Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

4 February 2021 *

(Reference for a preliminary ruling – Common commercial policy – Anti-dumping duties – Regulation (EC) No 384/96 – Article 3(9) – Threat of material injury – Factors – Article 9(4) – Regulation (EC) No 926/2009 – Imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China – Invalidity)

In Case C-324/19,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht Hamburg (Finance Court, Hamburg, Germany), made by decision of 3 April 2019, received at the Court on 19 April 2019, in the proceedings

eurocylinder systems AG

v

Hauptzollamt Hamburg-Stadt,

THE COURT (Fourth Chamber),

composed of M. Vilaras, President of the Chamber, N. Piçarra (Rapporteur), D. Šváby, S. Rodin and K. Jürimäe, Judges,

Advocate General: P. Pikamäe,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

– eurocylinder systems AG, by C. Salder and M. Oldiges, Rechtsanwälte,

– the Council of the European Union, by H. Marcos Fraile and J. Bauerschmidt, acting as Agents, and by N. Tuominen, avocat,

– the European Commission, initially by A. Demeneix and N. Kuplewatzky, and subsequently by P. Němečková, acting as Agent,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: German.

Judgment

1 This reference for a preliminary ruling concerns the validity of Council Regulation (EC) No 926/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China (OJ 2009 L 262, p. 19; 'the regulation at issue').

2 This request has been made in proceedings between eurocylinder systems AG ('eurocylinder') and the Hauptzollamt Hamburg-Stadt (principal customs office, city of Hamburg, Germany) ('the customs authority') concerning the legality of an anti-dumping duty paid by eurocylinder under the regulation at issue on the import of seamless tubes of steel originating in the People's Republic of China ('the PRC').

Legal context

The basic regulation

3 Recitals 2, 4 and 10 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12) ('the basic regulation'), on the basis of which the regulation at issue was adopted, state:

'(2) Whereas [the common rules established by Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1)] were adopted in accordance with existing international obligations, in particular those arising from Article VI of the General Agreement on Tariffs and Trade (hereinafter referred to as "GATT"), from the Agreement on Implementation of Article VI of the GATT (1979 Anti-Dumping Code) and from the Agreement on Interpretation and Application of Articles VI, XVI and XXIII of the GATT (Code on Subsidies and Countervailing Duties);

…

(4) Whereas, in applying the rules it is essential, in order to maintain the balance of rights and obligations which the GATT Agreement establishes, that the [European Union] take account of how they are interpreted by the [European Union's] major trading partners;

…

(10) Whereas it is desirable to lay down clear and detailed guidance as to the factors which may be relevant for the determination of whether the dumped imports have caused material injury or are threatening to cause injury; whereas, in demonstrating that the volume and price levels of the imports concerned are responsible for injury sustained by a [European Union] industry, attention should be given to the effect of other factors and in particular prevailing market conditions in the [European Union].'

4 Article 1 of the basic regulation provides:

'1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the [European Union] causes injury.

2. A product is to be considered as being dumped if its export price to the [European Union] is less than a comparable price for the like product, in the ordinary course of trade, as established for the exporting country.

…'

5 Article 3 of that regulation, under the heading 'Determination of injury', provides:

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

…

5. The examination of the impact of the dumped imports on the [European Union] industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including the fact that an industry is still in the process of recovering from the effects of past dumping or subsidisation, the magnitude of the actual margin of dumping, actual and potential decline in sales, profits, output, market share, productivity, return on investments, utilisation of capacity; factors affecting [European Union] prices; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can any one or more of these factors necessarily give decisive guidance.

…

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

…

9. A determination of a threat of material injury shall be based on facts and not merely on allegation, conjecture or remote possibility. The change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

In making a determination regarding the existence of a threat of material injury, consideration should be given to such factors as:

(a) a significant rate of increase of dumped imports into the [European Union] market indicating the likelihood of substantially increased imports;

(b) sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the [European Union], account being taken of the availability of other export markets to absorb any additional exports;

(c) whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports; and

(d) inventories of the product being investigated.

No one of the factors listed above by itself can necessarily give decisive guidance but the totality of the factors considered must lead to the conclusion that further dumped exports are imminent and that, unless protective action is taken, material injury will occur.'

6 Article 6 of that regulation, under the heading 'The investigation', states in its paragraph 1:

'Following the initiation of the proceeding, the Commission, acting in cooperation with the Member States, shall commence an investigation at [European Union] level. Such investigation shall cover both dumping and injury and these shall be investigated simultaneously. For the purpose of a representative finding, an investigation period shall be selected which, in the case of dumping shall, normally, cover a period of not less than six months immediately prior to the initiation of the proceeding. Information relating to a period subsequent to the investigation period shall, normally, not be taken into account.'

7 Under Article 7 of the basic regulation, under the heading 'Provisional measures':

'1. Provisional duties may be imposed if proceedings have been initiated in accordance with Article 5, if a notice has been given to that effect and interested parties have been given adequate opportunities to submit information and make comments in accordance with Article 5(10), if a provisional affirmative determination has been made of dumping and consequent injury to the [European Union] industry, and if the [European Union] interest calls for intervention to prevent such injury. The provisional duties shall be imposed no earlier than 60 days from the initiation of the proceedings but not later than nine months from the initiation of the proceedings.

…

4. The Commission shall take provisional action after consultation or, in cases of extreme urgency, after informing the Member States. In this latter case, consultations shall take place 10 days, at the latest, after notification to the Member States of the action taken by the Commission.

…

7. Provisional duties may be imposed for six months and extended for a further three months or they may be imposed for nine months. …'

8 Article 9 of that regulation, under the heading 'Termination without measures; imposition of definitive duties', provides in its paragraph 4:

'Where the facts as finally established show that there is dumping and injury caused thereby, and the [European Union] interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee. The proposal shall be adopted by the Council unless it decides by a simple majority to reject the proposal, within a period of one month after its submission by the Commission. Where provisional duties are in force, a proposal for definitive action shall be submitted not later than one month before the expiry of such duties. The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the [European Union] industry.'

9 Under the first subparagraph of Article 11(2) of that regulation:

'A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury. Such an expiry review shall be initiated on the initiative of the Commission, or upon request made by or on behalf of [European Union] producers, and the measure shall remain in force pending the outcome of such review.'

10 The basic regulation was repealed and replaced by Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51), which was itself repealed and replaced by Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21).

The provisional regulation

11 On 7 April 2009, the Commission adopted, on the basis of Article 7 of the basic regulation, Regulation (EC) No 289/2009 imposing a provisional anti-dumping duty on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China (OJ 2009 L 94, p. 48) ('the provisional regulation').

12 The rates of the provisional anti-dumping duty on imports of certain seamless pipes and tubes of iron or steel ('SPT') were set in Article 1(2) of the provisional regulation at 15.6% for Hubei Xinyegang Steel Co., Ltd ('Hubei'), 15.1% for Shandong Luxing Steel Pipe Co., Ltd, 22.3% for the companies listed in the annex to that regulation, and 24.2% for all other companies.

13 In recital 13 of that regulation, the Commission stated that the investigation of the dumping and the injury suffered by the EU industry had covered the period from 1 July 2007 to 30 June 2008 ('the investigation period') and the examination of trends relevant for the assessment of that injury the period from 1 January 2005 to the end of the investigation period ('the period considered').

14 In recitals 89 and 126 of that regulation, the Commission concluded that there was no material injury to the EU industry but there was a threat of material injury to that industry, should anti-dumping measures not be adopted.

The regulation at issue

15 Pursuant to Article 9 of the basic regulation, the regulation at issue imposed in its Article 1(1) a definitive anti-dumping duty on imports of certain SPT originating in the PRC and set in Article 1(2) the rates of that duty at 17.7% for Shandong Luxing Steel Pipe Co., Ltd, 27.2% for other cooperating companies listed in the annex to that regulation, and 39.2% for all other companies.

16 The regulation at issue confirmed in its recitals 35 to 81, the conclusion set out in the provisional regulation that (i) the EU industry was in a vulnerable situation at the end of the investigation period, although it had not suffered injury during that period and (ii) should anti-dumping measures not be adopted, dumped imports of certain SPT from the PRC would cause in the very short term material injury to that industry. That regulation took account of data relating to the period from July 2008 to March 2009 ('the post-investigation period').

17 The regulation at issue was annulled by the judgment of the General Court of the European Union of 29 January 2014, *Hubei Xinyegang Steel* v *Council* (T-528/09, EU:T:2014:35), in so far as it imposed an anti-dumping duty on products manufactured by Hubei. The appeals brought against that judgment were dismissed by the judgment of the Court of Justice of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Hubei Xinyegang Steel* (C-186/14 P and C-193/14 P, EU:C:2016:209).

Implementing Regulation (EU) 2015/2272

18 On 3 October 2014, the Commission initiated an expiry review of the anti-dumping measures imposed by the regulation at issue, under Article 11(2) of Regulation No 1225/2009. That review was intended to assess the likelihood of continuation or recurrence of dumping as a result of the expiry of those measures and covered the period from 1 July 2013 to 30 June 2014.

19 On 7 December 2015, at the end of that review, the Commission adopted Implementing Regulation (EU) 2015/2272 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation No 1225/2009 (OJ 2015 L 322, p. 21). The rates of the anti-dumping duty set by that implementing regulation were the same as those laid down in the regulation at issue.

Implementing Decision (EU) 2018/928

20 On 28 June 2018, the Commission adopted Implementing Decision (EU) 2018/928 terminating the re-opening of the investigation concerning the judgments in joined cases C-186/14 P and C-193/14 P in relation to Regulation No 926/2009 and Implementing Regulation 2015/2272 (OJ 2018 L 164, p. 51).

21 In recitals 7, 36 and 37 of that implementing decision, the Commission stated, in essence, that the purpose of the reopening of the review investigation under Article 11(2) of Regulation No 1225/2009, which led to the adoption of the Implementing Regulation 2015/2272, was not to examine the validity of the regulation at issue for Chinese exporting producers other than Hubei, but rather to determine whether the repeal of the Implementing Regulation was necessary in the light of the judgments of 29 January 2014, *Hubei Xinyegang Steel* v *Council* (T-528/09, EU:T:2014:35), and of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Hubei Xinyegang Steel* (C-186/14 P and C-193/14 P, EU:C:2016:209).

22 In addition, in recital 67 of that decision, the Commission stated that it would be inappropriate to repeal the anti-dumping duties imposed by Implementing Regulation 2015/2272 on Chinese exporting producers other than Hubei in view of the negative impact that such repeal would have on the EU industry.

The dispute in the main proceedings and the question referred for a preliminary ruling

23 On 4 November 2014, eurocylinder, a manufacturer of high-pressure steel cylinders, imported SPT manufactured by Tianjin Pipe (Group) Corporation from the PRC.

24 By decision on import duties of 4 November 2014, the customs authority imposed on eurocylinder an anti-dumping duty in the amount of EUR 22 123.10 pursuant to the rate of 27.2% laid down in Article 1(2) of the regulation at issue.

25 On 6 November 2017, eurocylinder requested from the customs authority the repayment of that anti-dumping duty on the ground that the regulation at issue had been annulled in part by the judgment of 29 January 2014, *Hubei Xinyegang Steel* v *Council* (T-528/09, EU:T:2014:35), which was upheld by the judgment of the Court of Justice of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Hubei Xinyegang Steel* (C-186/14 P and C-193/14 P, EU:C:2016:209). According to eurocylinder, the grounds for annulment by the General Court are of a general nature, so that they do not relate solely to Hubei.

26 By decision of 12 December 2017, the customs authority dismissed eurocylinder's application on the ground that the General Court had annulled the regulation at issue only in so far as it imposed an anti-dumping duty in respect of products manufactured by Hubei, the applicant in the case which gave rise to the judgment of 29 January 2014, *Hubei Xinyegang Steel* v *Council* (T-528/09, EU:T:2014:35).

27 Since the complaint brought against that decision was rejected by the customs authority on 23 August 2018, eurocylinder brought an action before the Finanzgericht Hamburg (Finance Court, Hamburg, Germany), claiming that the regulation at issue was void with *erga omnes* effect.

28 The referring court recalls that, in order to annul that regulation in so far as it imposed anti-dumping duties on products manufactured by Hubei, the General Court held, in its judgment of 29 January 2014, *Hubei Xinyegang Steel* v *Council* (T-528/09, EU:T:2014:35), that that regulation was vitiated by a manifest error of assessment as to the existence of a threat of material injury to the EU industry, in breach of Articles 3(9) and 9(4) of the basic regulation. Since such ground is of general application, it is sufficient for a finding that that regulation is invalid *erga omnes*.

29 The referring court notes, moreover, that eurocylinder has no standing to bring a direct action against the regulation at issue under Article 263 TFEU, since it was not targeted by the anti-dumping investigation that led to the adoption of that regulation. Accordingly, that company is entitled to plead, in support of its action brought against the decision of the customs authority at issue in the main proceedings, the invalidity of that regulation.

30 In those circumstances, the Finanzgericht Hamburg (Finance Court, Hamburg) decided to stay the proceedings and to refer the following question to the Court of Justice for a preliminary ruling:

'Is [the regulation at issue] valid?'

The admissibility of the question referred for a preliminary ruling

31 At the outset, it must be borne in mind that the partial annulment of the regulation at issue by the judgment of 29 January 2014, *Hubei Xinyegang Steel* v *Council* (T-528/09, EU:T:2014:35), delivered in the context of an action for annulment brought by Hubei under Article 263 TFEU, did not affect the legality of the other provisions of that regulation, in particular those which imposed anti-dumping duties on products other than those manufactured, exported or imported by that company. Until such time as those provisions are withdrawn or declared invalid following a reference for a preliminary ruling or a plea of illegality, they have full legal effect in relation to any other person (see, to that effect, judgment of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74, paragraphs 183 and 184 and the case-law cited).

32 It must also be borne in mind that it is settled case-law of the Court of Justice that the general principle which guarantees any litigant the right to plead, in an action brought against a national measure which adversely affects him or her, that the EU act forming the basis for that measure is invalid presupposes that that individual does not have the right to request the EU judicature directly to annul that act, under Article 263 TFEU. Conversely, an individual is prevented from pleading the

invalidity of that act before the national court having jurisdiction if it can be held that that individual would undoubtedly have been entitled to apply to the EU judicature for the annulment of that act (see, to that effect, judgment of 19 September 2019, *Trace Sport*, C-251/18, EU:C:2019:766, paragraph 29 and the case-law cited).

33 In the present case, as the referring court has observed, eurocylinder is an importer which was neither targeted by the investigation that led to the adoption of the regulation at issue nor even mentioned in that regulation. Moreover, it is not apparent from the file before the Court that eurocylinder is an importer associated with the exporter of the SPT at issue in the main proceedings. In any event, the Court has already specified that the status of importer, even if associated with exporters of the product concerned, cannot, on its own, be sufficient to support the view that an importer is individually concerned by a regulation imposing an anti-dumping duty (judgment of 19 September 2019, *Trace Sport*, C-251/18, EU:C:2019:766, paragraph 37).

34 It follows from the foregoing that eurocylinder was not undoubtedly entitled to seek the annulment of the regulation at issue under Article 263 TFEU.

35 The request for a preliminary ruling is therefore admissible.

Consideration of the question referred

36 By its question, the referring court asks, in essence, whether the regulation at issue, in so far as it imposes a definitive anti-dumping duty and collects definitively the provisional duty imposed on imports of certain SPT originating in the PRC, is valid in the light of Article 9(4) in conjunction with Article 3(9) of the basic regulation.

37 At the outset, it should be borne in mind that, according to the settled case-law of the Court of Justice, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (judgment of 19 September 2019, *Trace Sport*, C-251/18, EU:C:2019:766, paragraph 47 and the case-law cited).

38 Judicial review of the exercise of such a discretion must, in the context of both an action founded on Article 263 TFEU and a request for a preliminary ruling on validity submitted pursuant to Article 267 TFEU, be limited to verifying whether the 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 in the appraisal of those facts or a misuse of powers (judgment of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74, paragraph 162 and the case-law cited).

39 Furthermore, under Article 9(4) of the basic regulation, read in conjunction with Article 3(1) of that regulation, where the facts as finally established show that there is dumping and material injury or threat of material injury caused to an EU industry, a definitive anti-dumping duty is to be imposed by the Council. Under the first and second subparagraphs of Article 3(9) of that regulation, in determining whether there is a threat of material injury to an EU industry, it is appropriate to examine, in particular, the four factors expressly mentioned in that provision and not to rely merely on allegation, conjecture or remote possibility.

40 In addition, the Court has already stated that the existence of a threat of injury, like that of an injury, must be established as at the date of the adoption of the anti-dumping measure, having regard to the situation of the EU industry at that time. It is only in view of that situation that the EU institutions can determine whether the imminent increase in future dumped imports will cause material injury to

that industry if no trade defence measure is taken (see, to that effect, judgment of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Hubei Xinyegang Steel*, C-186/14 P and C-193/14 P, EU:C:2016:209, paragraphs 31 and 71).

41 However, the EU institutions are entitled, in certain circumstances, to take post-investigation period data into consideration. That is particularly so in investigations intended, not to find an injury, but to determine whether there is a threat of injury which, by its very nature, requires a prospective analysis. Those data may thus be used to confirm or invalidate the forecasts in the Commission regulation imposing a provisional anti-dumping duty and allow, in the former case, the imposition of a definitive anti-dumping measure. However, the EU institutions' use of those post-investigation period data cannot escape review by the EU judicature (see, to that effect, judgment of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Hubei Xinyegang Steel*, C-186/14 P and C-193/14 P, EU:C:2016:209, paragraphs 71 to 73).

42 Lastly, the Council's conclusion as to the situation of the EU industry established in the context of the analysis of material injury to an EU industry for the purposes of Article 3(5) of the basic regulation remains, in principle, relevant in the context of the analysis of threat of material injury to that industry within the meaning of Article 3(9) of that regulation (see, to that effect, judgment of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Hubei Xinyegang Steel*, C-186/14 P and C-193/14 P, EU:C:2016:209, paragraph 31).

43 It is in the light of the foregoing considerations that the validity of the regulation at issue must be assessed, in the light of Article 9(4) in conjunction with Article 3(9) of the basic regulation.

44 In this case, the Council confirmed, in recitals 47 to 49 of the regulation at issue, the Commission's assessment, set out in recitals 88 and 89 of the provisional regulation, that the EU industry had not suffered material injury during the investigation period, even though that industry was in a vulnerable situation at the end of that period. However, having regard, in particular, to the examination of the facts occurring after that period, the Council took the view, in recitals 76 to 81 of the regulation at issue, that there was, at that date, a threat of material injury to the EU industry, as the Commission had noted in recital 126 of the provisional regulation.

Whether the EU industry was in a vulnerable situation at the end of the investigation period

45 In order to conclude, in recital 89 of the provisional regulation, that the EU industry was in a vulnerable situation at the end of the investigation period, the Commission examined in recitals 66 to 87 of that regulation, pursuant to Article 3(5) of the basic regulation, the relevant economic factors and indices having a bearing on the state of that industry, such as production, capacity and capacity utilisation, stocks, sales volume, market share, growth, employment, productivity, wages, factors affecting sales prices, profitability and return on investment, cash flow and ability to raise capital, investments, and, lastly, the magnitude of the dumping margin and the recovery of the EU industry from past dumping.

46 In particular, with regard to that latter factor, the Commission stated in recital 87 of the provisional regulation that, while anti-dumping measures had been imposed in 2006 to counteract the injurious dumping caused by imports from a number of other countries, the EU industry had, however, not been able to benefit fully from the exceptional market expansion observed during the analysis period, since the market shares previously held by the imports under measures had been replaced by Chinese imports. The Commission specified that that development had an effect in limiting the full recovery of the EU industry and its inclination to invest and expand production capacity to follow the expansion in the market.

47 The Council, for its part, confirmed, in recitals 47 to 49 of the regulation at issue, the Commission's assessment of the vulnerable situation of the EU industry at the end of the investigation period. In doing so, it noted, in particular, that, although the EU industry did not suffer material injury during the investigation period, it was nevertheless exposed, given the important share of dumped imports in the EU market, to the injurious effects of those dumped imports and that its market share had declined by five percentage points during the period considered.

48 It should, however, be noted that the Council's assessment that, in essence, the EU industry had not fully recovered from dumping prior to 2006 is not supported by any concrete evidence and cannot, in any event, be inferred from the indices and economic factors identified in paragraph 45 of this judgment, which, on the contrary, point to a positive development of the situation of the EU industry as a whole during the period considered.

49 First, the fact that the EU industry's market share declined by five percentage points during the period considered should not be seen in isolation. Account must also be taken of the fact that (i) that market share remained significant during the investigation period, that is, 63.6% (recital 75 of the provisional regulation), and (ii) that EU industry experienced an increase in its sales volume and prices during the investigation period (recitals 73 and 80 of the provisional regulation).

50 Secondly, the Council's assessment of the impact of imports originating in the PRC on the EU industry's investments and its ability to develop production capacity directly contradicts the fact that that industry's investments increased by around 185% during the period considered (recital 85 of the provisional regulation).

51 Thirdly, while the Commission has stated that, should the economic trend reverse, the EU industry would be powerless to face the possible injurious effects of dumped imports (recital 89 of the provisional regulation), such a circumstance, in so far as it makes it possible to identify, where relevant, only a vulnerable situation for the future, cannot establish that that industry was in a vulnerable situation at the end of the investigation period.

52 In those circumstances, the Council committed a manifest error of assessment in confirming the Commission's conclusion that the EU industry was in a vulnerable situation at the end of the investigation period, in that such a conclusion is not supported by the relevant data in the present case.

Whether there was a threat of material injury at the end of the investigation period

53 In order to conclude that, at the end of the investigation period, there was a threat of material injury to the EU industry, the Council examined, in recitals 66 to 74 of the regulation at issue, relying in essence on the four factors referred to in the second subparagraph of Article 3(9) of the basic regulation, the development of volumes of dumped imports, the availability of free capacity of the exporters, prices of the imports from the PRC and the level of inventories.

54 With regard, first, to the development of volumes of dumped imports, it should be recalled that the factor referred to in point (a) of the second subparagraph of Article 3(9) of the basic regulation concerns whether there is 'a significant rate of increase of dumped imports into the [European Union] market indicating the likelihood of substantially increased imports'.

55 The Commission's assessments set out in recitals 115 and 116 of the provisional regulation, that the overall situation of the EU market would not have any 'considerable' impact on the 'development of the volumes' of imports originating in the PRC and that the pressure of those imports on the EU

market was likely to increase 'substantially', assessments which were confirmed by the Council in recitals 66 to 68 of the regulation at issue, are contradicted by the post-investigation period data, which were also taken into account in that regulation.

56 In particular, in recital 52 of the regulation at issue, the Council noted that imports from the PRC had 'decreased significantly' in absolute volume, as shown in the table appearing in that recital, from 542 840 tonnes in the investigation period to 306 866 tonnes in the post-investigation period.

57 It is true that in recital 68 of the regulation at issue, the Council stated that 'as also indicated in recital 52 above, notwithstanding their decrease in absolute volume, Chinese imports of the product concerned have slightly increased their market share during the post-[investigation] period'. However, that 'slight increase', which corresponded to only 0.7% market share of those imports, does not, on its own, lead to the conclusion that there was a significant rate of increase of dumped imports into the EU market, which would indicate the likelihood of substantially increased imports. Moreover, as the Council stated in recital 53 of the regulation at issue, the market share of the EU industry decreased by only 0.1% between the investigation period and the post-investigation period, from 63.6% in the former to 63.5% in the latter.

58 In this context, in the light of the case-law of the Court of Justice cited in paragraph 41 of this judgment, the importance of post-investigation period data in the prospective analysis of whether there is a threat of injury must be pointed out, since such data may be used to confirm or invalidate the forecasts contained in the provisional regulation.

59 In the present case, those data, to which attention was drawn in paragraphs 56 and 57 of this judgment, do not confirm that there was a significant rate of increase of dumped imports into the EU market which indicated the likelihood of substantially increased imports, within the meaning of point (a) of the second subparagraph of Article 3(9) of the basic regulation.

60 With regard, secondly, to the availability of free capacity of the exporters, it should be recalled that the factor referred to in point (b) of the second subparagraph of Article 3(9) of the basic regulation concerns 'sufficient freely disposable capacity of the exporter or an imminent and substantial increase in such capacity indicating the likelihood of substantially increased dumped exports to the [European Union], account being taken of the availability of other export markets to absorb any additional exports'.

61 In the present case, the Commission stated, in recital 118 of the provisional regulation, that 'over the period considered the Chinese exporters [had] substantially increased their inclination to export, which translated in a very considerable increase of exports in absolute terms'. In recital 119 of that regulation, the Commission found (i) that 'the percentage of Chinese exports to the [European Union] (as a percentage of total … exports [from the PRC]) [had] significantly increased during the period considered' which confirmed that 'during the period considered a considerable shift ha[d] already taken place in the exporting activities and the [European Union] ha[d] gained importance in the overall market strategy of the Chinese exporters' and (ii) that 'the other main markets [we]re the USA with 36% (up from 31% in 2007), Algeria (6%, up from 2% in 2006) and South Korea (6%, up from 3% in 2005)'.

62 On that basis, the Commission concluded that it could be expected that 'a significant part of the newly created excess capacity w[ould] be directed to the E[U] market' and that there would be 'a significant shrinking [shortly] of some of these markets, and in particular of the US market' so that 'the [production] volumes freed from those markets could be easily re-directed to the E[U]'. Those conclusions were confirmed by the Council in recitals 69 to 71 of the regulation at issue.

63 In that regard, it should be noted, however, that the analysis conducted in the regulation at issue concerning the likelihood of shifting of exports from the PRC to the EU market is flawed in two respects. That analysis did not take into account elements which were nevertheless relevant to explain the increase in imports from the PRC to the European Union. In particular, the regulation at issue did not refer to the fact, mentioned in recital 130 of the provisional regulation, that there was 'a clear coincidence in time between the rapid increase in the market share of the Chinese products and the corresponding substantial erosion of the market shares held by imports from Russia and Ukraine, which were their closest competitor in terms of prices', although that fact was relevant for the purpose of explaining, at least in part, the increase in the percentage of Chinese exports to the European Union during the period considered. Moreover, the regulation at issue did not take into account the ability of the other identified export markets to absorb additional exports. As is apparent from the data referred to in paragraph 61 of this judgment, the trend in exports to those markets increased over that period.

64 In those circumstances, the facts of the case do not lead to the conclusion that the factor referred to in point (b) of the second subparagraph of Article 3(9) of the basic regulation was fulfilled.

65 Thirdly, with regard to the prices of imports from the PRC, it should be borne in mind that the factor referred to in point (c) of the second subparagraph of Article 3(9) of the basic regulation concerns 'whether imports are entering at prices that would, to a significant degree, depress prices or prevent price increases which otherwise would have occurred, and would probably increase demand for further imports'.

66 In the present case, in recitals 120 and 121 of the provisional regulation, the Commission found (i) that, during the period considered, prices of the imports from the PRC were substantially lower not only than the prices of the EU industry, but also than prices from other countries and (ii) that there was no reason to believe that, in an economic environment characterised by a substantial contraction in demand, there may be a tendency for low prices to increase. In recital 122 of that regulation, the Commission stated that prices of imports from the PRC had shown a certain increase after the investigation period, that fact reflecting above all a worldwide increase in the price of some important raw materials. In recital 123 of that regulation, the Commission concluded that the 'very low prices' of the dumped imports had a twofold negative effect, that is (i) a probable shift towards the dumped imports and (ii) a 'depressive effect' on both the volumes and the prices offered by the EU producers and other sources.

67 In the regulation at issue, the Council found that, after the investigation period, the prices of imports from various sources, including from the PRC, increased substantially, as did the prices of the EU industry. It confirmed the Commission's conclusions, recalled in the previous paragraph, the Council stating, in recital 73 of that regulation, that an analysis of the price lists of the EU industry and of the prices of comparable products imported from the PRC carried out after the investigation period had 'shown that there [had] been a parallelism in price movements'.

68 However, such 'parallelism' in price movements is not corroborated by economic data for the post-investigation period as set out in the regulation at issue itself. It is apparent from recitals 52 and 53 of that regulation that the difference between the EU industry's sales price and the sales price of imports from the PRC decreased by around 10% between the investigation period and the post-investigation period, from around 40% for the former period (EUR 476 per tonne) to around 30% for the latter period (EUR 448 per tonne). Moreover, while, in the post-investigation period, the prices of the EU industry increased by 18.7%, the prices of Chinese imports increased by more than 35%.

69 In any event, even assuming that such parallelism in price movements could have been established and that the increase in price of the product concerned for the post-investigation period could have been explained by an increase in price of raw materials, those circumstances would not be capable of

supporting the Commission's conclusions, set out in recital 123 of the provisional regulation and confirmed by the Council in recital 73 of the regulation at issue, as to the existence of a negative effect of the 'very low' prices of imports originating in the PRC on the prices and volumes of the EU industry.

70 With regard to the effect on the EU industry's prices, the factor referred to in point (c) of the second subparagraph of Article 3(9) of the basic regulation is whether imports are entering at prices that would, 'to a significant degree, depress' prices in the European Union or 'prevent price increases'. Such a conclusion is not corroborated by the post-investigation data as set out in paragraphs 56 and 57 of this judgment. Furthermore, with regard to the depressive effect of the 'very low' prices on the volumes of the EU industry, it must be borne in mind that the market share of the EU industry during the post-investigation period decreased by only 0.1%, as is apparent from recital 53 of the regulation at issue.

71 Thus, it does not follow from the facts of the case that the factor referred to in point (c) of the second subparagraph of Article 3(9) of the basic regulation can be regarded as having been fulfilled.

72 With regard, fourthly and lastly, to the level of inventories of the product under investigation, expressly provided for in point (d) of the second subparagraph of Article 3(9) of the basic regulation as one of the factors relevant in determining whether there is a threat of material injury to the EU industry, the regulation at issue confirmed in recital 74 thereof the Commission's conclusion, set out in recital 124 of the provisional regulation, that that factor was not 'of any particular significance' for the analysis of whether there was such a threat, given that 'stocks are kept by traders (stockists) and not by producers' and that 'no evidence could be found that stockpiling activities might have taken place to an extent which may significantly influence the market in the near future'.

73 It follows from the foregoing considerations that, in the regulation at issue, the Council wrongly considered that, having regard to the factors referred to in the second subparagraph of Article 3(9) of the basic regulation, there was a threat of material injury to the EU industry, so that it also infringed the first subparagraph of Article 3(9) of that regulation, under which (i) a determination of a threat of material injury is to be based on facts and not merely on allegation, conjecture or remote possibility and (ii) the change in circumstances which would create a situation in which the dumping would cause injury must be clearly foreseen and imminent.

74 That conclusion cannot be invalidated by any of the arguments put forward by the Commission and the Council in their observations submitted under the second paragraph of Article 23 of the Statute of the Court of Justice of the European Union.

75 The Commission submits, in the first place, that an interpretation of Article 3(9) of the basic regulation in conformity with the World Trade Organisation (WTO) Anti-Dumping Agreement would lead to the conclusion that the EU legislature leaves it to the discretion of the anti-dumping investigating authority to choose on which factor(s) set out in that provision to base its conclusion as to whether there is a threat of material injury to the EU industry, on the sole condition that such a conclusion is based 'on facts and not merely on allegation, conjecture or remote possibility'. The Commission adds that the existence of a threat of injury must be examined in the light of all the relevant circumstances and not only the four factors referred to in Article 3(9) of the basic regulation. In particular, the Commission observes that, while it is true that the factor relating to the contraction of demand in the EU market, as examined in recitals 91 to 111 and 126 of the regulation at issue, is not expressly mentioned in Article 3(9) of the basic regulation, it remains relevant for the purposes of establishing whether there is a threat of material injury to the EU industry.

76 In that regard, it should be noted that, by that argument, the Commission seeks, in fact, to call into question the assessments of the General Court in the judgment of 29 January 2014, *Hubei Xinyegang Steel* v *Council* (T-528/09, EU:T:2014:35), although that judgment, upheld by the judgment of the

Court of Justice of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Hubei Xinyegang Steel* (C-186/14 P and C-193/14 P, EU:C:2016:209), became final and the Commission had the opportunity to challenge it by way of an appeal, which it did not do. That institution cannot therefore use the observations which it has submitted in the context of proceedings for a preliminary ruling for assessing validity to challenge that judgment of the General Court indirectly. There is therefore no need to examine those arguments of the Commission on the merits.

77 In the second place, the Council and the Commission argue that Implementing Regulation 2015/2272 and Implementing Decision 2018/928 establish that (i) there is a threat of material injury to the EU industry and (ii) such a threat would materialise if the invalidity of the regulation at issue were to be declared with *erga omnes* effect.

78 In that regard, it must be borne in mind that the assessment of the validity of a measure which the Court is called upon to undertake on a reference for a preliminary ruling must normally be based on the situation which existed at the time that measure was adopted (judgment of 9 July 2020, *Donex Shipping and Forwarding*, C-104/19, EU:C:2020:539, paragraph 43 and the case-law cited).

79 Moreover, as the Court pointed out in its judgment of 7 April 2016, *ArcelorMittal Tubular Products Ostrava and Others* v *Hubei Xinyegang Steel* (C-186/14 P and C-193/14 P, EU:C:2016:209, paragraph 71), the existence of a threat of material injury to the EU industry must be established as at the date of the adoption of the anti-dumping measure, that date corresponding, in the present case, to the date of adoption of the regulation at issue.

80 It follows that the adoption of both Implementing Regulation 2015/2272 and Implementing Decision 2018/928 could not have affected the validity of the regulation at issue, since they postdate the adoption of that regulation.

81 In addition, it cannot be inferred from either that implementing regulation or that implementing decision that, on the date of adoption of the regulation at issue, there was a threat of material injury to the EU industry.

82 Consequently, in so far as, as follows from paragraphs 45 to 73 of this judgment, by adopting the regulation at issue, the Council infringed Article 3(9) in conjunction with Article 9(4) of the basic regulation, it must be held that the regulation at issue is invalid.

Costs

83 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the referring court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Fourth Chamber) hereby rules:

Council Regulation (EC) No 926/2009 of 24 September 2009 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain seamless pipes and tubes of iron or steel originating in the People's Republic of China is invalid.

[Signatures]