Reports of Cases

OPINION OF ADVOCATE GENERAL
PITRUZZELLA
delivered on 11 November 2021 [1]

Case C-79/20 P

Yieh United Steel Corp.
v

European Commission

(Appeal – Dumping – Implementing Regulation (EU) 2015/1429 – Article 2(2) of Regulation No 1225/2009 (now Article 2(2) of Regulation 2016/1036) – Calculation of normal value – Sales of the like product intended for domestic consumption in the exporting country – Exclusion from the calculation of normal value of sales of the domestic market destined for export)

1. In anti-dumping law, what is the scope of the requirement that, in the calculation of the normal value which will then be used to determine dumping, account must normally be taken of sales of the like product 'intended for domestic consumption' in the exporting country? Does that requirement presuppose proof of a subjective element on the part of the producer-seller of the product in question?

2. That is, in essence, the question of law analysed in this Opinion, which concerns the appeal brought by Yieh United Steel Corp. ('Yieh United') against the judgment of the General Court of the European Union of 3 December 2019, *Yieh United* v *Commission* (T-607/15, EU:T:2019:831; 'the judgment under appeal'), in which the General Court dismissed the action brought by that company for the annulment of Commission Implementing Regulation (EU) 2015/1429 of 26 August 2015 imposing a definitive anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan ('the contested regulation). [2]

I. Legal framework

3. At the time of the facts underlying the dispute, the provisions which governed the adoption by the European Union of anti-dumping measures were to be found in Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community ('the basic regulation'). [3]

[1] Original language: Italian.

[2] OJ 2015 L 224, p. 10.

[3] OJ 2009 L 343, p. 51, corrigendum OJ 2010 L 7, p. 22. This regulation was repealed by Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of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).

4. Article 1 of the basic regulation provided, in paragraphs 1 and 2:

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

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

5. Under Article 2(1) and (2) of the basic regulation:

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

…

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

II. The facts and the contested regulation

6. Yieh United is a company established in Taiwan, which, inter alia, manufactures and distributes stainless steel cold-rolled flat products.

7. Following a complaint lodged by Eurofer, Association européenne de l'acier, ASBL ('Eurofer'), on 26 June 2014, the European Commission initiated an anti-dumping proceeding concerning imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan.[4] The investigation of dumping and injury covered the period from 1 January to 31 December 2013.

8. On 24 March 2015, the Commission adopted Implementing Regulation (EU) 2015/501[5] ('the provisional regulation') imposing a provisional anti-dumping duty of 10.9% on imports of the product in question, in so far as Yieh United was concerned.

9. On 26 August 2015, the Commission adopted the contested regulation.

10. As regards specifically the method of calculating the normal value for the imports of the product under consideration originating in Taiwan, it is clear from the contested regulation that the method initially used in the provisional regulation did not take into account the domestic sales to distributors and traders.[6]

4 See the Notice of initiation of the anti-dumping proceedings in OJ 2014 C 196, p. 9.

5 Commission Implementing Regulation (EU) 2015/501 of 24 March 2015 imposing a provisional anti-dumping duty on imports of stainless steel cold-rolled flat products originating in the People's Republic of China and Taiwan (OJ 2015 L 79, p. 23).

6 See recital 50 of the contested regulation, which expressly refers to recitals 63 to 66 of the provisional regulation.

11. In response to arguments made by some exporting producers involved in the anti-dumping investigation, the Commission, while considering that lack of knowledge about the final destination of a sale was not decisive, analysed the situation again, on the basis of the evidence available in the investigation.[7] After considering the observations and further information received after releasing its provisional conclusions,[8] the Commission revised the sales to be excluded from the normal value determination in order to reflect as accurately as possible the individual situation of the exporting producers investigated. Following that analysis, where warranted, some of the sales that had been excluded at the provisional stage from the normal value calculation were used in the normal value calculation.[9]

12. Recital 59 of the contested regulation states that, 'instead of excluding sales to distributors as a whole on the basis of the presumption that all sales to distributors were destined for export, the Commission excluded only those sales to the distributor for which there was sufficient objective evidence that they were actually exported. The Commission examined the reported sales at issue and classified them as domestic or for export on the basis of the specific situation and data of each of the exporting producers concerned. The existence of export-oriented discounts was for example used as relevant evidence. To the contrary, subjective elements such as intention or knowledge, or lack thereof, did not play any role in the objective assessment made by the Commission'.

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

13. On 27 October 2015, Yieh United brought an action for the annulment of the contested regulation before the General Court.

14. In support of its action, Yieh United put forward two pleas in law, alleging, respectively, infringement of Article 2(3) and (5) of the basic regulation and infringement of Article 2(1) and (2) of that regulation.[10]

15. In particular, in the context of its second plea in law, Yieh United claimed, in essence, that the Commission had infringed Article 2(1) and (2) of the basic regulation by considering, without adequate justification, that certain sales of the product concerned to independent buyers, made in the ordinary course of trade in the exporting country, had to be excluded for the purposes of determining the normal value on the sole ground that the products in question had subsequently been exported. Having regard, in particular, to the wording of Article 2(2) of the basic regulation, according to which the sales of the product concerned 'intended for domestic consumption' are normally used to determine normal value, the Commission could validly have excluded those sales from the calculation of normal value only after establishing that the seller had, at the time of the sale, knowledge of the export of the products concerned or anticipated that the purchaser would export them.

16. In the judgment under appeal, after rejecting the first plea in law,[11] in paragraphs 114 to 145, the General Court went on to dismiss the second plea in law also.

7 See recital 56 of the contested regulation.

8 See recital 57 of the contested regulation.

9 See recital 56 of the contested regulation.

10 Now, respectively, Article 2(3) and (5) of Regulation 2016/1036 and Article 2(1) and (2) of Regulation 2016/1036.

11 See paragraphs 29 to 113 of the judgment under appeal.

17. The General Court first of all pointed out that various language versions of the provision in question in Article 2(2) of the basic regulation referred to the 'destination' of the product concerned, without making reference to the intention of the producer as to that destination at the time of the sale.[12] On this point, in the judgment under appeal,[13] the General Court held that, contrary to Yieh United's submission, no final conclusions could be drawn either from a case decided by a World Trade Organisation (WTO) Panel,[14] or from an earlier Commission regulation of 1997 imposing a provisional anti-dumping duty on certain products.[15]

18. The General Court then held that the interpretation of the words 'intended for domestic consumption' according to which it is not necessary to seek a specific intention or knowledge on the part of the seller as to the final destination of the product concerned was confirmed by an analysis of the context of the provision in question. None of the concepts of 'dumping', 'injury' or 'circumvention', within the meaning of the basic regulation, implied, as a condition for its application, the finding of specific intention on the part of the interested party, but each required the fulfilment of objective conditions irrespective of any specific intention or knowledge on the part of that party.[16]

19. The General Court also held that that interpretation was in line with the purpose of the anti-dumping investigation, which 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. According to the General Court, the interpretation was also compatible with the principles of foreseeability and legal certainty.[17]

20. As regards the case at hand, the General Court noted, first of all, that, in the contested regulation, the Commission had replaced the approach initially taken in the provisional regulation with an approach based on the existence of objective evidence of exports of the product concerned by the distributor concerned.[18] The General Court made a number of specific observations: first, a certain number of the sales declared by Yieh United as domestic sales had been subject to an export rebate on the basis of a system intended to give an incentive to distributors that exported their steel products; secondly, it was established that Yieh United actually applied that export rebate, in particular, to a significant proportion of its sales to the independent purchaser which it had claimed should be included in the calculation of normal value; thirdly, further objective evidence was found that that purchaser had actually exported the bulk of the products purchased under sales declared as domestic sales.[19]

21. On the basis of those considerations, the General Court concluded that the Commission could legally and without committing any manifest error of assessment exclude the sales in question from the determination of the normal value pursuant to Article 2(1) and (2) of the basic regulation.[20]

12 See paragraphs 128 and 129 of the judgment under appeal.

13 See paragraphs 130 and 131.

14 Report of 16 November 2007, in the dispute 'European Communities – Anti-Dumping Measure on Farmed Salmon from Norway' (WT/DS 337/R), in particular, footnote 339.

15 Commission Regulation (EC) No 1023/97 of 6 June 1997 imposing a provisional anti-dumping duty on certain imports of flat pallets of wood originating in Poland and accepting undertakings offered from certain exporters in connection with those imports (OJ 1997 L 150, p. 4).

16 See paragraph 132 of the judgment under appeal.

17 See paragraphs 133 to 135 of the judgment under appeal.

18 See paragraphs 137 and 138 of the judgment under appeal.

19 See paragraphs 138 to 142 of the judgment under appeal.

20 See paragraph 144 of the judgment under appeal.

IV. Forms of order sought

22. In its appeal, Yieh United asks the Court of Justice to set aside the judgment under appeal, uphold its action at first instance and accordingly annul the contested regulation in so far as it concerns it and order the Commission and Eurofer to pay the costs of the proceedings at first instance and on appeal.

23. The Commission asks the Court to dismiss the appeal and order Yieh United to pay the costs.

24. Eurofer asks the Court of Justice to dismiss the appeal, in the alternative, to dismiss the application at first instance, in the further alternative, to refer the case back to the General Court, and to order Yieh United to pay the costs, including those of the proceedings at first instance.

V. Analysis of the appeal

A. The appeal brought by Yieh United

25. In support of its appeal, Yieh United puts forward three grounds. By its first and second grounds of appeal, it submits that, in the judgment under appeal, the General Court infringed respectively Article 2(3) and Article 2(5) of the basic regulation. By its third ground of appeal, Yieh United argues that the General Court infringed Article 2(2) of the basic regulation.

26. In accordance with the Court's request, I shall focus my analysis on the third ground of appeal.

B. The third ground of appeal

1. Arguments of the parties

27. By its third ground of appeal, which challenges paragraphs 129 to 135 of the judgment under appeal, Yieh United argues that the General Court infringed Article 2(2) of the basic regulation. According to Yieh United, the General Court erred in holding that that provision, and in particular the words 'intended for domestic consumption', did not mean that the Commission had to demonstrate a specific intention or knowledge on the part of the producer-seller as to the final destination of the products in question. According to the General Court's interpretation, that provision would allow the Commission legitimately to disregard domestic sales made to an independent customer merely because the products concerned were ultimately exported, without it being necessary to consider whether the producer-seller had intended or known that the products which it sold to its domestic customer would ultimately be exported.

28. The General Court's position, confirming that of the Commission, has the consequence that a producer will always and irremediably be held accountable for the marketing policies of its independent customers, even if it has no control over them and does not know the end destination of the product. That interpretation would enable the Commission to impose anti-dumping duties on a producer irrespectively of the producer's pricing policy, which is at odds with the overall purpose of the anti-dumping regulation.

29. Yieh United takes issue with the three reasons on which the General Court based its confirmation, in the judgment under appeal, of the Commission's interpretation of Article 2(2) of the basic regulation.

30. In the first place, Yieh United disputes that the analysis of various language versions of the basic regulation set out in paragraphs 129 and 130 of the judgment under appeal can validly support the General Court's conclusion that proof of the final destination of the product should be considered instead of the knowledge or intention of the producer as regards the final destination at the moment of sale. Indeed, there is nothing in the words 'destined to' to prevent an assessment of the perception of the producer-seller as regards the destination of the product concerned at the time of the sale. In addition, the language versions which the General Court mentions in paragraph 129 of the judgment under appeal do not contain the words 'final destination', but rather encompass a fair assessment by the producer-seller of the destination of the products resulting from its own sale.

31. In the second place, Yieh United takes issue with the contextual and teleological interpretation of the basic regulation given by the General Court in paragraphs 132 and 135 of the judgment under appeal. In its view, first, the fact that dumping, injury and circumvention can be found irrespective of the producer's or exporter's intention does not mean that domestic sales it has made should not be taken into consideration. There must, it submits, be a subjective element in the area of anti-dumping, because an anti-dumping duty punishes 'unfair' behaviour on the part of a producer or exporter. Secondly, Yieh United submits that the alternative interpretation of Article 2(2) of the basic regulation which it proposes would not prevent the Commission from finding objective evidence of the conditions for the imposition of an anti-dumping duty. Moreover, other trade protection mechanisms provided for, inter alia, in other provisions of the basic regulation, in WTO agreements and in anti-subsidy rules, require an investigative authority to establish and verify the subjective knowledge of producers and exporters. The General Court's assertion that such evidence is 'random' or impossible to adduce therefore does not stand.

32. In the third place, Yieh United argues that the reasoning followed by the General Court in paragraph 134 of the judgment under appeal is circular. If a producer-exporter adequately manages its prices and applies a similar pricing policy for its domestic sales and for its export sales, then there is no dumping.

33. The Commission and Eurofer dispute Yieh United's arguments and claim that the third ground of appeal should be dismissed.

2. Assessment

(a) Preliminary observations

34. By its third ground of appeal, Yieh United submits that the General Court infringed Article 2(2) of the basic regulation. In particular, Yieh United calls into question the General Court's interpretation of the words 'intended for domestic consumption' in paragraphs 129 to 135 of the judgment under appeal.

35. On this point, I would first of all observe that, within the framework of Article 2 of the basic regulation, which sets out the provisions on the determination of dumping, paragraphs 1 to 7 lay down the provisions on the determination of the normal value, which is then to be compared fairly with the export price in order to determine whether there is dumping. [21]

36. In accordance with paragraph 1 of Article 2 of the basic regulation, the normal value is normally to be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country. According to paragraph 2 of Article 2, 'sales of the like product intended for domestic consumption shall normally be used to determine normal value …'.

37. It may be inferred from that last provision, *a contrario*, that, in determining normal value, account is not normally to be taken of sales of the like product made by producers in the exporting country in the domestic market where the products sold are not intended for consumption in that market, but have another destination, such as export.

38. In its appeal, Yieh United maintains, in essence, that the words 'intended for domestic consumption' in Article 2(2) of the basic regulation presuppose a subjective element, an intention or knowledge on the part of the producer-seller as regards the final destination of the product in question. According to the approach advocated by Yieh United, in order to exclude from the calculation of normal value sales of the like product on the domestic market, the Commission is required to prove the intention or at least the specific knowledge of the producer-seller, at the time of concluding the sale, that the products would be exported subsequently.

39. In order to respond to Yieh United's third ground of appeal it is therefore necessary to verify the interpretation of the words 'intended for domestic consumption', in Article 2(2) of the basic regulation, adopted by the General Court in the light of the arguments put forward by that company.

(b) Article 2.1 of the Anti-Dumping Agreement

40. As a preliminary matter, however, it must be observed – as the General Court itself pointed out [22] – that the formulation 'intended for domestic consumption' in Article 2(2) of the basic regulation corresponds to the wording in Article 2.1 of the WTO Anti-Dumping Agreement, [23] in each of its three official language versions: 'destined for consumption' in English, 'destiné à la consommation' in French and 'destinado al consumo' in Spanish.

41. In this context, the case-law is clear that the provisions of the basic regulation must be interpreted, as far as possible, in the light of the corresponding provisions of the Anti-Dumping Agreement, [24] account also being taken of the interpretations of the various provisions of that agreement that have been given by the WTO Dispute Settlement Body. [25]

[21] See Article 2(10) of the basic regulation.

[22] See paragraph 130 of the judgment under appeal and the case-law cited.

[23] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103).

[24] Judgment of 9 January 2003, *Petrotub and Republica* (C-76/00 P, EU:C:2003:4, paragraph 57).

[25] See, by analogy, judgment of 6 October 2020, *Commission* v *Hungary (Higher education)* (C-66/18, EU:C:2020:792, paragraph 92), and, with reference to Article 3(1), (2) and (3) of Regulation (EU) 2016/1036, my recent Opinion in *Commission* v *Hubei Xinyegang Special Tube* (C-891/19 P, EU:C:2021:533, point 24).

42. However, the only instance in which the WTO has offered guidance as to the meaning of 'destined for consumption' in Article 2.1 of the Anti-Dumping Agreement seems to be the case mentioned in paragraph 131 of the judgment under appeal and cited in point 17 above,[26] in which a WTO Panel observed, in a footnote, that 'where a producer [sold] to an unrelated exporter (or a trader) knowing that the product [would] be exported, that sale [could not] … qualify as a sale intended for domestic consumption'.

43. In my view, it follows from that observation that knowledge on the part of the producer-seller that the products sold are destined for export is not irrelevant to determining whether or not the products can be considered as 'destined for consumption' within the meaning of Article 2.1 of the Anti-Dumping Agreement and whether or not, as a result, the sales in question can be taken into account in the calculation of normal value. Indeed, it follows from the panel's observation that actual knowledge on the part of the producer-seller that the products sold are destined for export precludes the products in question from being regarded as 'destined for consumption' and thus excludes the sales in question from the calculation of normal value.

44. That said, I do agree with the General Court's analysis in paragraph 131 of the judgment under appeal, to the effect that it cannot be inferred from that observation alone that, *a contrario*, the lack of proof of actual knowledge on the part of the producer-seller that the products in question are destined for export must necessarily lead to the their being treated as intended for domestic consumption. In other words, while knowledge on the part of the producer-seller that products are destined for export can justify the exclusion of the relevant sales from the calculation of normal value, that does not necessarily mean that, where the investigation authority is unable to prove actual knowledge, the sales must inevitably be included in the calculation.

45. Indeed, actual knowledge on the part of the producer-seller, at the time of the sale, that the products sold will subsequently be exported permits the presumption that the price and terms of sale (for export) are not the same as those for the domestic market, which justifies the exclusion of such sales from the calculation of normal value, since normal value must reflect as precisely as possible sale prices in the exporting country. However, the opposite is not necessarily true. As I shall explain, the exclusion of sales from the calculation of normal value may well be justified on the basis of objective matters relating to the sales, independently of proof of any intention or actual knowledge on the part of the producer-seller that the products will subsequently be exported.

46. It is therefore in that context that it is necessary to verify the General Court's interpretation of the provision of EU law contained in Article 2(2) of the basic regulation and, in particular, of the words 'intended for domestic consumption' contained within that provision.

(c) Interpretation of the words 'intended for domestic consumption' for the purposes of Article 2(2) of the basic regulation

47. As the General Court pointed out, in accordance with the Court's settled case-law, when interpreting provisions of EU law, it is necessary to consider not only their wording but also the context in which they occur and the objectives pursued by the rules of which they form part.[27]

[26] See footnote 339 to the report in the dispute cited in footnote 14 above.

[27] See, inter alia, judgment of 29 July 2019, *Vethanayagam and Others* (C-680/17, EU:C:2019:627, paragraph 42), and paragraph 127 of the judgment under appeal and the case-law cited.

48. As regards, in the first place, the literal interpretation of the provision in question, I would point out, as did the General Court, [28] that the English version of Article 2(2) of the basic regulation uses – unlike the English version of Article 2.1 of the Anti-Dumping Agreement – the words 'intended for domestic consumption', which could be read as meaning that the seller's intention with regard to the destination of the products sold is the relevant criterion. However, the other language versions of the provision to which the General Court referred, like the wording of the three official versions of Article 2.1 of the Anti-Dumping Agreement, do not expressly refer to such an intention, but rather to a 'destination'.

49. According to the Court's case-law, the meaning and scope of terms for which EU law provides no definition must be determined by reference to their usual meaning in everyday language, while account is also taken of the context in which they occur and the purposes of the rules in question. [29]

50. The Italian word 'destinare' is derived from the Latin 'destinare' and properly means 'to establish in a definite and irrevocable manner, as an act of a higher will'. [30] That allusion to a higher, inevitable will is clearly reflected in the Italian word 'destino', which corresponds to 'destiny' in English, 'destin' in French and 'destino' in Spanish and Portuguese. In a more figurative sense, in everyday language the word 'destinare' takes on the meaning – devoid of any connotation of a higher will – of 'marked for', 'reserved for' or 'directed toward' a particular purpose. [31]

51. Understood in that way, the words 'intended for domestic consumption' mean that, in order for the sales in the exporting country to be included in the calculation of normal value, the products sold must be 'marked for', 'reserved for' or 'directed toward' domestic consumption.

52. It follows that, in accordance with my observations in points 42 and 43 above, the intention and knowledge of the exporter regarding the final destination of the product are not irrelevant to determining whether or not the like product sold under certain sales is 'intended for domestic consumption'. Indeed, the final destination of the product sold, which may influence the price and terms of sale, may be determined by the producer-seller or may at least be known to the producer-seller and so affect the price and terms of sale.

53. Contrary to the claim made in Yieh United's appeal, however, proof of the intention or actual knowledge of the producer-seller regarding the actual destination of the products sold is not required in order to exclude certain sales from the calculation of normal value. Indeed, it is quite possible to conclude – independently of any proof of intention or actual knowledge – that the products are intended for, or 'marked for' or 'directed toward' export objectively on the basis of facts and matters relating to the sale or to the purchaser of the products. There might, for example, be evidence that the sale was made at a price or on terms and conditions conceived for export purposes, or evidence that the sale was made to a customer that mainly exports the products which were the subject of the sale. In my view, such evidence sufficiently supports the conclusion that the sales in question involve products 'intended' for export, which, as such, must

[28] See, in particular, paragraphs 128 to 130 of the judgment under appeal, with which Yieh United takes issue.

[29] See, inter alia, judgment of 26 May 2016, *Envirotec Denmark* (C-550/14, EU:C:2016:354, paragraph 27 and the case-law cited).

[30] See Treccani.it.

[31] *Ibidem*. Similarly, in French, the word 'destiner' is defined as 'fixer la destination de quelque chose, le réserver à cet usage, à cet emploi; affecter' (Larousse.fr) and in English the verb 'to destine' is defined as '[with object] intend or choose for a particular purpose or end' (*Oxford Dictionary of English* (3rd ed.), Oxford University Press, 2015).

be excluded from the calculation of normal value.[32] Evidence of such matters will be sufficient irrespective of any evidence of the intention or knowledge of the producer-seller regarding the destination of the products.

54. On the basis of evidence of such matters, the Commission may assume that the sales were of products having a destination other than consumption on the domestic market and it may, therefore, exclude them from the calculation of normal value, without having to prove actual knowledge on the producer-seller's part of the products' destination. It is, however, necessary to prove the existence of an objective link between the sales and the destination of the products in question other than domestic consumption, which is capable of justifying the exclusion of such sales from the calculation of normal value.

55. The interpretation which I have set out of the words 'intended for domestic consumption' in Article 2(2) of the basic regulation, according to which, although the intention or specific knowledge of the producer-seller regarding the destination of the products sold is not irrelevant, it is nevertheless not necessary, where one or more objective links between the sale and a subsequent export are proved, for the Commission to prove the existence of any subjective element on the part of the producer-seller in order to exclude the sales in question from the calculation of normal value, is confirmed in my view by a contextual and teleological assessment of that provision.

56. As regards context, as mentioned in point 35 above, this provision fits into the framework of paragraphs 1 to 7 of Article 2 of the basic regulation, which lay down the provisions on the determination of the normal value which is then to be compared fairly with the export price in order to determine whether there is dumping. It is not apparent from any of those provisions that proof of the subjective element to which Yieh United refers is required for the calculation of normal value for the purposes of determining dumping. Moreover, as the General Court pointed out in paragraph 132 of the judgment under appeal, without Yieh United's disputing the point in its appeal, the wording of Article 2(8) of the basic regulation, on the determination of the export price, contains no reference to the criterion of the 'knowledge' of the interested party.

57. From a teleological perspective, I must observe that the reference, in Article 2(2) of the basic regulation, to the like product intended for domestic consumption is inherent in the determination of normal value and has the purpose of ensuring that normal value corresponds as closely as possible to the normal price of the like product on the domestic market of the exporter.[33] That correspondence is necessary to ensure a fair comparison with the export price of the product in question, for the purposes of determining dumping. It follows that sales of products not intended for domestic consumption will not constitute an appropriate basis for the calculation of normal value and should, therefore, be excluded from the calculation of normal value.[34]

58. It may be understood from that purpose of the provision in question that it is necessary to prove the existence of a link between the domestic sale and a destination other than domestic consumption in order to be able to exclude such a sale from the calculation of normal value. It in

[32] As discussed in more detail in point 61 and in footnote 38, a similar although not identical approach has been taken in the case-law of the United States to the domestic anti-dumping provisions governing the calculation of normal value. See, in particular, United States Court of International Trade, 3 February 1997, *INA Walzlager Schaeffler KG v. United States* (957 F. Supp. 251 (Ct. Int'l Trade 1997) p. 265).

[33] See, by analogy, with reference to the concept of the 'ordinary course of trade' mentioned in Article 2(1) of the basic regulation, the Opinion of Advocate General Mengozzi in *Council* v *Alumina* (C-393/13 P, EU:C:2014:2105, point 43), to which the Court expressly referred in paragraph 28 of its judgment of 1 October 2014, *Council* v *Alumina* (C-393/13 P, EU:C:2014:2245).

[34] See, again by analogy, *ibidem*.

no way follows from that purpose, on the other hand, that the Commission must necessarily prove the existence of a subjective element on the part of the producer-seller in order to be able to exclude such a sale.

59. Furthermore, Yieh United offers no precise legal basis for its general assertion that 'there must be a subjective element in the area of anti-dumping'. On the contrary, as the Commission submits and as is clear from the case-law, the purpose of the imposition of an anti-dumping duty, for which the determination of normal value is essential, is not punitive, but to restore fair market conditions in the European Union. [35] It follows that, in this area of law, it is not, in principle, necessary to establish a subjective element.

60. In addition, as the General Court essentially pointed out in paragraphs 133 and 134 of the judgment under appeal, making the exclusion of sales of products which may be presumed subsequently to have been exported from the determination of the normal value of the product concerned entirely subject to proof of the intention or effective knowledge of the vendor, at the time of the sale, as to the final destination of the product in question, would run counter to the very objective of anti-dumping investigations. On this matter I have already had occasion to note that, by contrast with other areas of EU law, such as, for example, in relation to infringements of competition law, in anti-dumping investigations, the EU institutions' powers are more limited and they are therefore reliant on the voluntary cooperation of the parties concerned in providing them with the information needed in the investigation. [36] Moreover, I agree with the General Court that, demanding such proof of the institutions, which in this procedural context might be impossible to adduce, would ultimately be tantamount to allowing the taking into account, for the purposes of determining the normal value in accordance with Article 2 of the basic regulation, of the prices of exported products likely to distort or compromise the correct determination of the normal value. [37]

61. Lastly, and merely as an incidental point, I would observe that the interpretation of Article 2(2) of the basic regulation according to which, in determining whether a like product, being the subject of a sale, is 'intended for domestic consumption', the intention or actual knowledge of the producer-seller regarding a destination for export may be relevant, but is not decisive, where objective links between the sale and a subsequent export are proved and justify the ruling out of an 'intention for domestic consumption' of the products sold, is, in essence, consistent with the interpretation adopted in administrative and judicial practice in the United States with regard to the national provisions of anti-dumping law governing the determination of normal value. [38]

62. It is in the light of all the foregoing considerations that the judgment under appeal must be analysed.

[35] See, to that effect, judgment of 3 October 2000, *Industrie des poudres sphériques* v *Council* (C-458/98 P, EU:C:2000:531, paragraph 91), and Opinion of Advocate General Van Gerven in *Nölle* (C-16/90, not published, EU:C:1991:233, point 11).

[36] See my Opinion in *Commission* v *Kolachi Raj Industrial* (C-709/17 P, EU:C:2019:303, point 46, where there is a further reference).

[37] See paragraph 134 of the judgment under appeal.

[38] Namely, 19 US Code § 1677b and, in particular, subsection (a), paragraph (1). The case-law on the application of that provision reveals that a criterion is applied to the effect that the anti-dumping investigatory authority must prove that the producer '*knew or should have known that the merchandise was not for home consumption based upon the particular facts and circumstances surrounding the sales*'; see United States Court of International Trade, of 3 February 1997, *INA Walzlager Schaeffler KG v. United States* (957 F. Supp. 251 (Ct. Int'l Trade 1997) p. 264) and of 3 July 2001, *Tung Mung Development Co. Ltd. and Yieh United Steel Corp. v. United States* (219 F. Supp. 2d 1333 (Ct. Int'l Trade 2002) p. 46)). That case-law is substantially confirmed in the judgment of 17 June 2020, *Coalition of American Flange Producers v. United States* (448 F. Supp. 3d 1340 (Ct. Int'l Trade 2020) p. 1354 et seq.). It follows from this case-law that proof of actual knowledge on the part of an exporting producer of the destination for export of the products sold is not required when such knowledge can be presumed on the basis of objective facts and circumstances (*constructive knowledge*) leading to the conclusion that the producer 'should have known' that the products would be exported.

(d) The judgment under appeal

63. In the judgment under appeal, in its analysis of the second plea raised by Yieh United, the General Court first, in paragraphs 127 to 135, interpreted the provision in Article 2(2) of the basic regulation and the words 'intended for domestic consumption' contained within it. Then, in paragraphs 136 to 144 of the judgment under appeal, the General Court considered the case before it and concluded that the Commission had not committed any manifest error of assessment by excluding from the contested regulation the sales which Yieh United had made to its biggest customer in Taiwan.

64. I would observe, in the first place, that, in its third ground of appeal, Yieh United challenges only paragraphs 129 to 135 of the judgment under appeal, in which, as I have just mentioned, the General Court interpreted the words 'intended for domestic consumption' within the meaning of Article 2(2) of the basic regulation. However, on reading those paragraphs of the judgment, it is clear that the General Court did no more, essentially, than assess and reject the interpretation of that provision proposed by Yieh United, according to which, in order to be able to exclude certain sales from the calculation of normal value, the Commission must prove the intention or specific knowledge of the seller regarding the export destination of the products sold. In its submissions under its third ground of appeal, Yieh United merely argues that, by failing to accept that interpretation, the General Court erred in law.

65. However, it is clear from my analysis in points 47 to 60 above that the interpretation of the provision in question proposed by Yieh United must in my view be rejected and that, although the intention and actual knowledge of the producer-seller regarding the final destination of the products are not irrelevant, proving those elements is not necessarily decisive in determining whether or not the products sold in the country of the exporter are 'intended for domestic consumption' within the meaning of Article 2(2) of the basic regulation.

66. It follows that the General Court made no error of law by rejecting, in paragraphs 129 to 135 of the judgment under appeal, the interpretation of the provision in question proposed by Yieh United. In my view, that consideration is sufficient for the dismissal of the third ground of appeal, since, as I have mentioned, in that ground of appeal, Yieh United merely challenges that part of the judgment by reiterating that interpretation of the provision in question.

67. As an additional point, I would observe, in the second place, that, as is clear from my analysis in points 47 to 60 above, the General Court's interpretation in paragraphs 129 to 135 of the judgment under appeal of the words 'intended for domestic consumption' within the meaning of Article 2(2) of the basic regulation should be supplemented and clarified in the sense that the intention or actual knowledge of the producer-seller regarding an export destination may be relevant, but not decisive, where objective links between the sales in question and a destination other than domestic consumption of the goods sold are proved such as to exclude such sales from being taken into account in the calculation of normal value.

68. As a further point, I would note, in the third place, that it is clear from paragraphs 138 to 143 of the judgment under appeal – with which Yieh United does not take issue – that, in this case, the Commission had excluded from the calculation of normal value certain sales which Yieh United had made to its biggest customer in Taiwan on the basis of the proven facts that, to a significant

proportion of those sales, [39] an export discount had been applied and that the customer in question mainly exported the products which were the subject of the sales. [40]

69. In those circumstances, in light of the interpretation of the provision in question given in points 47 to 60 above, the General Court was right, in my view, to conclude that the Commission made no manifest error of assessment by excluding the sales to that customer from the calculation of normal value.

VI. Conclusion

70. On the basis of all the foregoing considerations, I propose that the Court dismiss as unfounded the third ground of appeal raised by Yieh United.

[39] It is clear from paragraph 141 of the judgment under appeal that, for example, such sales represented 40% of all sales to the customer over the course of December 2013.

[40] It is clear from paragraph 142 of the judgment under appeal that it was proved that the customer in question had sold only a negligible quantity of the product concerned on the domestic market.