Reports of Cases

OPINION OF ADVOCATE GENERAL
EMILIOU
delivered on 12 January 2023 [1]

Case C-747/21 P

PAO Severstal
v
European Commission
and
Case C-748/21 P
Novolipetsk Steel PAO
v

European Commission

(Appeal – Dumping – Imports of certain cold-rolled flat steel products originating in China and Russia – Definitive anti-dumping duty – Regulation (EC) No 1225/2009 – Regulation (EU) 2016/1036 – Article 9(4) – Injury elimination – Lesser duty rule – Underselling margin – Relevant period for the calculation of the target profit – Margin of discretion – Nature of anti-dumping duties)

I. Introduction

1. In their appeals, PAO Severstal and Novolipetsk Steel PJSC (NLMK) [2] – two companies incorporated under Russian law and active in the market for the manufacture and distribution of steel products, in particular cold-rolled flat products of steel – ask the Court of Justice to set aside the judgments of the General Court [3] by which it dismissed their actions for annulment of Commission Implementing Regulation (EU) 2016/1328 of 29 July 2016 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation ('the contested regulation'). [4]

2. The appellants rely on three (virtually identical) grounds of appeal. However, in accordance with the Court's request, I shall restrict my analysis in this Opinion to the second ground of appeal which concerns, essentially, the interpretation and application of the 'lesser-duty rule' laid down in Article 9(4) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on

[1] Original language: English.

[2] Collectively, 'the appellants'.

[3] Judgments of 22 September 2021, *Severstal* v *Commission* (T-753/16, EU:T:2021:612), and of 22 September 2021, *NLMK* v *Commission* (T-752/16, EU:T:2021:611) respectively; 'the judgments under appeal'.

[4] OJ 2016 L 210, p. 1.

protection against dumped imports from countries not members of the European Community,[5] which has, in substance, been repealed and replaced by Article 9(4) of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports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.[6]

3. Although the main legal issues raised by the present appeals in that respect are rather technical, in order to address certain arguments put forward by the appellants, it is necessary to go back to some 'existential' questions concerning the EU anti-dumping legislation: what is the nature and purpose of anti-dumping duties?

II. Legal framework

4. Article 9(4) of Regulation No 1225/2009, concerning the imposition of definitive duties, in force during the investigation, provided:

'Where the facts as finally established show that there is dumping and injury caused thereby, and the Union interest calls for intervention … a definitive anti-dumping duty shall be imposed by the Commission … The amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Union industry.'

5. Article 9(4) of Regulation 2016/1036, in force at the time the contested regulation was adopted, is, in the relevant part, worded identically.

III. Factual background

6. Following a complaint, on 14 May 2015, the European Commission published a Notice of initiation of an anti-dumping proceeding concerning imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation,[7] pursuant to Regulation No 1225/2009. The investigation of dumping and injury covered the period from 1 April 2014 to 31 March 2015 ('the investigation period'). The examination of the trends relevant for the assessment of injury covered the period from 1 January 2011 to 31 March 2015 ('the period considered').

7. On 10 February 2016, the Commission adopted Implementing Regulation (EU) 2016/181 imposing a provisional anti-dumping duty on imports of certain cold-rolled flat steel products originating in the People's Republic of China and the Russian Federation.[8]

8. Subsequently, on 29 July 2016, the Commission adopted the contested regulation. The rate of the definitive anti-dumping duty imposed on Severstal amounted to 34% and on NLMK to 36.1%.

5 OJ 2009 L 343, p. 51.

6 OJ 2016 L 176, p. 21.

7 OJ 2015 C 161, p. 9.

8 OJ 2016 L 37, p. 1.

IV. The judgments under appeal

9. On 28 October 2016, Severstal and NLMK each brought an action for annulment before the General Court against the contested regulation. In their respective applications, Severstal relied on six pleas in law and NLMK relied on five pleas in law.

10. On 22 September 2021, the General Court delivered the two judgments under appeal in which it dismissed the appellants' actions, and ordered them to bear their own costs and those of the Commission. In addition, the General Court also ordered Eurofer, European Steel Association, ASBL – which intervened in the proceedings in support of the form of order sought by the Commission – to bear its own costs.

V. Proceedings before the Court of Justice

11. In its appeal before the Court in Case C-747/21 P, lodged on 3 December 2021, Severstal asks the Court to:

– set aside the judgment in Case T-753/16;

– give final judgment in the matter, where the state of proceedings so permits;

– in the alternative, refer the case to the General Court for reconsideration;

– order the Commission to pay the costs of both proceedings.

12. In its statement of defence, dated 23 February 2022, the Commission asks the Court to dismiss the appeal and order Severstal to pay the costs.

13. In its appeal before the Court in Case C-748/21 P, lodged on 3 December 2021, NLMK asks the Court to:

– set aside the judgment in Case T-752/16;

– give final judgment in the matter, where the state of proceedings so permits;

– in the alternative, refer the case to the General Court for reconsideration;

– order the Commission to pay the costs of both proceedings.

14. In its statement of defence, dated 23 February 2022, the Commission asks the Court to dismiss the appeal and order NLMK to pay the costs.

15. By decision of the Court of 18 October 2022, the two cases were joined for the purposes of the oral procedure and the judgment.

16. By letter dated 24 October 2022, as a measure of organisation of procedure adopted under Article 62 of the Rules of Procedure of the Court of Justice, the parties were asked to answer certain questions, which they did by letters dated 24 November 2022 (Commission) and 1 December 2022 (the appellants).

VI. Assessment of the second ground of appeal

17. As mentioned in the introduction to this Opinion, my analysis will be limited to the appellants' second ground of appeal.

18. By that ground of appeal, the appellants challenge, respectively, paragraphs 243 to 257 (Severstal) and paragraphs 209 to 223 (NLMK) of the judgments under appeal. In those passages, the General Court rejected as unfounded the first part of Severstal's sixth plea, and the first part of NLMK's fifth plea. By those pleas, the appellants had claimed that, in the contested regulation, the Commission committed errors of law and manifest errors of assessment in determining the injury margin under Article 9(4) of Regulation No 1225/2009 (now Article 9(4) of Regulation 2016/1036).[9]

A. The arguments of the parties

19. In their appeals, the appellants submit, in essence, that the General Court erred in interpreting Article 9(4) of Regulation 2016/1036, and in reviewing the application of that provision by the Commission. They also contend that the judgments under appeal contain an insufficient statement of reasons with regard to their arguments on those points.

20. In particular, the appellants criticise the General Court for upholding the Commission's choice of a 9.9% target profit for the Union industry when calculating the 'underselling margin' for the purposes of applying Article 9(4) of Regulation 2016/1036. The appellants emphasise that, while the investigation period runs from 1 April 2014 to 31 March 2015, the Commission went back several years, to 2008, in order to identify the most recent 'representative year' to determine the target profit. In the appellants' view, the General Court's finding that the Commission is not bound by the temporal limits of the period considered (*in casu*, from 1 January 2011 to 31 March 2015) when selecting the most recent representative year is contrary to the principle of legitimate expectations.

21. In addition, the appellants claim that the General Court manifestly erred in endorsing the Commission's approach. The appellants consider the period identified by the Commission not to be adequately representative, since it is too far removed in time. They also argue that it was chosen arbitrarily as more recent periods were sufficiently representative. Furthermore, the appellants submit that, at first instance, they had raised arguments to establish the existence of a contradiction in the contested regulation: the years of the financial crisis were taken into account when ascertaining the existence of injury to the Union industry, but not when establishing the target profit for the industry. That 'pick and choose' approach by the Commission cannot, in the appellants' view, be considered acceptable under the provisions of Regulation 2016/1036, and the General Court failed adequately to explain the reasons for why it rejected their arguments in that regard.

22. Finally, the appellants contend that the General Court failed properly to assess the element of 'injury', inter alia because it did not address their argument according to which the reduction of the Union industry's production costs (which was relied on by the Commission to assess the injury inflicted) should, among other factors, be associated with the situation resulting from the global financial crisis of 2012.

[9] Given that, as mentioned in point 5 above, the two provisions are – in the relevant part – identical, throughout this Opinion I shall refer, for convenience, only to Article 9(4) of Regulation 2016/1036.

23. The Commission defends the judgments under appeal. In its view, the General Court deals adequately with the arguments put forward by the appellants, explaining why the Commission made no error in choosing 2008 as the most representative year in order to calculate the target profit. In particular, the Commission emphases the margin of discretion that it enjoys under Article 9(4) of Regulation 2016/1036, and that the method chosen in the contested regulation to identify the target profit is consistent with the General Court's relevant case-law. [10]

24. The Commission adds that the argument concerning an alleged breach of the principle of legitimate expectations is both inadmissible (since it was not raised at first instance) and unfounded (the appellants never received any assurance with regard to the manner in which the Commission would be carrying out its assessment). Moreover, the Commission takes the view that some of the arguments put forward by the appellants in the context of their second ground of appeal are ineffective since they call into question its assessment of the causal link between the dumped imports and the injury for the Union industry. However, the appellants did not – the Commission points out – challenge the General Court's findings with regard to the existence of the causal link. [11]

B. Analysis

25. The appellants put forward three different lines of arguments in the context of their second ground of appeal.

26. For the reasons explained below, I do not find those arguments to be convincing.

1. Legitimate expectations

27. First, the claim of an alleged breach of the principle of legitimate expectations is – as the Commission rightly points out – inadmissible since it was not raised before the General Court, and thus cannot be pleaded for the first time on appeal. [12]

28. At any rate, the appellants do not explain the manner and circumstances in which the Commission would have given them assurances, let alone *precise* assurances, with regard to the method and criteria with which it would establish the target profit. In that regard, it must be borne in mind that, according to settled case-law, the right to rely on the principle of the protection of legitimate expectations extends only to a person in a situation in which an administrative authority has caused that person to entertain expectations which are justified by precise unconditional and consistent assurances provided to him or her and originating from authorised, reliable sources. [13] This argument is, accordingly, in any event unfounded.

[10] The Commission refers to paragraph 60 of judgment of 28 October 1999, *EFMA* v *Council* (T-210/95, EU:T:1999:273). Hereinafter, 'the judgment in *EFMA*'.

[11] The assessment made by the Commission in the contested regulation with regard to the causal link was the subject matter of Severstal's fifth plea, dealt with by the General Court in paragraphs 200 to 241 of the judgment in case T-753/16, and of NLMK's fourth plea, dealt with in paragraphs 166 to 207 of the judgment in Case T-752/16.

[12] See, to that effect, judgment of 3 October 2000, *Industrie des poudres sphériques* v *Council* (C-458/98 P, EU:C:2000:531, paragraph 74 and the case-law cited).

[13] See, for example, judgment of 31 March 2022, *Smetna palata na Republika Bulgaria* (C-195/21, EU:C:2022:239, paragraph 65).

2. Effects of the financial crisis on the EU industry

29. Second, I also agree with the Commission that the appellants' claims concerning the alleged failure, on the part of the General Court, to (i) assess correctly the effects of the financial crisis on the status of the Union industry, and/or (ii) give a satisfactory explanation for its reasons for dismissing the appellants' arguments in that regard, are ineffective.

30. Indeed, in so far as the General Court's findings with regard to the existence of injury and of a causal link have not been challenged on appeal, the appellants' claims, regardless of their merit, could never lead to the annulment of the judgments under appeal.

3. Interpretation of Article 9(4) of Regulation 2016/1036

31. Third, and more importantly, the General Court did not, in my view, commit any error of law in interpreting Article 9(4) of Regulation 2016/1036. Nor did the General Court fail to explain, in the judgments under appeal, why it disagreed with the appellants' arguments in that respect.

32. Article 9(4) of Regulation 2016/1036 lays down, inter alia, the 'lesser-duty rule' (hereinafter 'the LDR'), according to which 'the amount of the anti-dumping duty shall not exceed the margin of dumping established but it should be less than the margin if such lesser duty would be adequate to remove the injury to the Union industry.'

33. Regulation 2016/1036 does not, however, provide any method or set of criteria for establishing the so-called 'injury margin'. It follows that the EU authorities enjoy a wide margin of discretion in that respect. Consequently, they are free to choose the methodology they find most appropriate under the given circumstances, provided that, in particular, it is reasonable, applied in an objective and consistent manner, and thus leads to plausible outcomes.

34. In their practice, the EU authorities have in fact used a variety of methodologies to that end. [14] In some cases, the injury margin has been determined by comparing the resale prices of the imports with the actual prices of the Union industry ('undercutting' methodology). In other cases, however, it was considered that such a comparison would not give appropriate indications of the injury margin since the imports exercised a significant downward pressure on the sales price of the Union industry. [15]

35. In such cases, the Commission resorted to the 'underselling' methodology: the injury margin is calculated by comparing actual import prices with a 'target price', representing the price the Union industry could reasonably expect to charge in the EU market in the absence of dumped imports. To establish that hypothetical price, a 'target profit' – understood as the profit margin that could be reasonably expected in the absence of the dumped imports – is added to the Union industry's production costs.

[14] For a brief overview, with further references, see Van Bael & Bellis, *EU Anti-Dumping and Other Trade Defence Instruments*, 6th edition, Wolters Kluwer, 2019, pp. 297 to 303.

[15] Cf. Article 3(3) of Regulation 2016/1036.

36. Importantly, the underselling methodology was the one actually applied in the contested regulation since, in the Commission's view, throughout the period considered there were significant volumes of imports from the countries concerned which had an adverse effect on the profitability of the Union industry. [16]

37. The appellants do not contest the appropriateness of that methodology in the case at hand. At any rate, I should point out that recourse to that methodology was, in principle, found to be acceptable by the Court as early as in the mid-1980s. [17]

38. In fact, the appellants dispute only the manner in which that methodology was applied in the contested regulation. In particular, they take issue with the *specific period* used by the Commission to determine the target profit, criticising the General Court for failing to censure the Commission's approach and to deal adequately with their arguments in that respect.

39. In recital 155 of the contested regulation, the Commission stated that 'the years 2005 to 2008 appeared to be representative years for establishing a target profit, as they were neither affected by the economic crisis … nor were they characterised by exceptionally favourable market circumstances. Moreover, the volume of imports … in these years indicated that competition was strong'.

40. In paragraphs 251 to 257 (Case T-753/16) and paragraphs 217 to 223 (Case T-752/16) of the judgments under appeal, the General Court found, essentially, that, for the selection of the most recent representative years for the purpose of establishing the Union industry's target profit, the Commission was not bound by the temporal limits of the period considered. The profit margin to be used for the calculation of the target price must correspond – the General Court stated – to the profit margin that the Union industry could reasonably expect to obtain under 'normal conditions of competition, in the absence of the dumped imports'. In the framework of its broad discretion, the Commission is thus entitled, according to the General Court, to conclude that the most recent representative year is, as the case may be, outside the period considered. The General Court then went on to explain why, in its view, the appellants had not provided any evidence showing that the Commission had committed a manifest error of assessment in discarding the years after 2008 for the purposes of identifying the most representative years.

41. The appellants criticise three aspects of those passages. However, I find none of their arguments to be convincing.

42. First, I am of the view that the appellants' arguments alleging a 'manifest error' of assessment by the General Court, on the ground that the most representative years identified by the Commission were not adequately representative and/or chosen arbitrarily, are inadmissible. Those arguments do not raise any issue of law and do not become any more admissible by referring to the alleged errors as 'manifest'.

43. In that regard, it must be borne in mind that allegedly erroneous assessments of facts by the General Court are, in principle, not issues that can be validly raised on appeal, save where the parties invoke a distortion of the clear sense of the evidence. [18] That is not the case in the present appeals.

[16] Recital 154 of the contested regulation.

[17] Judgment of 5 October 1988, *Silver Seiko and Others* v *Council* (273/85 and 107/86, EU:C:1988:466, paragraphs 41 and 42).

[18] See, to that effect, judgment of 28 April 2022, *Yieh United Steel* v *Commission* (C-79/20 P, EU:C:2022:305, paragraph 52 and the case-law cited).

44. Second, I am of the view that the judgments under appeal contain an adequate statement of reasons as to why the General Court rejected the appellants' contentions about an erroneous interpretation or application of Article 9(4) of Regulation 2016/1036. According to settled case-law, the statement of reasons on which a judgment is based must clearly and unequivocally disclose the General Court's thinking, so that the persons concerned can be apprised of the justification for the decision taken and the Court of Justice can exercise its power of review. [19]

45. It is clear that paragraphs 251 to 257 (Case T-753/16) and paragraphs 217 to 223 (Case T-752/16) of the judgments under appeal, explain, briefly but adequately, the reasons why the General Court found the appellants' criticism with regard to the Commission's determination of the most representative years to be unpersuasive.

46. Third, I consider the appellants' criticism with regard to an alleged inconsistency of the contested regulation, which the General Court failed to censure, to be unfounded. My reason for taking that view requires further elucidation.

(a) Interpretation and application of the lesser-duty-rule

47. At the outset, I should like to point out that the LDR – which the Commission made use of in the present cases – is, apart from being justified by considerations of fairness in trade and proportionality, viewed by many as the logical consequence of the fact that anti-dumping duties can, under both EU [20] and WTO [21] rules, only be imposed when the dumped products have caused (or threaten to cause) injury to the domestic industry. [22]

48. That consideration gives me the perfect opportunity to explain why the appellants' criticism of the General Court's and, by way of consequence, Commission's interpretation of the LDR has no merit. In order to do so, it may prove useful, as mentioned in the introduction to this Opinion, to take a step back and focus on some of the fundamental bases of EU anti-dumping legislation.

49. Since at least the early 19th century, [23] much ink has been spilled in attempting to uncover the true 'soul' of anti-dumping laws. What is the economic rationale of those laws? What type of commercial conduct should they target and why?

[19] See, inter alia, judgment of 7 March 2018, *SNCF Mobilités* v *Commission* (C-127/16 P, EU:C:2018:165, paragraph 34 and the case-law cited).

[20] See especially Article 1(1) of Regulation 2016/1036. See also Article 3, Article 7(1), Article 9(3) and Article 11(1) of that regulation.

[21] See Article VI.1 of the GATT 1994, according to which dumping 'is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry'. For the sake of completeness, it must be pointed out that, according to Article 9.1 of the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, a LDR is 'desirable' but not mandatory. In fact, a number of WTO Members (such as the United States) do not apply a LDR. However, several WTO Members would favour making such a rule binding within the WTO system. For the most recent negotiations on the point, see Chun, H.J., Ahn, D., 'Evolution and Limitations of the Lesser Duty Rule under the WTO Anti-Dumping Agreement', *Journal of World Trade*, 2022, pp. 985 to 1012.

[22] See, inter alia and with further references, Vermulst, E.A., 'The Anti-Dumping Systems of Australia, Canada, the EEC and the United States of America: Have Anti-Dumping Laws Become a Problem in International Trade?', *Michigan Journal of International Law*, Vol. 10, issue 3, 1989, pp. 773 and 774.

[23] See, in particular, the seminal study by J. Viner of 1926, 'Memorandum on Dumping', commissioned by the then League of Nations. For a discussion after the conclusion of the Marrakesh Agreements, see Hoekman, B.M., Mavroidis, P.C., 'Dumping, Anti-dumping and Antitrust', *Journal of World Trade*, 1996, pp. 27 to 52.

50. These are no doubt fascinating subjects for academic and policy discussions among international trade lawyers, economists and policy-makers. Yet, for the purposes of the present case, we should leave the most 'hard-core' philosophical and economic considerations aside, and look at EU anti-dumping legislation through the 'normative legal positivism' lens. Put more simply, we should focus on the nature and purpose of anti-dumping duties, as conceived within the EU legal order.

51. 'Dumping' is, in essence, nothing but a form of price discrimination.[24] Under EU law, that practice is, at least in absolute terms, neither prohibited nor, more generally, considered unlawful. It is however regarded as being unfair when it causes (or threatens to cause) injury to domestic industry. When that happens, the European Union *may*, if it deems it appropriate, react by adopting measures intended to counter those negative effects.

52. Thus, under the EU system, anti-dumping duties are not penalties meant to punish the undertakings responsible for their past conduct.[25] Nor are they compensatory measures intended to make good the actual damage caused.[26] The imposition of anti-dumping duties is 'a protective and preventive measure against unfair competition resulting from dumping practices',[27] which seeks 'to prevent dumped imports or to make them economically unattractive'.[28] Anti-dumping duties are, therefore, merely *trade-related measures* (that is, measures designed to govern the import of certain goods) with a *forward-looking* aim: redressing an imbalance in the domestic market.[29]

53. If that is so, it is by no means unreasonable – unlike what had been argued by the appellants – that, in certain circumstances, the period concerned and most representative years may not coincide. Indeed, those concepts serve a different function and their establishment thus requires the Commission to look at different parameters.

54. The 'period considered' is meant to identify meaningful trends in the EU domestic market, examining the evolution of the fortunes of the Union industry, in so far as a finding of injury under Article 3(2) of Regulation 2016/1036 normally implies a deterioration of the industry's situation over a certain time.[30] Since in the absence of any (actual or potential) injury there would be no justification for anti-dumping measures, it appears sound that any assessment with regard to the existence of that element is made on the basis of information that is as recent as possible,[31] and that relates to a sufficiently long period of time.[32]

[24] See Opinion of Advocate General VerLoren van Themaat in Joined Cases *Allied Corporation and Others* v *Commission* (239/82 and 275/82, EU:C:1984:1, p. 1038).

[25] See judgment of 3 October 2000, *Industrie des poudres sphériques* v *Council* (C-458/98 P, EU:C:2000:531, paragraph 91).

[26] See, to that effect, Opinion of Advocate General Cosmas in *Industrie des poudres sphériques* v *Council* (C-458/98 P, EU:C:2000:138, point 76).

[27] See judgment of 15 July 2021, *Profit Europe and Gosselin Forwarding Services* (C-362/20, EU:C:2021:612, paragraph 67 and the case-law cited).

[28] I borrow here the terms used by the referring court in the case which led to the judgment of 17 December 2015, *APEX* (C-371/14, EU:C:2015:828, paragraph 26).

[29] Similarly, Opinion of Advocate General Sharpston in *Council* v *Gul Ahmed Textile Mills* (C-638/11 P, EU:C:2013:277, point 60.) More generally, on this issue in the EU Court's case-law, see Kuplewatzky, N., 'Defining Anti-Dumping Duties under European Union Law', *Trade, Law and Development*, Vol. 10, 2018, pp. 448 to 462.

[30] In those terms, Müller, W., Khan, N., Neumann, H.-A., *EC Anti-Dumping Law*, John Wiley & Sons, 1998, p. 271.

[31] Judgment of 3 October 2000, *Industrie des poudres sphériques* v *Council* (C-458/98 P, EU:C:2000:531, paragraph 92). See also Opinion of Advocate General Tesauro in *Epichirisseon Metalleftikon, Viomichanikon kai Naftiliakon and Others* v *Council* (121/86, EU:C:1989:299, pp. 3939 and 3940).

[32] See, to that effect, judgment of 7 May 1991, *Nakajima* v *Council* (C-69/89, EU:C:1991:186, paragraph 87).

55. Conversely, the 'most representative years' for the determination of the target profit need not be based on recent data, if that data would not provide an adequate picture of what is required to re-establish fair competition in the post-investigation period. As the General Court held in the judgment in *EFMA* – to which it rightly referred in paragraph 249 (Case T-753/16) and paragraph 215 (Case T-752/16) of the judgments under appeal – the profit margin to be used when calculating the target price must be correspond to the profit margin which the Union industry 'could reasonably count on *under normal conditions of competition*, in the absence of the dumped imports'. [33]

56. That is, in my view, a sensible approach, in the light of the very rationale of the LDR, especially when examined in the light of the basic principles of the EU anti-dumping legislation discussed above. In that context, it stands to reason that, in order to determine the target profit, the Commission may decide to turn to the historical record of the domestic market, in order to identify the most recent year(s) in which competition was normal. That may well imply, in my view, the selection of a period in which dumping had not yet deployed its effects, and in which there were no other exceptional or transitory circumstances which affected the EU industry's (standard) profit margins.

57. In that regard, I note that the EU legislature also found such an approach to be reasonable, since it largely codified it in Article 7(2c) of Regulation 2016/1036. [34] Furthermore, such an approach has also been found to be consistent with the relevant WTO provisions. [35]

58. Accordingly, the General Court did not err in law in holding that the Commission is not bound by the temporal limits of the period considered when selecting the most recent representative years for the purposes of establishing a target price. Nor, a fortiori, do I find any inconsistency or contradiction in that regard in the contested regulation.

59. In the light of the foregoing, I take the view that all the arguments put forward by the appellants in support of their second ground of appeal are either inadmissible or unfounded.

VII. Conclusion

60. In conclusion, I suggest that the Court of Justice dismiss the second ground of appeal of PAO Severstal in Case C-747/21 P and of Novolipetsk Steel PJSC (NLMK) in Case C-748/21 P.

[33] Judgment in *EFMA*, paragraph 60. Emphasis added.

[34] Second subparagraph of Article 9(4) of Regulation 2016/1036 expressly refers to Article 7(2c) of the same regulation with regard to the application of the LDR. The latter, in the relevant part, provides: 'When the injury margin is calculated on the basis of a target price, the target profit used shall be established taking into account factors such as the level of profitability before the increase of imports from the country under investigation, … and the level of profitability to be expected under normal conditions of competition'. Some of the preparatory documents for that regulation, in fact, refer to paragraph 60 of the judgment in *EFMA* as one of the sources of inspiration for the new provision: see, for example, Commission, DG TRADE Working Document – Draft guidelines on the determination of the profit margin used in establishing the injury margin, of 2013.

[35] See Panel Report in DS405, *European Union – Anti-Dumping Measures on Certain Footwear from China*, paragraphs 7.920 to 7.928.