Reports of Cases

JUDGMENT OF THE COURT (Fourth Chamber)

24 February 2022 *

(Appeal – Dumping – Imports of hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia, Serbia and Ukraine – Termination of the proceedings against imports originating in Serbia – Determination of injury – Cumulative assessment of the effects of imports from more than one third country – Regulation (EU) 2016/1036 – Article 3(4) – Termination of the proceedings without measures – Article 9(2) – 'Negligible' imports – *De minimis* threshold – European Commission's discretion)

In Case C-226/20 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 29 May 2020,

Eurofer, European Steel Association, AISBL, established in Brussels (Belgium), represented by J. Killick and G. Forwood, avocats,

applicant,

the other parties to the proceedings being:

European Commission, represented initially by T. Maxian Rusche and by A. Demeneix, and subsequently by T. Maxian Rusche and G. Luengo, acting as Agents,

defendant at first instance,

HBIS Group Serbia Iron & Steel LLC Belgrade, established in Belgrade (Serbia), represented by R. Luff, avocat,

intervener at first instance,

THE COURT (Fourth Chamber),

composed of K. Jürimäe (Rapporteur), President of the Third Chamber, acting as President of the Fourth Chamber, S. Rodin and N. Piçarra, Judges,

Advocate General: G. Pitruzzella,

Registrar: A. Calot Escobar,

* Language of the case: English.

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 2 September 2021,

gives the following

Judgment

1 By its appeal, Eurofer, European Steel Association, AISBL ('Eurofer') asks the Court to set aside the judgment of the General Court of the European Union of 12 March 2020, *Eurofer* v *Commission* (T-835/17, EU:T:2020:96) ('the judgment under appeal'), by which the General Court dismissed its action for partial annulment of Commission Implementing Regulation (EU) 2017/1795 of 5 October 2017 imposing a definitive anti-dumping duty on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia and Ukraine and terminating the investigation on imports of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Serbia (OJ 2017 L 258, p. 24) ('the regulation at issue').

Legal context

2 At the time of the facts giving rise to the dispute, the provisions governing the adoption of anti-dumping measures by the European Union were contained in 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, and corrigendum OJ 2016 L 44, p. 20), as amended by Regulation (EU) No 37/2014 of the European Parliament and of the Council of 15 January 2014 (OJ 2014 L 18, p. 1) ('Regulation No 1225/2009').

3 At the time when the regulation at issue was adopted, the provisions governing the adoption of anti-dumping measures by the European Union were contained in 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). Pursuant to the first paragraph of Article 25, that regulation entered into force on 20 July 2016. In accordance with Article 24, first paragraph, it repealed Regulation No 1225/2009.

4 In so far as, first, the substantive provisions of Regulation No 1225/2009 and Regulation 2016/1036 relevant for this case are the same and, second, the judgment under appeal and the present appeal refer only to the provisions of the latter regulation, it is appropriate to examine the grounds of this appeal in the light of the provisions of Regulation 2016/1036, without prejudice to the application *ratione temporis* of Regulation No 1225/2009 and Regulation 2016/1036 to the present case.

5 Recital 16 of Regulation 2016/1036, which essentially reproduced the content of recital 15 of Regulation No 1225/2009, states:

'Investigations or proceedings should be terminated where the dumping is *de minimis* or the injury is negligible, and it is appropriate to define those situations. Where measures are to be imposed, it is necessary to provide for the termination of investigations and to specify that measures should be less than the margin of dumping if such lesser amount would remove the injury, and also to specify the method of calculating the level of measures in cases of sampling.'

6 Article 3 of Regulation 2016/1036, entitled 'Determination of injury', which reproduces in essence the provisions of Article 3 of Regulation No 1225/2009, provides in paragraphs 3 and 4:

'3. With regard to the volume of the dumped imports, consideration shall be given to whether there has been a significant increase in dumped imports, either in absolute terms or relative to production or consumption in the Union. With regard to the effect of the dumped imports on prices, consideration shall be given to whether there has been significant price undercutting by the dumped imports as compared with the price of a like product of the Union industry, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which would otherwise have occurred, to a significant degree. No one or more of those factors can necessarily give decisive guidance.

4. Where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the effects of such imports shall be cumulatively assessed only if it is determined that:

(a) the margin of dumping established in relation to the imports from each country is more than *de minimis* as defined in Article 9(3) and the volume of imports from each country is not negligible; and

(b) a cumulative assessment of the effects of the imports is appropriate in the light of the conditions of competition between imported products and the conditions of competition between the imported products and the like Union product.'

7 Article 5 of Regulation 2016/1036, entitled 'Initiation of proceedings', which reproduces in essence the provisions of Article 5 of Regulation No 1225/2009, provides in paragraph 7:

'The evidence of both dumping and injury shall be considered simultaneously in the decision on whether or not to initiate an investigation. A complaint shall be rejected where there is insufficient evidence of either dumping or of injury to justify proceeding with the case. Proceedings shall not be initiated against countries whose imports represent a market share of below 1%, unless such countries collectively account for 3% or more of Union consumption.'

8 Article 9(1) to (3) of Regulation 2016/1036, which reproduces in essence the provisions of Article 9 of Regulation No 1225/2009, provides:

'1. Where the complaint is withdrawn, proceedings may be terminated unless such termination would not be in the Union's interest.

2. Where protective measures are unnecessary, the investigation or proceedings shall be terminated. The [European] Commission shall terminate the investigation in accordance with the examination procedure referred to in Article 15(3).

3. For proceedings initiated pursuant to Article 5(9), injury shall normally be regarded as negligible where the imports concerned represent less than the volumes set out in Article 5(7). For the same proceedings, there shall be immediate termination where it is determined that the margin of dumping is less than 2%, expressed as a percentage of the export price, provided that it is only the investigation that shall be terminated where the margin is below 2% for individual exporters and they shall remain subject to the proceedings and may be reinvestigated in any subsequent review carried out for the country concerned pursuant to Article 11.'

9 Article 20(1) and (2) of Regulation 2016/1036, which reproduces in essence the provisions of Article 20(1) and (2) of Regulation No 1225/2009, is worded as follows:

'1. The complainants, importers and exporters and their representative associations, and representatives of the exporting country, may request disclosure of the details underlying the essential facts and considerations on the basis of which provisional measures have been imposed. Requests for such disclosure shall be made in writing immediately following the imposition of provisional measures, and the disclosure shall be made in writing as soon as possible thereafter.

2. The parties mentioned in paragraph 1 may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures.'

The background to the dispute

10 The background to the dispute is set out in paragraphs 1 to 12 of the judgment under appeal. For the purposes of this case, it may be summarised as follows.

11 Following a complaint lodged on 23 May 2016 by Eurofer, the Commission initiated an anti-dumping investigation with regard to imports into the European Union of certain hot-rolled flat products of iron, non-alloy or other alloy steel originating in Brazil, Iran, Russia, Serbia and Ukraine.

12 On 7 July 2016, the Commission published a notice of initiation of an anti-dumping procedure in respect of those imports (OJ 2016 C 246, p. 7), in accordance with Regulation No 1225/2009.

13 The investigation of dumping and injury covered the period from 1 July 2015 to 30 June 2016 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from 1 January 2013 to the end of the investigation period.

14 In the notice of initiation of the investigation, referred to in paragraph 12 of this judgment, the Commission stated that it expected to select a sample of the interested parties in accordance with the relevant provisions of Regulation No 1225/2009. The final sample of EU producers consisted of six such producers located in five Member States accounting for over 45% of production within the European Union, namely:

– ThyssenKrupp Steel Europe AG (Duisburg, Germany);

– Tata Steel IJmuiden BV (Velsen-Noord, Netherlands);

– Tata Steel UK Limited (Port Talbot, South Wales, United Kingdom);

– ArcelorMittal Mediterranée SAS (Fos-sur-Mer, France);

– ArcelorMittal Atlantique and Lorraine (Dunkirk, France), and

– ArcelorMittal España SA (Gozón, Spain).

15 Verification visits pursuant to Article 16 of Regulation 2016/1036 were carried out at the premises of the producers in question.

16 On 4 April 2017, the Commission informed all interested parties by means of an information document ('the information document') that it would continue the investigation without imposing provisional measures on imports into the European Union which were under investigation. That information document contained the essential facts and considerations on the basis of which the Commission had decided to continue the investigation without the imposition of provisional measures. Following the disclosure of that document, interested parties made written submissions providing comments on the information and findings disclosed. Interested parties who had requested to be heard were also granted a hearing.

17 On 4 May 2017, a hearing in the presence of the Hearing Officer in trade proceedings was held with Eurofer. On 8 June 2017, a second hearing was held with Eurofer.

18 Between 29 May and 9 June 2017, five additional verification visits were carried out at the premises of the following interested parties located in the territory of the European Union:

– ThyssenKrupp Steel Europe AG (Duisburg) (EU producer);

– HUS Ltd (Plovdiv, Bulgaria) (user, member of a consortium named 'Consortium for Imports of Hot-Rolled Flats');

– Technotubi SpA (Alfianello, Italy) (user, member of the consortium in the preceding indent);

– an Italian user that was not a member of the consortium and which had requested anonymity, and

– Eurofer.

19 Following the final disclosure on 17 July 2017 ('final disclosure'), another hearing in the presence of the Hearing Officer in trade proceedings was held on 27 July 2017 with Eurofer.

20 Following a hearing on 3 August 2017 with an Iranian exporting producer, the Commission made a new dumping calculation and new calculations based on it. The parties were informed of that revision by means of an additional final disclosure dated 4 August 2017.

21 On 5 October 2017, the Commission adopted the regulation at issue.

22 Article 2 of that regulation provides that 'the anti-dumping proceeding concerning imports into the Union of the product concerned originating in Serbia is hereby terminated in accordance with Article 9(2) of [Regulation 2016/1036]'.

The procedure before the General Court and the judgment under appeal

23 By application lodged at the Registry of the General Court on 29 December 2017, Eurofer brought an action seeking the partial annulment of the regulation at issue.

24 By document lodged at the Court Registry on 17 April 2018, HBIS Group Serbia Iron & Steel LLC Belgrade ('HBIS Serbia') sought leave to intervene in the present proceedings in support of the forms of order sought by the Commission. By order of 12 July 2018, the President of the Eighth Chamber of the General Court granted leave to intervene. Certain data contained in the application at first instance were the subject of confidential treatment with regard to HBIS Serbia.

25 Eurofer advanced three pleas in law in support of its action. The first plea in law alleged that the Commission made a manifest error of assessment and an error of law in deciding not to subject Serbian imports to cumulative assessment in accordance with Article 3(4) of the Regulation 2016/1036. The second plea in law alleged that the Commission made a manifest error of assessment and an error of law in finding that protective measures against the Republic of Serbia were 'unnecessary', even in the absence of cumulative assessment. The third plea in law alleged that in refusing to disclose data on undercutting and underselling in relation to the Serbian exporter the Commission infringed Article 20(2) of that regulation, its right to disclosure and its rights of defence, and the right to sound administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union.

26 As regards the admissibility of the application, the General Court responded to the Commission's challenge to that admissibility with reference to the case-law of the Court of Justice resulting, inter alia, from the judgment of 26 February 2002, *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118, paragraphs 51 and 52), according to which the EU judicature is entitled to assess, according to the circumstances of each case, whether the proper administration of justice justifies dismissing the action on the merits without first ruling on its admissibility.

27 As to the merits, the General Court rejected Eurofer's arguments in respect of the second of the conditions laid down in Article 3(4) of Regulation 2016/1036 relating to the non-negligible volume of imports. The conditions laid down in that provision being cumulative, it dismissed in its entirety the first plea in law for annulment.

28 As regards the second plea for annulment, the General Court held that Eurofer had not shown that the Commission had exceeded its discretion in the application of Article 9(2) of Regulation 2016/1036. It rejected the complaint based on a cursory and partial examination of imports from Serbia and, therefore, rejected the second plea in law in its entirety as being unfounded.

29 As regards the third plea in law for annulment, the General Court held that, in accordance with Article 20(2) of Regulation 2016/1036, Eurofer had been informed of the essential facts and considerations on the basis of which it was intended to recommend the termination of the proceedings in respect of imports from Serbia without the imposition of measures, and had been afforded the opportunity to make its views known, and that its rights of defence were therefore respected in the present case. In addition, it rejected Eurofer's argument based on an analogy with competition case-law. Furthermore, it held that, as shown from the examination of the second plea, the Commission had examined all the relevant factors in the present case and consequently had not breached the principle of sound administration. Consequently, it dismissed the third plea in law for annulment.

30 By the judgment under appeal, the General Court dismissed Eurofer's action in its entirety.

Forms of order sought before the Court of Justice

31 By its appeal, Eurofer claims that the Court should:

– set aside the judgment under appeal;

– annul Article 2 of the regulation at issue;

– in the alternative, refer the matter back to the General Court, and

– order the Commission and HBIS Serbia to pay the costs of the proceedings at first instance and on appeal.

32 The Commission contends that the Court should:

– set aside the judgment under appeal and declare the action at first instance inadmissible;

– dismiss the appeal, and

– order Eurofer to pay the costs of the proceedings at first instance and on appeal.

33 HBIS Serbia claims that the Court should:

– dismiss the appeal, and

– order Eurofer to pay the costs of the proceedings incurred by HBIS Serbia at first instance and on appeal.

34 By order of 2 September 2020, *Eurofer* v *Commission* (C-226/20 P, not published, EU:C:2020:669), the President of the Court granted Eurofer's request that the Court of Justice grant confidential treatment, vis-à-vis HBIS Group Serbia, in respect of the information set out in Annex A.4 to Eurofer's appeal corresponding to the information which has already been treated as confidential in the case giving rise to the judgment under appeal and is annexed to Eurofer's application at first instance.

The appeal

35 In support of its appeal, Eurofer raises four grounds. The first ground of appeal alleges that the General Court made an error of law in interpreting Article 3(4) of Regulation 2016/1036 to mean that the Commission has the discretion to consider that imports representing a market share exceeding 1% are 'negligible'. The second ground of appeal alleges manifest errors in assessment and an error of law as regards the assessment that 'the volume of imports' from Serbia was 'negligible' for the purpose of Article 3(4) of that regulation. The third ground of appeal alleges a manifest error of assessment and an error of law as regards the finding that 'protective measures are unnecessary' for the purpose of Article 9(2) of that regulation. The fourth ground of appeal alleges that the General Court erred in law in finding that the Commission was not required to disclose data on undercutting and underselling.

The first ground of appeal

Arguments of the parties

36 By its first ground of appeal, Eurofer alleges that the General Court erred in law in interpreting Article 3(4)(a) and Article 5(7) of Regulation 2016/1036 as meaning that the Commission has discretion to consider that imports representing a market share exceeding 1% are 'negligible' for the purposes of Article 3(4)(a) of that regulation. That ground challenges paragraphs 67, 68, 73, 74 and 78 to 80 of the judgment under appeal.

37 In the first place, it submits that the case-law of the General Court, stemming from the judgment of 25 January 2017, *Rusal Armenal* v *Council* (T-512/09 RENV, EU:T:2017:26, paragraphs 101 to 105), confirms that there is a 'complementary relationship' between Article 3(4)(a) and Article 5(7) of Regulation 2016/1036. Accordingly, the proper interpretation of Article 3(4) of that regulation is that the 1% threshold contained in Article 5(7) of the same regulation should be applied as a binding threshold for the assessment of whether the volume of imports is 'negligible' for the purposes of Article 3(4) thereof. That interpretation is confirmed by the Commission's decision-making practice, to which the General Court referred in paragraphs 73 and 74 of the judgment under appeal, and by the explanatory note of 21 September 2000 to the World Trade Organisation (WTO) Committee on Anti-Dumping Practices (Ad Hoc Group on Implementation), as cited in paragraph 37 of the judgment under appeal, which represents, according to Eurofer, 'the Commission's best interpretation of what EU law provides'.

38 In the second place, in paragraphs 65 to 68 and 79 of the judgment under appeal, the General Court offers no convincing reason to support the interpretation it adopts. First, the lack of an explicit cross-reference in Article 3(4) to Article 5(7) of Regulation 2016/1036 does not mean that those provisions cannot be read together. Second, the fact that Article 5(7) of that regulation applies at the stage of the initiation of the investigation, whereas Article 3(4) of the regulation applies at the stage of the investigation itself is not a sufficient reason to reject a coherent interpretation of those two provisions. It would, Eurofer submits, be logical for the same rules to apply at both stages of the proceedings, as is the case with other provisions of that regulation. Third, the extent of the Commission's discretion in trade policy is irrelevant to the determination of whether imports from a given country are greater than the threshold of 1%, since that issue invites a binary response. Fourth, the examples of imports of over 1% market share on which the General Court relied in paragraph 79 of the judgment under appeal are irrelevant for the interpretation of Article 3(4) of Regulation 2016/1036.

39 In the third place, Eurofer submits that the General Court's interpretation is contrary to the principle of legal certainty, to the extent that that interpretation would also result in uncertainty as to whether the threshold of 3%, laid down in Article 5(7) of that regulation, applied analogously at the stage of initiation of the investigation and at the stage of the investigation itself. Similarly, the General Court's interpretation whereby Article 5(7) of that regulation may serve as guidance for the interpretation of Article 3(4) of the same regulation, without however fixing a binding threshold, is likely to lead to legal uncertainty and increased political pressure in dumping cases. Under such an interpretation, the Commission would have a broad discretion over which there would be light judicial review.

40 The Commission submits that this ground of appeal is ineffective and, in any event, unfounded.

41 HBIS Serbia submits that this ground of appeal is unfounded.

Findings of the Court

42 At the outset, the Commission's argument that this ground of appeal is ineffective must be rejected. Although this ground of appeal refers, in particular, to paragraphs 67, 68, 73, 74 and 78 to 80 of the judgment under appeal, it is clear from Eurofer's arguments in support of this ground that it in fact seeks to contest all the grounds of that judgment by which the General Court rejected the first plea for annulment, in which it dealt with the condition laid down in Article 3(4)(a) of Regulation 2016/1036 relating to whether the volume of imports was negligible.

43 In substance, Eurofer submits, in essence, that the General Court based its decision on an incorrect interpretation of Article 3(4) and Article 5(7) of the regulation in so far as those provisions do not confer any discretion on the Commission to regard imports from Serbia representing a volume greater than 1% as 'negligible' for the purposes of Article 3(4)(a) of that regulation.

44 In that regard, it should be recalled that Article 3(4) of Regulation 2016/1036 provides that where imports of a product from more than one country are simultaneously subject to anti-dumping investigations, the effects of such imports are to be cumulatively assessed only if, first, the margin of dumping established for the imports from each country is more than *de minimis*, as defined in Article 9(3) of that regulation, and the volume of imports from each country is not negligible, and, second, a cumulative assessment of the effects of the imports is appropriate in light of the conditions of competition between imported products and the conditions of competition between the imported products and the like EU product.

45 As the General Court correctly observed in paragraph 51 of the judgment under appeal, Article 3(4) of the regulation lays down, in substance, three conditions for the cumulative assessment of imports originating from more than one country that are simultaneously subject to anti-dumping investigations to be permitted, and it suffices that one of those three conditions is not met for such an assessment to be precluded.

46 In the present case, only the second of those conditions, namely that relating to a non-negligible volume of imports, is at issue in the present case.

47 In the first place, it is clear from the wording of Article 3(4)(a) of Regulation 2016/1036 itself that, as regards that condition, that provision makes no reference to Article 5(7) of that regulation, nor to any other provision of that regulation.

48 As the General Court correctly observed in paragraph 63 of the judgment under appeal, unlike the first part of Article 3(4)(a) of Regulation 2016/1036, which precisely defines the first condition concerning the margin of dumping by reference to the *de minimis* level referred to in Article 9(3) of that regulation, the second part of Article 3(4)(a) of that regulation makes no cross-reference and requires only that the volume of imports from each country not be 'negligible', without further defining that term.

49 It follows that, in the absence of an explicit reference to the 1% threshold laid down in Article 5(7) of Regulation 2016/1036, the EU legislature did not impose a mandatory requirement that the negligible nature of the imports, for the purposes of the second condition laid down in Article 3(4)(a) of that regulation, be assessed having regard to that threshold.

50 In the second place, it must be observed that Article 3(4) and Article 5(7) of Regulation 2016/1036 pursue different objectives in the context of the procedure laid down by that regulation.

51 The General Court correctly held in that regard, in paragraph 66 of the judgment under appeal, that Article 5(7) of that regulation concerns a different stage of the investigation than that governed by Article 3(4) of the same regulation.

52 Under Article 5(7) of Regulation 2016/1036, where the 1% threshold laid down in that provision is not reached, no anti-dumping procedure is initiated. It follows that that provision concerns a stage prior to the initiation of the investigation.

53 By contrast, Article 3(4) of the regulation concerns imports which are already subject to an investigation commenced by the Commission following the initiation of proceedings in accordance with Article 6(1) of that regulation.

54 In that context, as the Advocate General observed in point 52 of his Opinion, while it is not precluded that the 1% threshold laid down in Article 5(7) of the same regulation may be taken into account as an indicative threshold for examining the 'negligible' nature of the volume of imports referred in Article 3(4)(a) of Regulation 2016/1036, that threshold cannot, however, constitute a mandatory threshold which, if exceeded, requires imports originating in a particular third country to be regarded as 'not negligible' for the purposes of that provision.

55 In the third place, the interpretation of Article 3(4)(a) of Regulation 2016/1036 adopted by the General Court is consistent with the broad discretion enjoyed by the institutions of the European Union in matters of common commercial policy, and in particular on the subject of measures to protect trade. That power follows from the complexity of the economic and political situations which those institutions have to examine (see, to that effect, judgment of 19 September 2019, *Trace Sport*, C-251/18, EU:C:2019:766, paragraph 47 and the case-law cited) and concerns inter alia the determination of the existence of injury caused to European Union industry in the context of an anti-dumping proceeding (judgment of 10 July 2019, *Caviro Distillerie and Others* v *Commission*, C-345/18 P, not published, EU:C:2019:589, paragraph 15 and the case-law cited).

56 In the present case, as the Advocate General observed, in essence, in point 51 of his Opinion, while the 1% threshold laid down in Article 5(7) of Regulation 2016/1036 may be an indication that the EU judicature may take into account in the exercise of its review of the assessments made by the Commission in the context of Article 3(4)(a) of that regulation, that threshold does not constitute a mandatory threshold above which the Commission will be prevented from concluding, in all circumstances, that the imports subject to the anti-dumping investigation and originating in a country are negligible.

57 Such an interpretation of Article 3(4)(a) of Regulation 2016/1036 would deprive that institution of the discretion that that provision confers on it to assess the negligible nature of imports for the purposes of a cumulative assessment of imports of a product originating from several countries that are simultaneously the subject of an anti-dumping investigation.

58 It therefore follows from the foregoing considerations that, in paragraph 67 of the judgment under appeal, the General Court was fully entitled to hold that Article 5(7) of that regulation may serve as guidance concerning negligible import volumes, without it being possible to infer that, in the context of Article 3(4) of that regulation, imports originating from the country in question which represent a market share exceeding 1% cannot be regarded as negligible.

59 That conclusion is not called into question by the arguments advanced by Eurofer in support of this ground of appeal.

60 In the first place, as regards the argument that the General Court's interpretation of Article 3(4)(a) of Regulation 2016/1036 was contrary, in essence, to the EU institutions' previous decision-making practice, it suffices to observe, in accordance with the settled case-law of the Court of Justice, that that decision-making practice is not to be taken into account for the interpretation of a provision of that regulation (see, to that effect, judgment of 10 February 2021, *RFA International* v *Commission*, C-56/19 P, EU:C:2021:102, paragraph 79 and the case-law cited).

61 Next, as regards the consistency of that interpretation with the explanatory note referred to in paragraph 37 of this judgment, the General Court held, in paragraph 77 of the judgment under appeal, which is not specifically challenged in this appeal, that that note cannot be categorised as a guideline from which a self-imposed limitation of its discretion can be inferred.

62 Lastly, the arguments alleging that that interpretation was contrary to the principle of legal certainty must also be rejected.

63 First, in the light of the considerations set out in paragraphs 50 to 54 of this judgment, Eurofer's argument that the same interpretation would lead to uncertainty as to the interpretation of the thresholds laid down in Article 5(7) of Regulation 2016/1036 cannot succeed. Second, as the Advocate General emphasised in point 57 of his Opinion, the interpretation of Article 3(4)(a) of that regulation proposed by Eurofer is likely to undermine the effectiveness of that provision in so far as, in accordance with Article 5(7) of that regulation, proceedings are not, in principle, initiated against a country from which the volume of imports represents a market share of less than 1%.

64 In the light of all the foregoing considerations, the first ground of appeal must be rejected as unfounded.

The second ground of appeal

Arguments of the parties

65 By its second ground of appeal, Eurofer submits that the General Court's assessment that the volume of imports from Serbia was 'negligible' for the purposes of Article 3(4)(a) of Regulation 2016/1036 is vitiated by an error of law. This ground refers to paragraphs 81 to 85 of the judgment under appeal and has three parts.

66 By the first part of this ground, it submits that the General Court erred in law, in paragraphs 81 to 83 of the judgment under appeal, by including price elements in the assessment of whether the volume of imports was 'negligible', whereas it is necessary to make a solely quantitative assessment of the volume of the imports.

67 The three elements necessary for the cumulative evaluation under Article 3(4) of Regulation 2016/1036 were correctly recalled in paragraphs 50 and 51 of that judgment. The second of those elements relates to the volume of imports, the 'negligible' nature of which should be based on market share and not on the price of those imports. The latter is the subject of the third of those

elements and the regulation makes a clear distinction between those two aspects. However, the General Court mixed up two separate concepts and consequently based its reasoning regarding the negligible nature of the volume of imports on an irrelevant consideration.

68 By the second part of this ground of appeal, raised in the alternative, Eurofer submits that, in any event, the General Court did not correctly apply the criteria, which it set out in paragraph 82 of the judgment under appeal, for the assessment of whether a volume of imports is negligible. Thus, by disregarding data on undercutting and underselling in its analysis, the Commission did not take into account all the relevant evidence, as required by Article 3(3) of Regulation 2016/1036. Consequently, the General Court erred in law, in paragraph 83 of the judgment under appeal, in upholding the Commission's approach.

69 By the third part of the same ground, Eurofer submits that the General Court also made, in paragraphs 83 and 85 of the judgment under appeal, a manifest error of assessment and distorted the evidence in finding that the average prices associated with volumes amounting to an insignificant market share supported a finding that the volume of imports in question was 'negligible'. Eurofer acknowledged that the average price of the imports from Serbia was higher than that of imports from other countries. However, the evidence in the case file clearly showed that the average price charged by the sole Serbian exporting producer was practically the same as that charged by two other exporters on which the Commission did impose anti-dumping duties.

70 The Commission considers that this ground of appeal is ineffective and that, in any event, each of its three parts is unfounded. In the Commission's view, the third of those parts is moreover partially inadmissible.

71 HBIS Serbia submits that this ground of appeal must be rejected as unfounded

Findings of the Court

72 It must be held, as the Commission submits, that this ground of appeal is ineffective.

73 This ground challenges, in particular, paragraphs 81 to 84 of the judgment under appeal.

74 In paragraph 81 of that judgment, the General Court held that the Commission was fully entitled to consider, in recital 248 of the regulation at issue, that the fact that Serbian average sales prices during the investigation period were significantly higher than those of the other four countries concerned was an indication that that low volume of imports could not cause injury to the EU industry.

75 It is true that, in paragraph 82 of the judgment under appeal, the General Court considered that the issue of whether a volume of imports is negligible within the meaning of Article 3(4)(a) of Regulation 2016/1036 cannot be reduced to a simple issue of how large that volume is but rather extends to its quality, that is to say other factors which indicate the effects which that volume is capable of having, including the prices associated with those imports.

76 However, as is clear in particular from paragraph 69 of the judgment under appeal, in recital 232 of the regulation at issue the Commission stated, in essence, that the volume of imports from Serbia was found to be negligible, on the basis of Article 3(4) of Regulation 2016/1036, in so far as, first, that volume of imports was very close to the 1% threshold laid down in Article 5(7) of

that regulation below which no investigation would have been initiated by the Commission and, second, that volume was considerably lower than the volume of the imports from each of the four other countries concerned.

77 Therefore, even if, as Eurofer submits, the General Court's reasoning in paragraphs 81 to 84 of the judgment under appeal, relating to the analysis of the prices associated with the imports at issue, were vitiated by one or more errors of law, those errors would have no effect on the finding made in paragraphs 70 and 80 of that judgment that the Commission made no error of assessment and was entitled to find, in this case, that the volume of imports from Serbia remained negligible for the purposes of Article 3(4) of Regulation 2016/1036.

78 In those circumstances, the second ground of appeal, in its three parts, must be dismissed as ineffective.

The third ground of appeal

Arguments of the parties

79 By its third ground of appeal, Eurofer submits that, in paragraphs 109, 114, 120 and 121 of the judgment under appeal, the General Court made several errors of law in confirming the Commission's conclusion that, in the present case, 'protective measures are unnecessary', for the purposes of Article 9(2) of Regulation 2016/1036. That ground of appeal is divided into two parts.

80 By the first part, Eurofer submits that, in paragraph 114 of the judgment under appeal, the General Court erred in law in finding that a detailed analysis of whether dumping has taken place, pursuant to Article 2 of Regulation 2016/1036, and whether injury has been caused, pursuant to Article 3 of that regulation, is not always necessary and that it may be appropriate to terminate the investigation or proceedings, inter alia on the sole basis of the dumping margin or volume of imports.

81 Eurofer submits that, while Article 9(2) of Regulation 2016/1036 does not specify the circumstances in which 'protective measures are unnecessary', there is clear guidance in recital 16 of that regulation, which states that proceedings should be terminated 'where the dumping is *de minimis* or the injury is negligible'. In those circumstances, the General Court was wrong to conclude, in paragraph 114 of the judgment under appeal, that an assessment of potential material injury was not necessary.

82 Article 9(3) of Regulation 2016/1036 does not change this, Eurofer submits, as it simply sets out two 'safe harbour' thresholds below which the two criteria in recital 16 of that regulation would normally be met. In the present case, the Serbian imports exceeded those thresholds. Consequently, the only basis on which the Commission could have concluded that it was unnecessary to adopt protective measures would have been a finding that the injury caused by Serbian imports was negligible, which would have required that the Commission verify whether those imports could have contributed to causing material injury, taking into account the various considerations set out in Article 3 of Regulation 2016/1036.

83 By the second part, Eurofer submits that, in paragraphs 115 to 121 of the judgment under appeal, the General Court made an error of law and a manifest error of assessment in finding that the Commission had not exceeded its margin of discretion in the application of Article 9(2) of Regulation 2016/1036. According to Eurofer, neither the volumes of Serbian imports nor the average sales prices could, in the absence of other factors, justify the Commission's conclusion.

84 Thus, regarding the volume of Serbian imports exceeding the 1% threshold laid down in Article 9(3) of Regulation 2016/1036, read in the light of Article 5(7) of that regulation, it could not be presumed that that volume would cause no injury. As regards the use of average prices of imports, the Commission should have taken into account not only those prices, but also the prices applied by those exporters in the other countries concerned, as well as the level of undercutting and underselling. Furthermore, the failure by the Commission to consider relevant data constitutes a manifest error of assessment. The Commission's assessment did not take into account the high dumping margin of Serbian imports even though that fact was obviously relevant for the determination of the injurious effects of those imports, as is clear from Article 3(3) of that regulation.

85 The Commission considers that this ground is in part inadmissible and, in any event, unfounded.

86 HBIS Serbia submits that this ground of appeal must be rejected as unfounded.

Findings of the Court

87 By the first part of this ground of appeal, Eurofer submits, in essence, that in paragraph 114 of the judgment under appeal the General Court wrongly held that a detailed analysis of whether there has been injury is not always necessary and that it may be appropriate to terminate the investigation or proceedings, inter alia, on the sole basis of the dumping margin or volumes of imports.

88 In that respect, in accordance with Article 9(2) of Regulation 2016/1036, where protective measures are unnecessary, the investigation or proceedings are to be terminated. Recital 16 of that regulation states that proceedings should be terminated where the dumping is *de minimis* or the injury is negligible.

89 In that context, Article 9(3) of Regulation 2016/1036 provides in particular that, for proceedings initiated pursuant to Article 5(9), injury shall normally be regarded as negligible where the imports concerned represent less than the volumes set out in Article 5(7) of that regulation, namely a market share of below 1%.

90 However, as the Advocate General observed in point 100 of his Opinion, Article 9(3) of the regulation is not to be interpreted as preventing the Commission from considering that the injury caused by those imports is negligible where, as in this case, the volume of those imports slightly exceeds it.

91 It is clear from the use of the adverb 'normally' that the EU legislature intended to allow the Commission a certain margin of discretion in the assessment of whether the potential injury that could be caused by those imports was 'negligible'.

92 That interpretation is consistent with the discretion that the EU institutions enjoy in matters of trade protection measures, which extends, as recalled in paragraph 55 of this judgment, to the determination of whether there is injury caused to EU industry in the context of anti-dumping proceedings.

93 Therefore, the Commission is entitled to consider that no protective measures are shown to be necessary, within the meaning of Article 9(2) of Regulation 2016/1036, where it finds that the imports under investigation exceed the 1% threshold below which the injury caused by those imports from a third country is normally regarded as negligible, where those imports are very close to that threshold and that institution has other elements available to it which allow the negligible nature of those imports to be corroborated.

94 In those circumstances, the margin of discretion available to the Commission allows it to terminate the investigation on the sole basis of Article 9(2) of Regulation 2016/1036, without the Commission being required to determine whether the same imports are likely to cause material injury in the light of the matters set out, inter alia, in Article 3(2) and (3) of that regulation.

95 In the light of the foregoing, the first part of this ground of appeal must be rejected as unfounded.

96 By the second part of this ground of appeal, Eurofer submits in essence that the General Court made an error of law and a manifest error of assessment in paragraphs 115 to 121 of the judgment under appeal, by upholding the Commission's finding that, in the present case, protective measures were unnecessary.

97 At the outset, the Commission's argument that this part is inadmissible, on the ground that it relates only to the assessment of the facts made by the General Court without any error of law being identified, must be rejected. As the Advocate General observed in point 105 of his Opinion, in paragraphs 115 to 121 of the judgment under appeal, against which this part is directed, the General Court made legal findings, and it is against those findings that Eurofer's line of argument is directed.

98 First of all, as regards Eurofer's argument that the General Court made an error of law in concluding that the Commission had not exceeded its margin of discretion in the application of Article 9(2) of Regulation 2016/1036, it must be observed that, for the same reasons as those set out in paragraphs 91 to 94 of this judgment, that argument must be regarded as unfounded.

99 Next, as regards the argument that, by failing to take into account the allegedly high dumping margin of Serbian imports, the Commission's conclusion that it was unnecessary to adopt protection measures is vitiated by a manifest error of assessment, it must be observed that, as the General Court correctly held in paragraphs 110 and 111 of the judgment under appeal, Article 9(2) of Regulation 2016/1036 leaves a certain margin of discretion to the Commission, without specifying the circumstances in which it may conclude that protective measures are unnecessary.

100 In those circumstances, the dumping margin is not a relevant factor which the Commission should necessarily have taken into account in order to conclude that there was no need to adopt protective measures.

101 In any event, it must be observed that, in support of its argument, Eurofer submits merely that, in view of the dumping margin at issue, it was 'unlikely' that the imports at issue were negligible, and thus it does not adduce any specific and precise evidence that would make it possible to conclude that the General Court should have found that the Commission's reasoning was vitiated by a manifest error of assessment.

102 Lastly, as the Advocate General stated in point 109 of his Opinion, the argument concerning the Commission's failure to consider data on price undercutting and underselling of Serbian products must be rejected since that argument is again based on a requirement, contrary to the ruling made in paragraph 94 of this judgment, that the Commission carry out a detailed analysis as to whether there is injury before it may terminate the investigation in accordance with Article 9(2) of Regulation 2016/1036.

103 In the light of the foregoing considerations, the second part of the third ground of appeal must be rejected as unfounded and, consequently, this ground of appeal must be dismissed in its entirety.

The fourth ground of appeal

Arguments of the parties

104 By its fourth ground of appeal, Eurofer argues that the General Court made several errors in law in concluding that the Commission was not required to disclose to it the data on undercutting and underselling on the part of the Serbian exporter. This ground refers to paragraphs 135 to 137, 141 to 146 and 148 of the judgment under appeal, and has three parts.

105 By the first part of its fourth ground of appeal, Eurofer submits that the General Court erred in law in holding that its rights of defence had not been infringed.

106 According to Eurofer, the rights of the defence are not restricted to knowledge of the matters on the basis of which the Commission has built its case, in accordance with Article 20(2) Regulation 2016/1036, but extend to access to other relevant evidence in the Commission's file. In the present case, the data on undercutting and underselling were essential information which made it possible to demonstrate the effect of the imports in question and were necessary in order for Eurofer to be able to put forward its views on whether those imports caused injury to the EU industry and on whether the Commission was right to consider the effect of those imports to be negligible.

107 In the context of the second part of this ground, Eurofer submits that the General Court erred in law in finding, in paragraph 142 of the judgment under appeal, that in an anti-dumping investigation, in its capacity as the representative of the EU industry, it could not rely on requirements stemming from respect of the rights of the defence. That conclusion has no legal basis and has no basis in the case-law of the Court of Justice or of the General Court.

108 By the third part of this ground, Eurofer submits that the General Court erred in law in holding, in paragraph 146 of the judgment under appeal, that the Commission had not infringed the principle of sound administration enshrined in Article 41 of the Charter of Fundamental Rights of the European Union. Eurofer submits that, if its second or third ground of appeal is upheld, its arguments alleging infringement of the principle of sound administration should also be upheld.

In addition, Eurofer considers that the General Court erred in law, in paragraph 148 of the judgment under appeal, by failing to order the Commission to produce the evidence on undercutting and underselling.

109 The Commission and HBIS Serbia submit that the fourth ground of appeal is in part unfounded and in part ineffective.

Findings of the Court

110 Article 20(2) of Regulation 2016/1036 provides that the parties mentioned in Article 20(1), which includes representative associations such as Eurofer, may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the termination of an investigation or proceedings without the imposition of measures.

111 It should be borne in mind that the three parts of this ground are based on the premiss that the data on undercutting and underselling were data that should have been taken into consideration by the Commission for the purposes of applying Article 3(4)(a) and Article 5(7) of Regulation 2016/1036.

112 However, as is apparent from the examination of the second ground of appeal, the General Court was fully entitled to hold that the Commission was entitled to decide to terminate the proceedings with regard to the imports from Serbia on the sole basis of the volumes of imports and the average sales price data, without having to analyse the data on undercutting and underselling.

113 Consequently, the General Court did not err in law in holding, in paragraph 137 of the judgment under appeal, that, in accordance with Article 20(2) of Regulation 2016/1036, Eurofer had been informed of the essential facts and considerations on the basis of which it was intended to recommend the termination of the proceedings in respect of imports from Serbia without the imposition of measures, that Eurofer had been afforded the opportunity to make its views known, and that its rights of defence had been respected in the present case.

114 For the same reasons, the General Court did not err in law in finding, in paragraph 146 of the judgment under appeal, that the Commission had examined all the relevant factors in the present case and consequently had not breached the principle of sound administration. Similarly, Eurofer cannot rely on an argument based on the fact that, in paragraph 148 of the judgment under appeal, the General Court rejected its request for the production of data on undercutting and underselling margins for the Republic of Serbia.

115 In those circumstances, without it being necessary to rule on the question of whether, as regards respect for the rights of the defence in anti-dumping investigation proceedings, a distinction should be made between Eurofer and undertakings that risk having a penalty or an anti-dumping duty imposed on them, the fourth ground of appeal must be rejected as unfounded.

116 Having regard to all the foregoing considerations, as none of the grounds of this appeal has been upheld, the appeal must be dismissed in its entirety without it being necessary to rule on the Commission's submissions alleging the inadmissibility of the application at first instance.

Costs

117 Under Article 184(2) of the Rules of Procedure of the Court of Justice, where the appeal is unfounded, the Court is to make a decision as to the costs. Article 138(1) of those rules, applicable to appeal proceedings pursuant to Article 184(1) thereof, provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

118 As Eurofer has been unsuccessful in its appeal and as the Commission and HBIS Serbia have sought a form of order that Eurofer pay the costs, it must be ordered to pay, in addition to its own costs, those incurred by the Commission and HBIS Serbia.

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

1. **Dismisses the appeal;**

2. **Orders Eurofer, European Steel Association, AISBL to bear its own costs and to pay those incurred by the European Commission and HBIS Group Serbia Iron & Steel LLC Belgrade.**

Jürimäe Rodin Piçarra

Delivered in open court in Luxembourg on 24 February 2022.

A. Calot Escobar
Registrar

K. Lenaerts
President