Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 7 September 2023 [1]

Case C-517/22 P

Eurobolt BV,
Fabory Nederland BV,
ASF Fischer BV
v
European Commission,

Stafa Group BV

(Appeal – Dumping – Extension of the anti-dumping duty imposed on imports of certain iron or steel fasteners originating in China to imports consigned from Malaysia – Re-imposition of a definitive anti-dumping duty – Validity of Implementing Regulation (EU) 2020/611 – Legal basis – Articles 13 and 14 of Regulation (EU) 2016/1036 – Validity of Regulation (EC) No 91/2009 – Judgment of the Court in *APEX*)

I. Introduction

1. In their appeal, Eurobolt BV, Fabory Nederland BV, and ASF Fischer BV ('the appellants') – three companies based in the Netherlands which import and sell iron and steel fasteners – ask the Court of Justice to set aside the judgment of the General Court [2] by which it dismissed their action for annulment of Commission Implementing Regulation (EU) 2020/611 of 30 April 2020 [3] re-imposing the definitive anti-dumping duty imposed by Council Regulation (EC) No 91/2009 [4] on imports of certain iron or steel fasteners originating in the People's Republic of China to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not.

2. The appellants rely on seven grounds of appeal. However, in accordance with the Court's request, I shall restrict my analysis in this Opinion to the sixth ground of appeal, alleging that, by finding that the contested regulation has a proper legal basis, the General Court misinterpreted

[1] Original language: English.

[2] Judgment of 18 May 2022, *Eurobolt and Others* v *Commission* (T-479/20, EU:T:2022:304) ('the judgment under appeal').

[3] OJ 2020 L 141, p. 1 ('the contested regulation').

[4] Council Regulation of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (OJ 2009 L 29, p. 1) ('the original regulation').

and misapplied Article 13(1) 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,[5] Article 5(1) and (2) TEU as well as the principle of good administration.

3. In a nutshell, the issue which the Court will have to address, in order to deal with that ground of appeal, is the following: does the repeal of a regulation imposing an anti-dumping duty on imports originating in a third State, on the ground of a possible inconsistency with the World Trade Organization (WTO) rules, preclude the Commission from extending that duty to imports from another third State, for reasons of circumvention, even where the extension relates to the period before the repeal of the regulation, and the imports have been registered in conformity with the relevant anti-dumping rules?

II. Legal framework

4. In the period that is relevant for the present proceedings, the adoption of anti-dumping measures was governed by Council Regulation (EC) No 1225/2009 first,[6] then Council Regulation (EC) No 384/96,[7] and finally, the already-mentioned Regulation 2016/1036 ('the basic regulation').[8]

5. Article 13 of the basic regulation ('Circumvention') provides:

'1. Anti-dumping duties imposed pursuant to this Regulation may be extended to imports from third countries … when circumvention of the measures in force is taking place.

…

3. … Initiations [of investigations] shall be made by Commission Regulation which may also instruct customs authorities to subject imports to registration in accordance with Article 14(5) …

Where the facts as finally ascertained justify the extension of measures, this shall be done by the Commission acting in accordance with the examination procedure referred to in Article 15(3). The extension shall take effect from the date on which registration was imposed pursuant to Article 14(5) …'

6. Article 14(5) of the basic regulation, concerning 'general provisions', states:

'The Commission may, after having informed the Member States in due time, direct the customs authorities to take the appropriate steps to register imports, so that measures may subsequently be applied against those imports from the date of such registration. … Imports shall not be made subject to registration for a period longer than nine months.'

5 OJ 2016 L 176, p. 21.

6 Regulation of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51).

7 Regulation of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1).

8 Given that the legal provisions that are relevant for the present proceedings are worded very similarly, I shall refer throughout this Opinion to the provisions of Regulation 2016/1036, as both parties did in their submissions.

7. Article 2 of Commission Implementing Regulation (EU) 2016/278 of 26 February 2016 repealing the definitive anti-dumping duty imposed on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not ('the repeal regulation'),[9] provides:

'The repeal of the anti-dumping duties referred to in Article 1 shall take effect from the date of the entry into force of this Regulation as provided for in Article 3 and shall not serve as a basis for the reimbursement of the duties collected prior to that date.'

8. Recital 14 of the repeal regulation is worded similarly.

9. Article 1(1) and (3) of the contested regulation, in essence, extends the anti-dumping duties imposed by Article 1(2) of the original regulation 'to imports of certain iron or steel fasteners … consigned from Malaysia, whether declared as originating in Malaysia or not …', when 'registered in accordance with Article 2 of Regulation (EU) No 966/2010 and Articles 13(3) and 14(5) of Regulation (EC) No 1225/2009 …'.

10. Article 2 of the contested regulation provides:

'1. Duties collected on the basis of Implementing Regulation (EU) No 723/2011 shall not be reimbursed.

'2. Any reimbursements that took place following the judgment of the Court of Justice Case C-644/17 *Eurobolt* (EU:C:2019:555) shall be recovered by the authorities which made those reimbursements.'

III. Factual background

11. The most relevant facts, as set out in the judgment under appeal, can be summarised as follows.

A. The adoption and repeal of the original regulation

12. In 2009, the Council found that fasteners sold on the EU market had been dumped by Chinese exporting producers. Thus, on 26 January 2009, it adopted the original regulation.

13. Following the imposition of the definitive anti-dumping duty, the European Commission received evidence that those measures were being circumvented through transhipping via Malaysia. It thus adopted, on 27 October 2010, Commission Regulation (EU) No 966/2010 initiating an investigation concerning the possible circumvention of anti-dumping measures imposed by [the original regulation] by imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, and making such imports subject to registration.[10] As is apparent from recital 18 and Article 2 of that regulation, the customs authorities were directed to take the appropriate steps to register the imports into the European Union in accordance with Article 13(3) and Article 14(5) of the basic regulation, in order to ensure

[9] OJ 2016 L 52, p. 24.

[10] OJ 2010 L 282, p. 29.

that, should the investigation result in findings of circumvention, anti-dumping duties of an appropriate amount could be levied retroactively from the date of registration of such imports consigned from Malaysia.

14. On 18 July 2011, the Council adopted, pursuant to Article 13 of Regulation No 1225/2009, Council Implementing Regulation (EU) No 723/2011 extending the definitive anti-dumping duty imposed by Regulation No 91/2009 on imports of certain iron or steel fasteners originating in the People's Republic of China to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not. [11]

15. Following two sets of proceedings before the WTO adjudicatory bodies, and the adoption of those bodies' reports by the WTO Dispute Settlement Body ('the DSB'), [12] on 26 February 2016 the Commission adopted the repeal regulation.

B. The dispute before the Netherlands courts and the judgment of the Court in Case C-644/17, Eurobolt

16. The applicants had imported fasteners from Malaysia during the period of the anti-circumvention investigation conducted by the Commission. Those imports were registered in accordance with Article 2 of Regulation No 966/2010 and Articles 13(3) and 14(5) of Regulation No 1225/2009.

17. Between January 2012 and October 2013, the Netherlands customs authorities issued collection notices for the anti-dumping duties owed by the applicants on imports of fasteners pursuant to Implementing Regulation No 723/2011. Within the time limit stipulated under Netherlands law, the applicants challenged those collection notices in accordance with Article 243 of Regulation (EEC) No 2913/92. [13]

18. On 17 November 2017, the Hoge Raad der Nederlanden (Supreme Court of the Netherlands) made a request to the Court of Justice for a preliminary ruling concerning the validity of Implementing Regulation No 723/2011, in the context of the national appeal on a point of law lodged by Eurobolt against the anti-dumping duties paid on the basis of that implementing regulation.

19. In its judgment of 3 July 2019, *Eurobolt*, [14] the Court held that that implementing regulation was vitiated by an infringement of an essential procedural requirement. In essence, the Court found that the adoption of extended anti-dumping measure was not preceded by a valid consultation of the Advisory Committee, as provided for in Article 15(2) of the basic regulation. That provision provided that all relevant information is to be communicated to the Advisory Committee no later than 10 working days before the meeting of that committee. However, the observations submitted by Eurobolt, which had to be regarded as 'relevant information' for the purposes of Article 15(2) of the basic regulation, had been communicated to the Member States only two days before the meeting of the Advisory Committee. The Court therefore concluded that Implementing Regulation No 723/2011 was invalid inasmuch as it was adopted in breach of Article 15(2) of the basic regulation.

[11] OJ 2011 L 194, p. 6.

[12] See, in more detail, paragraphs 7 to 11 of the judgment under appeal.

[13] Council Regulation of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1), as amended.

[14] C-644/17, EU:C:2019:555.

C. The adoption of the contested regulation

20. Following the judgment of the Court of 3 July 2019, *Eurobolt*, the Commission reopened, by means of Implementing Regulation (EU) 2019/1374,[15] the anti-circumvention investigation in order to correct the procedural illegality identified by the Court. It is apparent from recital 17 of Implementing Regulation 2019/1374 that the reopening of the anti-circumvention investigation aimed at guaranteeing observance of all the procedural requirements under the Advisory Committee procedure. To that end, the examination committee received Eurobolt's observations within the time limit set out in the relevant provisions.

21. After receiving the Advisory Committee's recommendation, on 30 April 2020, the Commission adopted the contested regulation and re-imposed the circumvention duties.

IV. The judgment under appeal and the proceedings before the Court

22. On 28 July 2020, the appellants brought an action for the annulment of the contested regulation before the General Court. In their application, the appellants relied on three pleas in law.

23. On 18 May 2022, the General Court delivered the judgment under appeal, dismissing the action and ordering the appellants to pay the costs.

24. In their appeal before the Court, lodged on 2 August 2022, the appellants ask the Court to (i) set aside the judgment under appeal; (ii) uphold the application at first instance and annul the contested regulation in so far as it concerns the appellants or, in the alternative, refer the case back to the General Court for a fresh assessment; and (iii) order the Commission to pay the costs.

25. For its part, the Commission asks the Court to dismiss the application and order the appellants to pay the costs.

26. On 23 May 2023, the Court sent the appellants certain questions for written answer, to which the appellants responded by letter of 9 June 2023.

27. Both parties presented their views at the hearing before the Court that was held on 6 July 2023.

V. Assessment of the sixth ground of appeal

28. As mentioned in the introduction to this Opinion, my analysis will be limited to the appellants' sixth ground of appeal, which is directed against paragraphs 123 to 155 of the judgment under appeal.

29. In those passages, the General Court dismissed as unfounded the appellants' second plea, by which they had claimed that the contested regulation infringed Article 13(1) of the basic regulation, Article 5(1) and (2) TEU, and the principle of good administration, in so far as the contested regulation lacks a proper legal basis.

[15] Implementing Regulation (EU) 2019/1374 of 26 August 2019 reopening the investigation following the judgment of 3 July 2019, in Case C-644/17, Eurobolt, with regard to Council Implementing Regulation No 723/2011 (OJ 2019 L 223, p. 1).

A. The arguments of the parties

30. At the outset, the appellants emphasise that, in their view, the General Court has missed the gist of their claim: in so far as the original regulation was unlawful and, for that reason, repealed in 2016, it could not serve as a proper legal basis for adopting the 'merely ancillary' contested regulation in 2020. The Commission therefore lacked a valid legal basis when it adopted the contested regulation. The appellants then put forward various arguments in support of their contentions.

31. First, the appellants claim that the General Court's reliance on the judgment of the Court in *APEX*[16] to dismiss their claim is misguided. In the judgment in *APEX*, the legality of the legal basis for the contested act was not at issue. Accordingly, the appellants contend that the judgment in that case does not offer any guidance in respect of the issue raised by them in the context of the present proceedings. In their view, the crucial element in the present case is that the original regulation, having been found unlawful, cannot constitute the legal basis for the contested regulation.

32. Second, the appellants argue that the General Court missed the point in referring to Article 207 TFEU as a legal basis for adopting, in general, anti-dumping measures. The appellants again emphasise that the contested regulation required, as legal basis, a *valid* regulation imposing the anti-dumping duties allegedly circumvented. Absent a proper legal basis, the contested regulation infringes – in the appellants' view – Article 5(1) and (2) TEU which enshrine the principle of conferral of competences.

33. Third, according to the appellants, the General Court erred in finding that the repeal of the original regulation does not affect its validity. The appellants emphasise that the Commission repealed that regulation because it was unlawful, since it had been found to be inconsistent with the WTO Agreements. The adoption of the contested regulation thus amounted, in their view, to reviving an unlawful regulation.

34. Fourth, the appellants maintain that the General Court's considerations concerning their inability to invoke WTO law as parameter of validity of EU legislation is irrelevant. They stress that, as the General Court itself acknowledged, they did not claim that the breaches of WTO law in the original regulation vitiate the contested regulation. Instead, they claimed that the original regulation cannot serve as a legal basis for the contested regulation.

35. The Commission argues that the appellants' criticism of the judgment under appeal is unfounded. In its view, the General Court made no error of law when evaluating the appellants' arguments concerning an alleged lack of a proper legal basis for the contested regulation. In particular, the Commission argues that the original regulation – which, in its view, is by no means unlawful as the appellants claim – cannot be considered to be the legal basis (or one of the legal bases) of the contested regulation. The contested regulation was, the Commission emphasises, correctly based on Articles 13 and 14 of the basic regulation.

B. Analysis

36. I do not find the arguments put forward by the appellants to be convincing.

[16] Judgment of 17 December 2015, *APEX* (C-371/14, EU:C:2015:828) ('the judgment in *APEX*').

37. To begin with, I am not convinced that the General Court has missed the gist of the appellants' claim. In my view, the judgment under appeal has, in paragraphs 123 to 155, accurately set out, and correctly dealt with, the arguments put forward at first instance. In particular, I am of the view that the two premisses on which the appellants base their various arguments (absence of a proper legal basis and unlawfulness of the original regulation) are incorrect.

38. I shall explain the reasons for my views below.

1. The legal basis has been correctly identified by the General Court

39. First, the appellants' claims appear to be based on a misunderstanding concerning the concept of 'legal basis' in the EU legal order. In essence, a legal basis stems from the EU legal provision that confers, to the relevant EU institution(s), the power to act in a given area of EU competence, when the relevant conditions are satisfied. The requirement to have a legal basis for any action taken by the EU institutions flows, in particular, from the principle of the conferral of powers to the institutions, enshrined in Article 13(2) TEU, providing that 'each institution shall act within the limits of the powers conferred on it in the Treaties, and in conformity with the procedures, conditions and objectives set out in them'.[17]

40. Against that background, it is quite clear to me that Commission's power to extend anti-dumping duties already imposed on imports from a third country, to imports from another third country, where circumvention takes place, flows from the provisions of the basic regulation. That power is conferred on the Commission by the EU legislature (*in casu*, the Parliament and the Council) in the main legal instrument that governs the protection against dumped imports from third countries.

41. It is, in fact, Article 13 of the basic regulation (entitled 'Circumvention') that, in particular, (i) provides that 'anti-dumping duties imposed pursuant to [that] Regulation may be extended … when circumvention of the measures in force is taking place' (paragraph 1); (ii) tasks the Commission with the conduct of the investigation (paragraph 3); and also (iii) identifies the Commission as the institution in charge of extending the duties, acting in accordance with the procedure for the adoption of an implementing act referred to therein (paragraph 3).[18] In addition, Article 14(1) of the same regulation (concerning 'General provisions') specifies that all anti-dumping duties – and thus also those extended – must be imposed 'by regulation'.

42. The reference to those two provisions in the preamble of the contested regulation thus correctly identifies the legal provisions from which the Commission derived its power to extend the duties in question to imports such as those made by the appellants.

43. Consequently, the appellants are incorrect in claiming that the contested regulation is, or should have been, based on the original regulation. As the Commission rightly points out, the existence of a (valid) original regulation is only one of the *conditions* that have to be satisfied for the extension of those duties to be possible.

[17] See, in that regard, judgment of 1 October 2009, *Commission* v *Council* (C-370/07, EU:C:2009:590, paragraph 52).

[18] Article 13(3), third paragraph, of the basic regulation refers to the committee procedure set out in Article 15(3) thereof. In turn, the latter provision makes a *renvoi* to the 'examination procedure' provided for in Article 5 of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

44. That condition follows from Article 13(1) of the basic regulation.[19] It is, after all, self-evident that anti-dumping duties can only be *extended* if they have been validly imposed in the first place. Nevertheless – it may be worth stressing this point once again – it is not the act imposing the anti-dumping duties (that is, the original regulation) that gives the Commission the power to extend them but, as explained, the basic regulation.

45. The General Court thus made no error of law in finding, in paragraphs 126 to 128 of the judgment under appeal, that Article 13 and Article 14(1) of the basic regulation constitute the *proper* legal basis for the contested regulation.

46. In this context, I would add that the General Court was also correct when, in paragraph 136 of the judgment under appeal, it refers not only to Article 13 of the basic regulation, but also to Article 207 TFEU, as the provisions conferring upon the Commission the competence to adopt anti-circumvention regulations. In fact, Article 207(2) TFEU is the provision of primary law which empowers the Parliament and the Council to 'adopt the measures defining the framework for implementing the common commercial policy.' The basic regulation, which in turn empowers the Commission to adopt certain anti-circumvention measures, is unquestionably one of the measures defining the framework for implementing the common commercial policy referred to in Article 207 TFEU.

47. The appellants' claim that the General Court erred in its reference to Article 207 TFEU, and thus failed to censure a breach of principle of conferral of competences, set out in Article 5(1) and (2) TFEU,[20] is thus unfounded.

48. The above considerations lead me to the second point I wish to make with regard to the premisses on which the appellants base their arguments.

2. The validity of the original regulation

49. The second premiss on which the appellants base their arguments is that the original regulation was unlawful.

50. That argument too is, in my view, incorrect.

51. As I shall explain in the following sections, neither the fact that the original regulation was repealed by the EU legislature, nor its possible inconsistency with the WTO Agreements, implies its unlawfulness.

52. The original regulation has been repealed by the Commission in accordance with Article 1(1)(a) of Regulation (EU) 2015/476.[21] Under that provision, whenever the DSB adopts a report concerning an EU measure taken pursuant to, inter alia, the basic regulation, 'the Commission may take one or more of the following measures, whichever it considers

[19] See, supra, points 5 and 41 of this Opinion.

[20] In a nutshell, under that principle, the European Union can only act within the limits of the competences that the Member States have conferred upon it in the Treaties. Competences not conferred on the European Union by the Treaties thus remain with the Member States.

[21] Regulation of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (codification) (OJ 2015 L 83, p. 6).

appropriate … (a) repeal or amend the disputed measure; or (b) adopt any other special implementing measure deemed to be appropriate in the circumstances in order to bring the Union into conformity with the recommendations and rulings contained in the report.'

53. The wording of Article 1(1)(a) of Regulation 2015/476 makes clear that adverse findings of the DSB concerning the possible inconsistency of an EU measure with the WTO Agreements do not result, *ipso facto*, in the invalidity of the EU act in question. It is for the EU institutions to draw the necessary consequences from such findings in terms of what is to be done to re-establish consistency, and they enjoy some room for manoeuvre in that regard. Article 1(1)(a) of Regulation 2015/476 in fact states that the Commission 'may' take one or more measures, depending on 'whichever it considers appropriate'.

54. The above is consistent with the provisions of the WTO Agreements. Under Article 19 of the Understanding on rules and procedures governing the settlement of disputes ('the DSU'), 'where a panel or the Appellate Body concludes that a measure is inconsistent with [the WTO Agreements], it shall recommend that the Member concerned bring the measure into conformity with that agreement'. Those bodies may only 'suggest ways in which the Member concerned could implement the recommendations'. It is, indeed, well established that 'WTO Members have discretion in how to bring a measure found to be WTO-inconsistent into conformity with WTO obligations'.[22] In that respect, WTO Members are generally granted, under Article 21.3 of the DSU, 'a reasonable period of time' to re-establish consistency.

55. In this context, I must say that I am somewhat puzzled by the appellants' statements – made both at first instance[23] and in the context of the present proceedings[24] – according to which they are not claiming that the alleged violation of the WTO rules by the original regulation vitiates the contested regulation. As a matter of fact, one of the key arguments of the appellants is, in essence, that the Commission repealed the original regulation because that regulation was unlawful on the ground of its inconsistency with the WTO Agreements, and that unlawfulness affects, in turn, the validity of the contested regulation.

56. Asked at the hearing about that apparent contradiction, the appellants stated that they do not rely on the WTO rules to *invalidate* the original regulation, but only to claim its *illegality*. To my mind, the appellants' arguments in that regard are bordering on sophism: illegality is, in my view, the lack of consistency of a measure with higher ranking norms of law, with invalidity being the obvious consequence following therefrom for the measure in question. Those concepts are the proverbial 'two faces of the same coin'.

57. In any event, I must say that I find no error of law, in the judgment under appeal, in respect of the General Court's findings that, in the light of the circumstances of the case, neither the legality of the original regulation, nor that of the contested regulation, could be assessed against the WTO rules and rulings at issue. In particular, paragraphs 144 and 150 of that judgment correctly reflect and apply the principles which flow from the EU Courts' settled case-law on this matter. In fact,

[22] See, for example, Report of the Panel of 31 July 2002, *United States – Countervailing Measures Concerning Certain Products From the European Communities* (WT/DS212/R), paragraph 6.43; and Report of the Panel of 22 December 1999, *United States—Sections 301–310 of the Trade Act of 1974* (WT/DS152/R), paragraph 7.102.

[23] See paragraphs 139 to 144 of the judgment under appeal.

[24] See above, point 34 of this Opinion.

the Court has, most recently in *Donex*, already confirmed that the validity of the original regulation cannot be assessed by reference to the 2011 and 2016 DSB reports mentioned in point 15 above. [25]

58. That said, I shall now turn to appellants' claim that the repeal of the original regulation by the Commission, being motivated by the requirement to ensure compliance with an international agreement, renders the original regulation unlawful.

59. That argument is not correct. The simple repeal of an EU act – regardless of the motives that prompted that repeal – cannot be equated to a finding that such an act is unlawful. The repealed act is no longer into force and, consequently, it cannot govern situations which arise in the future. By contrast, its capacity to govern situations which arose in the past, during the period in which it was in force, is generally not called into question by its repeal.

60. It must be borne in mind that, in the EU legal order, it is only for the Court of Justice of the European Union to decide whether or not an EU act is lawful, by virtue of the exclusive jurisdiction conferred on it by the Treaties. [26]

61. Naturally, a declaration of invalidity of the original regulation by the Court, because of its *ex tunc* effects, would have also affected the validity of the contested regulation. [27] However, as the Commission points out, the EU Courts have not declared that regulation to be unlawful, either when its validity was challenged before them under Article 263 TFEU, [28] or when questioned in the context of references for a preliminary ruling. [29]

62. In this context, I would add that it is for that very reason that the appellants' situation is fundamentally different from that which was at issue in *Vitol*, [30] a recent judgment of the Court which the appellants referred to extensively at the hearing. In their view, that judgment confirms that they can invoke successfully the illegality of an EU act (*in casu*, the original regulation) in order to challenge the validity of another, related, EU act (*in casu*, the contested regulation).

63. However, I do not see how the Court's findings in *Vitol* could be relevant in the present case. In that case, a national court had asked the Court, via a preliminary ruling procedure, about the validity of a regulation imposing anti-dumping duties whose invalidity had already been declared by the General Court in a judgment given under Article 263 TFEU that had, by that time, become *res judicata*. Although the parties that brought the action before the referring court were not those that had successfully sought annulment before the General Court, the Court found that all the appropriate conclusions had to be drawn from the findings made by the General Court concerning the fact that the challenged regulation had infringed a certain provision of the basic regulation. Since the infringements in question also affected the legal position of the parties who had acted before the referring court, the Court had no difficulty in holding the challenged regulation to be invalid. [31]

[25] Judgment of 9 July 2020, *Donex Shipping and Forwarding* (C-104/19, EU:C:2020:539, paragraph 48).

[26] To that effect, see inter alia judgments of 19 December 2018, *Berlusconi and Fininvest* (C-219/17, EU:C:2018:1023, paragraph 44), and of 22 October 1987, *Foto-Frost* (314/85, EU:C:1987:452, paragraph 17).

[27] See, for example, judgment of 15 March 2018, *Deichmann* (C-256/16, EU:C:2018:187, paragraph 62 and the case-law cited).

[28] See, inter alia, judgments of 11 September 2014, *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (C-602/12 P, EU:C:2014:2203), and of 27 February 2014, *Ningbo Yonghong Fasteners* v *Council* (C-601/12 P, EU:C:2014:115).

[29] See, inter alia, judgments of 9 July 2020, *Donex Shipping and Forwarding* (C-104/19, EU:C:2020:539); of 15 November 2018, *Baby Dan* (C-592/17, EU:C:2018:913); and of 18 October 2018, *Rotho Blaas* (C-207/17, EU:C:2018:840).

[30] Judgment of 22 June 2023 (C-268/22, EU:C:2023:508).

[31] Ibid., paragraphs 60 to 78.

64. In the present case, however, there exists no previous finding by the EU Courts concerning the alleged invalidity of the original regulation. Actually, the opposite is true, as I have explained in point 61 above.

65. Nor – I would add – did the appellants take advantage of the provisions of Article 277 TFEU to invoke the inapplicability of the original regulation on the ground of the alleged unlawfulness thereof. At the hearing, the appellants seemed to suggest that, implicitly, they did invoke the plea of illegality at first instance and/or in the present proceedings. However, the two passages of the submissions referred to by the appellants in that respect do not, in my view, support that contention.

66. For these reasons, the General Court was correct in finding, in paragraph 138 of the judgment under appeal, that the repeal of the original regulation does not affect the validity of that regulation.

3. Repeal of the original regulation with effects ex nunc

67. Obviously, had the EU legislature decided to repeal the original regulation with *ex tunc* effects – that is, to eliminate its effects retroactively – the extension of the duties operated by the contested regulation would have no longer been feasible.

68. That is not, however, what the EU legislature did when it decided to repeal the original regulation. It follows from the very wording of the repeal regulation that the original regulation was repealed with an *ex nunc* effect. Article 2 of the repeal regulation states that 'the repeal of the anti-dumping duties [in question] shall take effect from the date of the entry into force of [that] Regulation … and shall not serve as a basis for the reimbursement of the duties collected prior to that date'. That provision is echoed by recital 14 of the same regulation, which reads: 'the repeal of the disputed measures should take effect from the date of its entry into force and, therefore, does not provide any basis for the reimbursement of the duties collected prior to that date'.

69. The choice made by the EU legislature in that regard is consistent with principles codified in Regulation 2015/476. Article 3 thereof provides that 'any measures adopted pursuant to [that] Regulation shall take effect from the date of their entry into force and shall not serve as a basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for'. Recital 7 of that regulation reiterates the provisions of Article 3 and explains their rationale. That recital reads: '… the recommendations in reports adopted by the DSB only have prospective effect. Consequently, it is appropriate to specify that any measures taken under this Regulation will take effect from the date of their entry into force, unless otherwise specified, and, therefore, do not provide any basis for the reimbursement of the duties collected prior to that date'.

70. The consequence of the above is that all the situations that were, *ratione temporis*, governed by the provisions of the original regulation have been left unaffected by its repeal. Accordingly, in so far as the EU legislature confirmed the correct perception of the anti-dumping duties collected between the date on which the original regulation entered into force, and the date on which that regulation was repealed, there is no basis to consider the extension of those duties to imports that attempted to circumvent the EU trade measure to be invalid.

71. As correctly stated in paragraph 129 of the judgment under appeal, what is required for such an extension to be lawful, in circumstances such as those at issue, is that (i) the extension concerns exclusively the period before those measures expired, and (ii) that registration of the imports

concerned, in accordance with Articles 13(3) and 14(5) of the basic regulation, was ordered. It is undisputed that those conditions are, in the present case, fulfilled. [32]

72. In the light of that, the General Court was also correct, in my view, to rely on the judgment of the Court in *APEX* to dismiss the appellants' arguments on this point.

4. The reliance of the General Court on the judgment in APEX

73. In the judgment in *APEX* – a preliminary reference concerning the validity of another regulation extending anti-dumping duties on the ground of circumvention – one of the parties who submitted observations argued that the contested regulation had to be considered invalid because it was adopted at a time when the regulation originally imposing those duties was no longer in force.

74. The Court dismissed that contention, ruling that Article 13 of the basic regulation allowed a decision extending anti-dumping measures for circumvention, even where the original regulation imposing the duties had expired. Such an interpretation was – the Court stated – not excluded by the wording of the provision and, more importantly, was supported by a contextual and purposive reading thereof. In that context, the Court also rejected the argument according to which the ancillary character of the measure extending the duties for circumvention – an element which the Court had emphasised in a previous judgment [33] – would run counter to that interpretation. The Court held that, 'while it follows from that finding that the extended measures cannot apply beyond the expiry of the measures which they extend, it cannot be deduced from the link between them that the decision to impose the former must be taken before the latter have expired'. [34]

75. The appellants, however, disagree on the relevance of the judgment in *APEX* to the present case, on the ground that, in that judgment, the validity of the original regulation was not at issue. However, as I have explained in the previous sections of this Opinion, in the present case too there is no indication that the original regulation is unlawful.

76. The mere fact that the Commission has decided, in the exercise of the policy discretion that it enjoys on this matter, to repeal that regulation prior to its originally intended expiry [35] is immaterial. The Court's findings in *APEX* are still very much relevant in the present case.

77. At the hearing, however, the appellants argued that, even if the Court were to consider the original regulation to be valid, the two cases would still be different, given that the period that elapsed between the expiry of the original regulation and the imposition (or re-imposition) of the anti-circumvention duties would be more significant in the present case than that considered in the judgment in *APEX*. I must say that, absent any other explanation on this point, I fail to see why that factual element (the shorter or longer length of the mentioned period) would call into question the legal assessment carried out above.

78. After all, it would be odd to come to the conclusion that, in a given period (that corresponding to the actual duration of the original regulation), the EU institutions could validly impose an anti-dumping duty on imports from a third country, but not on those imports that were

[32] See also paragraphs 133 and 134 of the judgment under appeal.

[33] Judgment of 6 June 2013 in *Paltrade*, C-667/11 (EU:C:2013:368, paragraph 28).

[34] Judgment in *APEX*, paragraphs 39 to 55.

[35] In that respect, see the provisions of Article 11 of the basic regulation, entitled 'duration, reviews and refunds'.

channelled via another third country in an attempt to circumvent an EU trade measure. Such a finding would de facto encourage traders to attempt to circumvent EU trade measures in the future, since it penalises honest importers and favours dishonest ones. [36] That would run contrary to the very purpose of Article 13 of the basic regulation.

79. Thus, I find no error of law in paragraphs 129 and 134 of the judgment under appeal, in which the General Court referred to the judgment in *APEX* in support of its findings.

80. Lastly, there is no need, in my view, to deal specifically with the breach of the principle of good administration alleged by the appellants. They have not developed any specific and self-standing argument in that regard.

81. In conclusion, the appellants' sixth ground of appeal raised the issue as to whether the repeal of a regulation imposing an anti-dumping duty on imports originating in a third State, on the ground of possible inconsistency with the WTO rules, precludes the Commission from extending that duty to imports from another third State, on grounds of circumvention, even where the extension relates to the period before the repeal, and the imports have been registered in conformity with the relevant anti-dumping rules.

82. In the present Opinion, I have sought to explain why – unlike the appellants – I am of the view that the answer to that question must be in the negative.

VI. Conclusion

83. In the light of the foregoing, I suggest that the Court of Justice dismiss the sixth ground of appeal of Eurobolt BV, Fabory Nederland BV, and ASF Fischer BV.

[36] See, similarly, Opinion of Advocate General Bot in *APEX* (C-371/14, EU:C:2015:507, point 39).