JUDGMENT OF THE COURT (Grand Chamber)

19 July 2012 (*)

(Appeal – Commercial policy – Dumping – Imports of glyphosate originating in China – Regulation (EC) No 384/96 – Article 2(7)(b) and (c) – Status of an undertaking operating under market economy conditions – Concept of 'significant State interference' within the meaning of the first indent of Article 2(7)(c) – State shareholder controlling de facto the general meeting of the producer's shareholders – Equating such control to 'significant interference' – Assessment of an export contract stamping mechanism – Limits of judicial review – Assessment of the evidence submitted)

In Case C−337/09 P,

APPEAL under Article 56 of the Statute of the Court of Justice, brought on 18 August 2009,

Council of the European Union, represented by J.-P. Hix, acting as Agent, and by G. Berrisch, Rechtsanwalt,

appellant,

the other parties to the proceedings being:

Zhejiang Xinan Chemical Industrial Group Co. Ltd, established in Jiande City (China), represented initially by D. Horovitz, avocat, and subsequently by F. Graafsma, J. Cornelis and A. Woolich, advocaten, K. Adamantopoulos, dikigoros, and D. Moulis, Barrister,

applicant at first instance,

European Commission, represented by T. Scharf, N. Khan and K. Talabér-Ritz, acting as Agents,

Association des utilisateurs et distributeurs de l'agrochimie européenne (Audace), represented by J. Flynn QC,

interveners at first instance,

THE COURT (Grand Chamber),

composed of V. Skouris, President, A. Tizzano, J.N. Cunha Rodrigues, K. Lenaerts, J.-C. Bonichot, J. Malenovský and M. Safjan, Presidents of Chambers, G. Arestis, A. Borg Barthet, M. Ilešič (Rapporteur), A. Arabadjiev, C. Toader and J.-J. Kasel, Judges,

Advocate General: J. Kokott,

Registrar: L. Hewlett, Principal Administrator,

having regard to the written procedure and further to the hearing on 29 November 2011,

after hearing the Opinion of the Advocate General at the sitting on 19 January 2012,

gives the following

Judgment

1 By its appeal, the Council of the European Union seeks to have set aside the judgment of the Court of First Instance of the European Communities (now 'the General Court') of 17 June 2009 in Case T−498/04 *Zhejiang Xinan Chemical Industrial Group* v *Council* [2009] ECR II−1969, ('the judgment under appeal'), by which the General Court annulled Article 1 of Council Regulation (EC) No 1683/2004 of 24 September 2004 imposing a definitive anti-dumping duty on imports of glyphosate originating in the People's Republic of China (OJ 2004 L 303, p. 1, 'the contested regulation'), in so far as it concerns Zhejiang Xinan Chemical Industrial Group Co. Ltd ('Xinanchem').

Legal context

2 For the purposes of determining the existence of dumping, Article 2(1) to (6) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12; 'the basic regulation'), lays down general rules on the method to be used for determining what is known as the 'normal value'.

3 Article 2(7)(a) of the basic regulation lays down a special rule on the method to be used for determining the normal value for imports from non−market economy countries. For these, normal value is, as a general rule, determined on the basis of the price or constructed value in a market economy third country (the 'analogue country' method).

4 However, Article 2(7)(b) of the basic regulation provides that the general rules laid down in Article 2(1) to (6) are to apply to certain non−market economy countries, including the People's Republic of China, if it is shown on the basis of properly substantiated claims submitted by one or more producers subject to the anti-dumping investigation that market economy conditions prevail for that producer or those producers in respect of the manufacture and sale of the like product concerned.

5 The criteria and procedures for determining whether the market economy conditions are satisfied are defined in Article 2(7)(c) of the basic regulation. That provision is worded as follows:

'A claim under [Article 2(7)] (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

– decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

– firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

– the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

– the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

– exchange rate conversions are carried out at the market rate.

…’

6 The provisions of Article 2(7)(b) and (c) of the basic regulation were inserted by Article 1 of Council Regulation (EC) No 905/98 of 27 April 1998 amending Regulation (EC) No 384/96 (OJ 1998 L 128, p. 18). Prior to that amendment, the normal value for imports from non−market economy countries was always calculated according to the ‘analogue country’ method. It is apparent from the fifth recital in the preamble to Regulation No 905/98 that that amendment was inserted ‘in order to be able to take account of the changed economic conditions in Russia and in the People’s Republic of China’. The fourth recital of that regulation states in that connection that ‘the process of reform in Russia and the People’s Republic of China has fundamentally altered their economies and has led to the emergence of firms for which market economy conditions prevail’ and that ‘both countries have as a result moved away from the economic circumstances which inspired the use of the analogue country method’.

7 Article 9 of the basic regulation concerns the imposition of definitive duties and the termination of the proceedings without measures. Article 9(5) provides:

‘An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury ... The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned.

Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:

(a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;

(b) export prices and quantities, and conditions and terms of sale are freely determined;

(c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;

(d) exchange rate conversions are carried out at the market rate; and

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.’

Background to the dispute

8 Xinanchem is a company incorporated under Chinese law, listed on the Shanghai Stock Exchange (China), which produces and sells in China and in world markets, inter alia glyphosate, which is a basic herbicide chemical widely used by farmers throughout the world.

9 By Regulation (EC) No 368/98 of 16 February 1998 (OJ 1998 L 47, p. 1), the Council imposed a definitive anti-dumping duty on imports of glyphosate originating in China. That regulation was amended by Council Regulation (EC) No 1086/2000 of 22 May 2000 (OJ 2000 L 124, p. 1), and by Council Regulation (EC) No 163/2002 of 28 January 2002 (OJ 2002 L 30, p. 1).

10 On 18 November 2002, following publication of a notice of the impending expiry of certain anti-dumping measures (OJ 2002 C 120, p. 3) applicable to imports of glyphosate originating in the People's Republic of China, the Commission of the European Communities received a request for review of those measures under Article 11(2) of the basic regulation, submitted by the European Glyphosate Association ('the EGA'). On 15 February 2003, the Commission published a notice of initiation of an expiry and an interim review of the anti-dumping measures applicable to imports of glyphosate originating in the People's Republic of China (OJ 2003 C 36, p. 18), under Article 11(2) and (3) of the basic regulation.

11 On 4 April 2003, following the initiation of the investigation, Xinanchem submitted to the Commission the completed claim form for producers claiming the status of an undertaking operating under market economy conditions, that is, market economy treatment ('MET'), requesting the Commission to grant it MET by virtue of Article 2(7)(b) of the basic regulation. Furthermore, on 30 April 2003, that company also submitted to the Commission the completed form for exporting producers of glyphosate in China. Subsequently, Xinanchem responded to several requests for additional information from the Commission and reacted to the EGA's observations, in which the EGA opposed the grant of MET to Xinanchem. In addition, from 2 to 4 September 2003, the Commission carried out a verification visit at that company's premises.

12 On 5 December 2003, the Commission informed Xinanchem of its intention to refuse the request for MET. On 16 and 23 December 2003, that company submitted its observations on that communication. By letter of 6 April 2004, the Commission confirmed its decision refusing to grant the company MET. On 7 April 2004, the Commission informed it of the essential facts and considerations on the basis of which it intended to propose the imposition of definitive anti-dumping measures. Xinanchem submitted its observations on that communication on 19 April 2004.

13 On 24 September 2004, on a proposal from the Commission, the Council adopted the contested regulation. As regards the request for MET submitted by Xinanchem, recitals 13 to 17 of that regulation state:

'(13) Although the majority of the shares of the company were owned by private persons, due to the wide dispersion of the non State-owned shares, together with that fact that the State owned by far the biggest block of shares, the company was found to be under State control. Moreover, the board of directors was in fact appointed by the State shareholders and the majority of the directors of the board were either State officials or officials of State-owned enterprises. Therefore, it was determined that the company was under a significant State control and influence.

(14) Moreover, it was established that the government of the PRC [People's Republic of China] had entrusted the China Chamber of Commerce Metals, Minerals & Chemicals Importers and Exporters (CCCMC) with the right of contract stamping and verifying export prices for customs clearance. This system included the setting of a minimum price for glyphosate exports and it allowed the CCCMC to veto exports that did not respect these prices.

(15) Consequently, after consulting the Advisory Committee, it was decided not to grant MET to Xinanchem on the basis that the company did not meet all the criteria set in Article 2(7)(c) of the basic Regulation.

(16) As Xinanchem was not granted [MET], the company applied for individual treatment, i.e. the determination of an individual dumping margin on the basis of its individual export prices. The Commission verified whether this company enjoyed, both in fact and in law, the necessary degree of independence from the State for setting its export price.

(17) In this respect, it was established that Xinanchem was subject to significant State control with regard to setting of its export prices of the product concerned as explained in recital 14. It was, therefore, concluded that Xinanchem did not meet the necessary requirements for individual treatment as set in Article 9(5) of the basic Regulation.'

14 Since the request for MET was refused, the normal value was determined, in accordance with Article 2(7)(a) of the basic regulation, on the basis of data obtained from producers in a market economy third country, namely the Federative Republic of Brazil. A definitive anti-dumping duty of 29.9% was thus imposed, under Article 1 of the contested regulation, on imports of glyphosate originating in China.

Procedure before the General Court and the judgment under appeal

15 By application lodged at the Registry of the General Court on 23 December 2004, Xinanchem brought an action for the annulment of the contested regulation in so far as it concerns it. During the procedure before the General Court, the Association des utilisateurs et distributeurs de l'agrochimie européenne ('Audace') intervened in support of the form of order sought by that company, and the Commission intervened in support of the form of order sought by the Council.

16 By the judgment under appeal, the General Court upheld the first plea in law raised by Xinanchem, alleging that the European Union institutions had infringed the first indent of Article 2(7)(c) of the basic regulation, in refusing to grant it MET. It accordingly annulled Article 1 of the contested regulation in so far as it concerns that company, without examining the other pleas advanced by it in support of its action.

17 The General Court found, first, in paragraphs 38 and 39 of the judgment under appeal, that it is not in dispute that Xinanchem was refused MET solely because it had failed to establish that it satisfied the criteria set out in the first indent of Article 2(7)(c) of the basic regulation. It added that the Commission considered that the other criteria set out in the second to fifth indents of Article 2(7)(c) were met and that, moreover, it expressed no objection concerning the final criterion set out in the first indent of Article 2(7)(c), according to which the costs of major inputs should substantially reflect market values.

18 Next, in the first part of its analysis in paragraphs 43 to 109 of the judgment under appeal, the General Court examined the complaints concerning the grounds for refusal set out in recital 13 of the contested regulation, that is, those regarding State control over Xinanchem and the appointment and composition of the company's board of directors.

19 In that connection, the General Court pointed out, in paragraphs 80 to 82 of the judgment under appeal, that the Commission and the Council confined themselves to determining that there was State control on the basis of findings relating to the distribution of the shareholdings in Xinanchem, without expressing a view on the question of how that control was or could be exercised in practice. The General Court also held that it had to be

determined whether State control, as found in this case, necessarily entails ‘significant State interference’ within the meaning of the first indent of Article 2(7)(c) of the basic regulation.

20 In that regard, the General Court observed, in paragraphs 84 and 85 of the judgment under appeal, that it is clear from the wording of the first indent of Article 2(7)(c) that the question of whether or not there is significant State interference must be assessed in the light of the way that ‘decisions of firms regarding prices, costs and inputs’ are taken. That provision requires the exporting producer concerned to show that its decisions are taken both ‘in response to market signals’ and ‘without significant State interference’. Consequently, conduct by the State which is not such as to influence those decisions cannot constitute ‘significant … interference’ within the meaning of that provision. Furthermore, in view of the wording, purpose and context of that provision, the concept of ‘significant State interference’ cannot be equated to just any influence on the activities of an undertaking or to just any influence in its decision-making process, but must be understood as meaning action by the State which is such as to render the undertaking’s decisions incompatible with market economy conditions.

21 The General Court concluded, in paragraph 88 of the judgment under appeal, that the criteria in question are intended to determine whether the relevant decisions of the exporting producers concerned are based on purely commercial considerations, appropriate for an undertaking operating under market economy conditions, or whether they are distorted by other considerations, specific to State−run economies.

22 In paragraphs 89 and 90 of the judgment under appeal, the General Court also found that, for the purposes of interpreting and applying the first indent of Article 2(7)(c) of the basic regulation, account must be taken of the fact that the countries referred to are not regarded as States with market economies, despite the reforms achieved by them, and that it is legitimate for the Council and the Commission to take account, in their examination of the evidence submitted by a producer from such a country, of the fact that the undertaking concerned is State−controlled.

23 In paragraphs 91 and 92 of the judgment under appeal, the General Court added that State control, as established in this case, is not, however, as such, incompatible with the taking of commercial decisions by the undertaking concerned in keeping with market economy conditions. The approach advocated by the Council, equating State control to ‘significant State interference’, leads to the exclusion, in principle, of State-controlled companies from entitlement to MET, irrespective of the real context in which they operate and of the evidence they have submitted.

24 In that context, the General Court held, in paragraph 93 of the judgment under appeal, that the Council’s assertions concerning the appointment and composition of the board of directors of Xinanchem cannot, in the light of the contents of the Court file, put in doubt the fact that the control which the State exercises over that company remains within the limits of the usual mechanisms of the market.

25 The General Court concluded, in paragraph 97 of the judgment under appeal, that, since the criterion of State control is not one of the criteria laid down in the first indent of Article 2(7)(c) of the basic regulation, and given that such a control is not sufficient, by itself, to demonstrate the existence of ‘significant State interference’ within the meaning of that provision, the Council’s approach is incompatible with the system which it itself established. After pointing out, in paragraph 99 of the judgment under appeal, that the burden of proof lies on the producer, the General Court noted that Xinanchem provided various documentary evidence, which was, however, judged to be irrelevant because of the abovementioned approach. At paragraph 102 of the judgment under appeal, the General Court considered

that, in those circumstances, the circumstances set forth in recital 13 of the contested regulation could not justify the Council's conclusion.

26 Consequently, in paragraph 109 of the judgment under appeal, the General Court upheld Xinanchem's complaints concerning the Council's assessment regarding State control of that undertaking and the appointment and composition of its board of directors. On the other hand, it did not rule on the question of whether the evidence provided by that undertaking was sufficient to decide that the criteria in the first indent of Article 2(7)(c) of the basic regulation were satisfied, taking the view that that assessment is reserved to the Council and to the Commission.

27 Lastly, in a second part of its analysis, carried out in paragraphs 110 to 159 of the judgment under appeal, the General Court examined the complaints concerning the grounds of refusal set out in recitals 14 and 17 of the contested regulation, that is, the complaints relating to the setting of export prices.

28 After having rejected, in paragraphs 114 to 120 of the judgment under appeal, the first of those complaints, which alleged that the Council had misconstrued Article 2(7)(b) and (c) of the basic regulation by considering that export sales are relevant to the examination of the request for MET, the General Court examined the second complaint, which alleged that the Council's assessment concerning the setting of that undertaking's export prices is vitiated by manifest error.

29 In paragraph 137 of the judgment under appeal, the General Court pointed out, first, that it was for Xinanchem to prove that its export sales were consistent with the conduct of an undertaking operating under market economy conditions and, particularly, that it was free to decide on export prices, by reference to purely commercial considerations without significant State interference. The General Court then pointed out, in paragraph 139 of that judgment, that the institutions concluded that the State exercised in that regard significant control over that undertaking by means of the export contract stamping mechanism of the China Chamber of Commerce Metals, Minerals & Chemicals Importers and Exporters ('the CCCMC'). Lastly, the General Court concluded, in paragraph 140 of the judgment under appeal, that it was therefore necessary to review whether, in the light of the evidence submitted by that undertaking during the investigation, the institutions had been entitled to decide, without making a manifest error of assessment, that the ground relating to that mechanism could lead to the conclusion that Xinanchem had not demonstrated that it met the criteria at issue.

30 In that regard, the General Court found, first, in paragraph 141 of the judgment under appeal, that it is clear from the statements of Xinanchem, which are borne out by the CCCMC's brochure and a letter from the EGA, that the mechanism in question was established on the initiative of the glyphosate producers who were members of the CCCMC, which is a non-governmental body, with the aim of facilitating their compliance with the anti-dumping regulations and thus of protecting them against complaints. It is from that point of view that the government adopted measures conferring on the CCCMC the right to stamp contracts and verify export prices for customs clearance.

31 The General Court pointed out, secondly, in paragraph 142 of the judgment under appeal, that it is clear from those documents and from a CCCMC document that the price was set by the members of the glyphosate producers' group themselves.

32 Thirdly, the General Court noted, in paragraphs 143 to 150 of that judgment, that Xinanchem submitted a series of documents, which include statements made by itself and by the CCCMC and also invoices and export sales contracts, showing that the price at issue was

not binding during the investigation period and that that undertaking was free to set the export prices at a lower level than that adopted by the members of the group.

33 The General Court inferred from this, in paragraph 151 of the judgment under appeal, that those documents were capable of demonstrating that the export contract stamping mechanism had not been imposed by the State, that the price was set by the glyphosate producers who were members of the CCCMC themselves and that it had not entailed any actual restriction on Xinanchem's exports. The General Court considered that, therefore, without putting in issue the probative value or sufficiency of that evidence, the institutions could not, without making a manifest error of assessment, conclude that, by means of the mechanism in question, the State had exercised significant control over the prices of the product concerned and that such mechanism constituted 'significant State interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation.

34 Next, in paragraphs 152 to 159 of the judgment under appeal, the General Court pointed out that that evidence and those statements were not, however, put in issue by the institutions, and it held that the institutions' assessment relating to the CCCMC's role was not sufficient, in view of the evidence submitted by Xinanchem during the investigation, to justify the refusal to grant MET. Accordingly, the General Court upheld the complaint alleging a manifest error in the Council's assessment concerning the setting of that undertaking's export prices.

35 Lastly, in paragraph 160 of that judgment, the General Court held that, as regards the Council's argument that, to succeed in its action, Xinanchem ought to have demonstrated that it was the overall conclusion that there was significant State interference which was vitiated by a manifest error of assessment, the General Court held that the grounds set forth in recitals 13, 14 and 17 of the contested regulation, even taken together, cannot justify the refusal to grant MET. After recalling its conclusion, that, the institutions did not, in their analysis, take account of all the relevant evidence which Xinanchem had put forward, it found that the errors thus made also vitiate the Council's overall conclusion.

The developments which took place in the course of the proceedings before the Court

36 Following a request from the EGA, the Commission initiated, on 29 September 2009, an expiry review of the contested regulation, requesting all the exporting producers concerned, including Xinanchem, to cooperate in the procedure. On 30 December 2009, that undertaking, taking the view that, as a result of the judgment under appeal, it did not have to participate in that review procedure, lodged an application for interim measures before this Court, requesting an order that the effects of the judgment under appeal are not suspended pending the outcome of the appeal lodged by the Council against that judgment.

37 On 11 February 2010, the Council adopted Implementing Regulation (EU) No 126/2010 (OJ 2010 L 40, p. 1), extending for a period of one year the suspension of the definitive anti-dumping duty imposed by Regulation No 1683/2004. That extension followed Commission Decision 2009/383/EC of 14 May 2009 suspending the definitive anti−dumping duties imposed by Council Regulation (EC) No 1683/2004 (OJ 2009 L 120, p. 20), by which the Commission had suspended that duty for a period of nine months.

38 On 13 December 2010, the Council adopted Implementing Regulation (EU) No 1187/2010 terminating the anti-dumping proceeding on imports of glyphosate originating in the People's Republic of China (OJ 2010 L 332, p. 31), which repealed, as from its entry into force on 17 December 2010, the anti-dumping measures concerning those imports and terminated the proceeding concerning them.

39 By order of 18 May 2011 in Case C−337/09 P-R *Council* v *Zhejiang Xinan Chemical Industrial Group*, the President of the Court ordered that, following the adoption of Regulation No 1187/2010, it was no longer necessary to adjudicate on the application for interim measures.

Forms of order sought by the parties

40 The Council and the Commission claim that the Court should:

– set aside the judgment under appeal and dismiss the action brought by Xinanchem for the annulment of the contested regulation,

– in the alternative, refer the case back to the General Court, and

– order Xinanchem to pay the costs at first instance and on appeal.

41 Xinanchem claims that the Court should:

– dismiss the appeal in its entirety as inadmissible, or alternatively as unfounded,

– in the alternative, in case the Court decides to grant the appeal, in whole or in part, confirm the ruling of the General Court, according to which the institutions failed to respect Xinanchem's rights of defence, and on that basis annul Article 1 of the contested regulation in so far as it concerns Xinanchem, and

– order the Council to pay the costs.

42 Audace contends that the Court should dismiss the first ground of appeal and order the Council to pay the costs.

The appeal

43 In support of its appeal, the Council raises three grounds directed against the General Court's assessment of (i) the grounds of refusal set out in recital 13 of the contested regulation, and hence also the effect of the State's shareholding in Xinanchem (ii) the grounds of refusal set out in recitals 14 and 17, and hence also the CCCMC's export contract stamping mechanism, and (iii) the Council's argument that it was not sufficient to call in question those grounds separately.

Admissibility

The consequences of the adoption of Regulation No 1187/2010

44 Following a request from the Court of Justice, the Council, by letter of 25 January 2011, stated that it wished to maintain its appeal for two reasons. First, if the appeal were withdrawn, the effect would be that the contested regulation, in so far as it applies to Xinanchem, would be annulled *ex tunc* whereas, if the appeal were upheld, that regulation would be wholly valid until its repeal by Regulation No 1187/2010. Second, the judgment under appeal raises important questions of principle concerning the interpretation of Article 2(7)(c) of the basic regulation with implications beyond the scope of the present case.

45 Following the order in *Council* v *Zhejiang Xinan Chemical Industrial Group*, by letter of 29 June 2011 Xinanchem requested the Court to declare that it was no longer necessary to give a ruling on the appeal. It contends that such a finding is required in particular in the light of

paragraph 44 of that order, which states that the interest in the resolution of legal questions which might be raised in the future in similar cases to that which gave rise to the application for interim measures cannot suffice to justify its maintenance.

46 It should be pointed out, in that regard, that the Court of Justice can declare an appeal to be inadmissible where an event subsequent to the judgment of the General Court has removed its prejudicial effect for the appellant. An interest in bringing the appeal proceedings assumes that the appeal is likely, if successful, to procure an advantage to the party bringing it (see Case C−19/93 P *Rendo and Others* v *Commission* [1995] ECR I−3319, paragraph 13, and the orders in Case C−111/99 P *Lech-Stahlwerke* v *Commission* [2001] ECR I−727, paragraph 18, and Case C−503/07 P *Saint-Gobain Glass Deutschland* v *Commission* [2008] ECR I−2217, paragraph 48).

47 It must be stated, however, that the adoption of Regulation No 1187/2010 has not eliminated the consequences of the judgment under appeal for the Council.

48 The judgment under appeal annulled the contested regulation *ex tunc*, in so far as it concerns Xinanchem, which means that, unless that judgment is set aside by the Court, that regulation is deemed never to have had effects on that company. By contrast, Regulation No 1187/2010 only repealed the contested regulation as from the date on which it entered into force, namely, 17 December 2010.

49 Consequently, if the Court were to uphold the appeal and dismiss the action for annulment of the contested regulation brought before the General Court by Xinanchem, it would follow that that regulation would have full legal effect in the European Union legal order between the date of its adoption, on 24 September 2004, and that of its repeal on 17 December 2010. It is not therefore in dispute that the outcome of the appeal is still capable of procuring an advantage to the Council.

50 The situation is therefore fundamentally different from that which gave rise to the order in *Council* v *Zhejiang Xinan Chemical Industrial Group*, which was characterised by the fact that the reasons relied on by Xinanchem in support of its application for interim measures had ceased to exist as from the date on which Regulation No 1187/2010 entered into force, so that that application was then based solely on the interest which the resolution of the legal questions raised might have for similar cases in the future and by the hypothetical risk that the Commission might decide in the future to reopen the anti-dumping procedure concerning imports of glyphosate originating in China (see paragraphs 39 to 48 of that order).

51 Nor does it appear that, as a consequence of the adoption of Regulation No 1187/2010, the dispute between the parties has been brought to an end and that the appeal has therefore become devoid of purpose for that reason (see, by analogy, in particular, the order in Case C−498/01 P *OHIM* v *Zapf Creation* [2004] ECR I−11349, paragraph 12, and Case C−27/09 P *France* v *People's Mojahedin Organisation of Iran* [2011] ECR I−0000, paragraph 48).

52 The Council still maintains that it was justified not to grant Xinanchem MET and that the contested regulation ought to have applied to that company until it was repealed.

53 It follows from the foregoing that the appeal has not become inadmissible as a result of the adoption of Regulation No 1187/2010.

The other grounds of inadmissibility raised

54 Xinanchem contends that the appeal is inadmissible on the ground that the Council challenges the General Court's findings of fact and assessments regarding the evidence, without identifying the error of law allegedly made by it.

55 In that connection, it must be noted that it is clear from Article 256 TFEU and the first paragraph of Article 58 of the Statute of the Court of Justice of the European Union that the General Court has exclusive jurisdiction, first, to find the facts and, second, to assess those facts. It is only where the material inaccuracy of the General Court's findings is apparent from the procedural documents submitted to it or where the evidence used to support those facts has been distorted that those findings of fact and the appraisal of evidence constitute points of law subject to review by the Court of Justice on appeal. By contrast, the Court of Justice has jurisdiction under Article 256 TFEU to review the legal characterisation of those facts by the General Court and the legal conclusions it has drawn from them (see, to that effect, in particular, Case C−440/07 P *Commission* v *Schneider Electric* [2009] ECR I−6413, paragraphs 103 and 104, and Case C−352/09 P *ThyssenKrupp Nirosta* v *Commission* [2011] ECR I−0000, paragraphs 179 and 180 and case-law cited).

56 By its first ground of appeal, the Council complains that the General Court misinterpreted the first indent of Article 2(7)(c) of the basic regulation and, on the basis of that misinterpretation, wrongly considered that the facts established in the contested regulation, and in particular the fact that Xinanchem was *de facto* controlled by the State, were insufficient in themselves to demonstrate the existence of 'significant State interference' within the meaning of that provision and, therefore, to refuse to grant that company MET without taking into account the evidence submitted by it.

57 That ground of appeal does not therefore concern the General Court's findings of fact or assessment of the evidence, but the interpretation of a legal provision and its application to facts such as those established by the Council.

58 As regards the second ground of appeal, this alleges, in particular, that, in finding that the Council and the Commission had made a manifest error in their assessment of the CCCMC's export contract stamping mechanism, the General Court misconstrued the wide discretion enjoyed by those institutions in the application of the criteria laid down in Article 2(7)(c) of the basic regulation. As the Advocate General observed in paragraph 33 of her Opinion, the extent of the margin of appreciation enjoyed by the European Union institutions in assessing complex economic circumstances and, in that context, the limits of judicial review of that margin by the European Union Courts are points of law subject to review by the Court of Justice on appeal.

59 As regards the third ground of appeal, it must be pointed out that, in support of that ground, the Council relies on the same errors of law allegedly made by the General Court as those forming the basis of the first and second grounds of appeal. Consequently, the considerations set out in paragraphs 56 to 58 above also apply to the third ground of appeal.

60 In addition, Xinanchem contends that the appeal is inadmissible on the ground that the Council is attempting to impose its own interpretation of the first indent of Article 2(7)(c) of the basic regulation, which the Council had applied in the administrative investigation and defended before the General Court, but which was criticised by the latter. The appeal is therefore merely a repetition of the arguments already presented to the General Court.

61 In that connection, it is sufficient to note that, provided that the appellant challenges the interpretation or application of Community law by the General Court, the points of law examined at first instance may be discussed again in the course of an appeal. Indeed, if an appellant could not thus base his appeal on pleas in law and arguments already relied on before the General Court, an appeal would be deprived of part of its purpose (see Case C−425/07 P *AEPI* v *Commission* [2009] ECR I−3205, paragraph 24, and Case C−54/09 P *Greece* v *Commission* [2010] ECR I−7537, paragraph 43).

62 It follows from the foregoing that the appeal must be declared admissible.

Substance

The first ground of appeal, relating to the effect of the State's shareholding in Xinanchem

– Arguments of the parties

63 The Council and the Commission submit that the General Court misinterpreted the concept of 'significant State interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation, by holding that the fact that the distribution of the shares allowed the State shareholders to control Xinanchem does not automatically amount to such interference.

64 First, such an interpretation is said to be contrary to the wording of that provision and eliminates as an independent criterion the requirement that there be no significant State interference. Second, the abovementioned interpretation is at odds with the ordinary meaning of 'significant', which refers to the degree of State interference and not the type or effect thereof. Third, the interpretation in question is contrary to the requirement that Article 2(7)(b) and (c) of the basic regulation should be interpreted strictly in view of its status as an exception. Fourth, the General Court's interpretation disregards the fact that that provision should be interpreted in the light of Article 9(5) of the basic regulation and that MET cannot be granted to a producer that does not even satisfy the conditions for granting individual treatment. Fifth, the interpretation adopted by the General Court reverses the burden of proof and leads to impractical results.

65 Xinanchem and Audace contend that the arguments advanced by the Council and the Commission are unfounded and that the General Court was fully entitled to reject the interpretation put forward by those institutions, since that interpretation leads to the imposition of criteria for the grant of MET which go beyond those set out in the first indent of Article 2(7)(c) of the basic regulation.

– Findings of the Court

66 It should be noted, first of all, that Article 2(7)(a) of the basic regulation provides that in the case of imports from non-market economy countries, in derogation from the rules set out in paragraphs 1 to 6 of Article 2, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country. The aim of that provision is to prevent account being taken of prices and costs in non-market-economy countries which are not the normal result of market forces (see Case C−26/96 *Rotexchemie* [1997] ECR I−2817, paragraph 9, and Case C−338/10 *GLS* [2012] ECR I−0000, paragraph 20).

67 However, pursuant to Article 2(7)(b), in anti-dumping investigations concerning imports from China, normal value is to be determined in accordance with Article 2(1) to (6) of the basic regulation, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation, and in accordance with the criteria and procedures set out in Article 2(7)(c), that market economy conditions prevail for that producer or those producers in respect of the manufacture and sale of the like product concerned.

68 It is clear from the fourth and fifth recitals of Regulation No 905/98 that it inserted Article 2 (7)(b) and (c) into the basic regulation owing to the fact that the process of reform in particular in China has fundamentally altered its economy and has led to the emergence of firms for which market economy conditions prevail, so that China has moved away from the economic circumstances which inspired use of the analogue country method as a matter of course.

69 However, since, despite that process of reform, the People's Republic of China is still not a market economy country to whose exports the rules set out in Article 2(1) to (6) of the basic

regulation apply automatically, it is, in accordance with Article 2(7)(c), for each producer wishing to benefit from those rules to produce sufficient evidence, as laid down by that provision, that it operates under market economy conditions.

70 It is for the Council and the Commission to assess whether the evidence supplied by the producer concerned is sufficient to show that the criteria laid down in Article 2(7)(c) of the basic regulation are fulfilled in order to grant it MET and it is for the European Union judicature to examine whether that assessment is vitiated by a manifest error (see Case C−249/10 P *Brosmann Footwear (HK) and Others* v *Council* [2012] ECR I−0000, paragraph 32).

71 It is not in dispute, in the present case, that Xinanchem was refused MET solely on the ground that it had not proved that it had met the criteria set out in the first indent of Article 2 (7)(c) of the basic regulation, the Commission taking the view that the other criteria had been met.

72 In accordance with the first indent of Article 2(7)(c), a producer must produce sufficient evidence to show that its decisions regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are taken in response to market signals reflecting supply and demand, and without significant State interference in that regard, and that costs of major inputs substantially reflect market values.

73 That provision thereby lays down a twofold criterion with regard to certain commercial decisions of the producer and a criterion with regard to the costs of major inputs.

74 As the General Court observed in paragraph 39 of the judgment under appeal, the Commission expressed no objection concerning the requirement that the costs of major inputs should substantially reflect market values. The dispute between the parties therefore relates solely to the interpretation and application of the twofold criterion, in accordance with which a producer must take its decisions regarding prices, costs and inputs in response to market signals and without significant State interference in this regard.

75 More specifically, the Council and the Commission call in question the General Court's interpretation of the second component of that twofold criterion, claiming, in essence, that the State control such as that described in recital 13 of the contested regulation automatically amounts to 'significant State interference' within the meaning of the first indent of Article 2 (7)(c) of the basic regulation. Consequently, contrary to what the General Court held, the Council and the Commission claim that they were justified in refusing to grant MET to Xinanchem without taking into account the evidence submitted by it in order show that its decisions regarding prices, costs and inputs were taken in conformity with the twofold criterion in question.

76 In recital 13 of the contested regulation, the Council stated that, although the majority of the shares of Xinanchem were owned by private persons, the company was under State control due to the wide dispersion of the non State-owned shares, together with that fact that the State owned by far the biggest block of shares. Recital 13 also states that, in addition, the board of directors was appointed by the State shareholders and that the majority of the directors of the board were either State officials or officials of State-owned enterprises.

77 As regards that last statement, the General Court – without being contradicted on the point by either the Council or the Commission – found, in paragraphs 94 and 95 of the judgment under appeal that, with regard to, first, the statement concerning the appointment of the board of directors, it is clear from the Court file that that statement relates to the fact that, because of the wide dispersion of the private shareholdings, the State shareholders control the general meeting, which appoints the members of the board of directors, so that it is those

shareholders who decide, in practice, on the composition of that board. As regards, second, the statement that the majority of the directors of the board were either State officials or officials of State-owned enterprises, the General Court found that that statement was based on the mere fact that the applicant is State-controlled and, in particular, on the fact that three of the nine directors were in an employment relationship with Xinanchem or connected by a contract for the supply of services.

78 It must be found that the General Court was fully entitled to hold, in paragraphs 98 and 107 of the judgment under appeal, that State control, such as that observed in the present case, cannot be equated, as a matter of principle, to 'significant State interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation and cannot therefore relieve the Council and the Commission of the obligation to take into account the evidence, submitted by the producer concerned, of the real factual, legal and economic context in which it operates.

79 It clearly follows from the wording of the first indent of Article 2(7)(c) of the basic regulation that that provision is not directed at all types of State interference in producer undertakings, but only that concerning their decisions regarding prices, costs and inputs.

80 In addition, the use of the word 'interference' indicates that it is not sufficient that a State may have a certain amount of influence over those decisions, but implies actual interference in them.

81 Furthermore, the interference in the producer's decisions regarding prices, costs and inputs must be 'significant'. It is therefore not in dispute that the first indent of Article 2(7)(c) of the basic regulation allows – as the Council and the Commission indeed acknowledge – a certain degree of State interference in those decisions.

82 Whether or not such State interference in the decisions is significant must be assessed in relation to the purpose of that provision, which is to ensure that a producer operates under market economy conditions and, in particular, that the costs to which it is subject and the prices which it charges are the result of market forces. Consequently, State interference that is neither by its nature nor effect capable of rendering a producer's decisions regarding prices, costs and inputs incompatible with market economy conditions cannot be considered significant.

83 In the present case, it must be found that State control, such as that found by the institutions, and in particular in recital 13 of the contested regulation, is not, by its nature, incompatible with market economy conditions. In addition, although the fact that the distribution of the shares enabling the State shareholders – even though minority shareholders – to control *de facto* the general meeting of Xinanchem's shareholders, and thereby appoint the board of directors, does give the State a certain influence over that company, it does not, however, follow that the State actually interferes – still less significantly – in the company's decisions regarding prices, costs and inputs. Nor does such interference automatically follow either from the fact that some of the directors of that company are connected to it by employment contracts or by a contract for the supply of services.

84 It should also be noted that recital 13 of the contested regulation does not even refer to State interference in Xinanchem's decisions, but merely states that that company is under a significant State control and influence.

85 Since the facts set out in recital 13 do not definitively exclude that Xinanchem may take its decisions regarding prices, costs and inputs in response to market signals reflecting supply and demand and without significant State interference in that regard, it was for the Council and the Commission to assess whether the evidence submitted by that company was

sufficient to satisfy the twofold criterion laid down in the first indent of Article 2(7)(c) of the basic regulation.

86 As the General Court found in paragraphs 90 and 98 of the judgment under appeal, it was open to the Commission and the Council, in the examination of that evidence and in view of the wide discretion that those institutions enjoy in that regard, to take account of the fact that Xinanchem is State-controlled in terms of company law. In the context of a non-market economy country, the fact that a company established in that country is *de facto* controlled by State shareholders raises serious doubts as to whether the company's management is sufficiently independent of the State to be able to take decisions regarding prices, costs and inputs autonomously and in response to market signals.

87 However, as the General Court noted, in particular in paragraphs 99, 100 and 107 of the judgment under appeal, and as expressly confirmed by the Council at the hearing before the Court, it was because of their interpretation of the first indent of Article 2(7)(c) of the basic regulation that the Council and the Commission did not assess the evidence submitted by Xinanchem, thereby disregarding it.

88 The interpretation of that provision adopted above by this Court, which corresponds, in essence, to the interpretation on which the General Court based its analysis, is not called in question by the arguments advanced in support of the first ground of appeal.

89 In that connection, it must be found that the fact that the first indent of Article 2(7)(c) is interpreted as meaning that State control, such as that described in recital 13 of the contested regulation, does not automatically amount to 'significant State interference' within the meaning of that provision does not eliminate the criterion that the producer must take its decisions regarding prices, costs and inputs without such interference.

90 Even when a producer has taken the decisions in response only to market signals, the criterion in question precludes granting it MET in the event that the State has significantly interfered with the operation of market forces. In that regard, it must be noted that MET may only be granted to an operator if the costs to which it is subject and the prices it charges are the result of the free operation of supply and demand. That would not be the case if, for example, the State interfered directly with the price of certain raw materials or the price of labour. Even if, in such circumstances, the producer based its decisions regarding prices, costs and inputs on market signals, the significant State interference in that regard would not allow the conclusion that market economy conditions prevail for such a producer. The second component of the twofold criterion in the above provision thereby retains its separate character from the first, both for undertakings which are *de facto* State-controlled and for any other producer.

91 In addition, the above interpretation in no way reverses the burden of proof, which, as noted in paragraphs 35 and 99 of the judgment under appeal and paragraphs 70 and 85 above, falls on the producer. In addition, although, admittedly, that interpretation requires the Council and the Commission to take into account, in a situation such as the present, evidence submitted by that producer, and to examine it with all due care in order to determine whether that evidence is sufficient to show that the producer satisfies the twofold criterion in question, it leaves intact the wide discretion enjoyed by those institutions in assessing that evidence.

92 Moreover, as the Advocate General observed in paragraphs 84 to 88 of her Opinion, the institutions' approach cannot be justified by the alleged need to interpret Article 2(7)(c) of the basic regulation in the light of the second subparagraph of Article 9(5) of that regulation, in the specific case of an undertaking a majority of whose shares belong to private persons but which is nevertheless controlled *de facto* by the State.

93 Lastly, as regards the argument based on the status of Article 2(7)(b) and (c) of the basic regulation as an exception, it should be noted that the requirement that a provision be interpreted strictly cannot enable the institutions to interpret and apply the provision in a manner inconsistent with its wording and purpose.

94 It follows from all the foregoing considerations that the first ground of appeal must be rejected as unfounded.

Second ground of appeal, relating to export contract stamping mechanism

– Arguments of the parties

95 By their second ground of appeal, the Council and the Commission submit that the General Court exceeded the limits of judicial review by finding that those institutions had made a manifest error in their assessment of the CCCMC's export contract stamping mechanism. Those institutions submit that their finding that that mechanism amounted to significant State interference in the setting of the export prices of Xinanchem's goods did not exceed the wide discretion which they enjoy in the application of the criteria set out in Article 2(7)(c) of the basic regulation.

96 The Council and the Commission claim, inter alia, that the Court's conclusion that the CCCMC is a non-governmental organisation, and that the price system and floor price were established by its members is irrelevant and incorrect. There is no evidence to suggest that the companies which were members of the CCCMC were operating under market economy conditions. On the contrary, the fact that only 2 out of 39 Chinese producers requested MET is an indication that the majority did not operate under such conditions. The actions of the CCCMC must therefore be assumed to be actions of an association that operates according to State directed economy principles and that the system of export price control constitutes a restriction on the freedom of individual exporters, based on non-market economy considerations. This last conclusion is further supported by the fact that the Chinese customs authorities allow exports only where the export contract bears the stamp of the CCCMC.

97 Moreover, contrary to what the General Court held, the Council and the Commission were fully entitled to take the view that the evidence submitted by Xinanchem regarding its export prices was irrelevant. Indeed, that evidence merely shows that there were export transactions, stamped by the CCCMC, where the price was below the floor price. However, that evidence cannot serve to refute the fact that the system in place allowed the CCCMC to control export prices. In particular, the fact that certain export transactions were made at prices below the floor price does not give any indication as to whether other export transactions at such prices were refused. The consideration on which the General Court based its finding, namely that the institutions must assess pricing behaviour in order to determine whether a system such as that at issue in the present case actually restricts exporters' ability to set export prices independently, not only effectively reverses the burden of proof but makes it impossible for those institutions to discharge that burden, because they can hardly ever find evidence of actual participation by the State in setting prices.

98 Xinanchem contends that, even if admissible, the second ground of appeal is unfounded.

– Findings of the Court

99 After examining, in paragraphs 141 to 150 of the judgment under appeal, the contents of the evidence submitted by Xinanchem, the General Court found, in paragraph 151 of that judgment, that the evidence was capable of demonstrating that the export price stamping mechanism had not been imposed by the State, that the price was set by the glyphosate producers who were members of the CCCMC themselves and that it had not entailed any actual restriction on Xinanchem's exports. The General Court inferred from this, without

putting in issue the probative value or sufficiency of that evidence, that the Council and the Commission could not, without making a manifest error of assessment, conclude that, by means of the mechanism in question, the State had exercised significant control over the prices of the product concerned and that such a mechanism constituted 'significant State interference' within the meaning of the first indent of Article 2(7)(c) of the basic regulation.

100 The Council and the Commission do not claim any distortion with regard to the General Court's examination and findings of fact in paragraphs 141 to 151 of the judgment under appeal. In addition, those institutions do not dispute that – as the General Court noted in paragraphs 152 to 155 of the judgment under appeal – they had not put in issue the probative value or sufficiency of the evidence.

101 It should also be noted that the General Court in no way held that that evidence was conclusive and that it showed to the required legal standard that the CCCMC had not imposed on Xinanchem the price for its glyphosate exports. On the contrary, the General Court expressly held in paragraphs 151 to 155 of the judgment under appeal that it was open to the Commission and the Council to put in issue the probative value or sufficiency of that evidence.

102 As regards the Commission's argument that the fact that the CCCMC was able to refuse to stamp export contracts if the reference price was not complied with is *prima facie* evidence of interference in setting prices, it must be found that the institutions cannot restrict their assessment to an analysis of the 'prima facie' situation if the producer furnishes evidence which is capable of rebutting that analysis.

103 In addition, contrary to what the Council and the Commission claim, the General Court in no way reversed the burden of proof by holding, in paragraph 157 of the judgment under appeal, that those institutions were in this case required to take into account, when assessing the CCCMC's export contract stamping mechanism, the evidence put forward by Xinanchem capable of establishing that that mechanism had not entailed any actual restriction of its export activities.

104 It must be pointed out that while it is not for the Council or the Commission to prove that the CCCMC's export contract stamping mechanism actually results in significant State interference in the decisions concerning export prices, those institutions are, however, required, under the principle of sound administration, to examine with all due care and impartiality the evidence provided by the producer and to take due account of all relevant evidence when assessing the effects of that mechanism on that producer's decisions concerning export prices.

105 In the present case, the General Court did not hold that it was for those institutions to prove that the mechanism did indeed restrict Xinanchem's capacity to set export prices, but only that they failed to carry out an assessment of Xinanchem's evidence in accordance with their obligation set out in paragraph 104 above.

106 In that context, it must be observed that, by reason of the complexity of the economic, political and legal situations which they have to examine in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade (Case C−351/04 *Ikea Wholesale* [2007] ECR I−7723, paragraph 40; Case C−398/05 *AGST Draht- und Biegetechnik* [2008] ECR I−1057, paragraph 33; Case C−373/08 *Hoesch Metals and Alloys* [2010] ECR I−951, paragraph 61; and Joined Cases C−191/09 P and C−200/09 P *Council and Commission* v *Interpipe Niko Tube and Interpipe NTRP* [2012] ECR I−0000, paragraph 63), the institutions in question enjoyed, during such an assessment, a broad discretion and could have taken into account any evidence at their disposal in order to assess whether the evidence submitted by Xinanchem was convincing and whether it was sufficient

to dispel the concern that that company was not free to set its export prices because of that mechanism. In addition, as the General Court indeed noted in paragraph 36 of the judgment under appeal, if any doubt remains as regards the question whether the criteria set out in Article 2(7)(c) of the basic regulation are satisfied, MET cannot be granted.

107 However, that wide discretion does not relieve the institutions of the obligation to have due regard to the relevant evidence submitted by the producer. In that connection, it must be noted that the Court has already held that, where those institutions have a wide discretion, observance of the guarantees conferred by the European Union legal order in administrative procedures is of even more fundamental importance (see Case C−269/90 *Technische Universität München* [1991] ECR I−5469, paragraph 14, and Case C−405/07 P *Netherlands* v *Commission* [2008] ECR I−8301, paragraph 56).

108 It follows from all the foregoing considerations that the second ground of appeal must be rejected.

The third ground of appeal, relating to the validity of the overall conclusion of the Council and the Commission

109 By its third ground of appeal, the Council calls in question paragraph 160 of the judgment under appeal, by which the General Court held that the grounds for refusing MET, set out in recitals 13, 14 and 17 of the contested regulation, cannot, even taken together, justify such a refusal, given that the errors established in respect of each of those grounds taken separately also vitiate the institutions' overall conclusion in that regard. Without advancing specific arguments, the Council merely submits that the General Court's finding suffers from the same legal error as its findings contested in the first and second grounds of appeal.

110 Since it has been found that neither of those two grounds is well founded and the Council does not advance any specific argument in support of its third ground of appeal, that ground must also be rejected.

111 The appeal must, therefore, be dismissed in its entirety.

Costs

112 The first paragraph of Article 122 of the Rules of Procedure states that where the appeal is unfounded the Court shall make a decision as to costs. Under Article 69(2) of the Rules of Procedure, which applies to appeal proceedings pursuant to Article 118 of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since Xinanchem and Audace have applied for costs against the Council and the latter has been unsuccessful in its pleas, it must be ordered to pay the costs, including those relating to the proceedings for interim relief.

113 In accordance with the first subparagraph of Article 69(4) of the Rules of Procedure, the Commission, intervener at first instance, shall bear its own costs.

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

1. **Dismisses the appeal;**

2. **Orders the Council of the European Union to pay the costs, including those relating to the proceedings for interim relief;**

3. **Orders the European Commission to bear its own costs.**

[Signatures]

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* Language of the case: English.