Slip Op. 24-79

UNITED STATES
COURT OF INTERNATIONAL TRADE

Court No. 23-00133

GIORGIO FOODS, INC.,

Plaintiff,

v.

UNITED STATES,

Defendant,

and

PROCHAMP B.V.,

Defendant-Intervenor.

Before: M. Miller Baker, Judge

OPINION

[The court sustains Commerce's final determination in part and remands for further proceedings.]

Dated: July 17, 2024

John M. Herrmann, *Paul C. Rosenthal*, and *Joshua R. Morey*, Kelley Drye & Warren LLP, Washington, DC, on the briefs for Plaintiff.

Brian M. Boynton, Principal Deputy Assistant Attorney General; *Patricia M. McCarthy*, Director; *Tara K. Hogan*, Assistant Director; and *Daniel Bertoni*, Trial Attorney, Commercial Litigation Branch, Civil

Division, U.S. Department of Justice, Washington, DC, on the brief for Defendant. Of counsel for Defendant was *Alexander Fried*, Attorney, Office of the Chief Counsel for Trade Enforcement & Compliance, U.S. Department of Commerce, Washington, DC.

Lizbeth R. Levinson, *Brittney R. Powell*, and *Alexander D. Keyser*, Fox Rothschild LLP, Washington, DC, on the brief for Defendant-Intervenor.

Baker, Judge: In this case, a domestic producer challenges the Department of Commerce's finding that a Dutch competitor did not dump mushrooms in the U.S. market. For the reasons explained below, the court sustains that determination in part and remands for reconsideration in part.

I

In an antidumping investigation, Commerce must determine whether imported goods are sold in the United States at "less than fair value." 19 U.S.C. § 1677b(a). The Tariff Act of 1930, as amended, directs the Department to measure "fair value" by making a "fair comparison" between the "export price or constructed export price and normal value." *Id.*

"Normal value" is at issue here. In most antidumping duty cases, that term refers to, in relevant part, "the price at which the foreign like product is first sold . . . *for consumption* in the exporting country."

Id. § 1677b(a)(1)(B)(i) (emphasis added). In other words, the agency must calculate the sales price to consumers in the home market. *See Smith-Corona Grp. v. United States*, 713 F.2d 1568, 1573 (Fed. Cir. 1983) (explaining that "[t]he home market sales method is preferred" for ascertaining normal value).

When there are no home-market sales or if such transactions amount to less than five percent of the product's purchases in the United States, 19 U.S.C. § 1677b(a)(1)(C)(i)–(ii), Commerce uses an alternative method to determine normal value. In those circumstances, the Department will examine "the price at which the foreign like product is . . . sold (or offered for sale) *for consumption*" in a third country, *id.* § 1677b(a)(1)(B)(ii) (emphasis added), subject to various conditions, *see id.* § 1677b(a)(1)(B)(ii)(I)–(III).[1]

The statute does not speak to what happens if more than one country satisfies those conditions. A regulation provides that in such cases, Commerce "generally will select the third country based on" certain "criteria." 19 C.F.R. § 351.404(e). The Department weighs product similarity, *id.* § 351.404(e)(1), sales volume,

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[1] If Commerce finds that no third country provides an appropriate comparison market, it may determine normal value using "constructed value." *See id.* § 1677b(a)(4); *see also* 19 C.F.R. § 351.405.

id. § 351.404(e)(2), and "[s]uch other factors as . . . appropriate," *id.* § 351.404(e)(3).[2]

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[2] The CIT has previously construed 19 C.F.R. § 351.404(e) as having "a descending hierarchy of criteria from which Commerce must select the appropriate third country comparison market." *Viraj Forgings, Ltd. v. United States*, 350 F. Supp. 2d 1316, 1324 (CIT 2004). The court respectfully disagrees. That the regulation merely contains a "seriatim," *id.*, list of relevant considerations does not imply any ranking. To the contrary, the prefatory language—"generally will select based on"—suggests a balancing of factors rather than any hierarchy.

Indeed, the CIT's earlier decision in the same litigation recognized that the regulation directs the agency to weigh the enumerated benchmarks: "The comments to the 1997 regulations in *Antidumping Duties; Countervailing Duties*, 62 Fed.Reg. 27,296, 27,358 (May 19, 1997), explain that '. . . not all of the three criteria [in 19 C.F.R. § 351.404(e)] need be present in order to justify the selection of a particular market, and . . . *no single criterion is dispositive*.'" *Viraj Forgings, Ltd. v. United States*, 283 F. Supp. 2d 1335, 1344–45 (CIT 2003) (emphasis in original). Thus, "Commerce is not required to choose the appropriate comparison market *solely* because the goods are identical, any more than it is required to choose the appropriate comparison market *solely* because the market is the largest available." *Id.* at 1345 (emphasis in original). As this case illustrates, the Department might reasonably conclude in certain circumstances that substantially greater sales volume (or some other relevant consideration) may outweigh marginal differences in product similarity.

As with other aspects of its investigation, in determining a suitable third-country comparison market, Commerce has no subpoena power. To "deter[] . . . noncompliance" with agency data requests, the statute authorizes the Department to impose a "built-in [tariff] increase" in certain circumstances. *F.lli De Cecco Di Filippo Fara S. Martino S.p.A. v. United States*, 216 F.3d 1027, 1032 (Fed. Cir. 2000). When either "necessary information is not available on the record," 19 U.S.C. § 1677e(a)(1), or an interested party withholds requested information, fails to provide it by the applicable deadline or in the form and manner requested, significantly impedes the proceeding, or provides information that cannot be verified, *id.* § 1677e(a)(2), the agency "shall, subject to [19 U.S.C. § 1677m(d)], use the facts otherwise available" to make its determination, *id.* § 1677e(a). In short, if any one of these specified conditions exists, and as qualified by § 1677m(d),[3] the agency must look beyond the information provided by the respondent. Only *if* Commerce does so, and if it also finds that the interested party failed to cooperate to the best of its ability, may the Department opt to apply an adverse inference in

[3] This provision requires notice and an opportunity to cure in certain circumstances. *See* 19 U.S.C. § 1677m(d).

selecting from the facts otherwise available. *Id.* § 1677e(b)(1)(A).[4]

II

At the request of Giorgio Foods, Inc., a domestic producer, Commerce opened an antidumping investigation into mushrooms[5] imported from the Netherlands. Appx10555–10559. The Department selected Prochamp B.V., one of that country's two largest exporters to the United States, as a mandatory respondent. Appx1691.

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[4] Litigants and the agency often blur together this two-step process of applying facts otherwise available with an adverse inference by using the shorthand "adverse facts available" or "AFA." *See, e.g.*, *Hung Vuong Corp. v. United States*, 483 F. Supp. 3d 1321, 1336–39 (CIT 2020).

[5] Adopting agency bureaucratese, the parties refer to mushrooms as "CPMs," jargon not generally known by the trade bar, much less educated lay readers. The court again reminds litigants that plain English is easier to read—and thus more persuasive, presumably the intended goal—than "obscure acronyms . . . *made up for a particular case* . . . ." *Del. Riverkeeper Network v. FERC*, 753 F.3d 1304, 1321 (D.C. Cir. 2014) (Silberman, J., concurring) (emphasis added); *cf. AsymaDesign, LLC v. CBL & Assocs. Mgmt., Inc.*, 103 F.4th 1257, 1261 (7th Cir. 2024) (Easterbrook, J.) ("Judges are long-term consumers of lengthy texts. To present an argument to such people, counsel must make the words easy to read and remember.").

As relevant here, the agency's questionnaire asked Prochamp to disclose six product characteristics, one of which was net drained weight. Appx10899–10902. It also instructed the company to report its home-market and foreign sales. Appx10754–10756. If the former were less than five percent of its U.S. transactions, the company was to contact the Department within 14 days. Appx10755.

Almost three weeks after that deadline, Prochamp informed Commerce that its home-market sales were below that five percent threshold and submitted data for what it said were its largest third-country markets—in alphabetical order, France, Germany, and Israel. Appx1735. The company urged the Department to select Germany as the comparison market. Appx1707.

Giorgio argued that France was the most appropriate comparison market because Prochamp's exports to that country most closely resembled those sold in the U.S. The American company also maintained that its Dutch competitor's reporting of German sales was unreliable. Appx2610–2614.

Early in its investigation, Commerce chose Germany. Appx1000. In doing so, it explained that its "practice is to consider all of the criteria under 19 CFR 351.404(e) when determining the appropriateness of a third-country comparison market." Appx1002. "If all

other factors are equal," the Department will "select the largest third-country market by volume." *Id*.

Regarding the regulation's first factor, product similarity, Commerce found that the mushrooms exported to all three candidate countries were identical as to three of the six relevant physical characteristics and very similar with respect to two others. Appx1003–1004. As for the remaining attribute, "the products sold in France are the *most similar* to [those] sold in the United States in terms of net drained weight." Appx1003 (emphasis added).[6] But weighing all six criteria, "the record reflects that the products sold in each

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[6] Commerce inexplicably treated identical information as confidential on the next page of its memorandum. *See* Appx1004 ("[W]e find that Prochamp's sales to France have the [[most similar product weights]] to match with U.S. sales.") (double-bracketed words redacted in original). The court fails to see how such a relative comparison qualifies as "business proprietary information" under the relevant agency regulation. *See* 19 C.F.R. § 351.105(c). And even if this comparison otherwise so qualified, the Department waived the protection by disclosing it on the preceding page. *Cf. Jiangsu Alcha Aluminum Co. v. United States*, Ct. No. 22-00290, Slip Op. 24-77, at 6 n.3, 2024 WL 3372922, at *2 n.3 (CIT July 11, 2024) (noting that parties can "waive[] any confidentiality claim by referring to [assertedly business proprietary information] in their public briefs and in open court") (citing Fed. Cir. R. 25.1(c)). This opinion therefore does not treat the agency's comparison of product similarity as confidential.

of the third-country markets all appear to be very similar" to the mushrooms sold in the U.S. Appx1004.

As to the regulation's second factor, sales volume, Commerce determined that Prochamp sold a "[[significantly larger]] overall quantity"[7] of mushrooms in "the German market" than in France or Israel. *Id*. Balancing the first two regulatory criteria, the Department found that the "slight difference in product weights" favoring France did not offset the greater German sales. *Id*.

Finally, the Department rejected Giorgio's objections to Prochamp's German sales data, which were preponderantly based on sales to a single multinational retailer. The American company complained that its Dutch competitor wrongly proffered product

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[7] Commerce redacted the double-bracketed words from its public decision, but the court declines to do so because a mere comparison does not qualify as business proprietary information. *See* note 6. Moreover, "[t]he public's right of access to judicial records is a fundamental element of the rule of law." *Binh Hoa Le v. Exeter Fin. Corp.*, 990 F.3d 410, 417 (5th Cir. 2021) (quoting *In re Leopold*, 964 F.3d 1121, 1123 (D.C. Cir. 2020)). It does not matter that the parties agreed to seal information ineligible for such protection from disclosure because "courts are duty-bound to protect public access to judicial proceedings and records." *Id.* As with product similarity, this opinion does not treat the Department's comparison of relative sales volume as confidential.

label language (German) and the customer's corporate address (the same) as support for evidence of sales *to consumers* in Germany.[8] Appx1005. Dismissing those concerns, Commerce found no indication that mushrooms sold to the retailer were not in turn resold to German consumers. *Id*.[9]

At verification, however, the Department concluded that Prochamp's sales to a multinational German retailer did not necessarily translate into *consumer* purchases in that country. Appx10073–10074. In particular, the agency found that the mushrooms were delivered to the retailer's warehouse *outside* of Germany, Appx10071–10072, and "[t]he documentation confirmed that" Germany and one *other* Deutsch-speaking country "are the likely countries of consumption but did not offer information to disambiguate the two," Appx10073. But Commerce assessed that, despite a few discrepancies, its review "did not generally conflict with Prochamp's assertion that the identification of German language label products sold to German [retailer] customers was the best possible way to

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[8] Outside of Deutschland, German is an official language of Austria, Belgium, Liechtenstein, Luxembourg, and Switzerland. *See* https://worldpopulationreview.com/country-rankings/german-speaking-countries.

[9] Commerce also found that Germany had the "most similar channel of distribution and customer type when compared to the French and Israeli markets," Appx1004–1005, "which further support[ed]" the agency's choice, Appx1004.

identify products likely to be" purchased by consumers in that country. Appx10073.

In its final determination, Commerce found that "the record continue[d] to support [its] selection of Germany as the appropriate third country market . . . ." Appx1081; *see also* Appx1082 ("[W]e do not find that the record as further developed compels reconsideration of our finding that the products sold in Germany are sufficiently comparable to the products sold in the United States . . . , and Germany provides the most robust data when compared to the French and Israeli markets.").[10]

Regarding product similarity, the Department found that the difference in weight—one of the six relevant attributes—between Prochamp's French and German exports (with the former more closely resembling the company's U.S. sales) was not "determinative." Appx1082. That difference did "not conflict with the conclusion that the record reflects that the products sold in each of the third-country markets for this

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[10] Before doing so, the agency took a swipe at Giorgio's persistence in challenging the selection of Germany, asserting that "reconsideration would [not] be administrable at the final stage of this investigation even if Commerce were to agree that the basis for this initial determination was unsupported." Appx1081.

characteristic all appear to be very similar" to the mushrooms sold to American customers. *Id*.

As to whether Prochamp's German sales exceeded those in France and Israel, the Department acknowledged that the company's database only showed sales to a multinational retailer that could just as easily have been "distributed to other German-speaking countries for final consumption." Appx1064. Thus, the actual number of sales to consumers in Germany was unknowable. Even so, the company cooperated with the investigation and could not provide any more specific information about the end destination of mushrooms sold to the retailer. *Id*. And there was no evidence that "suggested German consumption was unlikely or more likely in a non-German market." Appx1064. As a result, "the German market . . . offer[ed] the largest and most robust database from which to determine [normal value]." Appx1082.[11]

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[11] The Department also acknowledged that the record as further developed "did not support" its earlier conclusion that Prochamp's sales channels and customer type in Germany buttressed the selection of that country. Appx1082; *see also* note 9. All the same, "this additional finding was . . . not determinative, and merely provided additional corroboration for the selection of Germany." Appx1082. The revised record did not suggest "that another proposed third country market [was] more similar than Germany with respect to sales channel[s] and type of customer." *Id*.

Finally, Commerce declined Giorgio's request to apply facts otherwise available with an adverse inference as to Prochamp's reporting of financial information and third-country sales. As to the former, the Department found that Dutch law exempted the company—a member of a corporate family—from preparing standalone statements. Appx1051. Consequently, the agency could not "fault Prochamp for not providing a document that it does not have, nor was it obligated to have." *Id*. Similarly, Commerce refused to criticize the company for not providing internal financial statements, reasoning that they were not created using generally accepted accounting principles and in any event were consistent with the parent's statements. *Id*.

As to third-country sales, Commerce found that there were a few discrepancies in Prochamp's reporting, but the company corrected them and cooperated with all supplemental information requests. Appx1059. Regarding the tardiness in notifying the agency that the company's home-market sales fell below the statutory threshold, the Department explained that it was excusable because the company may not yet have "resolve[d] the issue" of such sales. Appx1060. In any event, the failure to make that notification did not impede the investigation. *Id*.

For the foregoing and other reasons, Commerce ultimately assigned Prochamp a dumping rate of zero. Appx1272.

III

Invoking jurisdiction conferred by 28 U.S.C. § 1581(c), *see* ECF 10, ¶ 2, Giorgio brought this suit under 19 U.S.C. §§ 1516a(a)(2)(A)(i)(II) and (a)(2)(B)(i) to challenge Commerce's final determination, *see id.* Prochamp intervened to support the government. ECF 17. Giorgio then moved for judgment on the agency record (ECF 25); the government (ECF 28) and Prochamp (ECF 34) opposed, and Giorgio replied (ECF 37). The court decides the motion on the papers.

In § 1516a(a)(2) actions such as this, "[t]he court shall hold unlawful any determination, finding, or conclusion found . . . to be unsupported by substantial evidence on the record, or otherwise not in accordance with law." 19 U.S.C. § 1516a(b)(1)(B)(i). That is, the question is not whether the court would have reached the same decision on the same record—rather, it is whether the administrative record as a whole permits Commerce's conclusion.

> Substantial evidence has been defined as more than a mere scintilla, as such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. To determine if substantial evidence exists, we review the record as a whole, including evidence that supports as well as evidence that fairly detracts from the substantiality of the evidence.

Nippon Steel Corp. v. United States, 337 F.3d 1373, 1379 (Fed. Cir. 2003) (cleaned up); *see also SSIH Equip. S.A. v. U.S. Int'l Trade Comm'n*, 718 F.2d 365, 382 (Fed. Cir. 1983) (if the Department makes a choice between "two fairly conflicting views," the court may not substitute its judgment even if its view would have been different "had the matter been before it *de novo*") (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951)).

IV

Giorgio accuses Commerce of two administrative law sins, one of commission and the other of omission. First, the company argues that the Department's selection of Germany as the comparison market is not supported by substantial evidence. ECF 25, at 2–3. Second, it asserts that the agency's refusal to apply facts otherwise available with an adverse inference to Prochamp suffers from the same defect. *Id.* The court addresses each charge in turn.

A

In challenging Commerce's choice of Germany, Giorgio first attacks the Department's stated reluctance (*see* Appx1081) to revisit that finding in its final determination. *See* ECF 25, at 35–41. But the agency went ahead—even if grudgingly, *see* note 10—and *did* reconsider that conclusion on the merits. *See*

Appx1081–1082. Thus, the company's quarrel is with its own strawman.

Giorgio next assails Commerce's initial finding that the "slight difference in product weights" that supported using France as the comparison market did not "outweigh[] the significantly larger overall quantity" of such mushrooms "sold to the German market." Appx1004. *See* ECF 25, at 44–47. The American company asserts that the agency's conclusion that the difference in product weights was slight is "clearly erroneous," *id.* at 46, and "no reasonable mind could reach the Department's conclusion" that Prochamp's German sales "outweighed [the] differences in product characteristics," *id*. at 46–47.

Giorgio's argument fails. To begin with, the company reads the agency's decision out of context. Commerce found

> that Prochamp's sales to France have the most similar product weights to match with U.S. sales. Nevertheless, the record reflects that the products sold in each of the third-country markets *all appear to be very similar* to the [merchandise under consideration]. Thus, we do not find that the slight difference in product weights outweighs the significantly larger overall quantity of [merchandise under consideration] sold to the German market.

Appx1004 (emphasis added). The second sentence is key. Given that the Department found that five of the six relevant characteristics were identical or nearly so, Appx1003–1004, it apparently (and reasonably) concluded that *on balance* the products sold in all three markets were very similar. *Cf. Commc'ns Workers of Am. Local 4123 ex rel. Former Emps. of AT&T Servs., Inc. v. U.S. Sec'y of Labor*, 518 F. Supp. 3d 1342, 1351 (CIT 2021) (stating that a court "will uphold a decision of less than ideal clarity if the agency's path may reasonably be discerned") (quoting *Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 286 (1974)).

Giorgio also asks the court to second-guess Commerce's balancing of product likeness with sales volume. Given that weight was only one of six relevant product characteristics, the Department reasonably determined that the significantly larger volume of German sales—assuming for the moment the reliability of that data—more than offset the *overall* slight difference in product similarity that pointed toward using France as a comparison market.[12] That the court might reach a different conclusion were it weighing

[12] Giorgio further attacks Commerce's decision to stick with Germany as the comparison market by essentially rehashing its critique of the agency's initial choice. *See* ECF 25, at 47–49. Those attacks fail for the same reason.

the evidence de novo does not permit it to substitute its own judgment for the agency's.[13]

Giorgio's final swing at Commerce's choice of comparison market is that even if the Department otherwise properly weighed the competing considerations of product similarity and sales volume, inconclusive German data compromised that balancing. ECF 25, at 54–56. As described above, most of Prochamp's ostensible "German" sales were to a multinational retailer, which received them at a warehouse outside of that country. Appx10071–10072. From there, the agency found that the mushrooms "likely" made their way to retail outlets in Deutschland and one other country, but it was impossible to determine the relative apportionment between the two. Appx10073. It's thus unknown the extent to which mushrooms sold to that retailer were in turn resold *in Germany* for consumption. *Cf.* 19 U.S.C. § 1677b(a)(1)(B)(ii) (requiring the Department to examine "the price at which the foreign like

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[13] Giorgio also claims the record does not support the Department's characterization of Prochamp's sales channels and customers in its initial choice of Germany. ECF 25, at 50–54. As described above, the agency agreed with the company, *see* note 11, but explained that mistake was at most corroborative rather than determinative. *Id*. As Commerce's balancing of product similarity versus sales volume was plainly dispositive, this asserted error was at most harmless.

product is . . . sold (or offered for sale) *for consumption*" in the third country) (emphasis added).[14]

The government admits that Prochamp's "German" sales data are inconclusive, ECF 28, at 56–58, but appears to contend—echoing the Dutch company—that because the retailer was German-based, "it was reasonable to consider it a German sale." *Id*. at 57. Moreover, "there was no other information that would have allowed for more accurate identification of sales likely consumed in Germany." *Id*. at 58 (citing Appx10074). And insofar as Prochamp's German sales records are unreliable because of the absence of any basis on which to apportion the retailer's resales in Germany and another country, the government adds, its French sales data are plagued by the same issue. *Id*.[15]

Houston, we have a problem: "Congress has not authorized the [Department] to exercise its [Tariff Act] powers based on speculation, conjecture, divination, or anything short of factual findings based on substantial evidence." *Fla. Gas Transmission Co. v. FERC*, 604 F.3d 636, 641 (D.C. Cir. 2010); *see also OSI Pharms., LLC v. Apotex Inc.*, 939 F.3d 1375, 1382 (Fed. Cir.

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[14] What matters is not where a product is ultimately consumed, but the country in which the product is "sold or offered for sale for consumption." 19 U.S.C. § 1677b(a)(1)(B)(ii).

[15] For its part, Prochamp is conspicuously silent on the issue of the reliability of its "German" sales data.

2019) ("'Mere speculation' is not substantial evidence.") (citing *Intell. Ventures I LLC v. Motorola Mobility LLC*, 870 F.3d 1320, 1331 (Fed. Cir. 2017)). Here, Commerce simply assumed that a multinational retailer that received Prochamp's mushrooms outside of Germany ultimately resold *all* of them in that country. Not only is that assumption mere speculation, it contradicts the Department's finding that the retailer "likely" resold the mushrooms in Germany *and* another country. Appx10073.

The inconsistency matters because Commerce's choice of comparison market rested entirely on its conclusion that Prochamp's "*significantly* larger overall quantity" of sales in Germany for consumption "outweigh[ed]" the "slight difference" in product similarity that otherwise pointed toward using France. Appx1004 (emphasis added). But on this record, we don't know the actual number of German sales. What we do know is that it must have been lower than what the retailer purchased because some of those mushrooms were "likely" sold to consumers in another country. Absent any better explanation, the Department could not reasonably conclude that the Dutch company's exports to Germany were "significantly" larger

than those to France.[16] The court must return this issue to the agency for reconsideration.

B

1

Giorgio challenges Commerce's refusal to apply facts otherwise available in choosing a comparison market. *See* 19 U.S.C. § 1677e(a). The American company maintains that Prochamp impeded the investigation by failing to timely notify the Department that its home-market sales volume did not meet the statutory threshold. ECF 25, at 60–61. In response, the agency explained that regardless of whether it timely receives that notification, the process is the same—it issues a questionnaire about potential third countries and must wait for a response. *Id.* Giorgio's argument, essentially, is that Commerce could have sought Prochamp's third-country data sooner if the Dutch company had identified its home market as non-viable within 14 days. *Id.* at 61. But given the Department's

[16] Insofar as Prochamp's French sales data are equally unreliable, as the government contends, *see* ECF 28, at 55, it should go without saying that it's impossible to validate inconclusive evidence by comparing it to equally inconclusive evidence. If the Department is unable to reasonably determine Prochamp's sales volumes in the comparison-market candidate countries, nothing in the regulation requires the agency to rely on that criterion. *See* 19 C.F.R. § 351.404(e); *see also* note 2.

finding that the delay made no difference, the determination that it did not *significantly* hinder the proceeding is supported by substantial evidence.

Giorgio further argues that Prochamp significantly impeded the investigation by providing inaccurate information concerning product characteristics, sales volume, sales channels, and customer types. *Id.* at 61–63. Once again, the critical word in the statute is "significantly." *See* 19 U.S.C. § 1677e(a)(2)(C). Even if the Dutch company otherwise obstructed the investigation through the actions described by its American competitor—something that Commerce did not find—the court must uphold the agency's determination so long as substantial evidence supports the conclusion that such alleged impediments were not "significant." The Department explained at length why Prochamp's "handful" of reporting errors did not interfere with the proceeding. Appx1059; *see also* Appx1059–1065. The record here more than supports that subjective determination.

Finally, Giorgio's assertion that Prochamp withheld necessary information by "completely ignor[ing] a lengthy set of instructions regarding . . . each of the potential comparison markets," ECF 25, at 64 (citing Appx4859–4860), fails because it mischaracterizes what the questionnaire sought. Commerce asked the company to "provide the following breakdown *of all sales reported to Germany*" in a particular chart and then specified what to include. Appx4859 (emphasis

added). It requested similar data for sales where the German label "*also* included" a language other than German. Appx2765 (emphasis added); Appx4860. The agency's finding that the company provided what was requested, Appx1060–1061, is amply supported by substantial evidence.

2

Giorgio also objects to the Department's failure to apply facts otherwise available as to financial reporting. The American company challenges the agency's findings that Dutch law exempted Prochamp from preparing standalone statements and that the latter's internal statements were not responsive to the agency's requests.

Before Commerce, Giorgio submitted a PricewaterhouseCoopers report as "proof" that Dutch law requires Prochamp to prepare financial statements for adoption by shareholders, even if they need not be filed with government authorities. Appx5265–5266, Appx11465. In response, the Department issued a supplemental questionnaire, to which Prochamp responded by providing a screenshot from its parent company's financial statements' citation of Dutch law and then quoting the cited provisions. Appx5923–5926.

Commerce found that the record supported Prochamp's characterization of Dutch law as imposing only "minimal requirements" as to internal financial

statements. Appx1050. The Department was unwilling to fault the company "for not providing a document that it does not have, nor was it obligated to have," *id.*, and determined that it could not characterize Prochamp as "not acting to the best of [its] ability" by not maintaining statements Dutch law did not require, *id.* The agency also concluded that the company had consistently explained why it did not maintain standalone financial statements and proved why it was not required to do so. *Id.*

Giorgio now contends that "the record unequivocally demonstrates that Prochamp and its affiliates *were* required to maintain these types of financial documents." ECF 25, at 66 (emphasis in original) (citing Appx11459–11465, Appx11492, and Appx7772–7773). The first two sets of cited record pages are all part of the PricewaterhouseCoopers report. The company makes no effort to explain why the Department, and the court, should find that report more compelling than the quotations from Dutch law provided in Prochamp's questionnaire response—quotations that Giorgio, in turn, ignores. The final two cited pages, Appx7772–7773, are an auditor's letter that directly supports Commerce's characterization of Prochamp's internal statements.

In short, conflicting evidence on the record pointed in two directions as to the adequacy of Prochamp's financial reporting. The Department reasonably

weighed that evidence, and as such the court must sustain the agency's finding.

3

As described above, substantial evidence supports Commerce's determination not to use facts otherwise available as to its market-comparison choice and Prochamp's financial reporting. Consequently, the court need not consider Giorgio's argument that the Department abused its discretion in not applying an adverse inference. *See* 19 U.S.C. § 1677e(b)(1)(A).

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The court sustains Commerce's final determination in part and otherwise remands for further proceedings consistent with this opinion.

Dated: July 17, 2024
New York, NY

/s/ *M. Miller Baker*
Judge