JUDGMENT OF THE COURT (Fourth Chamber)
21 November 2024 (*)

(Appeal – Common commercial policy – Measures to ensure the exercise by the European Union of its rights under international trade rules – Regulation (EU) No 654/2014 – Implementing Regulation (EU) 2018/886 – Customs union – Regulation (EU) No 952/2013 – Union Customs Code – Decisions relating to binding origin information (BOI) adopted by national customs authorities – Delegated Regulation (EU) 2015/2446 – Determination of the non-preferential origin of certain Harley-Davidson motorcycles – Concept of 'processing or working operations which are not economically justified' – Implementing decision of the European Commission on the revocation of BOI decisions – Delegation of power – Legitimate expectations – Right to good administration – Right to be heard)

In Case C-297/23 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 11 May 2023,

Harley-Davidson Europe Ltd, established in Oxford (United Kingdom),

Neovia Logistics Services International NV, established in Vilvorde (Belgium),

represented by E. Righini, avvocato, and S. Völcker, Rechtsanwalt,

appellants,

the other party to the proceedings being:

European Commission, represented by F. Clotuche-Duvieusart, M. Kocjan and F. Moro, acting as Agents,

defendant at first instance,

THE COURT (Fourth Chamber),

composed of K. Lenaerts, President of the Court, acting as President of the Fourth Chamber, C. Lycourgos (Rapporteur), President of the Third Chamber, S. Rodin, N. Jääskinen and O. Spineanu-Matei, Judges,

Advocate General: J. Kokott,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after hearing the Opinion of the Advocate General at the sitting on 30 May 2024,

gives the following

Judgment

By their appeal, Harley-Davidson Europe Ltd and Neovia Logistics Services International NV seek to have set aside the judgment of the General Court of the European Union of 1 March 2023, *Harley-Davidson Europe and Neovia Logistics Services International* v *Commission* (T-324/21, EU:T:2023:101; 'the judgment under appeal'), by which the General Court dismissed their action for the annulment of Commission Implementing Decision (EU) 2021/563 of 31 March 2021 on the validity of certain decisions relating to binding origin information (OJ 2021 L 119, p. 117; 'the decision at issue'), addressed to the Kingdom of Belgium.

Legal context

International law

Article 2 of the Agreement on Rules of Origin (OJ 1994 L 336, p. 144), contained in Annex 1A to the Agreement establishing the World Trade Organization (WTO) (OJ 1994 L 336, p. 3), provides:

'Until the work programme for the harmonization of rules of origin … is completed, Members shall ensure that:

…

(b) notwithstanding the measure or instrument of commercial policy to which they are linked, their rules of origin are not used as instruments to pursue trade objectives directly or indirectly;

(c) rules of origin shall not themselves create restrictive, distorting, or disruptive effects on international trade. They shall not pose unduly strict requirements or require the fulfilment of a certain condition not related to manufacturing or processing, as a prerequisite for the determination of the country of origin. However, costs not directly related to manufacturing or processing may be included for the purposes of the application of an ad valorem percentage criterion …;

…'

European Union law

Customs legislation

– *The Community Customs Code*

Article 25 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1; 'the Community Customs Code') was worded as follows:

'Any processing or working in respect of which it is established, or in respect of which the facts as ascertained justify the presumption, that its sole object was to circumvent the provisions applicable in the [European] Community to goods from specific countries shall under no circumstances be deemed to confer on the goods thus produced the origin of the country where it is carried out …'

– *The Union Customs Code*

Recitals 9 and 55 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1; 'the Union Customs Code') state:

The [European] Union is based upon a customs union. It is advisable, in the interests both of economic operators and of the customs authorities in the Union, to assemble current customs legislation in a code. Based on the concept of an internal market, that code should contain the general rules and procedures which ensure the implementation of the tariff and other common policy measures introduced at Union level in connection with trade in goods between the Union and countries or territories outside the customs territory of the Union, taking into account the requirements of those common policies. …

…

In accordance with the principle of proportionality, as set out in Article 5 [TEU], it is necessary and appropriate, for the achievement of the basic objectives of enabling the customs union to function effectively and implementing the common commercial policy, to lay down the general rules and procedures applicable to goods brought into or taken out of the customs territory of the Union. …'

Article 33 of that code provides:

'1. The customs authorities shall, upon application, take … decisions relating to binding origin information [("BOI decisions")].

…

3. … BOI decisions shall be valid for a period of three years from the date on which the decision takes effect.

…'

Under Article 34(11) of that code:

'The [European] Commission may adopt decisions requesting Member States to revoke … BOI decisions, to ensure a correct and uniform tariff classification or determination of the origin of goods.'

Article 59 of that code provides:

'Articles 60 and 61 shall lay down rules for the determination of the non-preferential origin of goods for the purposes of applying the following:

the Common Customs Tariff …;

measures, other than tariff measures, established by Union provisions governing specific fields relating to trade in goods; and

other Union measures relating to the origin of goods.'

Article 60 of the Union Customs Code provides:

'1. Goods wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory.

2. Goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture.'

Article 62 of that code provides:

'The Commission shall be empowered to adopt delegated acts …, laying down the rules under which goods, whose determination of non-preferential origin is required for the purposes of applying the Union measures referred to in Article 59, are considered as wholly obtained in a single country or territory or to have undergone their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture in a country or territory, in accordance with Article 60.'

– *Delegated Regulation (EU) 2015/2446*

According to recital 21 of Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1):

'In order to prevent manipulation of the origin of imported goods with the purpose of avoiding the application of commercial policy measures, the last substantial processing or working should in some cases be deemed not to be economically justified.'

Article 33 of Delegated Regulation 2015/2446, entitled 'Processing or working operations which are not economically justified (Article 60(2) of the [Union Customs] Code)', was worded as follows:

'Any processing or working operation carried out in another country or territory shall be deemed not to be economically justified if it is established on the basis of the available facts that the purpose of that operation was to avoid the application of the measures referred to in Article 59 of the [Union Customs] Code.

…

For goods not covered by Annex 22-01, where the last working or processing is deemed not to be economically justified, the goods shall be considered to have undergone their last substantial, economically justified processing or working, resulting in the manufacture of a new product or representing an important stage of manufacture, in the country or territory where the major portion of the materials originated, as determined on the basis of the value of the materials.'

Legislation relating to the common commercial policy

– *Regulation (EU) No 654/2014*

Article 3 of Regulation (EU) No 654/2014 of the European Parliament and of the Council of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (OJ 2014 L 189, p. 50), provides:

'This Regulation applies:

…
for the rebalancing of concessions or other obligations, to which the application of a safeguard measure by a third country may give right pursuant to Article 8 of the WTO Agreement on Safeguards, or to the provisions on safeguards included in other international trade agreements, including regional or bilateral agreements;
…'

Article 4 of Regulation No 654/2014 provides:

'1. Where action is necessary to safeguard the Union's interests in the cases referred to in Article 3, the Commission shall adopt implementing acts determining the appropriate commercial policy measures. …

2. Implementing acts adopted pursuant to paragraph 1 shall meet the following conditions:

…

in the case of rebalancing of concessions or other obligations under provisions on safeguards in international trade agreements, the Union's action shall be substantially equivalent to the level of concessions or other obligations affected by the safeguard measure, in accordance with the conditions of the WTO Agreement on Safeguards or of the provisions on safeguards in other international trade agreements, including regional or bilateral agreements, under which the safeguard measure is applied;

…'

– *Implementing Regulation (EU) 2018/724*

Article 1 of Commission Implementing Regulation (EU) 2018/724 of 16 May 2018 on certain commercial policy measures concerning certain products originating in the United States of America (OJ 2018 L 122, p. 14) is worded as follows:

'The Commission shall immediately, and in any event no later than 18 May 2018, give written notice to the WTO Council for Trade in Goods that, absent disapproval by the Council for Trade in Goods, the Union suspends, from 20 June 2018, the application to the trade of the United States of import duty concessions under the [General Agreement on Tariffs and Trade (GATT)] 1994 in respect of the products listed in Annex I and Annex II, so as to allow for an application of additional customs duties on the importation of these products originating in the United States.'

– *Implementing Regulation (EU) 2018/886*

In accordance with Article 1 of Commission Implementing Regulation (EU) 2018/886 of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724 (OJ 2018 L 158, p. 5), the European Union is to apply additional customs duties on imports into the Union of certain products originating in the United States of America, which include motorcycles with reciprocating internal combustion piston engine of a cylinder capacity exceeding 800 cm^3. It follows from Article 2 of Implementing Regulation 2018/886 that those products are to be subject, in addition to the conventional rate of duty of 6%, to additional customs duty of a rate of 25% at a first stage from 22 June 2018, and subsequently to further additional customs duty of a rate of 25% at a second stage with effect, in essence, from 1 June 2021 at the latest.

Background to the dispute

The background to the dispute is set out in paragraphs 20 to 38 of the judgment under appeal. For the purposes of the present proceedings, it may be summarised as follows.

In June 2018, the Government of the United States of America introduced additional customs duties of 25% and 10% on imports of steel and imports of aluminium, respectively, from the European Union, with the aim of promoting and increasing domestic production of those products. In response to the introduction of those additional customs duties, the Commission adopted Regulation 2018/886, providing for the application of additional customs duties on the importation of certain products originating in the United States, including motorcycles with reciprocating internal combustion piston engine of a cylinder capacity exceeding 800 cm^3.

Harley-Davidson Inc., a US undertaking specialising in the construction of motorcycles, became aware of those additional customs duties following the publication of that implementing regulation in the *Official Journal of the European Union*.

On 25 June 2018, Harley-Davidson issued a 'Form 8-K Current Report' ('Form 8-K') to the United States Securities and Exchange Commission, intended to inform its shareholders of the application of the additional customs duties adopted by the European Union by means of Implementing Regulation 2018/886, and of their consequences for its business.

In the Form 8-K, Harley-Davidson stated, in particular:

'The European Union has enacted tariffs on various U.S.-manufactured products, including Harley-Davidson motorcycles. These tariffs, which became effective June 22, 2018, were imposed in response to the tariffs the U.S. imposed on steel and aluminum exported from the [European Union] to the U.S.

Consequently, EU tariffs on Harley-Davidson motorcycles exported from the U.S. have increased from 6% to 31%. Harley-Davidson expects these tariffs will result in an incremental cost of approximately [United States dollars (USD) 2 200] per average motorcycle exported from the U.S. to the [European Union].

…

To address the substantial cost of this tariff burden long-term, Harley-Davidson will be implementing a plan to shift production of motorcycles for EU destinations from the U.S. to its international facilities to avoid the tariff burden. Harley-Davidson expects ramping-up production in international plants will require incremental investment and could take at least 9 to 18 months to be fully complete.'

Following publication of the Form 8-K, Harley-Davidson chose its factory in Thailand as a production site for some of its motorcycles for the EU market.

Harley-Davidson wished to obtain assurances regarding the determination of the country of origin of those motorcycles. Thus, Harley-Davidson and Neovia Logistics Services International, an intermediary which provides Harley-Davidson with logistic support services in connection with the latter's importation of motorcycles into the

European Union through Belgium, jointly lodged, on 25 January 2019, two initial formal applications for BOI decisions, concerning two families of motorcycles, with the Belgian customs authorities. Three further applications for BOI decisions, concerning three other families of motorcycles, were lodged subsequently.

On 31 January 2019, the Belgian authorities took part in a meeting with the Commission regarding the first two applications for BOI decisions. At the end of that meeting, the Commission gave an informal opinion to the effect that, because of the information contained in the Form 8-K, the economic justification test, within the meaning of Article 33 of Delegated Regulation 2015/2446, might not be met. Despite the requests of the Belgian authorities, however, the Commission never gave a formal opinion on the applicability of that provision to the facts of the present case.

On 24 June 2019, pursuant to Article 33(1) of the Union Customs Code, the Belgian customs authorities adopted two BOI decisions, by which they acknowledged and certified that the two families of motorcycles that were the subject of the first two applications for BOI decisions, referred to in paragraph 22 above, originated in Thailand. The three other applications for BOI decisions also referred to in paragraph 22 above were subsequently dealt with in the same way by those authorities. The first two BOI decisions were notified to the Commission by those authorities on 21 August 2019.

On 5 October 2020, the Commission informed the Belgian authorities of its intention to request them to revoke the first two BOI decisions. On 13 November 2020, the Belgian authorities replied to the Commission that they were opposed to such a request for revocation. On 23 December 2020, the Commission launched a formal procedure for adoption of the decision at issue.

On 5 March 2021, the Commission submitted the draft decision at issue to all the national delegations of the Union Customs Code Committee – Origin Section under a written advisory procedure. Four Member States submitted observations on the draft decision at issue and opposed the opinion expressed by the Commission in that draft. On 29 March 2021, the Commission sent a note to the Union Customs Code Committee – Origin Section, in which it stated that the 23 Member States which had not expressed a view had given their tacit support for the draft decision at issue.

On 31 March 2021, the Commission adopted the decision at issue, which it notified to the Kingdom of Belgium on 6 April 2021 and which was published in the *Official Journal of the European Union* the following day, requesting the Belgian authorities to revoke the first two BOI decisions.

In recitals 6, 7 and 9 of the decision at issue, the Commission stated:

‘(6) Subsequent to the publication of the European Union’s commercial policy measures, [Harley-Davidson] reported with [the] Form 8-K … submitted to the [Securities and Exchange Commission] on 25 June 2018 its plan to shift production of certain motorcycles destined to the European Union’s market from the United States of America to its international facilities in another country to avoid the European Union’s commercial policy measures.

(7) Even if the avoidance of the commercial policy measures may not necessarily be the only purpose of the shift of production, the conditions mentioned in the first paragraph of Article 33 of [Delegated Regulation 2015/2446] are met based on the available facts. The processing or working operations carried out in the last country of production shall therefore be deemed not to be economically justified. As a result, the determination of the non-preferential origin of the motorcycles is to be based on the third paragraph of the same Article 33.

(9) Since the determination of the non-preferential origin of the motorcycles covered by the BOI decisions referred to in the Annex is not based on the rule laid down in the third paragraph of Article 33 of [Delegated Regulation 2015/2446], the Commission deems this determination of non-preferential origin to be incompatible with Article 60(2) of the [Union Customs] Code, in conjunction with Article 33 of [Delegated Regulation 2015/2446].’

Following the adoption of the decision at issue, the Belgian authorities informed the appellants, by letter of 16 April 2021 addressed to Neovia Logistics Services International, that they were revoking the five BOI decisions adopted in respect of the importation into the European Union of motorcycles manufactured in Thailand by Harley-Davidson.

The action before the General Court and the judgment under appeal

By their action before the General Court, Harley-Davidson Europe and Neovia Logistics Services International sought, inter alia, the annulment of the decision at issue.

In the context of that action, the appellants put forward six pleas for annulment, alleging:

first, infringement of the obligation to state reasons and of the advisory procedure prior to the adoption of the decision at issue;

second, a manifest error of assessment;

third, incorrect interpretation and application of Article 33 of Delegated Regulation 2015/2446;

fourth, that Article 33 of Delegated Regulation 2015/2446 is invalid;

fifth, breach of general principles of EU law and of the Charter of Fundamental Rights of the European Union, and

sixth, abuse of powers by the Commission for political ends.

By the judgment under appeal, the General Court, having rejected those six pleas for annulment, dismissed that action in its entirety.

Forms of order sought by the parties to the appeal

The appellants claim that the Court of Justice should:

set aside the judgment under appeal;

annul the decision at issue; and

order the Commission to pay the costs incurred by them before the Court of Justice and the General Court.

The Commission contends that the Court should:

dismiss the appeal; and

order the appellants to pay the costs.

The appeal

In support of the appeal, the appellants raise three grounds of appeal, alleging, first, incorrect interpretation of Article 33 of Delegated Regulation 2015/2446, second, raised in the alternative, an exceeding of the limits of the delegation conferred by Article 62 of the Union Customs Code, and third, breach of the right to good administration.

The first ground of appeal, alleging incorrect interpretation of Article 33 of Delegated Regulation 2015/2446

Arguments of the parties

The first ground of appeal, which is divided into three parts, concerns the General Court's interpretation of Article 33 of Delegated Regulation 2015/2446.

By the first part of that ground of appeal, the appellants submit that the General Court ignored the purpose and context of that provision.

According to them, the purpose of that provision is to specify the content of Article 60(2) of the Union Customs Code, which, in their submission, defines the origin of a product according to a factual criterion, consisting in identifying the last jurisdiction in which value has been added that is significant. They submit that the General Court changed that objective test into a subjective test, empowering the Commission to engage in a ranking assessment of subjective elements.

The appellants state that Article 25 of the Community Customs Code, which was based on a subjective criterion, was removed because of systemic issues and difficulties in implementing it. According to them, that criterion was a factor contributing to legal uncertainty and conflicted with Article 2 of the Agreement on Rules of Origin, which prohibits those rules from being used as instruments to pursue trade objectives or from laying down conditions not relating to manufacturing or processing.

In the appellants' submission, Article 33 of Delegated Regulation 2015/2446, as interpreted in the judgment under appeal, introduces a presumption, extremely difficult to rebut, that, in a situation where a relocation coincides with the adoption of a commercial policy measure, circumvention of that measure constitutes the primary reason for that relocation, without regard being had to the economic justifications for that relocation.

Furthermore, according to the appellants, in the light of the purpose, stated in recital 21 of Delegated Regulation 2015/2446, of preventing 'manipulation' of the origin of imported goods with the purpose of avoiding the application of commercial policy measures, Article 33 of that delegated regulation is an anti-circumvention clause, which should, as in the case of tax matters or anti-dumping duties, be read narrowly. They submit that that provision concerns solely instances of relocation that would clearly make no sense in the absence of the commercial policy measures in question, similar to Article 13 of Regulation (EU) 2016/1036 of the European Parliament and of the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union (OJ 2016 L 176, p. 21).

By the second part of the first ground of appeal, the appellants claim that the General Court interpreted Article 33 of Delegated Regulation 2015/2446 in such a way that any reaction by an undertaking to commercial policy measures of the European Union would constitute an almost irrebuttable infringement of that provision.

According to the appellants, instead of determining whether there was a reasonable ground for the relocation not linked to the circumvention of EU commercial policy measures, the General Court, in practice, entitled the Commission to redefine the country of origin in such a manner that it fit the goals of those measures. The appellants claim that the General Court placed on them the burden of rebutting a presumption of infringement of Article 33 of Delegated Regulation 2015/2446, even though economic operators are free to determine their own commercial policy by reference to considerations of business efficiency, such as when, for example, they exercise their right to structure their business so as to limit their tax liability, which the appellants assert was acknowledged in paragraph 73 of the judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121).

In addition, the appellants submit that the General Court erred in holding that Article 33 of Delegated Regulation 2015/2446 does not limit the freedom to conduct a business, whereas, in their submission, the interpretation adopted in the judgment under appeal unduly curtails the freedom of a business to choose its place of production. The fact that, following the reasoning of the General Court, new motorcycle models, which have been built only in Thailand, have to be regarded as having their origin in the United States, is an additional limitation of that freedom.

By the third part of the first ground of appeal, the appellants claim that the judgment under appeal contains an error of law as regards the level of evidence required of the Commission to impose on the economic operator the burden of proving that the relocation of its business is economically justified. According to them, the General Court erred in holding that a coincidence in timing between the adoption of a commercial policy measure and the relocation is sufficient to establish a presumption that that relocation is not economically justified. The appellants assert that, by its reasoning, the General Court misinterpreted paragraph 29 of the judgment of 13 December 1989, *Brother International* (C-26/88, EU:C:1989:637).

Furthermore, according to the appellants, the General Court adopted a selective reading of the concept of 'available facts', within the meaning of Article 33 of Delegated Regulation 2015/2446, relying solely on the Form 8-K to place the burden of proof on the appellants. They claim that, since that provision obliges it to examine all available facts, the General Court, by failing to take account of evidence produced after the publication of that form, distorted that evidence and committed a manifest error of assessment. In the light of the existing evidence, the Court of Justice should find that the General Court committed an error, since, although the adoption of the commercial policy measure at issue was indeed the event that gave rise to the relocation, that relocation did not necessarily have as its principal or predominant purpose that of avoiding that measure.

The Commission contends that the arguments put forward in the third part of the first ground of appeal, relating to the distortion of evidence, are inadmissible, on the ground that the appellants have not explained precisely what errors of appraisal were committed by the General Court. In any event, the first ground of appeal is, according to the Commission, unfounded.

Findings of the Court

By the first two parts of the first ground of appeal, which it is appropriate to consider together, the appellants complain that the General Court misinterpreted the test laid down in the first paragraph of Article 33 of Delegated Regulation 2015/2446, pursuant to which any processing or working operation carried out in another country or territory is to be deemed not to be economically justified 'if it is established on the basis of the available facts that the purpose of that operation was to avoid the application of the measures referred to in Article 59 of the [Union Customs] Code', such as those at issue in the present case.

In the first place, in paragraph 58 of the judgment under appeal, the General Court interpreted the expression 'the purpose of that operation was to avoid' in that provision, taking account of the fact that the term 'purpose' is used in that expression in the singular, as meaning that, while it may be that the decision to relocate production may not have as its sole purpose that of avoiding a commercial policy measure, that purpose must nevertheless be decisive. In paragraph 62 of that judgment, the General Court concluded that that provision must be interpreted as meaning that if, on the basis of the available facts, it appears that the principal or dominant purpose of a relocation was to avoid the application of EU commercial policy measures, then that relocation must be considered incapable, as a matter of principle, of being economically justified.

That interpretation is not vitiated by any error of law. In particular, contrary to what the appellants claim, the first paragraph of Article 33 of Delegated Regulation 2015/2446 cannot be interpreted as referring only to instances of relocation that would clearly make no sense in the absence of the commercial policy measures in question.

First, in so far as the appellants rely, by analogy, on the judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121), in paragraph 73 of which the Court held, in relation to value added tax, that economic operators are entitled to structure their business so as to limit their tax liability, it must be stated that, even supposing that that judgment could be applied by analogy to the situation at issue in the present case, the appellants' argument is based on an incomplete reading of that judgment.

In paragraph 62 of the judgment under appeal, the General Court gave the first paragraph of Article 33 of Delegated Regulation 2015/2446 an interpretation similar to that adopted by the Court of Justice in relation to value added tax in paragraphs 75 and 86 of the judgment of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121), that is to say, that an abusive practice can be found to exist, inter alia, if it is apparent from a number of objective factors that the essential aim of the transactions concerned is to obtain a tax advantage.

Second, the interpretation adopted by the General Court in paragraph 62 of the judgment under appeal, according to which the decisive test in applying Article 33 is the principal or dominant purpose of an operation, is necessary to ensure the effectiveness of that provision. That provision would be largely deprived of its effectiveness if it had to be interpreted as not applying for the sole reason that, in addition to the principal or dominant purpose of avoiding the application of EU commercial policy measures, a relocation also pursues other, secondary purposes.

Third, as regards the appellants' argument that the General Court's interpretation of the first paragraph of Article 33 of Delegated Regulation 2015/2446, which confirms in essence the interpretation adopted by the Commission in the decision at issue, undermines their freedom to conduct a business, it should be noted that they criticise paragraph 184 of that judgment, formulated in the context of the General Court's response to the similar argument raised before it. By contrast, the appellants do not refer, in their appeal, to paragraph 183 of that judgment, where the General Court found that they had not specified the facts that might demonstrate that the decision at issue disproportionately limited their right to property or their freedom to conduct a business.

In addition, as regards paragraph 184 of the judgment under appeal, the General Court stated, for the sake of completeness, that any limitation of the appellants' right to property or freedom to conduct a business, even if it were established, would be the consequence not of the decision at issue but of Implementing Regulation 2018/886, which introduced the additional customs duties.

Accordingly, the appellants' line of argument relating to an alleged infringement of their freedom to conduct a business is ineffective.

Fourth, contrary to what the appellants claim, it cannot be inferred from recital 21 of Delegated Regulation 2015/2446, stating that 'manipulation' of the origin of imported goods with the purpose of avoiding the application of commercial policy measures should be prevented, that the first paragraph of Article 33 of that delegated regulation should be interpreted as referring solely to instances of relocation that would clearly make no sense in the absence of the commercial policy measures in question, as is the case, in the appellants' submission, with 'circumvention' of anti-dumping duties, defined in Article 13 of Regulation 2016/1036.

First of all, no lessons can be drawn from Article 13 of Regulation 2016/1036 for the purpose of interpreting the first paragraph of Article 33 of Delegated Regulation 2015/2446, since the former relates to another matter and is drafted in terms that are very different from those of Article 33, which contains neither the term 'circumvention' nor the detailed definition that Article 13 of Regulation 2016/1036 gives to that term.

Next, it should be noted that the term 'manipulation', appearing in recital 21 of that delegated regulation, is capable of covering a wide range of voluntary actions leading to imported goods changing their origin. It is clear from the very wording of that recital that, among those actions, the ones that must be prevented are those carried out with the purpose of avoiding the application of commercial policy measures. The reference to that purpose, without, moreover, any indication of its exclusive nature, would be superfluous and would have no practical effect if the term 'manipulation' were interpreted as already referring, as such, only to actions which have no other purpose than that of avoiding the application of EU commercial policy measures, such as those resulting from Implementing Regulation 2018/886.

Lastly, since the term 'manipulation' does not appear in the first paragraph of Article 33 of Delegated Regulation 2015/2446, it cannot, in any event, allow an interpretation of that provision in a manner that is incompatible with its wording and scheme. The interpretation advanced by the appellants not only finds no support in the wording and scheme of that provision, but would also undermine its effectiveness, as has been stated in paragraph 53 above.

It follows from the foregoing that the General Court did not err in paragraphs 58 and 62 of the judgment under appeal in holding that the decisive test in applying Article 33 of Delegated Regulation 2015/2446 is the principal or dominant purpose of the operation at issue.

In the second place, on the basis of that interpretation, the General Court held, in paragraph 63 of the judgment under appeal, that where, on the basis of the available facts, it appears that the principal or dominant purpose of a relocation was to avoid the application of EU commercial policy measures, it is for the economic operator concerned to prove that the principal or dominant purpose of that relocation was not, at the time when the decision concerning that operation was taken, to avoid the application of such measures. According to the General Court, such proof differs from the search, after the event, for an economic justification or rationale for that relocation.

By that reasoning, the General Court in no way established a presumption that is irrebuttable or, at least, extremely difficult to rebut. On the contrary, it merely drew inferences from the fact that it must be possible to establish the principal or dominant purpose of the operation in question on the basis of objective matters, namely the available facts.

It follows from the clear wording of the first paragraph of Article 33 of Delegated Regulation 2015/2446 that that provision is applicable only where the available facts are such as to establish that the purpose of the conduct of the undertaking concerned was to avoid the application of the commercial policy measure at issue. It is therefore only in situations where that is in fact the case that the competent authorities are required, under that provision, to regard that operation as not being economically justified.

In such situations, either there exists no factual information such as to establish that another propose is the principal or dominant purpose of that operation, in which case the application of Article 33 of Delegated Regulation 2015/2446 is mandatory, or such factual information exists but the competent authorities do not have it at their disposal. In that context, it is warranted for it to fall on the undertaking concerned, which is best placed, or even the only one able, to have that information at its disposal, to provide it to the competent authorities.

In that regard, Article 33 of Delegated Regulation 2015/2446 does not define any particular characteristic that the 'available' facts must have, in particular in terms of time. Accordingly, it cannot be ruled out that facts may become 'available' after the decision to perform the operation in question, or after that operation has been performed. Nevertheless, the principal or dominant purpose of that operation must be assessed, at the latest, at the time when it was decided upon, as borne out by the use of the past tense in the expression 'the purpose … was to avoid the application'. Moreover, it is impossible for that decision to have been influenced by considerations that postdate it.

In the third place, contrary to the appellants' line of argument, it does not follow from the General Court's reasoning that the Commission is allowed to carry out a subjective assessment of the purposes of an operation or to presume the respective importance of those purposes.

It is true that the first paragraph of Article 33 of Delegated Regulation 2015/2446 requires the identification of a subjective element, namely the intention to avoid the application of a commercial policy measure. Nevertheless, that provision is intended to establish the principal or dominant purpose of the operation examined objectively, on the basis of the available facts. Accordingly, as stated in paragraph 75 of the judgment under appeal, the finding that the intention to avoid the application of a commercial policy measure is decisive must be based on objective evidence.

In that regard, the first paragraph of Article 33 of Delegated Regulation 2015/2446 differs fundamentally from Article 25 of the Community Customs Code, which, referring to the operation at issue, used the expression 'its sole object was to circumvent the provisions applicable' and provided for the possibility of relying on a presumption in order to establish such an object. Accordingly, there is no incompatibility between the judgment under appeal and the legislature's intention to remove the latter provision.

It follows from the foregoing findings that the incompatibility, alleged by the appellants, of Article 25 of the Community Customs Code with Article 2 of the Agreement on Rules of Origin cannot be regarded as relevant for the purpose of assessing the interpretation given to the first paragraph of Article 33 of Delegated Regulation 2015/2446 in the judgment under appeal. That argument of the appellants is based on the premiss that the General Court transformed the objective test in the first paragraph of Article 33 into a subjective test. As stated in paragraphs 67 and 68 above, that premiss is incorrect.

In the light of the foregoing, the first two parts of the first ground of appeal must be rejected.

The third part of the first ground of appeal concerns the evidential rules set out in paragraphs 70 and 71 of the judgment under appeal. In paragraph 70, the General Court found that there was a coincidence in time between the entry into force of Implementing Regulation 2018/886, which introduced the additional customs duties, and the announcement of the relocation operation in question. Referring to paragraph 29 of the judgment of 13 December 1989, *Brother International* (C-26/88, EU:C:1989:637), the General Court held that such a coincidence in time is capable of justifying the presumption that a relocation is intended to avoid the application of commercial policy measures.

In the first sentence of paragraph 71 of the judgment under appeal, the General Court stated that it is apparent from that paragraph 29 that, where there is such a coincidence in time, the economic operator concerned must prove that there were reasonable grounds, other than avoiding the consequences of the provisions in question, for carrying out the manufacturing operations in the country to which production was relocated.

In that regard, it should be observed that paragraphs 70 and 71 of the judgment under appeal do not misconstrue the meaning of paragraph 29 of the judgment of 13 December 1989, *Brother International* (C-26/88, EU:C:1989:637), relied on by the appellants before the General Court. In paragraph 29 of that judgment, the Court of Justice held that, where the transfer of assembly of the parts of a product coincides with the entry into force of the relevant regulations, the manufacturer concerned must prove that there were reasonable grounds for that transfer in order to rebut the presumption that that transfer was carried out in order to avoid the consequences arising from those regulations.

It is true that paragraph 29 of that judgment contains an interpretation of Article 6 of Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (OJ, English Special Edition 1968 (I), p. 165). That provision corresponds, in essence, to Article 25 of the Community Customs Code, which, as stated in paragraph 69 above, differs fundamentally from the first paragraph of Article 33 of Delegated Regulation 2015/2446, since it expressly provided for the possibility of relying on a presumption.

That said, the General Court's reasoning is not vitiated by any error, since the first paragraph of Article 33 of Delegated Regulation 2015/2446 requires the purpose of the operation, which must be interpreted as the principal or dominant purpose, to be established on the basis of the available facts, as the General Court correctly held in paragraphs 58 and 62 of the judgment under appeal.

In paragraph 70 of its judgment, the General Court did rely on the available facts, referring both to the purpose of the relocation of Harley-Davidson's production, as stated by it in the Form 8-K, and to the coincidence in time between the entry into force of Implementing Regulation 2018/886 and the announcement of that relocation operation.

Thus, in paragraph 70 of the judgment under appeal, the General Court inter alia held that, as the only reason given in the Form 8-K for the relocation of Harvey-Davidson's production was 'to avoid the tariff burden' arising from the commencement of the additional customs duties, Harley-Davidson's principal or dominant purpose was to avoid the application of those commercial policy measures. The General Court emphasised in that regard that it is clear from the subject matter and content of the Form 8-K that that form, dated 25 June 2018, was issued in direct response to the publication of Implementing Regulation 2018/886, only five days after publication and three days after the entry into force of that implementing regulation.

On the basis of those factors, the General Court was entitled, without infringing the first paragraph of Article 33 of Delegated Regulation 2015/2446, to find that it was prima facie established that the relocation at issue was aimed at avoiding the application of the commercial policy measures. It was then for the economic operator concerned to prove that there was a different reasonable ground, showing that the principal or dominant purpose of the operation was unconnected with that aim.

As regards the alleged distortion of the evidence by the General Court, it must be noted that the appellants are, in fact, seeking a fresh assessment of the evidence, without indicating in a sufficiently precise manner the distortion levelled against the General Court or showing the errors of analysis which, in their view, led it to commit that distortion. Such a challenge is, therefore, inadmissible at the appeal stage (see, to that effect, judgment of 8 June 2023, *Severstal and NLMK* v *Commission*, C-747/21 P and C-748/21 P, EU:C:2023:459, paragraph 52).

It follows from all of the foregoing that the third part of the first ground of appeal must also be rejected and, accordingly, that that ground of appeal must be rejected in its entirety.

The second ground of appeal, alleging an exceeding of the limits of the delegation conferred by Article 62 of the Union Customs Code

Arguments of the parties

By the second ground of appeal, submitted in the alternative, the appellants complain that the General Court erred in law in paragraphs 86 to 90 of the judgment under appeal. The appellants claim that Article 33 of Delegated Regulation 2015/2446, as interpreted in the judgment under appeal, infringes Article 290 TFEU by amending certain essential elements of Article 60(2) of the Union Customs Code.

According to the appellants, that interpretation replaces the objective test laid down in Article 60(2), based on the economic justification for the operation, with a subjective test, based on the intention of the economic operator. In the appellants' submission, that interpretation amounts to accepting that the Commission made a political choice, going against the political choice of the legislature which consisted, by removing Article 25 of the Community Customs Code, in abandoning that subjective test. They submit that that interpretation undermines the hierarchy of rules and legal certainty by creating different law in the delegated act as compared to the legislative act.

The Commission contests those arguments.

Findings of the Court

The second ground of appeal seeks a finding that Article 33 of Delegated Regulation 2015/2446, as interpreted by the General Court, is unlawful.

Since provisions of EU law cannot be regarded as invalid where they can be interpreted in such a way as to ensure that they are consistent with higher-ranking rules of law (see, to that effect, judgment of 16 November 2023, *Ligue des droits humains (Verification by the supervisory authority of data processing)*, C-333/22, EU:C:2023:874, paragraph 57), that ground of appeal can be understood only as challenging, in essence, the interpretation given by the General Court to the first paragraph of Article 33 of Delegated Regulation 2015/2446.

That said, the appellants' line of argument is based on the premiss that the General Court interpreted the first paragraph of Article 33 of Delegated Regulation 2015/2446 as including a subjective test. As stated in paragraphs 67 and 68 above, that premiss is incorrect.

Consequently, the second ground of appeal must be rejected.

The third ground of appeal, alleging infringement of the right to good administration

Arguments of the parties

The third ground of appeal consists of two parts.

By the first part, the appellants submit that the General Court erred in law in holding, in paragraphs 166 to 169 of the judgment under appeal, that the Commission's infringement of the right to be heard does not justify the annulment of the decision at issue. They submit that it follows from paragraph 46 of the judgment of 21 September 2017, *Feralpi* v *Commission* (C-85/15 P, EU:C:2017:709), and from paragraph 56 of the judgment of 16 January 2019, *Commission* v *United Parcel Service* (C-265/17 P, EU:C:2019:23), that that right is an essential procedural requirement. The decisive question is whether there was even a slight chance that the undertaking concerned would have been better able to defend itself.

In the appellants' submission, that criterion is satisfied in the present case, since they would have been able to adduce extensive factual evidence, as produced before the General Court, that the relocation was economically justified. Account should also be taken, according to them, of the shifting of the burden of proof by virtue of a presumptive mechanism established in the application of Article 33 of Delegated Regulation 2015/2446.

The appellants submit that, even if the proper application in the present case of Article 33 of Delegated Regulation 2015/2446 were to turn exclusively on points of law, which they dispute in the light of paragraphs 64 and 72 of the judgment under appeal, the right to advance legal arguments would form part of the right to be heard, in particular in view of the differences of opinion between the Commission and the Belgian authorities and the Commission's refusal to provide a formal opinion regarding the interpretation of Article 33 of Delegated Regulation 2015/2446.

By the second part of the third ground of appeal, the appellants allege that the General Court misinterpreted the principles of legitimate expectations and of legal certainty and the right to good administration.

In the first place, the appellants assert that the General Court disregarded, in paragraphs 145 to 147 of the judgment under appeal, paragraphs 10 to 12 of the judgment of 3 March 1982, *Alpha Steel* v *Commission* (14/81, EU:C:1982:76), and paragraphs 35 to 38 of the judgment of 17 April 1997, *de Compte* v *Parliament* (C-90/95 P, EU:C:1997:198), from which it follows, in their submission, that the incompatibility of a legal act with EU law is not an absolute bar to the application of the principle of legitimate expectations. In that regard, the decisive point is whether that act confers a benefit on an individual.

The appellants state that, in the present case, the BOI decisions created legitimate expectations, on the basis of which major business decisions with long-term effects were adopted. Therefore, the decision at issue should have been adopted within a reasonable time. Since BOI decisions are valid for three years under Article 33(3) of the Union Customs Code, their revocation approximately two years after their adoption constitutes a manifest breach of the principle of legal certainty and causes harm to the appellants. Furthermore, according to them, Article 33 of Delegated Regulation 2015/2446 cannot be classified as 'unambiguous', a classification which is at odds with the unprecedented nature of the revocation of a BOI decision by the Commission.

In the second place, the appellants submit that the analysis relating to the length of the procedure followed by the Commission, set out in paragraphs 175 and 176 of the judgment under appeal, has no basis in law. In that regard, the General Court should have taken into account the importance of the case for the person concerned. According to the appellants, the relevant period is that between 31 January 2019, the date of the Commission's first discussions with the Belgian authorities, or, in the alternative, 24 June 2019, the date on which the first two BOI decisions were adopted by the Belgian authorities, and 7 April 2021, the date of publication of the decision at issue. The appellants claim that the length of the procedure for the adoption of the decision at issue, of 21 or 26 months, is not justified in the light of the supposedly obvious illegality of the BOI decisions. In any event, such length goes well beyond what is acceptable.

In the appellants' submission, the infringement of the right to good administration and of the general principle of EU law requiring action to be taken within a reasonable time requires, whether or not that delay has resulted in an infringement of the rights of the defence, both that the judgment under appeal be set aside and that the decision at issue be annulled, since any belated action on the part of the Commission becomes time barred.

The Commission contests those arguments.

Findings of the Court

The first part of the third ground of appeal concerns paragraphs 166 to 169 of the judgment under appeal, in which the General Court, while acknowledging that the Commission had failed to comply with its obligation to hear the appellants before adopting the decision at issue, held that that irregularity was not sufficient to result in the annulment of that decision. In so doing, the General Court, according to the appellants, applied different criteria from those derived from the case-law of the Court of Justice.

In that regard, in paragraph 162 of the judgment under appeal, the General Court referred to the case-law of the Court of Justice according to which, in order for the infringement of the right to be heard to result in the annulment of the measure in question, there must be a possibility that the administrative procedure could have resulted in a different outcome (judgment of 5 May 2022, *Zhejiang Jiuli Hi-Tech Metals* v *Commission*, C-718/20 P, EU:C:2022:362, paragraph 49). That criterion is also referred to, in essence, in paragraph 167 of the judgment under appeal.

Referring, by analogy, to paragraph 98 of the judgment of 29 June 2006, *SGL Carbon* v *Commission* (C-308/04 P, EU:C:2006:433), the General Court also held, in paragraph 162 of the judgment under appeal, that it is for the applicant to prove, by putting forward specific evidence or at least sufficiently reliable and precise arguments or indicia, that the Commission's decision might have been different, thus making it possible to establish specifically that there was an infringement of the rights of the defence.

In so doing, the General Court correctly identified the relevant case-law of the Court of Justice with regard to the right of every person to be heard before any individual measure which would affect him or her adversely is taken, as follows from Article 41(2)(a) of the Charter of Fundamental Rights.

First, paragraph 46 of the judgment of 21 September 2017, *Feralpi* v *Commission* (C-85/15 P, EU:C:2017:709), relied on by the appellants, refers to the right to a hearing as provided for in the specific context of Commission Regulation (EC) No 773/2004 of 7 April 2004 relating to the conduct of proceedings by the Commission pursuant to Articles [101 and 102 TFEU] (OJ 2004 L 123, p. 18).

Second, in order to have a contested measure annulled on the basis of Article 263 TFEU, it is for the person alleging an infringement of his or her rights of defence to show that there is a possibility that the administrative procedure leading to the adoption of that measure might have led to a different outcome (see, to that effect, judgment of 26 September 2018, *Infineon Technologies* v *Commission*, C-99/17 P, EU:C:2018:773, paragraph 79 and the case-law cited). In that regard, although a person who relies on such an irregularity cannot be required to show that, in its absence, the act concerned would have been more favourable to his or her interests, he or she must nevertheless prove, in a concrete manner, that such a possibility is not entirely excluded (judgment of

28 September 2023, *Changmao Biochemical Engineering* v *Commission*, C-123/21 P, EU:C:2023:708, paragraph 170 and the case-law cited).

Applying that criterion, the General Court did not err in law when, after finding, in paragraph 166 of the judgment under appeal, that the appellants' right to be heard had been infringed, it held, in paragraphs 167 to 170, that the factual evidence that the relocation was 'economically justified' on account of expected economic efficiency was not capable of allowing for a possibility that the administrative procedure could have resulted in a different outcome.

It is sufficient in that regard to note that, in paragraph 170 of that judgment, which is not directly mentioned in the present appeal and which refers to paragraphs 65 and 66 of that judgment, the General Court held that the appellants had not produced before it any specific evidence that the relocation in question had been justified mainly on the basis of considerations unconnected with the introduction of the additional customs duties provided for by Implementing Regulation 2018/886.

In those circumstances, the first part of the third ground of appeal must be rejected.

The second part of the third ground of appeal alleges breach of the principle of legitimate expectations and infringement of the appellants' right to good administration due to the length of the procedure followed by the Commission.

In the first place, in paragraph 144 of the judgment under appeal, the General Court found, without this being challenged in the present appeal, that a BOI decision, taken pursuant to Article 33 of the Union Customs Code, cannot have the aim or effect of definitively guaranteeing to the trader that the origin to which that decision refers will not subsequently be amended, given that, pursuant to Article 34(11) of that code, the Commission may adopt decisions requesting Member States to revoke BOI decisions, to ensure a correct and uniform tariff classification or determination of the origin of goods.

In so doing, the General Court correctly interpreted Article 33 and Article 34(11) of the Union Customs Code, an interpretation which, moreover, has not been criticised by the appellants in the present appeal. That interpretation constitutes a sufficient basis for rejecting the line of argument at first instance alleging breach of the principle of the protection of legitimate expectations. Consequently, as the Advocate General observes in point 105 of her Opinion, the grounds on which the General Court, in paragraphs 145 to 147 of the judgment under appeal, rejected that line of argument are included for the sake of completeness in relation to those set out in paragraph 144 of that judgment. The appellants' criticisms of paragraphs 145 to 147 of that judgment must, therefore, be rejected as ineffective.

In the second place, in paragraph 164 of the judgment under appeal, the General Court recalled, relying on the case-law of the Court of Justice, that the reasonableness of the period taken up by proceedings is to be appraised in the light of the circumstances specific to each case. Although the importance of the case for the person concerned is one of those circumstances, it is only one circumstance among others (see, to that effect, judgment of 12 May 2022, *Klein* v *Commission*, C-430/20 P, EU:C:2022:377, paragraph 72 and the case-law cited), which it is for the General Court to assess as a matter of fact.

Furthermore, the reasonableness of the length of proceedings cannot be determined by reference to a precise maximum limit determined in an abstract manner (judgment of 12 May 2022, *Klein* v *Commission*, C-430/20 P, EU:C:2022:377, paragraph 86). The same applies to the determination of the starting point for the calculation of that length, in the absence, as in the present case, of precise indications in the applicable provisions.

In that context, the appellants' arguments can succeed only if it is established that the General Court distorted the facts. The appellants do not allege such distortion, merely requesting, in essence, a fresh assessment of the facts, which does not fall within the jurisdiction of the Court of Justice in an appeal (see, to that effect, judgment of 12 September 2024, *Anglo Austrian AAB* v *ECB and Far-East*, C-579/22 P, EU:C:2024:731, paragraph 147 and the case-law cited).

In those circumstances, the second part of the third ground of appeal must also be rejected. Consequently, the third ground of appeal must be rejected in its entirety.

In the light of all the foregoing considerations, since none of the grounds of appeal has been upheld, the appeal must be dismissed.

Costs

In accordance with 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.

In accordance with Article 138(1) of those rules, which applies to appeal proceedings by virtue of Article 184(1) thereof, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

As the appellants have been unsuccessful, they must be ordered to pay the costs relating to the appeal, in accordance with the form of order sought by the Commission.

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

Dismisses the appeal;

Orders Harley-Davidson Europe Ltd and Neovia Logistics Services International NV to pay, in addition to their own costs, those incurred by the European Commission.

Lenaerts Lycourgos Rodin

Jääskinen Spineanu-Matei

Delivered in open court in Luxembourg on 21 November 2024.

A. Calot Escobar K. Lenaerts

Registrar President

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* Language of the case: English.