Reports of Cases

JUDGMENT OF THE GENERAL COURT (Fourth Chamber)

8 July 2020 *

(Dumping — Imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China — Undertakings — Admissibility — Implementing Regulation (EU) 2016/2146 — Invalidation of undertaking invoices — Temporal application of new provisions)

In Case T-110/17,

Jiangsu Seraphim Solar System Co. Ltd, established in Changzhou (China), represented by Y. Melin, lawyer,

applicant,

v

European Commission, represented by N. Kuplewatzky and T. Maxian Rusche, acting as Agents,

defendant,

supported by

Council of the European Union, represented by H. Marcos Fraile, acting as Agent, and by N. Tuominen, lawyer,

intervener,

APPLICATION based on Article 263 TFEU seeking partial annulment of Commission Implementing Regulation (EU) 2016/2146 of 7 December 2016 withdrawing the acceptance of the undertaking for two exporting producers under Implementing Decision 2013/707/EU confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures (OJ 2016 L 333, p. 4), in so far as it concerns the applicant,

THE GENERAL COURT (Fourth Chamber),

composed of H. Kanninen, President, J. Schwarcz (Rapporteur) and C. Iliopoulos, Judges,

Registrar: P. Cullen, Administrator,

having regard to the written part of the procedure and further to the hearing on 30 January 2019,

* Language of the case: English.

gives the following

Judgment

Background to the dispute

1 The applicant, Jiangsu Seraphim Solar System Co. Ltd, manufactures crystalline silicon photovoltaic modules in China and exports them to the European Union.

2 On 4 June 2013, the European Commission adopted Regulation (EU) No 513/2013 imposing a provisional anti-dumping duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China and amending Regulation (EU) No 182/2013, making these imports originating in or consigned from the People's Republic of China subject to registration (OJ 2013 L 152, p. 5).

3 By Decision 2013/423/EU of 2 August 2013 accepting an undertaking offered in connection with the anti-dumping proceeding concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells and wafers) originating in or consigned from the People's Republic of China (OJ 2013 L 209, p. 26), the Commission accepted a price undertaking ('the undertaking') offered by the China Chamber of Commerce for Import and Export of Machinery and Electronic Products ('CCCME') on behalf of the applicant and a number of other exporting producers.

4 On 2 December 2013, the Council of the European Union adopted Implementing Regulation (EU) No 1238/2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ 2013 L 325, p. 1).

5 On 2 December 2013, the Council also adopted Implementing Regulation (EU) No 1239/2013 imposing a definitive countervailing duty on imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China (OJ 2013 L 325, p. 66).

6 Article 3(2) of Implementing Regulation No 1238/2013 and Article 2(2) of Implementing Regulation No 1239/2013 provide, in the same terms, that the Commission may identify transactions for which 'a customs debt shall be incurred at the time of acceptance of the declaration for release into free circulation' in cases where the acceptance of the price undertaking is withdrawn.

7 By Implementing Decision 2013/707/EU of 4 December 2013 confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures (OJ 2013 L 325, p. 214), the Commission confirmed the acceptance of the undertaking, as amended at the request of the CCCME, on behalf of the Chinese exporting producers. On 10 September 2014, the Commission adopted Implementing Decision 2014/657/EU accepting a proposal made by a group of exporting producers together with the [CCCME] for clarifications concerning the implementation of the undertaking referred to in Implementing Decision 2013/707/EU (OJ 2014 L 270, p. 6).

8 The total *ad valorem* duty applicable to imports of photovoltaic cells and modules originating in China for non-sampled cooperating companies listed in Annex I to Implementing Regulation No 1238/2013 and in Annex 1 to Implementing Regulation No 1239/2013 is 47.7%. It corresponds to an anti-dumping duty of 41.3% (Article 1(2) of Implementing Regulation No 1238/2013), plus a countervailing duty of 6.4% (Article 1(2) of Implementing Regulation No 1239/2013). Imports covered

by the undertaking and Implementing Decision 2013/707 are exempt from those duties under Article 3(1) of Implementing Regulation No 1238/2013 and Article 2(1) of Implementing Regulation No 1239/2013.

9 By letter of 11 October 2016, the Commission informed the applicant that it was proposing to withdraw its acceptance of the undertaking and disclosed the essential facts and considerations forming the basis of that proposal. A general disclosure document and a disclosure document specific to the applicant were annexed to that letter.

10 In the disclosure document specific to the applicant, the Commission indicated that it was proposing to withdraw its acceptance of the undertaking and informed the applicant, under heading 4 'Invalidation of undertaking invoices', that it would, first, invalidate the undertaking invoices which accompanied the sales made to the importer and, second, instruct the customs authorities to recover the customs debt that would have been incurred had the applicant failed to present valid undertaking invoices when the declaration for release of the goods for free circulation was accepted.

11 By letter of 28 October 2016, the applicant submitted comments on the general disclosure document and on the Commission's disclosure document specific to the applicant. The applicant stated, in essence, that the Commission did not have the power to invalidate the invoices or to instruct the customs authorities to collect duties as if no undertaking invoice had been presented. According to the applicant, that in fact amounted to giving retroactive effect to the withdrawal of the undertaking.

12 The Commission confirmed its position in Implementing Regulation (EU) 2016/2146 of 7 December 2016 withdrawing the acceptance of the undertaking for two exporting producers under Implementing Decision 2013/707 (OJ 2016 L 333, p. 4; 'the contested regulation'), adopted on the basis of Article 8 of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21; 'the basic anti-dumping regulation'), and Article 13 of Regulation (EU) 2016/1037 of the European Parliament and of the Council of 8 June 2016 on protection against subsidised imports from countries not members of the European Union (OJ 2016 L 176, p. 55; 'the basic anti-subsidy regulation').

Procedure and forms of order sought

13 By application lodged at the Registry of the General Court on 18 February 2017, the applicant brought the present action.

14 The Commission lodged its defence at the Court Registry on 22 May 2017.

15 By document lodged at the Court Registry on 23 May 2017, the Council sought leave to intervene in support of the form of order sought by the Commission. The main parties did not submit any observations in that regard.

16 By decision of 10 July 2017, the President of the Fourth Chamber of the General Court granted the Council leave to intervene in support of the form of order sought by the Commission.

17 The Council lodged its statement in intervention on 27 July 2017.

18 By letter sent to the Court Registry on 12 September 2017, the Commission indicated that it had no observations on the statement in intervention.

19 The applicant lodged its observations on the statement in intervention at the Court Registry on 12 September 2017.

20 The applicant lodged its reply at the Court Registry on 28 July 2017.

21 The Commission lodged a rejoinder at the Court Registry on 6 October 2017. It included a request to withdraw from the case file Annex C.3 to the reply. The applicant lodged its observations on that request on 9 November 2017.

22 The applicant also submitted to the Court, after lodging the reply and before the hearing, a document designated E.1, which refers to the procedure before the Swedish national customs authorities in respect of the imports in question, which were the subject of the undertaking invoices invalidated by the Commission. The Commission had initially requested, in paragraph 14 of the observations lodged at the Court Registry on 23 January 2019, that the Court declare that annex inadmissible and remove it from the file as new evidence. At the hearing, the Commission withdrew its plea of inadmissibility.

23 The applicant claims that the Court should:

– annul Article 2 of the contested regulation in so far as it concerns the applicant;

– order the Commission, and any party which may be granted leave to intervene in support of the Commission in the course of the proceedings, to bear the costs.

24 The Commission contends that the Court should:

– principally, dismiss the action as inadmissible;

– in the alternative, dismiss the single plea in law as inadmissible;

– in the further alternative, dismiss the single plea in law, and, therefore, the action in its entirety, as unfounded;

– order the applicant to pay the costs.

25 The Council contends that the Court should:

– dismiss the action as inadmissible;

– in the alternative, dismiss the action as unfounded in law;

– order the applicant to pay the costs, including its own costs.

26 During the hearing, the applicant requested that Cases T-781/17, *Kraftpojkarna* v *Commission*, and T-782/17, *Wuxi Saijing Solar* v *Commission*, be joined to the present case for the purposes of the decision closing the proceedings. Following a question put by the Court in that regard, the Commission and the Council opposed the joining of those cases, arguing, in essence, that the cases did not have the same subject matter. In accordance with Article 68 of the Rules of Procedure of the General Court, the President of the Fourth Chamber of the General Court decided not to join those cases to the present proceedings.

Law

Subject matter of the action

27 As a preliminary point, it should be noted that, as is apparent from the form of order sought by the applicant, the present action seeks the annulment of Article 2 of the contested regulation in so far as it concerns the applicant. This action therefore concerns the legality of the invalidation of the applicant's undertaking invoices and the consequences to be drawn from that, in particular as regards the recovery of the anti-dumping and countervailing duties due. The present case therefore does not concern whether the Commission was entitled to withdraw its acceptance of the applicant's undertakings. As the Commission rightly points out, the applicant does not contest either Article 1 of the contested regulation, by which the Commission withdrew acceptance of the undertakings, or the procedural rules laid down, in particular, in Article 3 of that regulation.

Admissibility

The admissibility of the action

28 The Commission, supported by the Council, submits that the action is inadmissible. As the applicant refers only to Article 2 of the contested regulation, it must demonstrate that it has standing under Article 263 TFEU, and thus, in particular, that it is directly concerned. It must also demonstrate that it has an interest in bringing proceedings in respect of that provision of the contested regulation. The Commission submits that, since it was not the applicant, but Seraphim Solar System GmbH which had to pay to the national authorities the anti-dumping and countervailing duties due as a legal consequence of the invalidation of the invoices issued by the applicant, the latter has failed to demonstrate either that it is directly concerned or that it has an interest in bringing proceedings. According to the Commission, in the present case, the contested regulation did not specifically place the applicant at a disadvantage (see, by analogy, judgment of 16 March 1978, *Unicme and Others* v *Council*, 123/77, EU:C:1978:73).

29 The Commission states that it was for the applicant to establish that Article 2 of the contested regulation had direct effects on its legal position. The applicant has simply contested one particular consequence of the breach and withdrawal of its undertaking, namely that the undertaking invoices were invalidated and that, as a result, another company was obliged to pay anti-dumping and countervailing duties. The Commission submits that the applicant confuses the requirements applicable to having standing as regards the contested regulation as a whole, in particular Article 2 of the latter.

30 According to the Commission, the applicant is not individually concerned. First of all, it is undeniable that the applicant was not the addressee of Article 2 of the contested regulation, which is of general application. Next, the Commission states that the fact that the applicant was mentioned in the contested regulation as a whole was not decisive. According to the Commission, the contested regulation did not impose anti-dumping or countervailing duties. The duties on imports of the applicant's product were due from the outset but were not collected because they were exempt from collection on account of the presentation of undertaking invoices. Even after those invoices were invalidated, the import duties were not collected from the applicant, but from the companies Huashun Solar GmbH and Seraphim Solar System, as set out in Annex I to the contested regulation, those companies being, according to the Commission, the only companies directly concerned by the abovementioned provision.

31 Finally, the Commission claims that the applicant also has no interest in bringing proceedings. In its view, the applicant has not demonstrated how the annulment of Article 2 of the contested regulation could benefit it, when the invalidation of the invoices did not create a customs debt for the applicant and did not release it from any obligation.

32 The applicant contests the arguments put forward by the Commission and the Council. It submits that it is directly and individually concerned by the contested regulation, that it has an interest in bringing proceedings and that it therefore has standing to bring the present action.

33 In that regard, it should be noted that, under the fourth paragraph of Article 263 TFEU, any natural or legal person may, under the conditions laid down in the first and second paragraphs of that article, institute proceedings against an act addressed to that person or which is of direct and individual concern to them, and against a regulatory act which is of direct concern to them and does not entail implementing measures.

34 As regards the condition of being individually concerned, it should be noted that, while it is true that, in the light of the criteria set out in the fourth paragraph of Article 263 TFEU, regulations imposing anti-dumping duties are, by virtue of their nature and scope, of a general nature in that they apply generally to the economic operators concerned, certain of their provisions may nonetheless be of individual concern to particular traders (see order of 21 January 2014, *Bricmate* v *Council*, T-596/11, not published, EU:T:2014:53, paragraph 23 and the case-law cited).

35 It follows that measures imposing anti-dumping duties may, without losing their character as regulations, be of individual concern in certain circumstances to certain traders (see order of 21 January 2014, *Bricmate* v *Council*, T-596/11, not published, EU:T:2014:53, paragraph 24 and the case-law cited).

36 As regards the condition of being directly concerned, it should be noted that the condition that a natural or legal person must be directly concerned by the decision being challenged, as provided for in the fourth paragraph of Article 263 TFEU, requires that two cumulative criteria be met, namely, first, that the contested act must directly affect the legal situation of the individual and, second, that act must leave no discretion to the addressees of that measure who are entrusted with the task of implementing it, such implementation being purely automatic and resulting from EU rules alone, without the application of other intermediate rules (see order of 14 January 2015, *SolarWorld and Others* v *Commission*, T-507/13, EU:T:2015:23, paragraph 40 and the case-law cited, confirmed by order of 10 March 2016, *SolarWorld* v *Commission*, C-142/15 P, not published, EU:C:2016:163).

37 As regards companies which offer an undertaking, the case-law has recognised that Commission decisions relating to the withdrawal of acceptance of an undertaking and of the Council regulation imposing a definitive anti-dumping duty on imports of that exporter may be the subject of an action by the exporter concerned before the EU Courts (see order of 14 January 2015, *SolarWorld and Others* v *Commission*, T-507/13, EU:T:2015:23, paragraph 41 and the case-law cited).

38 Exporters of the product subject to an anti-dumping duty alleged to be involved in dumping which are able to establish that they were identified in the acts of the institutions are considered to be directly concerned by the regulation imposing that duty (judgment of 28 February 2019, *Council* v *Marquis Energy*, C-466/16 P, EU:C:2019:156, paragraph 54).

39 Furthermore, according to case-law, the mere fact that, in order to apply the act the annulment of which is sought, a national implementing measure is necessary, does not prevent the particular applicant from being regarded as being directly concerned by the act at issue, provided that the Member State responsible for implementing it has no discretion of its own (see, to that effect, judgment of 5 October 2005, *Land Oberösterreich and Austria* v *Commission*, T-366/03 and T-235/04, EU:T:2005:347, paragraph 29 and the case-law cited). In such a situation, the adoption of the national

decision is automatic and the applicant's legal situation must be regarded as being directly affected by the contested decision (see, to that effect, judgment of 10 September 2009, *Commission* v *Ente per le Ville Vesuviane* and *Ente per le Ville Vesuviane* v *Commission*, C-445/07 P and C-455/07 P, EU:C:2009:529, paragraphs 45 and 46 and the case-law cited).

40 It must also be borne in mind that, according to settled case-law, an action for annulment brought by a natural or legal person is admissible only in so far as that person has an interest in the contested measure being annulled (see, to that effect, judgment of 24 September 2008, *Reliance Industries* v *Council and Commission*, T-45/06, EU:T:2008:398, paragraph 34 and the case-law cited).

– *Individual concern*

41 In the present case, it should be noted that the applicant is an exporting producer of the product concerned and fully cooperated with the Commission in the investigation which led to the imposition of the anti-dumping and countervailing duties and that its name appears in Implementing Regulations No 1238/2013 and No 1239/2013 imposing those duties and in the acceptance of the undertaking.

42 Furthermore, the applicant is expressly named in the contested regulation. First, the applicant is referred to in Article 1 of the operative part of the contested regulation, concerning the withdrawal of undertakings that had previously been accepted by the Commission. Second, the applicant is referred to in recital 31 of that regulation as one of the two exporting producers which issued the undertaking invoices that were invalidated in Article 2 of the operative part of that regulation. The invoices at issue in the present case were sent by the applicant to the company Seraphim Solar System. The contested regulation relates exclusively to compliance with undertakings by two named exporting producers, one of which is the applicant.

43 In those circumstances, the applicant must be regarded as individually concerned by the contested regulation and by Article 2 thereof.

– *Direct concern*

44 In the present case, the Commission, after finding that the applicant had breached the undertaking offered and after withdrawing its acceptance of that undertaking, invalidated the undertaking invoices issued by the applicant corresponding to certain specific transactions, pursuant to Article 2 of the contested regulation, and found, accordingly, that the definitive duties due with regard to those transactions had to be collected. The contested provisions thus had a direct effect on the applicant's legal position. Furthermore, the consequences to be drawn from that by the national customs authorities were laid down by those provisions, while those authorities were unable, under those provisions, to reverse the invalidation of the invoices or the collection of the duties due.

45 In those circumstances, the applicant is directly concerned by the contested regulation, including Article 2 thereof.

– *Interest in bringing proceedings*

46 It should be noted that the fact, put forward by the Commission, that customs debts are to be paid by the importer and not by the exporting producer does not preclude the latter from having an interest in obtaining the annulment of a measure giving rise to those debts.

47 In that regard, it should be noted that the admissibility of an exporting producer's action against measures withdrawing acceptance of an undertaking and imposing a definitive anti-dumping duty on the products which it manufactures and exports to the EU market is, implicitly but necessarily,

accepted by case-law (see, to that effect, judgment of 9 September 2010, *Usha Martin* v *Council and Commission*, T-119/06, EU:T:2010:369, upheld on appeal by judgment of 22 November 2012, *Usha Martin* v *Council and Commission*, C-552/10 P, EU:C:2012:736). In a similar situation, it should be inferred from the above that such an exporting producer must also be considered to be entitled to contest the imposition of that duty on products which it has already exported and in respect of which the undertaking invoices have been invalidated by the Commission.

48 Moreover, the applicant rightly submits that the contested provisions, in so far as they contribute to raising the import price of its products, have negative repercussions on its commercial relations with the importer of the products in question. The action, if successful, would alleviate those repercussions.

49 The applicant therefore has an interest in bringing proceedings to seek annulment of Article 2 of the contested regulation. The action must be considered admissible.

The admissibility of the plea of illegality raised by the applicant

50 The applicant submits that Article 3(2) of Implementing Regulation No 1238/2013 and Article 2(2) of Implementing Regulation No 1239/2013 are contrary to Article 8(1), (9) and (10) and Article 10(5) of 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), as amended, and contrary to Article 13(1), (9) and (10) and Article 16(5) of Council Regulation (EC) No 597/2009 of 11 June 2009 on protection against subsidised imports from countries not members of the European Community (OJ 2009 L 188, p. 93), since the Council, acting as an implementing authority and not as a legislator, was not entitled to delegate to the Commission the power to invalidate undertaking invoices by merely withdrawing acceptance of an undertaking, nor could it instruct the customs authorities to collect duties on goods already released for free circulation in the customs territory of the European Union.

51 The Commission, supported by the Council, contends that the applicant's right to raise a plea of illegality under Article 277 TFEU was time-barred, in accordance with the judgments of 9 March 1994, *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), and of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101).

52 In that regard, according to the Commission, as an exporting producer which cooperated in the anti-dumping and anti-subsidy investigations, the applicant enjoyed a time-limited right, which expired on 3 March 2014, to bring a direct action under Article 263 TFEU to challenge Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013. The applicant therefore cannot now raise a plea of illegality under Article 277 TFEU to challenge those provisions.

53 The Commission contends that, under the principle of legal certainty, the definitive nature of measures adopted by the EU institutions means that the measures cannot be called in question once the time limit laid down in Article 263 TFEU for bringing an action against those measures has expired, even in the context of a plea of illegality raised pursuant to Article 277 TFEU against those measures. That conclusion also applies to regulations imposing anti-dumping and countervailing duties by virtue of their dual nature as acts of a legislative nature and acts liable to be of direct and individual concern to certain economic operators.

54 According to the Commission, in the present case, it is common ground that the applicant was fully aware of Implementing Regulations No 1238/2013 and No 1239/2013. Although not selected in the sample, the applicant actively participated in the procedure that led to the imposition of anti-dumping and countervailing duties in order to gain an advantage over the exporting producers which did not

cooperate. The applicant is listed in the annexes to those regulations. In those circumstances, the applicant, as with any other prudent economic operator, should have been aware of the fact that the Council had given the Commission authority to invalidate the undertaking invoices and to instruct the customs authorities to collect duties for the invoices deemed to have breached the undertaking, so that the time limit for the applicant to call into question that authorisation, and thereby protect its interest in challenging the abovementioned regulations, expired on 3 March 2014.

55 The applicant disputes the arguments put forward by the Commission and the Council.

56 The Court notes that, according to settled case-law, Article 277 TFEU gives expression to a general principle conferring upon any party to proceedings the right to challenge, for the purpose of obtaining the annulment of a decision of direct and individual concern to that party, the validity of previous acts of the institutions which form the legal basis of the decision which is being attacked, if that party was not entitled under Article 263 TFEU to bring a direct action challenging those acts by which it was thus affected without having been in a position to ask that they be declared void (see judgment of 6 March 1979, *Simmenthal* v *Commission*, 92/78, EU:C:1979:53, paragraph 39 and the case-law cited). It is also apparent from case-law that the remedy of the plea of illegality is open only in the absence of any other available remedy (see, to that effect, judgments of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90, paragraph 17; of 15 February 2001, *Nachi Europe*, C-239/99, EU:C:2001:101, paragraph 37; and of 8 March 2007, *Roquette Frères*, C-441/05, EU:C:2007:150, paragraph 40).

57 In the present case, contrary to what the Commission argues, the applicant cannot be considered to have been entitled to challenge, under Article 263 TFEU, directly following their adoption, Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013, nor can the time limit for challenging those provisions be regarded as having expired on 3 March 2014.

58 In that regard, it should be noted that Article 3 of Implementing Regulation No 1238/2013 and Article 2 of Implementing Regulation No 1239/2013 constituted exemptions of benefit to the applicant, in that the products in question, imported into the European Union, were not subject to payment of definitive anti-dumping and countervailing duties, provided that the conditions laid down in the undertakings were met.

59 Furthermore, with regard to Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013, it is clear, as the applicant submits, that those provisions were intended merely to establish a right for the Commission to withdraw acceptance of specific undertakings and to invalidate corresponding undertaking invoices.

60 First, it was expressly provided, in that regard, that the Commission was to use special measures, namely withdrawing acceptance of an undertaking pursuant to Article 8(9) of Regulation No 1225/2009 and Article 13(9) of Regulation No 597/2009, by adopting a regulation or a decision referring to specific transactions and declaring the relevant undertaking invoices invalid (see, to that effect, order of 14 January 2015, *SolarWorld and Others* v *Commission*, T-507/13, EU:T:2015:23, paragraph 61). The situation in the present case is, therefore, not comparable to that at issue in the judgment of 28 February 2017, *Canadian Solar Emea and Others* v *Council* (T-162/14, not published, EU:T:2017:124, paragraph 47), to which the Commission referred at the hearing, arguing that the applicant was entitled to challenge the provisions referred to in paragraph 57 above as soon as they were adopted.

61 Second, as the applicant submits, when Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013 were adopted, the question of whether those provisions would apply to it remained purely hypothetical.

62 In those circumstances, prior to the actual implementation of Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013, which covered all the companies which had adopted the undertakings in question, the applicant could not be regarded as having been directly concerned by those provisions. Nor did it have an interest in challenging the legality of those provisions in an action for annulment during the period suggested by the Commission, which expired on 3 March 2014. In particular, the applicant's interest in bringing proceedings against the abovementioned provisions could not be based on the mere possibility that the Commission might withdraw its acceptance of the undertakings, followed by a withdrawal of undertaking invoices. The applicant had no reason to expect to find itself in such a hypothetical situation.

63 Moreover, it should be noted that, unlike the provisions at issue in judgment of 15 February 2001, *Nachi Europe* (C-239/99, EU:C:2001:101, paragraph 37), to which the Commission refers, the provisions which are, in the present case, covered by the plea of illegality did not have the characteristics of an individual decision. On the contrary, they were general provisions, to be followed by subsequent implementing measures which, depending on the circumstances, may have adversely affected the applicant's interests (see, by analogy, judgment of 16 March 1978, *Unicme and Others* v *Council*, 123/77, EU:C:1978:73, paragraphs 11 to 18). Neither the fact that the applicant was referred in the annexes to Implementing Regulations No 1238/2013 and No 1239/2013 nor the fact that it should have been aware that the Council had given the Commission authority to invalidate the undertaking invoices placed the applicant in a position in which it was entitled to challenge the provisions referred to in paragraph 57 above directly following their adoption.

64 Thus, since it did not have an interest in bringing proceedings against those provisions of Implementing Regulations No 1238/2013 and No 1239/2013 directly following their adoption, there is nothing to prevent the applicant from raising a plea of illegality against them in the present action.

The substance

65 The applicant raises a single plea in law in support of its action. In essence, it claims that, by the contested regulation, the Commission infringed Article 8(1), (9) and (10) and Article 10(5) of the basic anti-dumping regulation and Article 13(1), (9) and (10), and Article 16(5) of the basic anti-subsidy regulation by invalidating undertaking invoices and subsequently instructing the customs authorities to collect duties as if no undertaking invoice had been issued and communicated to the customs authorities at the time the goods were released for free circulation.

66 The applicant also bases its action on a plea of illegality in respect of Article 3(2) of Implementing Regulation No 1238/2013 and Article 2(2) of Implementing Regulation No 1239/2013, based on an alleged infringement of Article 8 and Article 10(5) of Regulation No 1225/2009 and Article 13 and Article 16(5) of Regulation No 597/2009, as applicable at the time Implementing Regulations No 1238/2013 and No 1239/2013 were adopted.

67 As a preliminary point, it should be noted that the provisions at issue, falling within the scope of the basic anti-dumping regulation and the basic anti-subsidy regulation (see paragraph 65 above), which were applicable when the contested regulation was adopted, are, in essence, identical to the provisions under Regulations No 1225/2009 and No 597/2009 (see paragraph 66 above) as regards the factors relevant to the analysis of the present case. Accordingly, in the remainder of this judgment, reference will be made to the basic regulations, except where the provisions of Regulations No 1225/2009 and No 597/2009, which are applicable or invoked, as the case may be, differ from them. It should be noted that, although Implementing Regulations No 1238/2013 and No 1239/2013 were adopted by the Council, which at the time had, under Regulations No 1225/2009 and No 597/2009, the implementing power to impose definitive duties, that power was transferred to the Commission by Regulation (EU)

No 37/2014 of the European Parliament and of the Council of 15 January 2014 amending certain regulations relating to the common commercial policy as regards the procedures for adoption of certain measures (OJ 2014 L 18, p. 1).

68 The applicant argues that it is clear from Article 8 of the basic anti-dumping regulation and Article 13 of the basic anti-subsidy regulation that, when price undertakings have been accepted, as long as those undertakings are in force, provisional or definitive duties, as the case may be, are not to apply. By contrast, when the acceptance of the undertaking is withdrawn after it has been discovered that one of the exporting producers which proposed the undertaking has breached some of the terms of the undertaking, it is clear from Article 8(9) of the basic anti-dumping regulation and from Article 13(9) of the basic anti-subsidy regulation that the duties which were not applied as a result of the acceptance of the undertaking are to apply automatically. However, according to the applicant, those duties relate only to imports made from the date on which the undertaking was withdrawn. That is also clear from the Commission's practice. It is only recently that the Commission has, on two occasions, invalidated undertaking invoices of the type referred to in the contested regulation.

69 The applicant submits that there are only two exceptions under which the Commission may impose duties retroactively. The first exception concerns cases where the conditions laid down in Article 8(10) of the basic anti-dumping regulation and Article 13(10) of the basic anti-subsidy regulation are met. When the Commission suspects that an undertaking has been breached, it may decide to impose provisional duties, which can be collected definitively if the suspicion that the undertaking was breached is confirmed.

70 According to the applicant, the second exception relates to cases where imports have been registered in accordance with Article 10(5) of the basic anti-dumping regulation and Article 16(5) of the basic anti-subsidy regulation. If customs authorities are instructed to register imports, the definitive duty may be imposed retroactively as from the date of registration, provided that registration took place no more than 90 days prior to the imposition of the provisional duties.

71 According to the applicant, the Commission itself stated that there was no legal basis for retroactive withdrawal of the undertaking invoices. The applicant disputes that the Commission is entitled to claim that, in the present case, since the anti-dumping investigation was completed, the withdrawal of acceptance of the undertaking and the invalidation of undertaking invoices did not have retroactive effect. The applicant criticises the Commission for what it alleges is a misinterpretation of the relevant provisions.

72 In the reply, the applicant adds that customs supervision and customs controls are competences of the customs authorities of the Member States, in accordance with Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1; 'the Union Customs Code').

73 The Commission submits, in essence, that the Council was entitled to give the Commission authority under Implementing Regulations No 1238/2013 and No 1239/2013 to invalidate undertaking invoices and to instruct the national customs authorities to collect duties on imports made in breach of the terms of the undertaking.

74 In the first place, the Commission contends that a price undertaking is a performance commitment. An exporter which has been found to be dumping or benefiting from countervailable subsidies can undertake to raise its export price to a level that eliminates the harmful effects of those practices, that level being evidenced by issuing undertaking invoices. The exporter must, however, abide by that performance commitment in order to retain its exemption from the anti-dumping or countervailing duties normally due in respect of the dumped or subsidised products concerned. An undertaking is therefore an exception to the conditions that normally apply to the products concerned. By contrast, where no undertaking invoice is presented, or where it is subsequently discovered that the

undertaking invoice did not fulfil the requirements imposed, the anti-dumping or countervailing duties revert to being applicable, and the national customs authorities will collect those duties. The Commission claims that, as an undertaking constitutes an exception and a delicate arrangement, it must be interpreted strictly. Entering into undertakings carries a risk for the Commission, as well as it being difficult to monitor. It is for any party accepting the undertaking to ensure that it is genuinely complied with and to carry out effective monitoring of its implementation, cooperating with the Commission in a relationship of trust.

75 For those reasons, the Court of Justice has recognised that the EU institutions can accept, reject, and define the terms of a price undertaking on the basis of their discretionary legislative power. The Commission may, therefore, impose a penalty for any breach of an undertaking or obligation to cooperate in the implementation of that undertaking, by withdrawing its acceptance of the undertaking and imposing anti-dumping and countervailing duties on the basis of the facts established in the investigation which led to the price undertaking, in accordance with Article 8(7) and (9) of the basic anti-dumping regulation and Article 13(7) and (9) of the basic anti-subsidy regulation. That power to impose penalties includes the power to invalidate undertaking invoices.

76 In the second place, the Commission disputes the applicant's argument that the Council was not entitled to authorise the Commission under Implementing Regulations No 1238/2013 and No 1239/2013 to invalidate invoices relating to goods which had already been released for free circulation, since such a possibility is not provided for in the basic anti-dumping regulation or in the basic anti-subsidy regulation.

77 First, in that regard, the Commission submits that it had the general task of monitoring undertakings accepted under Article 8 of the basic anti-dumping regulation and Article 13 of the basic anti-subsidy regulation, if necessary with the assistance of the customs authorities of the Member States. The Commission argues that those provisions do not preclude the invalidation of undertaking invoices, but merely contain no reference to invalidation.

78 Second, in the Commission's view, Article 8(9) of the basic anti-dumping regulation and Article 13(9) of the basic anti-subsidy regulation do not define the nature of breaches of the undertaking and do not determine the circumstances under which acceptance of the undertaking should be withdrawn. It is for the institutions to impose certain compliance requirements, the issuing of undertaking invoices being only one example. The legal basis for setting out such technical arrangements in regulations imposing definitive duties can be found in Article 14(1) of the basic anti-dumping regulation and in Article 24(1) of the basic anti-subsidy regulation, according to which duties are to be collected 'by Member States in the form, at the rate specified and according to the other criteria laid down in the Regulation imposing such duties'. The possibility of giving the Commission authority to invalidate undertaking invoices derives from the Commission's general task of monitoring undertakings, from the Council's power to set 'other criteria' for the collection of the duties in question, and from the exporting producer's obligation to permit monitoring in a relationship of trust with the Commission, that relationship being dependent on the accuracy of the documents provided.

79 Third, the Commission contends that the requirement to present undertaking invoices and the invalidation of those invoices in the event of non-compliance with the undertakings given are not new. In the present case, the Commission argues that it made use of its power to withdraw acceptance of the undertaking and to declare the corresponding invoices non-compliant, providing the applicant with appropriate reasons for its decision. An anti-dumping or countervailing duty that is due in such a scenario, because of an invalidated undertaking invoice, merely seeks to regularise the circumstances. The invalidation of undertaking invoices is intended to strengthen the effectiveness of price undertakings accepted by the Commission and mirrors and supplements the competence of the national customs authorities with an additional tool to collect the duties in the event of breach of an undertaking.

80 Fourth, according to the Commission, the applicant cannot rely on the principles of legal certainty and the protection of legitimate expectations. The Commission argues that the exemption from the anti-dumping and countervailing duties did not constitute a definitive situation at the time of release for free circulation. Moreover, clear rules of law indicated to the applicant, from the outset, that undertaking invoices can be invalidated, in particular in the event of breach of the undertaking.

81 The Commission argues that it falls to the national customs authorities to assess whether or not they are able to collect customs duties for those invoices in respect of which the three-year limitation period laid down in Article 103(2) of the Union Customs Code has expired, as applied to the duties at issue by Article 1(3) of Implementing Regulation No 1238/2013, read in conjunction with Article 14(1) of the basic anti-dumping regulation. The corresponding article of the anti-subsidy regulation is Article 24(1). The Commission submits, in particular, that, since the effects of those invalidated invoices did not apply *ratione temporis* to a date prior to 23 April 2014, that being the date on which the applicant's first undertaking invoice was presented, and even less so to 4 December 2013, that being the date of application of the duties on the product concerned, there was no retroactivity as a matter of EU law.

82 According to the Commission, in that context and in view of the principle of the protection of the European Union's own resources, it is clear that where incorrect or incomplete undertaking invoices are presented, the ordinary anti-dumping or countervailing duty payable by the exporting producer in question is to apply as if the latter had not presented an undertaking invoice and any duties not paid because of the presentation of those undertaking invoices would then be due as if no exemption had existed.

83 Fifth, as regards the provisions of Article 10(5) of the basic anti-dumping regulation and Article 16(5) of the basic anti-subsidy regulation, the Commission accepts that they do not cover the practice complained of.

84 In the third place, the Commission submits that there has never been a practice of exempting from anti-dumping or countervailing duties imports made prior to the withdrawal of acceptance of an undertaking. The only cases in which undertaking invoices have not been invalidated do not fall within the category described by the applicant. Even if such a practice had existed, it would not have any effect on the legality of the contested regulation. Against that background, the Commission argues that paragraph 33 of the application is inadmissible on the ground that it infringes Article 76(f) of the Rules of Procedure, as no evidence has been produced.

85 The Commission submits that the applicant's position can be summarised as being that the only legal consequence of breaching an undertaking is the withdrawal of that undertaking for the future. All transactions which are based on breaches and made prior to the adoption of the withdrawal decision are protected. The Commission states that there is no justification in EU law for such far-reaching protection of an economic operator which breaches the obligations that it has voluntarily accepted, in particular where it has been warned in advance about the consequences of such actions.

86 In the rejoinder, the Commission submits, in essence, that the applicant and the Commission agree that, in principle, anti-dumping and countervailing duties may be imposed as soon as the undertaking has been breached. The disagreement concerns only the method to be used in that regard. The Commission considers that there is no point in using registration and provisional duties where the investigation has been completed and definitive duties have been imposed. The method proposed by the applicant does not take account of the fact that the Commission can start registration only once it has detected a breach of an undertaking. The Commission maintains that it followed the appropriate procedure. In its view, cancellation of the undertaking invoice is the only way to collect duties, starting from the factual event constituting the infringement. The Commission also argues that a distinction should be drawn between the imposition of duties and the suspension of the collection of those duties. The situation in the present case falls within the latter scenario.

87 As regards the applicant's argument that customs supervision and customs controls are competences of the customs authorities of the Member States, the Commission submits that that argument was put forward for the first time in the reply, and, therefore, is inadmissible under Article 84(1) of the Rules of Procedure. In any event, in the Commission's view it is unfounded.

88 The Commission states that it is common ground that it had instructed the customs authorities to collect the anti-dumping and countervailing duties due on imports of the product concerned, in accordance with Article 2 of the contested regulation. The Commission submits that, without seeking to usurp the competences of the national authorities, it had given itself the task of carrying out certain monitoring and compliance activities under the powers set out in Article 14(1) of the basic anti-dumping regulation and Article 24(1) of the basic anti-subsidy regulation, in order to protect the Union's own resources.

89 Finally, the Commission states that the applicant's argument that the Commission and the Council in its executive capacity increased the Commission's powers beyond what is permitted by the Treaties and secondary legislation is inadmissible as it is a new plea raised for the first time in the reply, contrary to the requirements of Article 84(1) of the Rules of Procedure. In any event, in the Commission's view, that argument lacks clarity as to how the Council extended the Commission's powers.

90 The Council supports, in essence, the Commission's arguments. First, it claims that the correct interpretation of Article 8(9) of the basic anti-dumping regulation and Article 13(9) of the basic anti-subsidy regulation shows that those provisions allow for the invalidation of undertaking invoices. Second, the Council submits that those regulations provide a legal basis allowing the EU institutions to impose compliance requirements for managing price undertakings. Third, according to the Council, including clauses on the invalidation of undertaking invoices is a practice of the EU institutions. Fourth, the Council argues that the invalidation of undertaking invoices is not equivalent to the retroactive imposition of anti-dumping and countervailing duties, which would be contrary to Union law.

91 The applicant disputes the arguments put forward by both the Commission and the Council.

The legal framework governing the applicant's undertakings and undertaking invoices

92 It should be noted that, according to Article 8(1) of the basic regulation, where a determination of dumping and injury has been made, the Commission may accept satisfactory voluntary undertaking offers submitted by any exporter to revise its prices or to cease exports at dumped prices, if it is satisfied that the injurious effect of the dumping is eliminated as a result of the undertaking.

93 In the present case, first, it should be noted that the definitive anti-dumping and countervailing duties were set at rates which were established according to categories of companies, in particular on the basis of whether companies cooperated in the investigation. Second, the result of the acceptance of the undertakings in question was that the companies concerned were exempt from paying the definitive anti-dumping and countervailing duties, as is apparent from Article 3(1) and recital 438 of Implementing Regulation No 1238/2013, and Article 2(1) and recital 865 of Implementing Regulation No 1239/2013.

94 In that regard, it has previously been established in the case-law concerning interpretation of the regime applicable to undertakings under Regulation No 1225/2009 that it is not because of the adoption of the decision accepting the undertakings that imports covered by those undertakings are exempt from anti-dumping duties; the exemption results from the provisions adopted either by the Commission in the amended provisional anti-dumping regulation or by the Council in the definitive anti-dumping regulation, in order to implement the undertakings accepted by the Commission. The Council is under such an obligation pursuant to Article 9(5) of Regulation No 1225/2009, which

provides that a regulation must impose a definitive anti-dumping duty on imports of a dumped product which causes injury, and includes an exception for imports from sources from which, depending on the circumstances, undertakings have been accepted (order of 14 January 2015, *SolarWorld and Others* v *Commission*, T-507/13, EU:T:2015:23, paragraph 48).

95 It should be noted that, even if a decision accepting undertakings has been adopted, provisional or definitive anti-dumping duties are to be imposed, under Article 14(1) Regulation No 1225/2009, only by regulation. That provision also states that such duties are to be collected by Member States according to the other criteria laid down in the regulation imposing the duties, which include the conditions laid down for the implementation of the undertakings accepted (order of 14 January 2015, *SolarWorld and Others* v *Commission*, T-507/13, EU:T:2015:23, paragraph 49). Article 24(1) of Regulation No 597/2009 follows, in essence, the same approach.

96 Furthermore, first, it is provided that the Commission is required to monitor compliance with undertakings, if necessary with the assistance of the customs authorities of the Member States, in accordance with Article 8(9) of Regulation No 1225/2009 and Article 13(9) of Regulation No 597/2009. It is also clear that the accomplishment of the Commission's task of monitoring undertakings is dependent on the accuracy of the documents provided in the performance of the undertaking entered into by the exporter concerned (judgment of 22 November 2012, *Usha Martin* v *Council and Commission*, C-552/10 P, EU:C:2012:736, paragraph 35).

97 Second, in accordance with the purpose of Article 8 of Regulation No 1225/2009, the applicant was required, under the terms of the undertaking which it had given, not only to ensure that it genuinely complied with the undertaking but also to undertake effective monitoring of the implementation of the undertaking by cooperating with the Commission in the relationship of trust on which that institution's acceptance of such an undertaking is based (see, to that effect, judgment of 22 November 2012, *Usha Martin* v *Council and Commission*, C-552/10 P, EU:C:2012:736, paragraph 24). The same logic applies, by analogy, to undertakings in the context of countervailing duties pursuant to Article 13 of Regulation No 597/2009, since their purpose remains similar to the undertakings given in the context of the basic anti-dumping regulation.

98 In addition, as noted by the Commission, a price undertaking from a company must be regarded as a performance obligation, which has to be respected and evidenced by, inter alia, the issue of undertaking invoices when the products concerned are imported into the European Union. Article 3(1)(b) of Implementing Regulation No 1238/2013 and Article 2(1)(b) of Implementing Regulation No 1239/2013 contain explicit references to undertaking invoices. As the Commission argues, the content of undertaking invoices and export undertaking certificates is provided for in Annexes III and IV to Implementing Regulation No 1238/2013 and Annexes 2 and 3 to Implementing Regulation No 1239/2013.

99 Finally, it is clear from case-law that there is a requirement to ensure appropriate monitoring of undertakings (see, to that effect, judgment of 25 January 2017, *Rusal Armenal* v *Council*, T-512/09 RENV, EU:T:2017:26, paragraph 178).

The effects of the Commission's withdrawal of acceptance of the undertaking and the effects of the invalidation of the undertaking invoices in the contested regulation

100 First of all, it should be noted that, pursuant to the second subparagraph of Article 8(1) of the basic anti-dumping regulation:

'… as long as such undertakings are in force, provisional duties imposed by the Commission in accordance with Article 7(1), or definitive duties imposed in accordance with Article 9(4), as the case may be, shall not apply to the relevant imports of the product concerned manufactured by the companies referred to in the Commission decision accepting undertakings, as subsequently amended.'

101 The wording of the second subparagraph of Article 13(1) of the basic anti-subsidy regulation is, in essence, the same.

102 Second, Article 8(9) of the basic anti-dumping regulation states that:

'In the case of breach or withdrawal of undertakings by any party to the undertaking, or in the case of withdrawal of acceptance of the undertaking by the Commission, the acceptance of the undertaking shall be withdrawn by Commission Decision or Commission Regulation, as appropriate, and the provisional duty which has been imposed by the Commission in accordance with Article 7 or the definitive duty which has been imposed in accordance with Article 9(4) shall automatically apply, provided that the exporter concerned has, except where that exporter has withdrawn the undertaking, been given an opportunity to comment. …'

103 The wording of Article 13(9) of the basic anti-subsidy regulation is, in essence, the same.

104 In that respect, recitals 18 and 19 of Council Regulation (EC) No 461/2004 of 8 March 2004 amending Regulation (EC) No 384/96 on protection against dumped imports from countries not members of the European Community and Regulation (EC) No 2026/97 on protection against subsidised imports from countries not members of the European Community (OJ 2004 L 77, p. 12), which led to the adoption of an amendment to the wording of the provisions relevant to this dispute, read as follows:

'(18) Article 8(9) of the Basic Anti-Dumping Regulation stipulates, inter alia, that in case of withdrawal of undertakings by any party, a definitive duty is to be imposed in accordance with Article 9 on the basis of the facts established within the context of the investigation which led to the undertakings. This provision has led to a time-consuming double-proceeding consisting of both a Commission Decision withdrawing the acceptance of the undertaking and a Council Regulation re-imposing the duty. Taking into account that this provision does not leave any discretion to the Council as to the introduction of a duty to be imposed following the breach or withdrawal of an undertaking or as to its level, it is considered appropriate to modify the provisions in Articles 8(1), (5) and (9) in order to clarify the Commission's responsibility and to allow withdrawal of an undertaking and application of the duty by one single legal act. It is also necessary to ensure that the withdrawal procedure is terminated within a time limit of normally six months and in no case more than nine months in order to ensure a proper enforcement of the measure in force.

(19) Recital 18 applies, *mutatis mutandis*, to undertakings under Article 13 of the Basic Anti-subsidy Regulation.'

105 Finally, Article 8(10) of the basic anti-dumping regulation reads as follows:

'A provisional duty may be imposed in accordance with Article 7 on the basis of the best information available where there is reason to believe that an undertaking is being breached, or in case of breach or withdrawal of an undertaking where the investigation which led to the undertaking has not been concluded.'

106 The wording of Article 13(10) of the basic anti-subsidy regulation is, in essence, the same.

107 The disagreement between the parties consists in the interpretation of the effects of those provisions. On the one hand, the Commission and the Council consider that the withdrawal of acceptance of the undertakings has the effect of reverting to the original situation, in that all definitive anti-dumping and countervailing duties relating to the invalidated undertaking invoices are then due.

108 The applicant, on the other hand, submits that anti-dumping and countervailing duties may be imposed only for the future, that is, from the time when the Commission withdraws acceptance of the undertakings, apart from certain exceptions explicitly provided for in the basic anti-dumping regulation and in the basic anti-subsidy regulation.

109 The Commission submits, in essence, that, in those circumstances, the definitive anti-dumping or countervailing duties are 'reapplied'. It claims that the situation in the present case is similar to the situation where an importer presents for customs clearance an undertaking invoice which has not been signed by an authorising officer of the exporting producer or which shows other irregularities. Similarly, the Commission refers to certain situations relating to customs duties exemptions, where there is proof of preferential origin, in which a post clearance check demonstrates that the preferential tariff was wrongly granted, namely the judgments of 7 December 1993, *Huygen and Others* (C-12/92, EU:C:1993:914, paragraph 19), and of 9 March 2006, *Beemsterboer Coldstore Services* (C-293/04, EU:C:2006:162, paragraph 34). To the same effect, at the hearing, the Commission referred, in essence, to the fact that, when there is a withdrawal of acceptance of undertakings, the EU institutions instruct the national authorities to collect the applicable duties, or, in other words, to 'reset the transaction'. That therefore exposes the imports to the original definitive anti-dumping and anti-subsidy duties, as established in accordance with Article 9(4) of the basic anti-dumping regulation and Article 15(1) of the basic anti-subsidy regulation.

110 The applicant does not dispute that the EU institutions may accept, reject and define the terms of price undertakings at their discretion. Nor does the applicant dispute that the EU institutions have discretion to withdraw acceptance of an undertaking.

111 On the other hand, in support of its argument that it is only in very specific circumstances that definitive anti-dumping measures and countervailing duties can be applied retroactively, the applicant refers to Article 8(10) of the basic anti-dumping regulation, and in particular to paragraph 5 of Article 10, the latter entitled 'Retroactivity', which reads as follows:

'In cases of breach or withdrawal of undertakings, definitive duties may be levied on goods entered for free circulation no more than 90 days before the application of provisional measures, provided that imports have been registered in accordance with Article 14(5), and that any such retroactive assessment shall not apply to imports entered before the breach or withdrawal of the undertaking.'

112 The applicant submits that those provisions correspond, in essence, to Article 13(10) of the basic anti-subsidy regulation and Article 16(5) of that regulation.

113 The applicant claims that it was only if the imports in question had been registered that measures such as the requirement to reimburse the definitive anti-dumping and countervailing duties due could have been implemented in respect of the imports in question. Thus, in the applicant's view, the

Commission's approach in the present case is incorrect and unlawful because it does not follow any of the criteria expressly provided for by the legislator for situations in which anti-dumping or countervailing duties should be applied retroactively. The applicant submits that the Commission cannot order the collection of definitive duties on products released for free circulation if, beforehand, it has not imposed provisional duties or ordered registration.

114 The plea of illegality raised by the applicant against Article 3(2) of Implementing Regulation No 1238/2013 and Article 2(2) of Implementing Regulation No 1239/2013 must be understood as a submission that the retroactive application of the anti-dumping or countervailing duties in the present case could not lawfully be based on those provisions either. Those provisions, in particular Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013, are themselves contrary to Articles 8 and 10(5) of the basic anti-dumping regulation and Articles 13 and Article 16(5) of the basic anti-subsidy regulation. That will be examined after consideration of the applicant's single plea in law.

The single plea in law raised by the applicant

115 In the first place, it should be noted, with regard to the applicant's reference to Article 8(10) of the basic anti-dumping regulation and Article 13(10) of the basic anti-subsidy regulation, that those provisions are not relevant to the present case.

116 First, as the Commission and the Council argue, the situation in the present case cannot be likened to one where there were only 'reasons to believe' that an undertaking had been breached, with, as a consequence, the possibility of imposing a provisional duty. On the contrary, in the present case, the applicant has not disputed that it breached the undertaking. The fact that the applicant claims that it did not dispute the withdrawal of acceptance of the undertaking simply because it knew that the EU institutions have a broad discretion in that respect does not in any way alter that conclusion.

117 Second, the present case does not concern the second situation provided for by the provisions referred to in paragraph 115 above, where, 'in the case of a breach … of an undertaking', the investigation which led to the undertaking 'has not been concluded'. On the contrary, it is common ground that the Council adopted definitive anti-dumping and countervailing duties.

118 In the second place, as regards the applicant's reference to Article 10(5) of the basic anti-dumping regulation and Article 16(5) of the basic anti-subsidy regulation, it should be noted that those provisions relate to specific situations where the institutions carried out 'registration' of imports, pursuant to Article 14(5) of the basic anti-dumping regulation or Article 24(5) of the basic anti-subsidy regulation. Furthermore, those provisions take as a basis for calculating retroactivity the date of application of the interim measures. In the present case, none of those criteria is applicable, since the Commission did not register the imports in question and no provisional measures were imposed.

119 Since the situation in the present case does not therefore correspond to any of the situations expressly provided for in the basic anti-dumping regulation and the basic anti-subsidy regulation, it is necessary to assess whether, as the applicant claims (see paragraphs 69 to 71 above), there is no other legal basis for the adoption of Article 2 of the operative part of the contested regulation.

120 The Commission and the Council refer to the particular context of the present case to explain the approach taken in the contested regulation. In that regard, the Commission argued, referring to a systemic interpretation of the basic anti-dumping regulation and the basic anti-subsidy regulation, that it follows from such an interpretation that the definitive duties, as originally imposed on the products concerned by the applicant's undertakings, could be automatically applied as a direct consequence of the measure withdrawing the Commission's acceptance of the undertakings.

121 The Council indicated that the basic anti-dumping regulation and the basic anti-subsidy regulation did not explicitly envisage 'probably the most frequent' scenario, where, as in the present case, the Commission on its own initiative initiated an investigation into the breach of the undertaking. Furthermore, the Council disputed the approach according to which, since that type of investigation was not explicitly envisaged in the basic anti-dumping regulation or the basic anti-subsidy regulation and since those regulations did not expressly give the Commission power to invalidate undertaking invoices, it should follow that that practice was unlawful (see, also, paragraph 90 above). The Council adds that the term 'undertaking invoices', as a means of managing accepted undertakings, has been developed in the decision-making practice of the EU institutions.

122 According to the Council, in the present case, it was not possible or necessary to impose provisional anti-dumping and countervailing duties or to register the imported products because the investigation had already been completed and definitive duties set, notwithstanding the Commission's own acceptance at the same time of undertakings from the applicant and other Chinese exporting companies. The Council submits that the provisional duties were merely precursors to the definitive duties. In the present case, according to the Council, it was not possible to reverse matters, registration was pointless and the provisional duties were no longer relevant because they had been removed by the definitive duties. The Council argues that the procedure followed by the Commission was a special procedure which, in the Council's view, is part of the EU institutions' established practice in a similar situation.

123 The Council claims that, in the present case, it was necessary to assess which were the relevant undertaking invoices and, following their invalidation, to apply the anti-dumping and countervailing duties which were due and had simply been suspended. The Council also refers to the judgment of 21 February 1984, *Allied Corporation and Others* v *Commission* (239/82 and 275/82, EU:C:1984:68, paragraph 21). It points out that the undertaking invoices served the same purpose as registration of imports, namely, to make them traceable.

124 The Commission and the Council state that the applicant's argument is in fact intended to enable a company to take advantage, in the absence of precise rules in that regard, of a situation in which, even though it has adopted undertakings accepted by the Commission, it can nevertheless breach those undertakings, in principle with impunity in respect of situations which have already occurred.

125 The applicant claims that the withdrawal of acceptance of an undertaking is, in itself, a sufficient penalty, as it then becomes much more difficult for the operator to sell its goods at a profit on the EU market.

126 The Council and the Commission submit that, contrary to the applicant's contention, Article 14(1) of the basic anti-dumping regulation and Article 24(1) of the basic anti-subsidy regulation can be interpreted as leaving it to the EU institutions to impose compliance requirements for undertakings and to establish procedures in that regard. Those institutions state that those articles, entitled 'General provisions', provide that provisional or definitive anti-dumping or countervailing duties are to be imposed by regulation and collected by Member States in the form, at the rate specified and according to the other criteria laid down in the regulation imposing such duties.

127 The Council and the Commission argue, in particular, that the provisions cited in paragraph 126 above refer to 'other elements', which include the possibility of monitoring compliance with an undertaking by means of undertaking invoices. Consequently, it is possible to infer that the EU institutions have competence to invalidate undertaking invoices and to instruct the customs authorities to collect the duties 'on the imports in question'. It must therefore be assessed whether those provisions constituted a sufficient legal basis for the adoption of Article 2 of the contested regulation.

128 On that point, as a preliminary matter, it should be noted that the Court of Justice has previously found, in paragraph 58 of the judgment of 15 March 2018, *Deichmann* (C-256/16, EU:C:2018:187), to which the Commission referred at the hearing, that it follows from the wording of the first sentence of Article 14(1) of Regulation No 1225/2009 that the EU legislature did not intend to set out an exhaustive list of the criteria relating to the collection of anti-dumping duties that may be set by the Commission.

129 The judgment of 15 March 2018, *Deichmann* (C-256/16, EU:C:2018:187), concerned a Commission regulation, Article 1 of which imposed orders to safeguard the collection of anti-dumping duties imposed by definitive and prolonging regulations, obliging the national customs authorities to wait until the Commission had determined the rates at which those duties should have been set, in compliance with a judgment of the Court annulling the duties initially set. Thus, the order consisted, in essence, of the national customs authorities having to wait until they knew what duties were actually due before deciding on the requests for repayment submitted by the operators which had paid those duties. The situation at issue in that case therefore concerned the amount of the duties originally paid by the parties which had to be refunded to those parties by the customs authorities.

130 Unlike the situation at issue in the judgment of 15 March 2018, *Deichmann* (C-256/16, EU:C:2018:187), the issue raised in the present case, namely the temporal imposition of the anti-dumping and anti-subsidy duties which would have been due in the absence of an undertaking which in the meantime had been breached or withdrawn, is covered by the express provisions of Articles 8(10) and Article 10(5) of the basic anti-dumping regulation and Articles 13(10) and 16(5) of the basic anti-subsidy regulation. Thus, it is in the light of those express provisions that it is necessary to assess whether the action taken by the Commission in the present case had a legal basis provided for by the legislature or whether it departed from that legal basis, in the specific context of the consequences which can be drawn from a withdrawal of acceptance of an undertaking.

131 In that regard, it should be noted that it is clear from the Court of Justice's settled case-law that the interpretation of a provision of EU law requires that account be taken not only of its wording and the objectives it pursues, but also of its context and the provisions of EU law as a whole (see judgment of 8 July 2019, *Commission* v *Belgium (Article 260(3) TFEU — high speed networks)*, C-543/17, EU:C:2019:573, paragraph 49 and the case-law cited). Furthermore, where it is necessary to determine whether a provision has retroactive effect, it must be clear from the provision that such effect must be given to it (see, by analogy, judgment of 24 September 2002, *Falck and Acciaierie di Bolzano* v *Commission*, C-74/00 P and C-75/00 P, EU:C:2002:524, paragraph 119).

132 It is apparent from several recitals of the basic regulations that the legislature explicitly intended to regulate the consequences of a breach or withdrawal of undertakings by providing a framework for the manner in which duties due in the absence of undertakings can be imposed retroactively.

133 Thus, recital 14 of the basic anti-dumping regulation states as follows:

'It is necessary to set out procedures for accepting undertakings which eliminate dumping and injury instead of imposing provisional or definitive duties. It is also appropriate to specify the consequences of a breach or withdrawal of undertakings and that provisional duties may be imposed in cases of suspected violation or where further investigation is necessary to supplement the findings. In accepting undertakings, care should be taken that the proposed undertakings, and their enforcement, do not lead to anti-competitive behaviour.'

134 Recital 12 of the basic anti-subsidy regulation has similar wording.

135 In addition, recital 17 of the basic anti-dumping regulation states the following:

'It is necessary to provide for retroactive collection of provisional duties if that is deemed appropriate and to define the circumstances which may trigger the retroactive application of duties to avoid the undermining of the definitive measures to be applied. It is also necessary to provide that duties may be applied retroactively in cases of breach or withdrawal of undertakings.'

136 Recital 16 of the basic anti-subsidy regulation is identical.

137 In view of the general scheme and objectives of the basic regulations referred to, which show, first, the legislature's intention to legislate on the procedures which may be used to give due effect to the Commission's withdrawal of acceptance of an undertaking and, second, the provisions, referred to in paragraphs 69 and 70 above, by which that intention of the legislature was put into effect, it is necessary to reject the interpretation proposed by the Commission and the Council. That interpretation seeks to infer from the reference, in Article 14(1) of the basic anti-dumping regulation and Article 24(1) of the basic anti-subsidy regulation, to 'other criteria' for the collection of duties, that the EU institutions entrusted with the implementation of the basic regulations have the competence to require, when exercising that implementing power, that the companies concerned pay all duties due in respect of the transactions covered by undertaking invoices, which by that point have been invalidated.

138 That conclusion also applies to the arguments put forward by the Commission and the Council that such a power can be inferred from the wording of Article 8(9) of the basic anti-dumping regulation and Article 13(9) of the basic anti-subsidy regulation, according to which duties are to apply automatically following the withdrawal of acceptance of undertakings. It is clear that such automatic application is provided for within the limits expressly set by Article 8(10) and Article 10(5) of the basic anti-dumping regulation and by Article 13(10) and Article 16(5) of the basic anti-subsidy regulation.

139 None of the other arguments put forward by the Commission and the Council invalidate the above conclusion.

140 First, with regard to the Council's arguments referred to in paragraphs 122 and 123 above, in essence, first, those arguments are that provisional duties cannot be imposed where it is suspected that undertakings have been breached on the basis of Article 8(10) of the basic anti-dumping regulation and Article 13(10) of the basic anti-subsidy regulation, since it has already been decided previously to impose definitive duties. Second, the Council also maintains that the use of undertaking invoices is comparable to registration of imports within the meaning of Article 14(5) of the basic anti-dumping regulation. According to the Council, it follows that the above provisions either do not apply to the facts of the present case or validate the practice of undertaking invoices.

141 In that respect, as regards, first, the first argument, claiming that it is impossible to apply provisional duties in the present case because of the previous imposition of definitive duties that argument, even if it were well-founded, cannot call into question the conclusion that the basic regulations provide for precisely defined scenarios in which the duties due in the event of breach of undertakings may be imposed retroactively. Moreover, as the applicant rightly points out, Article 8(10) of the basic anti-dumping regulation and Article 13(10) of the basic anti-subsidy regulation refer to two different situations. Only the second situation implies that 'the investigation which led to the undertaking was not concluded' and therefore that definitive duties were not imposed.

142 Next, as regards the alleged treating of undertaking invoices as the equivalent of registration of imports within the meaning of Article 14(5) of the basic anti-dumping regulation, it is sufficient to note that those provisions limit the use of measures for compulsory registration of imports to a period of nine months. Consequently, even if registration within the meaning of Article 14(5) of the basic

anti-dumping regulation could be regarded as comparable to the drawing up of an undertaking invoice, the temporal scope of the invalidation of undertaking invoices established by the contested provisions exceeds the limits imposed by the basic anti-dumping regulation.

143 Furthermore, as regards the Council's reference to the judgment of 21 February 1984, *Allied Corporation and Others* v *Commission* (239/82 and 275/82, EU:C:1984:68, paragraph 21), it should be noted that that judgment has no bearing on whether the Commission has power, when withdrawing acceptance of an undertaking, to take measures with retroactive effect and, in particular, to instruct national customs authorities to collect definitive anti-dumping and countervailing duties as originally due. That judgment concerns a case in which, following the withdrawal of an undertaking, the Commission had to apply, as soon as possible, 'provisional' measures when it considered that such action was in the interests of the European Union. It was in those circumstances that it was specified that the Commission should use the 'information available'. In particular, it was stated in paragraph 21 of that judgment that, since the very fact that an undertaking is given warrants the presumption that dumping had actually taken place, the Commission cannot be required to conduct a further investigation when such an undertaking is withdrawn.

144 Second, the Council's references to recitals 18 and 19 of Regulation No 461/2004 should be rejected as they are not decisive for the present dispute (see paragraph 104 above). The recitals cited by the Council do not address the question of the retroactive application of duties which would have been due in the absence of an undertaking which has in the meantime been withdrawn or breached.

145 Third, as regards the Commission's references to certain circumstances or other judgments in the area of customs duties, relating to unsigned invoices submitted by the importer for customs clearance or to situations in which a post-clearance check showed that a preferential tariff had been wrongly granted (see paragraph 109 above), it must be noted that the aims and general scheme inherent in the basic regulations, as referred to above, preclude reasoning by analogy with the implementation of customs legislation.

146 Fourth, the Commission states, in paragraph 49 et seq. of its defence, in support of its argument that, in the present case, the legal rule was particularly clear, that Decision 2013/423 contained, in particular in recitals 14 and 15, provisions warning of the consequences of breaching undertakings. The Commission and the Council also refer to a number of previous cases, from which, they allege, it is apparent that the obligation to submit undertaking invoices and the possibility of them being invalidated are not new and that the Commission's action in the present case was not a change in previous institutional 'practice'.

147 The length of time that the practice claimed by the Commission and the Council has been in existence and the fact that the applicant was aware of it have no bearing on the finding that that practice has no legal basis.

148 Furthermore, since the resolution of the present dispute is also not based on the applicant's arguments concerning the existence of an alleged previous practice of exempting from anti-dumping or countervailing duties imports made prior to the withdrawal of acceptance of an undertaking, it is not necessary to rule on the plea of inadmissibility submitted by the Commission in that regard (see paragraph 84 above). In any event, that plea of inadmissibility must be rejected on the ground that the question whether a fact alleged in support of an application is made out relates not to the admissibility of that application but rather to whether it is well founded (see, by analogy, order of 27 April 2017, *CJ* v *ECDC*, T-696/16 REV and T-697/16 REV, not published, EU:T:2017:318, paragraph 39). In addition, it should be pointed out that it follows from the wording of Article 76(f) of the Rules of Procedure, and more specifically from the use of the expression 'where appropriate', that the application does not necessarily have to contain offers of evidence. The only sanction concerning offers of evidence is that it may be rejected on account of delay if it is submitted for the first time, and without justification, at the reply or rejoinder stage or, exceptionally, before the oral part of the procedure is closed, or before

the decision of the Court to rule without an oral part of the procedure (Article 85(2) and (3) of the Rules of Procedure) (see, to that effect, judgment of 3 February 2005, *Chiquita Brands and Others* v *Commission*, T-19/01, EU:T:2005:31, paragraph 71).

149 Fifth, the Commission argues that it was seeking to reinforce the effectiveness of undertakings, to supplement the powers of national customs authorities and to act in such a way that the applicant could not bypass post-clearance checks by those customs authorities, when it was found that the applicant was selling products covered by the undertaking by using related importers in the European Union which were not parties to the undertaking, that is, through a sales channel not authorised by the agreement.

150 As a preliminary point, it should be noted that, in paragraphs 31 to 37 of the reply, the applicant addressed the Commission's statements concerning the division of competences between national customs authorities and the EU institutions in the present context (see paragraph 72 above). The Commission claimed in the rejoinder that the arguments put forward in the reply were new and therefore inadmissible. At the hearing, however, it stated that the applicant had in fact merely given factual evidence. Since the applicant stated in that regard that it did not intend to raise a new plea based on the Union Customs Code, the plea of inadmissibility raised by the Commission must be regarded as having become devoid of purpose.

151 As regards the merits of the Commission's argument, it is clear that, as the applicant claims, the withdrawal of the acceptance of undertakings already has, as such, negative consequences for the operator which had given them, constituting a significant penalty (see paragraph 125 above). Furthermore, that situation cannot be akin to there being impunity for the operator which has breached its undertakings, or a situation which would allow the operator to benefit freely from such action, as the Commission and the Council argue. It should be noted that it is not all actions collecting anti-dumping or anti-subsidy duties which are prohibited, but the EU institutions are required to take into account procedural limitations as laid down, in that regard, by the basic anti-dumping regulation and the anti-subsidy regulation.

152 In the light of all the foregoing, it must be held that the basic regulations cannot constitute a sufficient legal basis for the adoption of the contested provisions.

The plea of illegality

153 It is still necessary to examine whether, despite the absence of a sufficient legal basis in the basic regulations, Article 3(2) of Implementing Regulation No 1238/2013 and Article 2(2) of Implementing Regulation No 1239/2013 could provide a legal basis for the contested provisions.

154 In that regard, the applicant also relies on a plea of illegality in respect of Article 3(2) of Implementing Regulation No 1238/2013 and Article 2(2) of Implementing Regulation No 1239/2013, based on an alleged infringement of Articles 8 and 10(5) of Regulation No 1225/2009 and Articles 13 and 16(5) of Regulation No 597/2009, as applicable when Implementing Regulations No 1238/2013 and No 1239/2013 were adopted.

155 Article 3(2) of Implementing Regulation No 1238/2013 and Article 2(2) of Implementing Regulation No 1239/2013 contain wording authorising the Commission to identify transactions where a 'customs debt is incurred at the time of acceptance of the declaration for release into free circulation' when the Commission withdraws its acceptance of the undertaking pursuant to Article 8(9) of Regulation No 1225/2009 or Article 13(9) of Regulation No 597/2009, by adopting a regulation or decision which refers to particular transactions and declares the relevant undertaking invoices invalid.

156 The applicant submits, in essence, that, acting as an implementing authority, and not as a legislator, the Council cannot delegate to the Commission the power to invalidate undertaking invoices by simply withdrawing acceptance of an undertaking, nor can it instruct the customs authorities to collect duties on goods already released for free circulation in the customs territory of the European Union. Those arguments should therefore be interpreted as referring, in particular, to the provisions of Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013.

157 For reasons similar to those already set out in paragraphs 128 to 140 above, relating to the general scheme of the basic anti-dumping regulation and the basic anti-subsidy regulation, the applicant's plea of illegality relating to Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013 must be upheld. First, those provisions do not cover the situations referred to in Articles 8 and 10(5) of Regulation No 1225/2009 and Articles 13 and 16(5) of Regulation No 597/2009, as applicable when Implementing Regulations No 1238/2013 and No 1239/2013 were adopted, and do not comply with those regulations. Second, nor is it apparent from the general scheme of Regulations No 1225/2009 and No 597/2009 that the Council was entitled, by means of an implementing regulation, to authorise the Commission to provide, without limiting that procedure in time, that, following the withdrawal of its acceptance of an undertaking and the invalidation of the relevant undertaking invoices, 'a customs debt [was incurred] at the time of acceptance of the declaration for release into free circulation …'.

158 It must therefore be concluded that Article 3(2)(b) of Implementing Regulation No 1238/2013 and Article 2(2)(b) of Implementing Regulation No 1239/2013 are not applicable in the present case.

Annex C.3 to the reply

159 In those circumstances, it is not necessary to comment on the admissibility of Annex C.3 to the reply. Irrespective of whether the document at issue, entitled 'Monitoring of Undertakings — Finding following the verification visit', the heading of which refers to the Commission's Directorate-General for 'Trade', could have been in the possession of the applicant's lawyer and used in the present case, it must be concluded that that is, at most, an example of an administrative approach that the Commission had adopted in a specific case which, moreover, has not been shown to have the same circumstances as the present case. It is apparent from that document, in essence, that the Commission, after finding that a particular undertaking had been breached, nevertheless considered that no action was necessary. In the present case, the basis for the resolution of the dispute is not a comparison of the different approaches which the Commission adopted in its previous practice when the operators concerned breached undertakings.

Conclusion

160 In the light of all of the foregoing considerations, the applicant's single plea in law must be upheld and, therefore, the contested provisions annulled.

Costs

161 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. In accordance with Article 138(1) of those rules, institutions which have intervened in the proceedings are to bear their own costs.

162 Since the Commission has been unsuccessful, it must be ordered, in addition to bearing its own costs, to pay the applicant's costs, in accordance with the form of order sought by the applicant. The Council is to bear its own costs.

On those grounds,

THE GENERAL COURT (Fourth Chamber)

hereby:

1. **Annuls Article 2 of Commission Implementing Regulation (EU) 2016/2146 of 7 December 2016 withdrawing the acceptance of the undertaking for two exporting producers under Implementing Decision 2013/707/EU confirming the acceptance of an undertaking offered in connection with the anti-dumping and anti-subsidy proceedings concerning imports of crystalline silicon photovoltaic modules and key components (i.e. cells) originating in or consigned from the People's Republic of China for the period of application of definitive measures, in so far as it concerns Jiangsu Seraphim Solar System Co. Ltd;**

2. **Orders the European Commission to bear its own costs and to pay those incurred by Jiangsu Seraphim Solar System;**

3. **Orders the Council of the European Union to bear its own costs.**

Kanninen Schwarcz Iliopoulos

Delivered in open court in Luxembourg on 8 July 2020.

E. Coulon
Registrar

S. Papasavvas
President