascertain whether the evidence available to the Commission contained all the relevant information which needed to be taken into account in order to assess a complex situation, that does not mean that the General Court may go so far in its assessment as to overstep the bounds of limited judicial review and substitute its own assessment for that of the Commission. A finding that the Commission did not have all the relevant data at its disposal must lead to the conclusion that, as a result thereof, the institution made a manifest error of assessment. In other words, the case-law mentioned in point 161 above must be read in the light of that mentioned in point 160. It follows that, in order to annul a regulation like the one contested in the present case, the EU judicature must find that the insufficiency in the relevant information needed in order to assess a complex situation entailed a manifest error of assessment on the Commission's part.

[73] See, inter alia, judgments of 29 January 2014, *Hubei Xinyegang Steel* v *Council* (T-528/09, EU:T:2014:35, paragraph 53), and of 28 June 2019, *Changmao Biochemical Engineering* v *Commission* (T-741/16, not published, EU:T:2019:454, paragraph 30 and the case-law cited).

[74] See judgment of 8 October 2011, *KME and Others* v *Commission* (C-272/09 P, EU:C:2011:810, paragraph 94).

[75] See, on that point, Opinion of Advocate General Mengozzi in *EBMA* v *Council* (C-61/16 P, EU:C:2017:615, point 50).

[76] See point 29 of this Opinion and the settled case-law cited in footnote 23.

166. In the third place, following on from the foregoing considerations, I believe that some clarification is needed regarding the breadth of the discretion which the institutions are recognised as having. Indeed, the dividing line between deciding whether the relevant data were sufficient for the assessment of a complex economic situation and calling into question the analytical method that was used is a rather fine one.

167. I consider that, in a situation such as that in the present case, that margin of discretion extends at least to decisions relating to the choice of analytical method, the data and evidence to be gathered, the calculation method used to determine the undercutting margin and the interpretation and assessment of the information gathered. In relation to all those matters the standard of manifest error must apply and the judicial review which the EU judicature is to carry out is limited.

168. Analysing the present case in the light of the foregoing considerations, it follows from points 59 and 60 of this Opinion that the first of the General Court's complaints against the Commission consists, on the one hand, in its failure – notwithstanding its use of the PCN method – to consider market segmentation in its analysis of price undercutting and, more generally, of the effect on prices and, on the other hand, in its failure to carry out a supplemental analysis to ascertain whether the decrease in the prices of the like product of the Union industry, considered as a whole, was not the result of dynamics at play in a segment of the market in which the dumped imports had not had any significant effect, either because their volume was not great or because the level of undercutting was not significant.

169. It follows from point 128 of this Opinion that, by its second complaint, the General Court criticised the Commission for not having taken account, in its analysis, of the possible contribution which the prices of the 17 product types for which it was not possible to establish any undercutting might have made to the development of the prices of the Union producers, which the Commission had calculated with reference to the like product considered as a whole.

170. It was on account of those two supposed analytical errors that the General Court concluded, in paragraph 76 of the judgment under appeal, that the Commission had failed to take account of all the relevant data in the case.

171. I would observe, first, that those complaints demonstrate a rather significant degree of intervention on the General Court's part in the price undercutting analysis carried out by the Commission, one which is, in my view, hard to reconcile with the limited intensity of judicial review prescribed by the case-law I mentioned in point 160 above. On that point, I would observe, on the one hand, that, as is clear from the heading given to the section beginning at paragraph 53 of the judgment under appeal, the second part of the first plea raised at first instance by Hubei Xinyegang, and upheld by the General Court, called into question the method used by the Commission in its examination of price undercutting, which, as I stated in point 167 above, unquestionably falls, in my view, within the broad scope of the Commission's discretion in the matter.

172. On the other hand, I note that the General Court in no way found that the supposed failure to take account of all the relevant data in the case entailed a manifest error on the Commission's part. It follows that, in my view, the General Court did not apply the standard of judicial review that, in a case such as the present, is required by the case-law.

173. In the light of all the foregoing considerations, I consider that the sixth ground of appeal should also be upheld.

E. Conclusion on the appeal

174. It follows from points 109, 110, 153 and 173 above that, in my view, both the part of the judgment under appeal which relates to the first complaint levelled by the General Court (paragraphs 59 to 67 and 77 to 79) and the part of the judgment which relates to the second complaint (paragraphs 68 to 76) are vitiated by errors of law. Consequently, the judgment under appeal must be set aside in so far as concerns the General Court's analysis of the first plea raised at first instance by Hubei Xinyegang.

175. Given that, as is clear from paragraph 88 of the judgment under appeal, the General Court upheld the second plea raised by Hubei Xinyegang in the action at first instance solely on the basis of the same findings it made in its analysis of the first plea, it is necessary, as the Commission claims, also to set aside the part of the judgment under appeal which relates to the analysis of the second plea in the action (paragraphs 82 to 89), and therefore set aside the judgment under appeal in its entirety.

VI. The action before the General Court

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

177. I consider that that is the case in so far as concerns the first and second pleas raised by Hubei Xinyegang before the General Court, which are summarised in paragraphs 24, 25 and 82 of the judgment under appeal. Indeed, it follows from all the foregoing considerations that, contrary to the General Court's ruling, the arguments which Hubei Xinyegang put forward in the context of those first two pleas in its action fail to prove any manifest error on the Commission's part in its analysis of price undercutting and of the effect of the dumped imports on prices in the Union market for the like product.

178. On the other hand, I do not consider the state of the proceedings permits the Court of Justice to rule on the third and fourth pleas in the action, which were not analysed by the General Court in the judgment under appeal and in relation to which further procedural steps might need to be taken. In those circumstances, I consider that the case should be referred back to the General Court so that it may rule on the remainder of the pleas in the action.

VII. Costs

179. In accordance with Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to the costs. Since that is not the case in this instance, the decision on costs should be reserved.

VIII. Conclusion

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

– set aside the judgment of the General Court of the European Union of 24 September 2019, *Hubei Xinyegang Special Tube* v *Commission* (T-500/17, not published, EU:T:2019:691);

– dismiss the first and second pleas in law raised by Hubei Xinyegang Special Tube at first instance;

– refer the case back to the General Court for it to determine the remainder of the pleas;

– reserve the decision on costs.