Reports of Cases

OPINION OF ADVOCATE GENERAL
MENGOZZI
delivered on 17 July 2014[1]

Case C-393/13 P

Council of the European Union
v

Alumina d.o.o.

(Appeal — Dumping — Implementing Regulation (EU) No 464/2011 — Importation of zeolite A powder originating in Bosnia and Herzegovina — Regulation (EC) No 1225/2009 — Article 2 — Normal value — Ordinary course of trade)

1. By its appeal, the Council of the European Union requests the Court of Justice to annul the judgment of the General Court of the European Union in *Alumina* v *Council*[2] ('the judgment under appeal'), by which the General Court annulled Council Implementing Regulation (EU) No 464/2011 of 11 May 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of zeolite A powder originating in Bosnia and Herzegovina[3] ('the contested regulation'), in so far as it concerned Alumina d.o.o. ('Alumina'), the applicant at first instance.

2. The Council's appeal relates to the interpretation given by the General Court to the concept of 'sales carried out in the ordinary course of trade', as used in Article 2 of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community[4] ('the basic regulation').

3. The question of law raised by this appeal is, in essence, the following: do sales the price of which includes a premium intended to cover the risk of non-payment or late payment by the purchaser of the products concerned due to its financial situation constitute sales carried out in the 'ordinary course of trade', with the result that they must be taken into account in the calculation of the normal value which is to be compared with the export price in order to determine whether dumping has occurred? The Council takes the view that, by answering this question in the negative, the General Court committed an error of law in the judgment under appeal in its interpretation of the concept of 'ordinary course of trade'. The Council is therefore requesting the Court to annul that judgment.

1 — Original language: French.
2 — T-304/11, EU:T:2013:224.
3 — OJ 2011 L 125, p. 1.
4 — OJ 2009 L 343, p. 51.

I – **Legal context**

4. Article 2(1) to (4) and 2(6) of the basic regulation provides:

‘1. The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.

However, where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers.

Prices between parties which appear to be associated or to have a compensatory arrangement with each other may not be considered to be in the ordinary course of trade and may not be used to establish normal value unless it is determined that they are unaffected by the relationship.

…

2. Sales of the like product intended for domestic consumption shall normally be used to determine normal value if such sales volume constitutes 5% or more of the sales volume of the product under consideration to the Community. However, a lower volume of sales may be used when, for example, the prices charged are considered representative for the market concerned.

3. When there are no or insufficient sales of the like product in the ordinary course of trade, or where because of the particular market situation such sales do not permit a proper comparison, the normal value of the like product shall be calculated on the basis of the cost of production in the country of origin plus a reasonable amount for selling, general and administrative costs and for profits, or on the basis of the export prices, in the ordinary course of trade, to an appropriate third country, provided that those prices are representative.

…

4. Sales of the like product in the domestic market of the exporting country, or export sales to a third country, at prices below unit production costs (fixed and variable) plus selling, general and administrative costs may be treated as not being in the ordinary course of trade by reason of price, and may be disregarded in determining normal value, only if it is determined that such sales are made within an extended period in substantial quantities, and are at prices which do not provide for the recovery of all costs within a reasonable period of time.

…

6. The amounts for selling, for general and administrative costs and for profits shall be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product, by the exporter or producer under investigation. When such amounts cannot be determined on this basis, the amounts may be determined on the basis of:

(a) the weighted average of the actual amounts determined for other exporters or producers subject to investigation in respect of production and sales of the like product in the domestic market of the country of origin;

(b) the actual amounts applicable to production and sales, in the ordinary course of trade, of the same general category of products for the exporter or producer in question in the domestic market of the country of origin;

(c) any other reasonable method, provided that the amount for profit so established shall not exceed the profit normally realised by other exporters or producers on sales of products of the same general category in the domestic market of the country of origin.'

II – **Background to the dispute**

5. On 17 February 2010, following a complaint lodged on 4 January 2010, the European Commission published a notice of initiation of an anti-dumping proceeding concerning imports of zeolite A powder originating in Bosnia and Herzegovina,[5] a product used as an additive for the production of dry detergents and water softeners.

6. On 15 November 2010, the Commission adopted Regulation (EU) No 1036/2010 imposing a provisional anti-dumping duty on imports of zeolite A powder originating in Bosnia and Herzegovina[6] ('the provisional regulation'), by which the Commission imposed provisional anti-dumping duties at the rate of 28.1% on imports of that product originating in Bosnia and Herzegovina.

7. It follows from that regulation, first, that the investigation period covered the period from 1 January 2009 to 31 December 2009 and, secondly, that the Birac group, to which Alumina belongs, was the sole exporting producer of the product concerned in Bosnia and Herzegovina during that period.[7]

8. It also follows from the provisional regulation that, in calculating the normal value, the Commission had recourse to the method described in Article 2(3) of the basic regulation, since Alumina's sales on the domestic market were not representative for the purposes of Article 2(2) of that regulation. In order to construct the normal value in accordance with that method, the Commission primarily used the weighted average profit made by the Birac group to which Alumina belongs on domestic sales of the like product, in the ordinary course of trade, during the investigation period.[8]

9. By letters of 1 December 2010 and 19 March 2011, Alumina submitted, inter alia, that the Commission's construction of the normal value infringed Article 2(3) and (6) of the basic regulation inasmuch as the Commission had used for that purpose the profit margin on sales to the Birac group's sole domestic client, which were associated with a higher risk of non-payment or late payment and, for that reason, included a risk premium of 25% on top of the price. Consequently, according to Alumina, those transactions were not transactions conducted in the ordinary course of trade for the purposes of the basic regulation and therefore could not be taken into consideration for the purpose of constructing the normal value.

10. Under the contested regulation, the Commission imposed a definitive anti-dumping duty of 28.1% on zeolite A powder originating in Bosnia and Herzegovina, applicable to the net, free-at-European-Union-frontier price, before duty.

11. It also emerges from that regulation that the Council rejected the argument put forward by Alumina that domestic sales should not be regarded as having been carried out in the ordinary course of trade, stating that 'the investigation [had] established that the data and evidence provided by [the Birac group] constituted a reliable basis for determining the normal value'.[9]

5 — OJ 2010 C 40, p. 5.

6 — OJ 2010 L 298, p. 27.

7 — See recitals 3, 10 and 11 in the preamble to the provisional regulation.

8 — See recitals 21 to 26 in the preamble to the provisional regulation.

9 — See recital 20 in the preamble to the contested regulation.

III – **The judgment under appeal**

12. By application lodged at the Registry of the General Court on 16 June 2011, Alumina brought an action for annulment of the contested regulation, in support of which it raised two pleas in law, alleging, respectively, infringement of Article 2(3) and (6) and infringement of Article 2(6) of the basic regulation.

13. In the judgment under appeal, the General Court found it appropriate to examine the second plea first, in relation to the alleged misapplication of the concept of 'sales carried out in the ordinary course of trade'. In essence, the General Court thus began by rejecting the first part of the second plea in law, under which Alumina maintained that sales which were non-representative under Article 2(2) of the basic regulation could not have been regarded as having been made in the ordinary course of trade. The General Court then analysed the second part of the second plea in law. In that part, Alumina contended that the Council had erred in treating its sales of the product concerned to its sole domestic client as having been carried out in the ordinary course of trade, when the price of those sales was increased by 25% by reason of a risk premium for late payment or non-payment.

14. In this regard, the General Court first pointed out, at paragraphs 26 to 30 of the judgment under appeal, that construction of normal value under Article 2(3) and (6) of the basic regulation is intended to establish a normal value which matches as closely as possible the selling price that a product would have if it were sold in the country of origin or the exporting country in the ordinary course of trade. The General Court then went on to set out the case-law confirming that the concept of the ordinary course of trade, which the General Court found to be an objective concept, is designed to exclude, for the determination of normal value, situations in which sales on the domestic market are not made under normal conditions. According to the General Court, that concept may be relied upon not only by the institutions but also by the operators targeted, in circumstances which undermine the ordinary character of the relevant trade.

15. Specifically in relation to the risk premium at issue, the General Court held, at paragraphs 36 to 41 of the judgment under appeal, that such a premium does not represent part of the value of the product sold, nor is it linked to the characteristics of the product; rather, it amounts to compensation for the risk which the supplier takes by selling products to a particular client and owes its existence and its size to the client's identity. Therefore, according to the General Court, the effect of taking such a premium into account in the construction of normal value is that of inserting into the calculation a factor which does not go to establishing the price at which the product would be sold in the country of origin but which relates exclusively to the financial capacity of the particular domestic buyer. The General Court stated that taking into account such a risk premium therefore artificially boosts the calculation of normal value, affecting the validity of that calculation and, consequently, affecting the validity of the assessment as to whether dumping had occurred.

16. On the basis of those considerations, the General Court upheld the action and annulled the contested regulation in so far as it concerns Alumina.

IV – **Procedure before the Court of Justice and forms of order sought by the parties**

17. By a document lodged at the Registry of the Court of Justice on 11 July 2013, the Council brought an appeal against the judgment under appeal.

18. By its appeal, the Council claims that the Court should:

— set aside the judgment under appeal;

— dismiss the action; and

— order Alumina to pay the costs relating to the appeal and to the proceedings before the General Court.

19. Alumina claims that the Court should:

— dismiss the Council's appeal;

— in the alternative, rule on the action at first instance and annul the contested regulation; and

— order the Council to pay the costs.

V – **Analysis**

20. In support of its appeal, which relates exclusively to paragraphs 36 to 41 of the judgment under appeal, the Council is relying on a single ground of appeal, alleging a misinterpretation of the concept of 'sales carried out in the ordinary course of trade'. The Council maintains, first, that the General Court erred in law in the interpretation of that concept, in so far as it held that sales are not carried out in the ordinary course of trade, and therefore must not be taken into account in the calculation of normal value, if their price includes a premium, such as the one in this case, intended to cover the risk of late payment or non-payment on the part of the buyer. The Council maintains, secondly, that, in adopting such an interpretation, the General Court infringed the principle of legal certainty. Thirdly, the Council alleges that the General Court failed to comply with its duty to state reasons.

21. Before analysing the substance of the arguments raised by the Council in its single ground of appeal, it is necessary to examine the plea raised by Alumina that the appeal is inadmissible.

A – *Admissibility of the appeal*

22. Alumina claims that the single ground of appeal relied on by the Council relates to a question of fact and not the infringement of a rule of law. That single ground, it argues, is thus inadmissible before the Court of Justice and the appeal must for that reason be dismissed as being inadmissible in its entirety. Alumina submits that, in its own documentation lodged before the General Court, the Council described the question as to whether domestic sales made by Alumina to its sole domestic client had been carried in the ordinary course of trade as being a question of fact. The Council disputes the plea of inadmissibility and considers its appeal to be admissible.

23. In this connection, it must be noted that it follows 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 establish 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 which are 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 which it has drawn from them.[10]

10 — See judgment in *Council* v *Zhejiang Xinan Chemical Industrial Group*, C-337/09 P, EU:C:2012:471, paragraph 55 and the case-law cited.

24. Even though the question of actually determining whether certain sales were, or were not, carried out in the ordinary course of trade is effectively a question of fact which is not amenable to review by the Court of Justice, it must nevertheless be noted that, in its single ground of appeal, the Council is criticising the General Court for an error of law in its interpretation of the concept of 'sales carried out in the ordinary course of trade', as used in Article 2 of the basic regulation, in holding that sales can take place in the ordinary course of trade even where the price includes a premium intended to cover the risk of non-payment or late payment.

25. The single ground of appeal raised by the Council does not, therefore, relate to findings of fact or to the analysis of the evidence carried out by the General Court, but to the interpretation of a legal concept and the legal consequences of applying that concept to the facts as established.

26. In my opinion, it follows that the single ground of appeal raised by the Council must be held to be admissible.

B – *Substance*

1. The arguments of the parties

27. The Council claims that the General Court committed an error of law in starting from the principle that sales are not carried out in the ordinary course of trade if the price includes an element, as in this case the risk premium for non-payment, which is not linked to the value of the product. This interpretation of the concept of 'sales carried out in the ordinary course of trade' is, it argues, not substantiated either by the basic regulation or by the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994[11] ('the anti-dumping agreement'). Nor, it contends, does it have any basis in the case-law of the Court of Justice.

28. The Council considers the General Court's choice of criterion, namely the 'price reflecting the value of the product', to be inappropriate for determining whether a sale has been carried out in the ordinary course of trade. Use of such a criterion would oblige the institutions systematically to 'guess' the basis of payment (and of the application) of the prices stated and to determine the actual value of the product. Such a practice would not only be unworkable and contrary to the principle of legal certainty, but would bear no relation to the concept of the ordinary course of trade, which presupposes that it is possible to verify whether the sales concerned took place under conditions and in compliance with practices which, over a reasonable length of time, can be regarded as normal for the domestic sales in question.

29. The General Court's interpretation also carries, in the Council's view, a serious risk of abuse. In order for domestic sales at a high price to be disregarded in dumping calculations, exporters would merely have to include in their domestic sales contracts a clause stating that the price includes a premium linked to some artificial element deemed to have no bearing on the value of the product and then to claim that those sales did not take place in the ordinary course of business and must for that reason be excluded from the calculation of normal value.

11 — OJ 1994 L 336, p. 103. Agreement included in Annex 1A to the Agreement establishing the World Trade Organisation (WTO), signed at Marrakech on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

30. In addition, the reference to Article 2(10)(k) of the basic regulation made by the General Court at paragraph 38 of the judgment under appeal is, the Council submits, meaningless in that the adjustments there referred to are intended to eliminate certain differences between the normal value and the export price and are to be applied only once normal value has been determined, and not in order to determine that value.

31. Finally, the Council submits that the General Court did not provide sufficient grounds for its findings and thus failed to comply with its duty to state reasons.

32. Alumina, by contrast, submits that the General Court did not commit any error in its interpretation of the concept of sales carried out in the ordinary course of trade and that it correctly applied the criteria developed by the Court of Justice in its case-law. The General Court, it argues, therefore acted correctly in holding that domestic sales featuring a risk premium cannot be regarded as having been made in the ordinary course of business since they do not result from the normal behaviour of purchasers or from the normal setting of prices.

33. The argument that there is a risk of abuse is, Alumina submits, misleading. In fact, the Commission itself acknowledged that sales made by Alumina to its sole domestic client were subject to a risk premium of 25% expressly intended to cover the risk of non-payment, with the result that the Council cannot claim that this premium is artificial in nature. In addition, there is no risk of abuse given that the General Court expressly limited its interpretation of the concept of sales carried out in the ordinary course of trade to the existence of a risk premium such as the one at issue.

34. Finally, Alumina submits, first, that the General Court's interpretation of the concept of sales carried out in the ordinary course of trade is in line with the case-law and does not infringe the principle of legal certainty and, secondly, that the General Court provided sufficient grounds for its findings.

2. Assessment

35. The Council's appeal essentially concerns the interpretation given by the General Court in the judgment under appeal to the concept of sales carried out in the 'ordinary course of trade' which, the Council argues, is vitiated by an error of law.

36. In this regard, it should first of all be pointed out that, under Article 1(2) of the basic regulation, in order to establish whether a product is being dumped, its export price must be compared with the price used in the ordinary course of trade for the like product as established for the exporting country.

37. The concept of the ordinary course of trade is therefore intrinsic to the concept of dumping. More specifically, it is inherent to determining the normal value of the like product which must be compared with the export price in order to determine whether dumping has occurred. The concept of the ordinary course of trade is in fact found throughout Section A of Article 2 of the basic regulation, which contains provisions for determining the normal value.[12] Sales which are not carried out in the ordinary course of trade must be excluded from the calculation of normal value.[13]

12 — More particularly, this concept can be found in the first subparagraph of Article 2(1) of the basic regulation, which states that the normal value is normally to be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country, and also in Article 2(3) and Article 2(6) of that regulation, which provide for the construction of normal value, which must be based on actual data pertaining to production and sales, in the ordinary course of trade, of the like product by the exporter or producer under investigation.

13 — See, to that effect, paragraph 139 of the report of the Appellate Body of the WTO dated 24 July 2001 in dispute DS 184 'United States — Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan'.

38. Even though it is a fundamental concept for determining the existence of dumping, neither the anti-dumping agreement nor the basic regulation contains a definition of the concept of the ordinary course of trade. The basic regulation does, however, provide certain indications in this regard in so far as it explicitly mentions two types of sale that, subject to certain conditions, cannot constitute sales made in the ordinary course of trade and the price of which may therefore be excluded from the calculation of normal value.

39. The first type is represented by sales between parties which are associated or which have entered into a compensatory arrangement with each other. The third sentence of Article 2(1) of the basic regulation states that such prices may not be considered to be in the ordinary course of trade unless it is determined that they are unaffected by the relationship between the parties.[14] It follows that the prices of such sales may be used to determine normal value only if it is shown that the association or contractual relationship between the seller and the buyer had no effect on those prices.

40. The second type of sale is where a product is sold below unit production costs. Under Article 2(4) of the basic regulation,[15] those sales may be treated as not being in the ordinary course of trade if they are made within an extended period in substantial quantities and at prices which do not provide for the recovery of all costs within a reasonable time.

41. These two types of sale are obviously not the only cases in which sales may not be carried out in the ordinary course of trade. In their practice, the institutions have held in various other situations that sales have not been made in the ordinary course of trade.[16]

42. The Court of Justice has itself already had occasion to consider the concept of the ordinary course of trade. In *Goldstar* v *Council*[17] and *Ajinomoto and NutraSweet* v *Council and Commission*,[18] the Court indicated that the concept of the ordinary course of trade relates to the nature of the sales themselves and is intended to exclude from determination of the normal value situations in which sales on the domestic market are not made under conditions corresponding to the ordinary course of trade, in particular where a product is sold at a price below production costs or where transactions take place between parties which are associated or have a compensatory arrangement with each other.

43. As can also be seen in the two situations mentioned above, which are mentioned in the basic regulation, that case-law is founded on the inherent purpose of the concept of the ordinary course of trade, which is to ensure that normal value corresponds as closely as possible to the normal price of the like product on the domestic market of the exporter. Thus, where a sale has been concluded on terms and conditions that are incompatible with commercial practice for sales of the like product on that market at the relevant time for determining whether dumping has occurred, that sale will not constitute an appropriate basis for determining the normal value of the like product on that market and must therefore be disregarded.[19]

14 — In relation to prices operated between parties having compensatory arrangements with each other, see *Petrotub and Republica*, C-76/00 P, EU:C:2003:4, in particular paragraph 85.

15 — This provision corresponds to Article 2.2.1 of the anti-dumping agreement.

16 — See, by way of example, recital 13 in the preamble to Commission Regulation (EEC) No 2818/91 of 23 September 1991 imposing a provisional anti-dumping duty on imports of cotton yarn originating in Brazil, Egypt and Turkey and terminating the anti-dumping proceeding in respect of cotton yarn originating in India and Thailand (OJ 1991 L 271, p. 17) or recital 11 in the preamble to Commission Regulation (EC) No 837/2000 of 19 April 2000 imposing a provisional anti-dumping duty on imports of certain cathode-ray colour-television picture tubes originating in India, Malaysia, the People's Republic of China and the Republic of Korea (OJ 2000 L 102, p. 15).

17 — C-105/90, EU:C:1992:69, paragraph 13.

18 — C-76/98 P and C-77/98 P, EU:C:2001:234, paragraph 39.

19 — See also, to that effect, paragraph 140 of the report of the Appellate Body of the WTO dated 24 July 2001 cited in footnote 13 to this Opinion.

44. It follows from all of these considerations that any assessment designed to determine whether or not sales have been carried out in the ordinary course of trade must be made by the institutions on a case-by-case basis and in the light of the inherent purpose of the concept of the ordinary course of trade referred to in the previous point. In that assessment, the institutions must take into account all the relevant factors and all the specific circumstances relating to the sales in question. [20]

45. With that in mind, it should be noted that price is only one of the elements, albeit an essential one, of the terms and conditions of a sale. Thus, in order to determine whether a sale is compatible with the ordinary course of trade, its price must be evaluated in the light of the other terms and conditions of the transaction. [21] Accordingly, the price of a sale may be taken into consideration when determining the normal value of the like product only after an analysis has been carried out of all the relevant factors and, in particular, the terms and conditions of the sale in question.

46. In that regard, it should be borne in mind that the Court has already confirmed that, when assessing the ordinary nature of sales, the institutions must provide grounds which cannot be limited to peremptory statements amounting to no more than references to the legislation. [22]

47. It should also be noted in relation to the concept of sales carried out in the ordinary course of trade that, as the General Court pointed out — in my view, rightly — at paragraph 29 of the judgment under appeal, that concept is objective in its scope.

48. This implies, first, that the concept of sales made in the ordinary course of trade may be relied upon not only by the institutions, in order to eliminate practices liable to disguise the dumping or its magnitude, but also by the operators targeted, in circumstances which undermine the ordinary character of the relevant trade. [23]

49. Second, the consequence of the objective scope of that concept is that determination of the ordinary nature of a commercial transaction must be based on objective elements relating to that transaction. The ordinary nature of a transaction may, on the contrary, be called into question when there are factors of a subjective nature, which, whilst potentially affecting the terms and conditions of a specific transaction, none the less solely involve special characteristics particular to the parties to the transaction, or to one of them. In such situations, taking into account those subjective factors in the determination of the terms and conditions of the commercial transaction may not reflect ordinary commercial practice in the country in question. Taking into consideration such specific subjective characteristics when determining the terms of a sale is therefore, in my opinion, liable to preclude the sale from being classified as being 'in the ordinary course of trade', unless a case-by-case analysis is carried out.

50. Finally, I also consider it important to note that, in a case-by-case analysis seeking to determine whether or not sales were made in the ordinary course of trade, the institutions must enjoy a certain margin of appraisal in relation both to the question of which factors are relevant in each specific case and to the actual assessment of those factors, according to the specific facts of each case in point.

51. The existence of that margin of appraisal on the part of the institutions is, in my view, confirmed by the terminology used by the basic regulation itself in relation to the two types of transaction referred to in points 39 and 40 above which, under certain conditions, cannot fall within the ordinary course of trade, namely sales between associated partners or between parties which have entered into a

20 — This case-by-case approach is also followed by the United States Court of International Trade. See, in that regard, *CEMEX SA* v *United States*, 19 cit 587 (1995); *NTN Bearing Corp. of America* v *United States*, 23 cit 486 (1999), and *Bergerac NC* v *United States*, 102 F. supp. 2 497 (2000).

21 — See also, to that effect, paragraph 142 of the report of the Appellate Body of the WTO dated 24 July 2001 and cited in footnote 13 to this Opinion.

22 — See *Petrotub and Republica* (EU:C:2003:4, paragraph 87).

23 — See paragraphs 29 and 30 of the judgment under appeal.

compensatory arrangement and sales that are made below cost. In fact, the use of the verb 'may' in the relevant provisions of the basic regulation points towards the existence of a certain margin of appraisal on the part of the competent institutions in relation to the actual classification of those sales as forming part of the ordinary course of trade.[24] I consider that, if the institutions have such a margin of appreciation when assessing the ordinary nature of sales included in the classification of sales expressly provided for in the basic regulation, then they must *a fortiori* also have the same margin of appraisal in order to assess the nature of sales that are not explicitly identified in that regulation.

52. In my view, it is in the light of these considerations that the objections raised by the Council to the judgment under appeal should be analysed.

53. Turning to the Council's claim that the General Court committed an error of law in starting from the principle that sales are carried out in the ordinary course of trade only if the price reflects the value of the product, in my opinion this claim is based on a misreading of the judgment under appeal.

54. At paragraphs 36 to 39 of the judgment under appeal, the General Court, basing itself on the factors considered at paragraphs 27 to 30 of that judgment, limited itself to holding that the effect of taking a premium such as the one in this case into account in the construction of normal value was that of inserting into the calculation a factor which does not go to establishing the price at which the product would be sold in the country of origin under normal conditions, but which relates exclusively to the financial capacity of the particular domestic buyer. According to the General Court, the inclusion of that element in the calculation of normal value artificially boosted the result of that calculation, such that that result no longer reflected as closely as possible the sale price of a product as it would be if the product in question were sold in the country of origin in the ordinary course of trade.

55. In my view, there is no error of law in this reasoning. Indeed, it is not disputed that the premium at issue in this case did not involve an objective element with a bearing on the price, but instead related, to adopt the terms used by the General Court, 'exclusively to the financial capacity of the particular domestic buyer'.[25]

56. Even though the financial capacity of the buyer of the products in question may indeed constitute a factor capable of affecting the price of a given sale (or other conditions of the sale), that is none the less a characteristic particular to that party to the sale in question. As I considered in point 49 above, unless there is a case-by-case analysis of all the relevant factors in the light of the inherent purpose of the concept of ordinary course of trade referred to in point 43 above, the existence, within the context of a sale, of subjective factors of this type prevents the sale from being categorised as 'ordinary'.

57. Contrary to what the Council claims, it is not, in my view, apparent from the judgment under appeal that the General Court found that sales are carried out in the ordinary course of trade only if the price reflects the value of the product.

58. It is true that, at paragraph 36 of the judgment under appeal, the General Court stated that the premium in question did not represent 'part of the value of the product sold; nor [was] it linked to the characteristics of the product' and even qualified it in paragraph 38 of the same judgment as 'an element which [did] not reflect part of the value of the product sold'. However, in my opinion, it is incorrect to interpret these paragraphs of the judgment under appeal as amounting to statements of principle by the General Court that the ordinary nature of sales necessarily depends on their price reflecting the value of the product.

24 — In this regard, it should be noted that the verb 'may' is also used in Article 2.2.1 of the anti-dumping agreement, which, as I have pointed out in footnote 15 to this Opinion, corresponds to Article 2(4) of the basic regulation.

25 — Paragraph 36, last sentence, of the judgment under appeal. In this regard, I would point out that, even if this assessment were to be disputed, it would in any event be an assessment of fact beyond the power of review of the Court of Justice.

59. In the light of the views that I have expressed in points 36 to 51 above, I consider that such statements of principle would in fact be erroneous, given that the concept of the ordinary course of trade relates to the nature of the sales considered in their own right and presupposes a case-by-case analysis of various factors, of which the price is only one among others.

60. Far from constituting the assertion of a principle, the statements made by the General Court at paragraphs 36 and 38 of the judgment under appeal must, in my view, be taken to refer to the fact that, in the circumstances particular to the case, the premium in question did not reflect an objective factor affecting the determination of the price — such as the value of the product or its characteristics — but instead related to a subjective element, namely the financial capacity of the particular domestic buyer.

61. Turning more specifically to the Council's argument alleging a risk of abuse, as I emphasised in points 50 and 51 above, the institutions have a certain margin of appraisal both as to which relevant objective factors to take into account and also as to their assessment. In addition, any potential argument raised by the operators targeted by the investigation and seeking to cast doubt on the ordinary nature of one or more sales would have to be substantiated by information or documentation constituting evidence of the alleged circumstances. It is down to the institutions themselves to assess the information supplied in support of those allegations while bearing in mind that, under Article 18(1) of the basic regulation, they are authorised to disregard any information that is false or misleading. In this regard, it should be noted that, in this case, the contested regulation itself testifies to the reliability of the information supplied. [26]

62. In relation to the Council's argument that the General Court erred in its reference to Article 2(10)(k) of the basic regulation, I consider this to be irrelevant. Even if this reference were established to be incorrect, this would have no bearing on the accuracy of the interpretation of the concept of sales carried out in the ordinary course of trade used by the General Court in the judgment under appeal and therefore would not be capable, by itself, of leading to the annulment of the judgment under appeal.

63. It follows from all of these considerations that, to the extent to which it is based on an incorrect reading of the judgment under appeal, the Council's claim that there was an error of law in the interpretation of the concept of sales carried out in the ordinary course of trade must be rejected. In addition, if construed in that way, the General Court's analysis is not capable of generating any legal uncertainty, with the result that the Council's claim that the principle of legal certainty was infringed must also be rejected.

64. It also emerges from the foregoing analysis that the statement of reasons on which the judgment under appeal was based clearly and unequivocally discloses the General Court's reasoning, so that the persons concerned can be apprised of the reasons for the decision taken and the Court of Justice can exercise its power of review. [27] It follows, in my opinion, that the allegation of a breach of the duty to state reasons, which is not substantiated by any specific argument, must also be rejected.

65. In the light of the foregoing, I propose that the single ground of appeal raised by the Council be rejected and, therefore, that the appeal be dismissed in its entirety.

26 — See recital 20 in the preamble to the contested regulation and point 11 above.

27 — See, in that regard, *Areva and Others* v *Commission*, C-247/11 P and C-253/11 P, EU:C:2014:257, paragraph 54 and the case-law cited.

VI – **Costs**

66. Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to costs. Under Article 138(1) of those rules, applicable to the procedure on appeal by virtue of Article 184(1) thereof, the unsuccessful party must be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council's single ground of appeal has been unsuccessful and Alumina has applied for costs, that application should be granted.

VII – **Conclusion**

67. On the basis of the foregoing considerations, I propose that the Court should:

(1) dismiss the appeal;

(2) order the Council of the European Union to bear its own costs and to pay the costs incurred by Alumina d.o.o.