Reports of Cases

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

1 March 2023 *

(Dumping – Imports of certain woven or stitched glass fibre fabrics originating in China and Egypt – Implementing Regulation (EU) 2020/492 – Definitive anti-dumping duty – Calculation of the normal value – Article 2(5) of Regulation (EU) 2016/1036 – Manifest error of assessment – Injury – Calculation of the undercutting margin)

In Case T-301/20,

Hengshi Egypt Fiberglass Fabrics SAE, established in Ain Sokhna (Egypt),

Jushi Egypt for Fiberglass Industry SAE, established in Ain Sokhna,

represented by B. Servais and V. Crochet, lawyers,

applicants,

v

European Commission, represented by P. Němečková and G. Luengo, acting as Agents,

defendant,

supported by

Tech-Fab Europe eV, established in Frankfurt am Main (Germany), represented by L. Ruessmann and J. Beck, lawyers,

intervener,

THE GENERAL COURT (First Chamber, Extended Composition),

Composed, at the time of the deliberations, of H. Kanninen, President, M. Jaeger, N. Półtorak, O. Porchia and M. Stancu (Rapporteur), Judges,

Registrar: M. Zwozdziak-Carbonne, Administrator,

having regard to the written part of the procedure,

further to the hearing on 23 March 2022,

* Language of the case: English.

gives the following

Judgment

1 By their action based on Article 263 TFEU, the applicants, Hengshi Egypt Fiberglass Fabrics SAE ('Hengshi') and Jushi Egypt for Fiberglass Industry SAE ('Jushi'), seek the annulment of Commission Implementing Regulation (EU) 2020/492 of 1 April 2020 imposing definitive anti-dumping duties on imports of certain woven and/or stitched glass fibre fabrics originating in the People's Republic of China and Egypt (OJ 2020 L 1, p. 108), in so far as it concerns them ('the contested implementing regulation').

I. Background to the dispute

2 Hengshi and Jushi are two companies formed in accordance with the laws of the Arab Republic of Egypt. They both belong to the China National Building Material group (CNBM). The applicants' business consists in the production and export, inter alia, of certain woven or stitched glass fibre fabrics ('GFF') sold, inter alia, within the European Union.

3 During the investigation period (from 1 January 2018 to 31 December 2018), Jushi produced both GFF and glass fibre rovings ('GFR'), the main raw material used to produce GFF. Jushi used its self-produced GFR to manufacture GFF, but it also sold GFR to unrelated customers both in Egypt and abroad, as well as to Hengshi. Hengshi manufactured GFF from GFR purchased from Jushi as well as from one other related company and from one unrelated company, which are both established in China.

4 Jushi sold GFF directly to unrelated customers in Egypt and the European Union. It also exported GFF to three related customers in the European Union, namely Jushi Spain SA, Jushi France SAS and Jushi Italia Srl. Jushi also sold GFF in the European Union through a related company established outside the European Union, Jushi Group (HK) Sinosia Composite Materials Co. Ltd.

5 Hengshi did not sell GFF on the Egyptian market. It sold GFF in the European Union directly to unrelated customers and through a related company established outside the European Union, Huajin Capital Ltd.

6 Following a complaint lodged on 8 January 2019 by the intervener, Tech-Fab Europe, on behalf of producers representing more than 25% of the total EU production of GFF, pursuant to Article 5 of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21; 'the basic regulation'), the Commission initiated an anti-dumping investigation with regard to imports into the European Union of GFF originating in China and Egypt. On 21 February 2019, the Commission published a Notice of Initiation in the *Official Journal of the European Union* (OJ 2019 C 68, p. 29).

7 As is apparent from recital 52 of the contested implementing regulation, the products subject to the anti-dumping investigation were fabrics of woven or stitched continuous filament glass fibre rovings or yarns with or without other elements, excluding products which are impregnated or pre-impregnated and excluding open mesh fabrics with cells with a size of more than 1.8 mm

both in length and in width and weighing more than 35 g/m^2, originating in China and Egypt, falling at the material time under CN codes ex 7019 39 00, ex 7019 40 00, ex 7019 59 00 and ex 7019 90 00 (TARIC codes 7019390080, 7019400080, 7019590080 and 7019900080).

8 The investigation of dumping and injury covered the period from 1 January to 31 December 2018. The examination of trends relevant for the assessment of injury and causation covered the period from 1 January 2015 to the end of the investigation period.

9 On 8 April 2019, the applicants submitted their replies to the anti-dumping questionnaire and Annex I to the questionnaire from their related companies.

10 On 16 May 2019, the Commission initiated a separate anti-subsidy investigation with regard to imports into the European Union of GFF originating in China and Egypt ('the parallel anti-subsidy investigation on GFF'). On 7 June 2019, the Commission also initiated an anti-subsidy investigation on GFR ('the parallel anti-subsidy investigation on GFR').

11 The Commission carried out verification visits at the applicants' premises and the premises of their related companies. On 30 May 2019, following those visits, the applicants submitted additional comments.

12 On 19 December 2019, the Commission communicated the essential facts and considerations on the basis of which it intended to impose definitive anti-dumping measures on the imports of GFF originating in China and Egypt ('the final disclosure'). On 9 January 2020, the applicants submitted their comments on that disclosure. On 16 January 2020, a hearing concerning that disclosure was held at the Commission's premises. On the same day, the applicants submitted further comments in writing.

13 On 10 February 2020, the Commission published an additional final disclosure document ('the additional final disclosure'). That disclosure took account of particular arguments communicated by the applicants regarding the final disclosure. The applicants submitted their comments on the additional final disclosure on 13 February 2020. On 17 February 2020, a hearing concerning that disclosure was held at the Commission's premises.

14 At the applicants' request, the Hearing Officer held a further hearing on 25 February 2020.

15 On 1 April 2020, the Commission adopted the contested implementing regulation. That regulation imposes a definitive anti-dumping duty of 20% on GFF imports by the applicants into the European Union.

II. Forms of order sought

16 The applicants claim that the Court should:

– annul the contested implementing regulation in so far as it concerns them;

– order the Commission to pay the costs;

– order the intervener to bear its own costs.

17 The Commission, supported by the intervener, contends that the Court should:

– dismiss the action as unfounded;

– order the applicants to pay the costs.

III. Law

18 In support of their action the applicants rely on two pleas in law. They allege, first, that the Commission's methodology for establishing Hengshi's GFF production cost, the selling, general and administrative expenses ('SG&A expenses') and the profit to be used for the calculation of its constructed normal value infringes Article 2(5), Article 2(3), (6), (11) and (12), and Article 9(4) of the basic regulation and, secondly, the Commission's methodology to determine the applicants' undercutting and underselling margins infringes Article 3(1), (2), (3) and (6), and Article 9(4) of that regulation.

First plea, alleging infringement of Article 2(5) and Article 2(3), (6), (11) and (12) as well as Article 9(4) of the basic regulation

19 This plea is divided into five parts.

The first part of the first plea, alleging infringement of the first subparagraph of Article 2(5) of the basic regulation

20 The applicants claim, in essence, that the reasoning followed by the Commission in not taking account of the cost of GFR in Hengshi's records infringes the first subparagraph of Article 2(5) of the basic regulation. In their view, that provision, as regards the second condition that it sets out, does not provide for an arm's length test and does not allow the Commission to assess the reasonableness of the GFR costs, in particular, associated with the production and sale of the product under consideration, namely GFF, reported in Hengshi's records.

21 That interpretation is confirmed, first, by the interpretation given by the Dispute Settlement Body of the World Trade Organisation (WTO) of Article 2.2.1.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT) (OJ 1994 L 336, p. 103; 'the 1994 Anti-Dumping Agreement'), secondly, by the principle of the restrictive interpretation of exceptions under EU law and, thirdly, by the context in which Article 2(5) of the basic regulation was adopted and the objectives pursued by that regulation.

22 The Commission, supported by the intervener, disputes those arguments.

23 It should be recalled that, where the European Union intended to implement a particular obligation assumed in the context of the WTO, or where the EU measure refers expressly to precise provisions of the WTO agreements, it is for the Courts of the European Union to review the legality of the EU measure in question in the light of the WTO rules (judgment of 14 July 2021, *Interpipe Niko Tube and Interpipe Nizhnedneprovsky Tube Rolling Plant* v *Commission*, T-716/19, EU:T:2021:457, paragraph 95).

24 The European Union, by means of Article 2(5) of the basic regulation, intended to implement the particular obligations laid down by Article 2.2.1.1 of the 1994 Anti-Dumping Agreement (see, to that effect, judgment of 7 February 2013, *Acron* v *Council*, T-118/10, not published, EU:T:2013:67, paragraph 66).

25 It follows that the provisions of the basic regulation, inasmuch as they correspond to the provisions of the 1994 Anti-Dumping Agreement, must be interpreted, as far as possible, in the light of the corresponding provisions of that agreement, as interpreted by the WTO Dispute Settlement Body (see judgment of 14 July 2021, *Interpipe Niko Tube LLC and Interpipe Nizhnedneprovsky Tube Rolling Plant* v *Commission*, T-716/19, EU:T:2021:457, paragraph 98 and the case-law cited).

26 The first subparagraph of Article 2(5) of the basic regulation is worded as follows:

'Costs shall normally be calculated on the basis of records kept by the party under investigation, provided that such records are in accordance with the generally accepted accounting principles of the country concerned and that it is shown that the records reasonably reflect the costs associated with the production and sale of the product under consideration.'

27 It follows from the wording of that provision that the records kept by the party under investigation are the prime source of information in order to establish the costs of production of the product under consideration and that the use of the data included in those records constitutes the rule, while the adaptation or replacement of that data on another reasonable basis is the exception. Since a derogation from or exception to a general rule must be interpreted narrowly, it must be considered that the exception arising from Article 2(5) of the basic regulation must be interpreted narrowly (see judgment of 3 December 2019, *Yieh United Steel* v *Commission*, T-607/15, EU:T:2019:831, paragraph 66 and the case-law cited).

28 As regards the burden of establishing the existence of factors justifying the application of the first subparagraph of Article 2(5) of the basic regulation, where the institutions consider that they must disregard the costs of production contained in the records of the party under investigation and replace them with another price deemed reasonable, the institutions must rely on direct evidence, or at least on circumstantial evidence pointing to the existence of the factor for which the adjustment was made (see judgment of 3 December 2019, *Yieh United Steel* v *Commission*, T-607/15, EU:T:2019:831, paragraph 67 and the case-law cited).

29 Furthermore, it should also be noted that, in the sphere of measures to protect trade, the institutions enjoy a wide discretion by reason of the complexity of the economic, political and legal situations which they have to examine. Consequently, review by the EU Courts of assessments made by the institutions must be limited to establishing whether the relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated and whether there has been a manifest error of assessment of those facts or a misuse of power. That limited judicial review covers, in particular, the choice between the different methods of calculating the dumping margin and the assessment of the normal value of a product (see judgment of 3 December 2019, *Yieh United Steel* v *Commission*, T-607/15, EU:T:2019:831, paragraph 68 and the case-law cited).

30 It is in the light of those considerations that this part of the first plea in law must be examined.

31 First, it should be noted that the first subparagraph of Article 2(5) of the basic regulation does not preclude the Commission from disregarding the costs reported in the records of the party under investigation where the price of the raw material used for the manufacture of the product under consideration is not at arm's length.

32 In that regard, as the parties note, however, the Dispute Settlement Body of the WTO considered, in the interpretation of Article 2.2.1.1 of the 1994 Anti-Dumping Agreement, that it could be stated that records kept in accordance with generally accepted accounting principles do not take reasonable account of the costs associated with the production and sale of the product under consideration where, for example, transactions involving some inputs associated with the production and sale of the product under consideration are not at arm's length (see, to that effect, report of the WTO Appellate Body in the case 'European Union – Anti-dumping measures on biodiesel from Argentina' (WT/DS 473/AB/R), adopted on 26 October 2016, paragraph 6.33).

33 However, as noted in paragraph 28 above, when the Commission considers that it must disregard the production costs contained in the records of the party under investigation and replace them with another price deemed reasonable, the Commission is required to rely on direct evidence, or at least on circumstantial evidence pointing to the existence of the factor for which the adjustment was made.

34 In that regard, it must be noted that the Commission observed, in recital 312 of the contested implementing regulation, that the prices at which Hengshi purchased GFR from Jushi were consistently and substantially below the prices at which Jushi sold the same product to independent customers operating on the Egyptian market. Given the significant difference between those prices, the Commission rightly concluded that the prices paid by Hengshi to Jushi could not be considered at arm's length. It is true that those prices were profitable for Jushi, but they did not reflect market prices in Egypt. As is apparent from the file lodged before the Court, the costs stated by Hengshi for GFR were significantly lower, namely approximately [*confidential*]%[1] than those applied by Jushi to unrelated customers in Egypt, which the applicants do not dispute.

35 In order to show that such a difference in prices was not sufficient for the Commission to consider that the GFR prices entered in Hengshi's records were not at arm's length and that they should therefore be disregarded, the applicants claimed that, since Jushi had sold GFR to Hengshi with a profit of [*confidential*]%, those documents suitably and sufficiently reflect the GFR cost. In addition, the Commission accepted already, inter alia in Commission Implementing Regulation (EU) No 360/2014 of 9 April 2014 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in the People's Republic of China and Russia, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 1225/2009 (OJ 2014 L 107, p. 13), that transactions between related parties may be made without profits accruing.

36 However, those arguments cannot succeed.

37 As regards, in the first place, the profit margin that Jushi achieved on its sales of GFR to Hengshi, it should be noted that, as the Commission observes, making a profit does not lead to an automatic conclusion that a transaction was made at arm's length. Moreover, it must be stated that that profit margin was significantly lower than that achieved with unrelated customers.

[1] Confidential data omitted.

38 As for, in the second place, the reference to Implementing Regulation No 360/2014, it should be noted that the lawfulness of a regulation imposing anti-dumping duties must be assessed in the light of legal rules and, in particular, the provisions of the basic regulation, not on the basis of the Commission's previous practice in taking decisions (see, to that effect, judgment of 18 October 2016, *Crown Equipment (Suzhou) and Crown Gabelstapler* v *Council*, T-351/13, not published, EU:T:2016:616, paragraph 107).

39 Secondly, as regards the applicants' argument that the second condition set out in the first subparagraph of Article 2(5) of the basic regulation is not concerned with the reasonableness of the costs, but rather the 'reliability' of the records of the party under investigation, it should be noted that such an interpretation would be tantamount in fact to precluding recourse to the constructed normal value in particular where the costs of production are affected by a particular market situation (see, to that effect, judgment of 7 February 2013, *EuroChem MCC* v *Council*, T-84/07, EU:T:2013:64, paragraph 59).

40 Thirdly, in respect of the applicants' argument that their interpretation of the first subparagraph of Article 2(5) of the basic regulation is confirmed by the context in which that provision was adopted and by the objectives pursued by that regulation, it should be noted that, while it is true, as they point out, that Article 2(5) does not contain any express provision concerning the reasonableness of the costs incurred between related parties, unlike those in the third subparagraph of Article 2(1) and in Article 4(1)(a) and (2) of the basic regulation, that circumstance is not sufficient to demonstrate that it was the intention of the EU legislature to exclude that circumstance when Article 2(5) of the basic regulation is applied.

41 In that regard, it should be noted, first of all, that, as was pointed out in paragraphs 31 and 32 above, the first subparagraph of Article 2(5) of the basic regulation does not prevent the Commission from disregarding the costs entered in the records of the party under investigation where the prices of the raw material used for the manufacture of the product under consideration do not appear to be at arm's length because of an intra-group relationship. Next, as the Commission rightly observes, the provisions of the third and fourth subparagraphs of Article 2(1) of the basic regulation, which make explicit reference to situations in which prices are affected because of the intra-group relationship, serve as a basis for the other provisions of Article 2 in relation to the normal value, including those provided for in Article 2(5). Lastly, Article 4(1)(a) and (2) of the basic regulation is not relevant in the context of the interpretation of the first subparagraph of Article 2(5) of that regulation in so far as it does not concern the determination of dumping but rather the definition of Union industry in the determination of injury. As is apparent from recital 10 of the basic regulation, the reference to parties related to exporters was introduced by the EU legislature in order to exclude them from the term 'Union industry'.

42 In the light of the foregoing, the Commission was therefore entitled to consider, without committing an error of law or a manifest error of assessment, that, since the price of GFR in Hengshi's records was not at arm's length, that price could not be regarded as reasonably taking into account the costs associated with the production and sale of the product under consideration, and that, consequently, that price had to be adjusted (see, to that effect, judgment of 7 February 2013, *Acron* v *Council*, T-118/10, not published, EU:T:2013:67, paragraph 53).

43 The first part of the first plea must therefore be rejected.

Second part of the first plea, alleging manifest errors of assessment

44 The applicants claim, in essence, that the Commission committed manifest errors of assessment in the application of the first subparagraph of Article 2(5) of the basic regulation when, in its analysis of arm's length conditions, it compared sales prices for GFR by Jushi to Hengshi and unrelated domestic customers respectively, without taking into account all the relevant factors relating to the sales in question, such as the significant difference in the volume of sales of GFR made by Jushi with unrelated domestic customers and Hengshi as well as the payment of customs duties applicable to Jushi for sales of GFR to those unrelated domestic customers.

45 The Commission, supported by the intervener, disputes those arguments.

– *Manifest error of assessment in relation to the volume of sales*

46 From the outset, it should be borne in mind that the question whether a price is charged in the ordinary course of trade depends also on the other conditions of a transaction which are capable of affecting the prices charged, such as the volume of the transaction, the additional obligations assumed by the parties to that transaction or the delivery period. In the context of that assessment, which has to be carried out on a case-by-case basis, the institutions must take into consideration all the relevant factors and all the particular circumstances relating to the sales at issue (judgment of 1 October 2014, *Council* v *Alumina*, C-393/13 P, EU:C:2014:2245, paragraph 30).

47 However, in order to establish that the Commission has committed a manifest error in the assessment of the facts such as to justify the annulment of the contested decision, the evidence adduced by the applicant must be sufficient to render implausible the assessments of the facts in that decision (see, to that effect, judgment of 11 September 2014, *Gold East Paper and Gold Huasheng Paper* v *Council*, T-444/11, EU:T:2014:773, paragraph 62 and the case-law cited).

48 In the present case, the applicants' complaint concerning the significant difference in the volume of sales of GFR achieved by Jushi with unrelated domestic customers and with Hengshi is based essentially on, first, the argument that it is logical for the volume of sales to influence the price charged to customers and, secondly, the fact that the rebate rate applied by Jushi to Hengshi in respect of sales of GFR was influenced by the volume of the sales.

49 As regards, first, the argument that it is logical that the volume of sales affects the price charged to customers, clearly, even though the case-law cited in paragraph 46 above accepted that the volume of transactions may influence the price of a product, such an assessment must be made on a case-by-case basis, taking into account all the relevant factors and particular circumstances relating to the sales in question. Such a claim is therefore not in itself sufficient to justify, without proof that Jushi had applied rebate rates to its customers on the basis of the sales volume of GFR, that the Commission made a manifest error of assessment in analysing arm's length conditions by not taking account of Jushi's sales volume of GFR.

50 As regards, secondly, the applicants' argument concerning the rebate rate applied by Jushi to Hengshi in respect of sales of GFR, it should be noted that there is nothing in the documents before the Court to establish that the alleged rebate rate applied by Jushi to Hengshi is not specific and is not applied exclusively to sales of GFR between those two companies.

Furthermore, as the Commission points out, the applicants have not adduced any evidence to show that such a rebate rate based on the volume of sales would apply or is applied to all customers and not only to Hengshi.

51 In the light of the considerations set out in paragraphs 49 and 50 above, it must be concluded that the applicants have therefore failed to adduce sufficient evidence, in accordance with the case-law cited in paragraph 47 above, to render implausible the assessments of the facts in the contested implementing regulation, in particular in recital 320 thereof, which led to the refusal to take account of sales volumes of GFR from Jushi to Hengshi in analysing arm's length conditions.

52 Furthermore, it is also necessary to reject the plea of inadmissibility concerning the Commission's argument in the defence that the overall percentage of sales to unrelated domestic customers for all products should be taken into account in order to determine whether the prices were comparable. That argument amounts only to a background matter put forward by the Commission in its defence in the light of which the complaint of the applicants as to the sales volumes must be read. It should be borne in mind that the defence serves, in particular, to inform the Court of the factual and legal context of the case before it, which forms the backcloth to the contested decision and with which the Court, unlike the parties, is not familiar. Furthermore, the fact that a decision against which an action for annulment is brought omits to mention background matters which would subsequently be brought before the Court in the course of the presentation, by a party, of the circumstances in which the dispute before it has evolved does not, as such, attest a failure to observe the duty to state the reasons for the contested decision (see, to that effect, judgment of 8 March 2007, *France Télécom* v *Commission* (T-340/04, EU:T:2007:81, paragraph 79). It follows that the fact that that argument was not raised at the administrative stage has no effect on the present case.

53 In light of the foregoing, the present complaint must be rejected.

– *Manifest error of assessment concerning the payment of customs duties*

54 So far as concerns the payment of the customs duties of the GFR inputs, first, the applicants allege infringement of the rights of the defence, since the Commission did not disclose to them, in the final disclosure or in the additional final disclosure, its intention not to take account of the payment of those customs duties because of the lack of evidence. Secondly, they raise an infringement of the duty of due diligence, in so far as the Commission should have used on its own initiative evidence of payment of those customs duties which it had in the parallel anti-subsidy investigation on GFR or, at the very least, asked them to produce that evidence in the anti-dumping investigation.

55 As regards infringement of the rights of the defence, it must be borne in mind that respect for those rights, which is of crucial importance in anti-dumping investigations, presupposes that the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury (see judgment of 14 July 2021, *Interpipe Niko Tube and Interpipe Nizhnedneprovsky Tube Rolling Plant* v *Commission*, T-716/19, EU:T:2021:457, paragraph 209 and the case-law cited).

56 The existence of an irregularity in the respect of those rights can lead to the annulment of a regulation establishing an anti-dumping duty only to the extent that there is a possibility that, as a result of that irregularity, the administrative procedure might have resulted in a different result, thereby materially affecting the rights of defence of the party concerned. However, that party cannot be required to demonstrate that the Commission's decision would have been different, but simply that such a possibility cannot be totally ruled out, since that party would have been better able to defend itself if there had been no procedural error complained of (see judgment of 14 July 2021, *Interpipe Niko Tube and Interpipe Nizhnedneprovsky Tube Rolling Plant* v *Commission*, T-716/19, EU:T:2021:457, paragraph 210 and the case-law cited).

57 In the present case, it is apparent from the file that the applicants were placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury, in so far as they were able to submit comments on both the final disclosure and the additional final disclosure. It was in that context that the applicants expressed their disagreement as to the fact that the Commission had not taken into account the existence of customs duties which Jushi had to pay for sales of GFR to unrelated domestic customers.

58 In addition, in so far as the applicants complain of not being heard specifically regarding the intention of the Commission to not take into account the payment of the customs duties, it is sufficient to note that the right to be heard extends to all the factual and legal material which forms the basis of the decision-making act, but not to the final position which the authority intends to adopt (see judgment of 14 July 2021, *Interpipe Niko Tube and Interpipe Nizhnedneprovsky Tube Rolling Plant* v *Commission*, T-716/19, EU:T:2021:457, paragraph 211 and the case-law cited). Moreover, the Commission cannot be criticised for not hearing the applicants specifically regarding its intention not to take account of the payment of customs duties, even though such a payment had not even been made at the time when the applicants submitted their comments on the final disclosure and the additional final disclosure. As is apparent from the file, that payment was made on 27 February 2020, whereas the deadline for submitting comments on the final additional disclosure was set at 13 February 2020.

59 The Commission did not therefore infringe the applicants' rights of defence.

60 As regards the breach of the duty of due diligence, it should be borne in mind that, although it is indeed for the Commission, as the investigating authority, to establish that the product concerned has been dumped, that there has been an injury and that there is a causal link between the dumped imports and the injury, the fact remains that, in so far as no provision in the basic regulation confers on the Commission any power to compel the interested parties to participate in the investigation or to provide information, the Commission is reliant on the voluntary cooperation of those parties in supplying the necessary information (see, to that effect, judgment of 14 December 2017, *EBMA* v *Giant (China)*, C-61/16 P, EU:C:2017:968, paragraph 54 and the case-law cited).

61 The purpose of the anti-dumping investigation consists, for the EU institutions, in seeking objective evidence, by using the tools put at their disposal by the basic regulation and on the basis of the voluntary cooperation of economic operators, namely, in particular, the replies to the anti-dumping questionnaire, any on-the-spot verification visits and the observations of the interested parties on the information documents, in order to establish the existence of any

dumping after having determined the normal value of the product concerned in accordance with Article 2 of the basic regulation (judgment of 3 December 2019, *Yieh United Steel* v *Commission*, T-607/15, EU:T:2019:831, paragraph 133).

62 In that respect, it is for the EU Courts to satisfy themselves that the institutions took account of all the relevant circumstances and appraised the facts of the matter with all due care, so that normal value may be regarded as having been determined in a reasonable manner (see judgment of 10 March 2009, *Interpipe Niko Tube and Interpipe NTRP* v *Council*, T-249/06, EU:T:2009:62, paragraph 41 and the case-law cited).

63 It follows from the case-law cited in paragraphs 60 to 62 above that while it is true that the Commission must conduct the investigation diligently and take into consideration all the relevant circumstances in determining the normal value, it is reliant on the voluntary cooperation of the parties under investigation to provide it with the necessary information.

64 In the present case, it was therefore for the applicants to adduce evidence which they considered relevant for the purposes of the investigation, at the time when they argued that the Commission should have taken into consideration the fact that the sale price of GFR invoiced by Jushi to unrelated domestic customers included an amount covering the customs duties applicable to the imported inputs. However, as is apparent from the file lodged before the Court, in particular the comments submitted by the applicants regarding the final disclosure and the additional final disclosure, they have never submitted, in the anti-dumping investigation, any evidence whatsoever of paying such duties. Moreover, as has been stated in paragraph 58 above, such a payment had not even been made at the time when the applicants submitted their comments on the final disclosure and the additional final disclosure. The document showing the payment of the customs duties on which they rely was submitted to the Commission, in the context of the parallel anti-subsidy investigation on GFR, on 18 March 2020, as was, moreover, confirmed by the applicants at the hearing. Thus, the applicants cannot benefit from their own negligence by criticising the Commission for failing to take account of evidence which they had every interest in submitting and which they did not produce.

65 Moreover, the applicants cannot reasonably maintain, in the reply, that the Commission could have used on its own initiative that document submitted in the parallel anti-subsidy investigation on GFR.

66 The first subparagraph of Article 29(6) of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ 2016 L 176, p. 55) provides as follows:

‘Information received pursuant to this Regulation shall be used only for the purpose for which it was requested.’

67 It follows from that provision that the Commission cannot, on its own initiative, rely, in an anti-dumping investigation, on evidence produced in a parallel anti-subsidy investigation. Therefore, in the present case, it was for the applicants to waive the guarantee provided for by that article and to request that such evidence be admitted also in the anti-dumping investigation.

68 Furthermore, contrary to the applicants’ submission, the reference in recital 268 of the contested implementing regulation concerning the product control numbers (‘PCNs’) of the parallel anti-subsidy investigation on GFF and the use of certain responses of the applicants to the anti-dumping questionnaire for the purposes of the latter anti-subsidy investigation do not in

any way demonstrate their claim that the Commission could rely on information from a parallel anti-subsidy investigation in the anti-dumping investigation. First, as is apparent from recital 276 of the contested implementing regulation, the Commission was able to use the information relating to the PCNs of the parallel anti-subsidy investigation on GFF only because the Chinese exporting producer in question had waived the guarantee provided for in Article 19(6) of the basic regulation and in Article 29(6) of Regulation 2016/1037 and requested that correct information concerning the PCNs collected in the parallel anti-subsidy investigation on GFF be used as the best information available in the anti-dumping investigation. Secondly, it is apparent from the letter of 24 May 2019 submitted by the applicants as an annex to the reply that the use of some of their replies to the anti-dumping questionnaire for the purposes of the parallel anti-subsidy investigation on GFF had been requested on their own initiative.

69 In the light of the foregoing, the second complaint must be rejected as must, consequently, the second part of the first plea in its entirety.

The third part of the first plea, alleging infringement of the second subparagraph of Article 2(5) of the basic regulation

70 By the third part of their first plea, the applicants complain that the Commission, first, infringed the second subparagraph of Article 2(5) of the basic regulation in that, in order to adjust the cost of Hengshi's GFR, the Commission used the exception provided for in that provision and adjusted those costs on the basis of 'any other reasonable basis', instead of making an adjustment 'on the basis of the costs of other producers or exporters in the same country', in particular on the basis of the costs incurred by Jushi, which is the only other producer of GFR in Egypt, for the production of that GFR. Secondly, they complain that the Commission infringed the obligation to state reasons, in that it did not explain, in the contested implementing regulation, why it used such an exception.

71 The Commission, supported by the intervener, disputes those arguments.

72 As regards, first, the infringement of the obligation to state reasons, which should be dealt with in the first place, the Court notes, as the Commission observes, that the reasons for the Commission's decision not to use Jushi's GFR production cost to adjust the cost of Hengshi's GFR are clearly and unequivocally apparent from recital 331 of the contested implementing regulation. In that recital, the Commission explained that after assessing whether Hengshi's records reasonably reflected the costs associated with the production of GFF, it found that the transfer prices for Hengshi's purchases of GFR from Jushi were substantially deflated in relation to the market price for the same product types in Egypt, that is, they were not at arm's length. That is why the Commission adjusted Hengshi's GFR cost on the basis of the prices charged by Jushi to unrelated domestic customers in the Egyptian market.

73 Furthermore, in so far as the applicants dispute the explanations provided by the Commission in its defence concerning the fact that Jushi and Hengshi were not capable of being compared, since Jushi is a vertically integrated company, unlike Hengshi, it must be borne in mind that, according to the case-law cited in paragraph 52 above, the fact that a decision against which an action for annulment is brought omits to mention background matters which would subsequently be brought before the Court in the course of the presentation, by a party, of the circumstances in which the dispute before it has evolved does not, as such, attest a failure to observe the duty to state the reasons for the contested decision.

74 In the present case, the clarification that Jushi is a vertically integrated company, which, moreover, the applicants do not dispute, is merely a background matter which the Commission was able to put forward in the defence, without infringing its obligation to state reasons.

75 In the light of the foregoing, the applicants cannot reasonably claim that the contested implementing regulation failed to provide sufficient reasoning or that the Commission set out for the first time in the defence the reason why it decided to rely, in the present case, on the exception provided for in the second subparagraph of Article 2(5) of the basic regulation.

76 The complaint alleging infringement of the obligation to state reasons must therefore be rejected.

77 As regards, secondly, the complaint alleging infringement of the second subparagraph of Article 2(5) of the basic regulation, it should be borne in mind, at the outset, that, according to that provision, 'if costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets'.

78 It should be noted, as the applicants have done, that, having regard to the wording of that provision, those two methods must be applied in the order in which they are presented. The Commission must therefore examine, above all, whether it can adjust or determine the costs associated with the production and sale of the product under consideration on the basis of the costs of other producers or exporters. It is only where that information is not available or cannot be used that recourse must be had to the exception provided for in the second subparagraph of Article 2(5) of the basic regulation to the effect that the costs may be calculated on 'any other reasonable basis' (see, to that effect, judgment of 12 October 1999, *Acme* v *Council*, T-48/96, EU:T:1999:251, paragraph 36 and the case-law cited).

79 Furthermore, since the choice of using 'any other reasonable basis' constitutes an exception to the general rule laid down in the second subparagraph of Article 2(5) of the basic regulation, it must be interpreted restrictively. Thus, in order to disregard the costs of other producers or exporters in the same country, the Commission must rely on direct evidence, or at least on circumstantial evidence, pointing to the existence of the factor for which the adjustment was made.

80 In the present case, in order to substantiate its decision not to use Jushi's GFR production cost to adjust the cost of Hengshi's GFR and, consequently, to use another reasonable basis, the Commission explained that Jushi, whilst being the only other producer of GFF in Egypt, was, first, a company related to Hengshi and, secondly, a vertically integrated company, which was not the case with Hengshi. In the light of those factors, it therefore decided to calculate the cost of Hengshi's GFR on the basis of the price invoiced by Jushi to unrelated domestic customers.

81 In challenging the Commission's decision to use any other reasonable basis for the adjustment of the costs in question, the applicants merely claim that, since the Commission 'verified and accepted' the GFR production costs of Jushi, which was the sole producer of GFR in Egypt, the Commission was obliged to make that adjustment on the basis of those costs.

82 That claim cannot succeed however.

83 First, as is apparent from paragraph 80 above, the Commission did not 'accept' Jushi's GFR production cost. Secondly, contrary to what the applicants claim, it is not apparent from the wording of the second subparagraph of Article 2(5) of the basic regulation that the Commission is required, even where there are other producers or exporters in the same country, to make the adjustment in question unconditionally on the basis of their costs. On the contrary, it follows from that provision that, even where such information is provided, the Commission may disregard it where the Commission considers that that information cannot be used. The Commission considered that the circumstances referred to in paragraph 80 above warranted such information not being used in the present case.

84 It follows that the Commission was justified in making an adjustment to the cost of Hengshi's GFR 'on any other reasonable basis'.

85 That conclusion cannot be called into question by the applicant's other arguments.

86 As regards, in the first place, the argument that it is apparent, in essence, from the defence that other producers or exporters must themselves be 'comparable', which leads to a broad interpretation of the exception provided for in the second subparagraph of Article 2(5) of the basic regulation, it should be noted that the 'comparability' of the producers to which the Commission refers is in fact part of the reasoning according to which it was not able to take into consideration Jushi's GFR production costs, since, unlike Hengshi, Jushi is a vertically integrated company. As is apparent from paragraphs 80 and 84 above, the Commission correctly relied on that factor in order to disregard Jushi's GFR production costs and make an adjustment on 'any other reasonable basis'.

87 As regards, in the second place, the argument that, since the Commission was guided by Jushi's SG&A costs and profits on its domestic sales of GFF in order to construct the normal value for Hengshi's GFF, in accordance with Article 2(6)(a) of the basic regulation it should have done the same with Jushi's GFR production cost, it must be held, as the Commission observes, that that argument is irrelevant. The provisions in question deal with different issues. Whereas Article 2(5) of the basic regulation concerns the calculation of the costs associated with the production and sale of the product under consideration, the subject matter of Article 2(6) of that regulation is the calculation of SG&A costs and profit based on the domestic sales of the like product in the ordinary course of trade.

88 In the light of the foregoing, the complaint alleging infringement of Article 2(5) of the basic regulation must be rejected, as must the third part of the first plea in law in its entirety.

The fourth part of the first plea, alleging infringement of Article 2(3), (6), (11) and (12) of the basic regulation

89 The applicants claim, in essence, that the Commission took into account twice the profit and SG&A expenses element relating to Jushi's sales of GFR in the constructed normal value of Hengshi's GFF. They submit, inter alia, that the Commission initially increased Hengshi's GFR cost on the basis of the sale price of GFR charged by Jushi to unrelated domestic customers and subsequently added to Hengshi's revised GFF production cost Jushi's SG&A expenses and profits for its sales of GFF to those customers. Since Jushi's sales of GFF to its unrelated domestic customers include not only a profit and SG&A expenses element relating to the GFF but also a

profit and SG&A expenses element relating to GFR used in the manufacture of GFF, the Commission took account of the SG&A expenses and profit element twice in respect of Jushi's sales of GFR. In so doing, it infringed Article 2(3), (6), (11) and (12) of the basic regulation.

90 The Commission, supported by the intervener, disputes those arguments.

91 It should be noted that the applicants' line of argument is speculative and is not based on any specific evidence capable of showing that the SG&A costs and profit for GFR were double-counted when calculating the normal value of Hengshi's GFF.

92 While asserting that, in principle, a vertically integrated producer, like Jushi, records SG&A costs and a profit on sales of the final product much higher than those recorded by a producer which is not vertically integrated, due to the fact that the vertically integrated producer must also bear SG&A costs and profit which allegedly relate to the input used for the manufacture of the final product, the applicants have failed to prove specifically to what extent, in the present case, the SG&A costs and profit arising from Jushi's sale of GFF included an element of profit and SG&A costs relating to the GFR used in the manufacture of GFF.

93 In the absence of such proof, the Commission cannot reasonably be criticised for double-counting the profit element and SG&A expenses relating to Jushi's sales of GFR in the constructed normal value of Hengshi's GFF.

94 The fourth part of the first plea in law must therefore be rejected as unfounded.

The fifth part of the first plea in law, alleging infringement of Article 9(4) of the basic regulation

95 The applicants maintain that, since the method used by the Commission to construct the normal value for Hengshi's GFF was unlawful for the reasons set out in the first to fourth parts of the first plea, the definitive anti-dumping duty of 20% imposed on them exceeds the dumping margin, infringing Article 9(4) of the basic regulation.

96 The Commission and the intervener dispute that argument.

97 In that regard, it should be noted, as the Commission observes, that the analysis of the first four parts of the first plea has not demonstrated any error of law or a manifest error of assessment which the Commission made in the construction of the normal value of Hengshi's GFF. Consequently, the applicants cannot reasonably claim that the anti-dumping duty imposed by the Commission exceeds the dumping margin, infringing Article 9(4) of the basic regulation.

98 In the light of the foregoing, the fifth part of the first plea must be rejected, as must the first plea in its entirety.

The second plea, alleging infringement of Article 3(1) to (3) and (6) and Article 9(4) of the basic regulation

99 This plea is divided into four parts. The applicants claim that, first, by determining the applicants' export price, in particular Jushi's, for the purpose of calculating the price undercutting margin on the basis of Article 2(9) of the basic regulation, applied by analogy, the Commission infringed Article 3(1) of that regulation; secondly, by relying on that constructed export price for the

purpose of determining injury, the Commission made a manifest error of assessment in determining injury, infringing Article 3(2) and (3) of the basic regulation; thirdly, the manifest error of assessment committed by the Commission in determining injury vitiates the causation analysis that the Commission carried out in accordance with Article 3(6) of the basic regulation; fourthly and lastly, by selecting an export price constructed on the basis of Article 2(9) of the basic regulation, applied by analogy, for the purpose of calculating the applicants' underselling margin, the Commission made a manifest error of assessment in establishing the amount of the anti-dumping duty sufficient to eliminate the injury caused to the Union industry, infringing Article 9(4) of the basic regulation.

100 The Commission, supported by the intervener, disputes not only the merits of that plea, but also contends, as a preliminary point, that it is ineffective.

101 In that latter regard, it submits that, even if the Court were to find that the Commission erred in using, by analogy, Article 2(9) of the basic regulation for the applicants' undercutting and underselling calculations, such an error would not be capable of leading to the annulment of the contested implementing regulation. The Commission produces, in this connection, in the rejoinder, new calculations which it maintains show that, even taking into consideration the values invoiced by Jushi's related companies in the European Union without making adjustments on the basis of Article 2(9) of the basic regulation, there is only a very small variation both at the level of price undercutting ([*confidential*] instead of 31.5%) and underselling ([*confidential*] instead of 63.9%).

102 Questioned by the Court both in writing, by way of measures of organisation of procedure, and orally, at the hearing, on the Commission's new calculations produced in the rejoinder, the applicants stated that, even though those calculations have no impact on the level of the anti-dumping duties imposed by the contested implementing regulation, which are set at the level of the dumping margin, those calculations are capable of affecting the cumulative level of the anti-dumping and countervailing duties, which is capped at the level of the underselling margin.

103 According to settled case-law, the Courts of the European Union may reject as ineffective a plea or complaint where they find that that plea or complaint is not capable, in the event that it is well founded, of leading to the annulment sought (judgments of 21 September 2000, *EFMA* v *Council*, C-46/98 P, EU:C:2000:474, paragraph 38, and of 19 November 2009, *Michail* v *Commission*, T-50/08 P, EU:T:2009:457, paragraph 59).

104 In the present case, the applicants accepted, as is apparent from paragraph 102 above, that even if the Commission had used, in order to determine the undercutting margin and the underselling margin, the calculations provided in the rejoinder, which are based on Jushi's export price without the adjustments made on the basis of Article 2(9) of the basic regulation, there would be no bearing on the level of the anti-dumping duties imposed by the contested implementing regulation.

105 Furthermore, the applicants were not in a position to adduce the slightest evidence, either in the context of measures of organisation of procedure or at the hearing, in order to substantiate their argument that those new calculations could affect the cumulative level of the anti-dumping and countervailing duties.

106 It follows that, even if the applicants were justified in challenging the method used by the Commission to establish Jushi's export price in calculating the undercutting margin and the underselling margin, the use of the new calculations mentioned in paragraph 101 above would not, in any event, lead to a modification of the anti-dumping duties, as the applicants moreover concede. The alleged error cannot therefore justify the annulment of the contested implementing regulation, in so far as it concerns them.

107 Consequently, the second plea in law must be rejected as ineffective, without there being any need to analyse the merits of the four parts raised by the applicants in support of that plea.

108 In the light of the foregoing, the action must be dismissed in its entirety.

IV. Costs

109 Under Article 134(1) of the Rules of Procedure of the General Court, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to bear their own costs and to pay those incurred by the Commission, in accordance with the form of order sought by the Commission.

110 Under Article 138(3) of the Rules of Procedure, the intervener is to bear its own costs.

On those grounds,

THE GENERAL COURT (First Chamber, Extended Composition)

hereby:

1. Dismisses the action;

2. Orders Hengshi Egypt Fiberglass Fabrics SAE and Jushi Egypt for Fiberglass Industry SAE to bear their own costs and to pay those incurred by the European Commission;

3. Orders Tech-Fab Europe eV to bear its own costs.

Kanninen Jaeger Półtorak

Porchia Stancu

Delivered in open court in Luxembourg on 1 March 2023.

E. Coulon S. Papasavvas
Registrar President