Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

10 September 2015*

(Reference for a preliminary ruling — Dumping — Anti-dumping duty imposed on imports of ceramic tiles originating in China — Implementing Regulation (EU) No 917/2011 — Validity — Regulation (EC) No 1225/2009 — Article 2(7)(a) — Normal value — Determination on the basis of the price in a market economy third country — Selection of the appropriate third country — Duty of care — Rights of the defence — Obligation to state reasons — Sampling)

In Case C-687/13,

REQUEST for a preliminary ruling under Article 267 TFEU from the Finanzgericht München (Germany), made by decision of 24 October 2013, received at the Court on 30 December 2013, in the proceedings

Fliesen-Zentrum Deutschland GmbH

v

Hauptzollamt Regensburg,

THE COURT (Third Chamber),

composed of M. Ilešič, President of the Chamber, A. Ó Caoimh (Rapporteur), C. Toader, E. Jarašiūnas and C.G. Fernlund, Judges,

Advocate General: E. Sharpston,

Registrar: K. Malacek, Administrator,

having regard to the written procedure and further to the hearing on 3 December 2014,

after considering the observations submitted on behalf of:

— Fliesen-Zentrum Deutschland GmbH, by B. Enders, Rechtsanwalt,

— the Council of the European Union, by S. Boelaert, acting as Agent, assisted by R. Bierwagen, Rechtsanwalt,

— the European Commission, by M. França, T. Maxian Rusche and R. Sauer, acting as Agents,

after hearing the Opinion of the Advocate General at the sitting on 21 May 2015,

gives the following

* Language of the case: German.

Judgment

1 This request for a preliminary ruling concerns the validity of Council Implementing Regulation (EU) No 917/2011 of 12 September 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tiles originating in the People's Republic of China (OJ 2011 L 238, p. 1).

2 The request has been made in proceedings between Fliesen-Zentrum Deutschland GmbH ('Fliesen-Zentrum') and Hauptzollamt Regensburg (Principal Customs Office, Regensburg; 'the Hauptzollamt') concerning the collection by the latter of an anti-dumping duty imposed on imports by that company of ceramic tiles originating in China.

European Union legal framework

The basic regulation

3 Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51; 'the basic regulation') provides, in Article 1(1), that '[a]n anti-dumping duty may be applied to any dumped product whose release for free circulation in the [Union] causes injury'.

4 Article 2 of that regulation, entitled 'Determination of dumping', sets out, in paragraphs 1 to 6, the rules concerning such a determination in the event of imports originating from market economy third countries. In particular, paragraph 1 of that article provides:

'The normal value shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country.'

However, where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers.

…'

5 Article 2(7)(a) of that regulation is worded as follows:

'In the case of imports from non-market economy countries …, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the [European Union], or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the [European Union] for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

…'

6 Article 2(10) of that regulation reads:

‘A fair comparison shall be made between the export price and the normal value. This comparison shall be made at the same level of trade and in respect of sales made at, as closely as possible, the same time and with due account taken of other differences which affect price comparability. Where the normal value and the export price as established are not on such a comparable basis due allowance, in the form of adjustments, shall be made in each case, on its merits, for differences in factors which are claimed, and demonstrated, to affect prices and price comparability. …’

7 Article 3 of that regulation, entitled ‘Determination of injury’, provides, in paragraphs 2 and 3:

‘2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both:

(a) the volume of the dumped imports and the effect of the dumped imports on prices in the [Union] market for like products; and

(b) the consequent impact of those imports on the [Union] industry.

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

8 Article 9(4) of the basic regulation is worded as follows:

‘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 Council … 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.’

9 Article 17 of the basic regulation, entitled ‘Sampling’, provides, in paragraph 1, that, ‘[i]n cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the time of the selection, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available’.

10 Paragraph 2 of that article provides that ‘[t]he final selection of parties, types of products or transactions made under these sampling provisions shall rest with the Commission, though preference shall be given to choosing a sample in consultation with, and with the consent of, the parties concerned’.

11 Article 18(1) and (5) of the basic regulation is worded as follows:

‘1. In cases in which any interested party refuses access to, or otherwise does not provide, necessary information within the time-limits provided in this Regulation, or significantly impedes the investigation, provisional or final findings, affirmative or negative, may be made on the basis of the

facts available. Where it is found that any interested party has supplied false or misleading information, the information shall be disregarded and use may be made of facts available. Interested parties should be made aware of the consequences of non-cooperation.

…

5. If determinations, including those regarding normal value, are based on the provisions of paragraph 1, including the information supplied in the complaint, it shall, where practicable and with due regard to the time-limits of the investigation, be checked by reference to information from other independent sources which may be available, such as published price lists, official import statistics and customs returns, or information obtained from other interested parties during the investigation

Such information may include relevant data pertaining to the world market or other representative markets, where appropriate.'

12 Article 20(4) of that regulation, concerning requests by the parties for disclosure of information, provides:

'Final disclosure shall be given in writing. It shall be made, due regard being had to the protection of confidential information, as soon as possible and, normally, no later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.'

The provisional regulation

13 On 16 March 2011 the Commission adopted Regulation (EU) No 258/2011 of 16 March 2011 imposing a provisional anti-dumping duty on imports of ceramic tiles originating in the People's Republic of China (OJ 2011 L 70, p. 5; 'the provisional regulation').

14 Part A of that regulation contained point 2 on the parties concerned by the proceeding. Recital 4 of that regulation, set out under point 2, stated that '[i]n order to enable the Commission to decide whether sampling would be necessary, and if so to select a sample, all known exporting producers in China, importers and Union producers were asked to make themselves known to the Commission and to provide, as specified in the Notice of initiation, basic information on their activities related to the product concerned during the period from 1 April 2009 to 1 March 2010'.

15 Point 2.1 of Part A relates to sampling of the Chinese exporting producers. It contained recital 6 of that regulation, which stated:

'In accordance with Article 17(1) of the basic Regulation, the Commission selected a sample of exporting producers based on the largest representative volume of exports of the product concerned to the Union which could reasonably be investigated within the time available. The sample selected consisted of three groups, representing 10 individual producers, which accounted for 14.4% of the total volume of exports from China to the Union and 31.3% of the total volume of the cooperating exporters during the [investigation period]. In accordance with Article 17(2) of the basic Regulation, the parties concerned and the Chinese authorities were consulted on the selection of sample. A number of comments were received in relation to the proposed sample. Comments considered appropriate were taken into account in the selection of the final sample.'

16 Point 2.2, set out under that Part A, relating to sampling of the Union producers, included recitals 7 to 14 of the provisional regulation. In particular, recitals 7 to 9 and 11 to 13 stated:

'(7) …, the Commission was … provided with information from 73 Union producers.

(8) In the sampling exercise the high fragmentation of the ceramic tiles sector has been taken into consideration. In order to ensure that the results of large companies did not dominate the injury analysis but that the situation of the small companies, collectively accounting for the [largest] share of the Union production, was properly reflected, it was considered that all segments, i.e. small, medium-sized and large companies should be represented in the sample.

(9) Three segments have been distinguished based on the volume of yearly production:

…

(11) Ten companies were sampled. They are the largest of each of the three segments, taking into account sales, production and geographical location. One sampled company belongs to the segment of large companies, four to the segment of medium-sized companies and five to the segment of small companies. The selected companies are based in six Member States (Italy, Spain, Poland, Portugal, Germany and France) which together account for over 90% of the total Union production. This sample represented 24% of total production by the cooperating producers and 7% of the total Union production.

(12) During the investigation, one sampled company from Poland decided to discontinue its cooperation with the investigation. The Commission could not obtain cooperation from any other producer based in Poland.

(13) Notwithstanding the withdrawal of the Polish producer, the representativeness of the sample remained high according to all the criteria mentioned in recitals 8 and 10. It has been thus decided that the proceeding could continue with a sample of nine producers from five Member States.'

17 Recitals 46 to 54 of the provisional regulation related to the selection of the United States of America ('United States' or 'US') as analogue country, in accordance with Article 2(7) of the basic regulation, and were worded as follows:

'(46) In the Notice of initiation, the Commission indicated its intention to use the US as an appropriate analogue country for the purpose of establishing normal value for China, and invited interested parties to comment thereon.

(47) A number of comments were received and several other countries were proposed to serve as an alternative, in particular Brazil, Turkey, Nigeria, Thailand, and finally Indonesia.

(48) The Commission therefore decided to seek cooperation from known producers in these countries including the US. However, only two producers of the product concerned in the US replied to the questionnaires. A Thai producer also submitted an incomplete reply to the questionnaire; and in any case its product range was not fully comparable to the cooperating Chinese producers.

(49) The investigation revealed that the US was a competitive market for the product concerned. Several producers were active on the US domestic market and the import volumes were high. The investigation has further shown that the ceramic tiles originating in China and in the US have basically the same physical characteristics and uses and that production processes were similar.

(50) It was argued that since the US market is mainly characterised by imports, the ceramic tiles manufactured in the US and those manufactured in China cover different segments of the market. Therefore, the domestically produced product types which would serve as a basis to establish normal value would not be comparable to the product types exported by China to the Union. However the investigation has shown that the US production covers a wide range of product types comparable to the ones produced in and exported from China, as mentioned above in recital 49.

(51) It was also argued that the US would be a relatively minor player in the worldwide ceramic tiles market. However, circa 600 million m^2 were produced domestically in 2009 which is considered significant. For comparison, China, the world's major producer, manufactured 2 000 million m^2 in the same period.

(52) One party argued that the US had strict quality standards and effectively created non-tariff barriers for Chinese imports. However, the investigation revealed that as mentioned above import volumes from China in the US were high and constituted the major share of the US domestic consumption. Therefore, the argument that non-tariff barriers in the US affect imports and thus competition was rejected.

(53) The data submitted in their reply by the two cooperating US producers were verified on spot. Only data from one producer visited was finally considered, as it was found to be reliable information on which a normal value could be based. The data from the second producer visited were found not to be reliable and had to be discarded, as this producer only reported part of its domestic sales and costs could not be fully reconciled with the accounts.

(54) It is therefore provisionally concluded that the US is an appropriate and reasonable analogue country in accordance with Article 2(7) of the basic Regulation.'

18 Recital 61 of the provisional regulation, concerning adjustments made to the normal value, stated:

'For the purpose of ensuring a fair comparison between the normal value and the export price, due allowance in the form of adjustments was made for differences affecting prices and price comparability, in accordance with Article 2(10) of the basic Regulation. The normal value was adjusted for differences in characteristics — mainly due to OEM branding and for quality differences for certain types not produced by the analogue country producer — for the lower cost of non-porcelain tiles. Further adjustments were made, where appropriate, in respect of ocean freight, insurance, handling and ancillary costs, packing, credit, bank charges and commissions in all cases where they were found to be reasonable, accurate and supported by verified evidence.'

19 Recital 144 of the provisional regulation provided that 'the product [subject to the anti-dumping investigation] [was] manufactured in several countries, both in the Union and outside (Turkey, United Arab Emirates, Egypt, Brazil, countries of South-East Asia, and others)'.

Regulation No 917/2011

20 Recitals 9 to 33 of Regulation No 917/2011 set out the parties concerned by the proceeding that led to the adoption of the anti-dumping duty at issue in the main proceedings. They contain recitals concerning the composition of the sample of the Chinese exporting producers and that of the Union producers. In particular, recitals 18, 23 and 31 of that regulation state:

'(18) It is correct that one Polish producer decided to cease cooperation and therefore had to be excluded from the sample. However, it is not necessary for a sample to reflect the exact geographical spread and weight of the producing Member States in order to be representative.

Given the fact that geographical spread is only one of the factors to take into account to ensure representativeness, such an approach would not have been administratively practicable. Rather, it is sufficient that the sample largely reflects proportions of the major manufacturing countries involved. Assessed against this criterion, it was found that the withdrawal of the Polish company did not affect the overall representativeness of the sample. On this basis, it is confirmed that the sample of Union producers was sufficiently representative within the meaning of Article 17 of the basic Regulation.

…

(23) As to the different methodologies used for selecting a sample of Union producers on the one hand and Chinese exporting producers on the other hand, it should be noted that the methodologies were used according to the objectives of the sampling exercise. Concerning the Union industry, the Commission had to assess the situation of the whole industry and therefore the criteria that would ensure the most representative picture of the entire sector were chosen. As far as the Chinese exporters are concerned, it was considered appropriate to choose a sample based on the largest volume of exports of the product concerned and thus the largest exporters were sampled. It is also noted that there is no obligation in Article 17 of the basic Regulation for both samples to be selected on the basis of the same criteria. Furthermore, in this case, before finalising the sample of Chinese exporting producers, the cooperating parties in China as well as the Chinese authorities were given the opportunity to comment on the proposed sample. Comments were received with regard to the composition of the sample but not with regard to its representativity.

…

(31) As for the claim on the use of the criterion of geographical spread, it is observed that this is a fragmented industry and in order to assess representativeness of the selected companies, the producers' geographical spread amongst Member States is used to reflect the different situations that can be encountered in the Union. The sample covers Member States where approximately 90% of the Union production is manufactured; after the withdrawal of the Polish company, this level remained high at approximately 80%. Thus, the methodology applied by the Commission ensured that the sample was representative of the Union production as a whole and complied with Article 17(1) of the basic Regulation. Therefore, the claim was rejected.'

21 Recitals 55, 58 to 63, 67 and 68, 70 to 72 and 74 to 77 of Regulation No 917/2011, relating to the choice of the United States as analogue country and to the determination of normal value during the investigation procedure, in accordance with Article 2(7) of the basic regulation, are worded as follows:

'(55) Two importers submitted comments against the choice of the United States … as analogue country, claiming that the US is inappropriate as analogue country due to its insignificant own production, and its lack of competitiveness in the world market. They further claimed that the US was selected in an unreasonable manner, claiming that the lack of alternative analogue countries was caused by undue pressure by the Union producers' association on producers from other possible analogue countries in order to discourage their possible cooperation. Two importers argued that information from a number of possible cooperating countries was disregarded by the Commission and that publicly available data from national or transnational associations of producers in third countries was not considered.

…

(58) These importers further claimed that the annual production volume of ceramic tiles in the US was approximately 60 million m^2 per year, and not 600 million m^2 as stated in recital 51 of the provisional Regulation. This was verified and found to be correct.

(59) With regard to the suitability of the US as analogue country in light of the significantly lower level of production, it should be emphasised that the US market is highly competitive — there are several local production companies and import quantities are significant. Furthermore, as mentioned in recital 52 of the provisional Regulation, there is no evidence of any non-tariff barriers that would be a substantial hindrance to competition on the market. In these circumstances, despite the lower production volume, the overall conclusion that the US is an appropriate analogue country remains unchanged.

(60) Two importers argued that unit sales prices of US produced tiles in the US domestic market were much higher than in the Union market and, when compared to export prices, give rise to the existence of dumping practices. This argument was found to be irrelevant for the purpose of this proceeding, since any such allegations, assuming that there would be prima facie evidence for them, could only be thoroughly examined in a separate anti-dumping proceeding relating to the US. It was therefore disregarded.

(61) These importers further claimed that the US cooperating producer was owned by, or affiliated with, Union producers, and thus the investigation was flawed as data obtained were not independent.

(62) It is recalled that the data submitted by the US cooperating producer was verified on spot. Therefore this claim was found to be irrelevant and was disregarded.

(63) These importers further claimed that US export volumes were limited. This argument was considered to be irrelevant to the selection of the analogue country, since the analogue country data are used to determine normal value and not export prices. It was therefore rejected.

…

(67) Following final disclosure, an importers' association made numerous claims. Firstly, they claimed that the allegedly low volume of sales of US producers on their domestic market compared to Chinese exports to the Union rendered the US an unsuitable analogue country market. In this regard, in examining possible analogue countries, the level of competition in those countries is, inter alia, one of the elements examined. To have similar levels of domestic sales of the domestic industry and imports from the country under investigation is not a precondition for deeming a country to be a suitable analogue country. As regards these claims, for this investigation, and as stated in recital 59, the US market was found to be sufficiently competitive to be a suitable choice. In these circumstances, this claim is rejected.

(68) The importers' association also claimed that it did not consider that the fact that imports into the US market are significant was relevant to choosing the USA as analogue country. As regards this claim, it should be noted that the level of imports is indeed one of the important factors examined when selecting a suitable analogue country. The combination of domestic production and high volumes of imports contribute to a competitive market as mentioned in recital 59. In these circumstances, this claim is rejected.

…

(70) The association also claimed that, as the average domestic sales price in the USA of the domestically produced ceramic tiles was allegedly several times higher than the price of Union imports from China, the US product is not a 'like product' to the imported product from China. In this regard, the fact that these two prices differ is not a reason to consider that the US product is not alike to the product concerned. As stated in recital 32 of the provisional Regulation, it was found that the product concerned and, inter alia, the product produced and sold on the domestic

market of the USA have the same basic physical and technical characteristics as well as the same basic uses. In these circumstances they are considered to be alike within the meaning of Article 1(4) of the basic Regulation. The association's claim is therefore rejected.

(71) Finally, the association asked why the Union was not considered as an appropriate analogue country in the absence of cooperation from third countries other than the US. In this regard, given that the US has been found to be a suitable analogue country, as mentioned in recital 59, the need to examine possible other suitable markets did not arise. Therefore, the association's claim is rejected.

(72) In the absence of further comments, it is confirmed that the choice of the USA as analogue country was appropriate and reasonable in accordance with Article 2(7)(a) of the basic Regulation, and recitals 45 to 54 of the provisional Regulation are hereby confirmed.

…

(74) [Two] importers pointed out that since the second subparagraph of Article 2(1) of the basic Regulation required that normal value be based on the prices of 'other sellers or producers', establishing normal value on the basis of one single company's data was flawed.

(75) In this regard, it is recalled that this proceeding concerns imports from a non-market economy country where the normal value needs to be established in accordance with Article 2(7)(a) of the basic Regulation. Thus, this claim was rejected.

(76) Following final disclosure, an importers' association stated that it considered that normal value in an analogue country could not be based on data provided by one company. However, for the reasons set out in recital 75, this claim is rejected.

(77) Finally, these importers claimed that the analogue producer's product lacked representativeness since it exclusively served the high-priced segment. Because the request for confidentiality of the analogue producer was granted, this allegation is neither confirmed nor denied. In any case, even if the allegation was correct, as explained in recital 61 of the provisional Regulation, adjustments were made where warranted to the constructed normal value in order to take into account all types of tiles, including resale branding. Therefore this claim was found not to be warranted and was therefore rejected.'

22 Recitals 86 and 87 of Regulation No 917/2011, concerning adjustments of the normal value, state:

'(86) Following final disclosure, one exporting producer claimed that, as normal value was based on data from one producer in the analogue country and consequently precise data could not be disclosed for reasons of confidentiality, it was imperative to ensure that adjustments were made where appropriate to ensure product comparability for the purposes of the dumping calculations. In this regard, as mentioned in recital 61 of the provisional Regulation, adjustments were made where necessary to ensure a fair comparison between normal value and export price.

(87) Following final disclosure, two importers claimed that the cooperating US producer exclusively serves the high-priced ceramic tiles sector while the Chinese exporting producers serve the low-priced segment. In terms of ensuring a fair comparison between normal value and export price, these importers claimed that the necessary adjustments pursuant to Article 2(10) of the basic Regulation were not disclosed to them. In this regard, it is noted that recital 61 of the provisional Regulation explains the adjustments that were made to ensure a fair comparison.'

23 Part D of Regulation No 917/2011, on determination of the injury caused to Union industry, contains recitals 99 to 137 of that regulation. According to recital 113 of that regulation, set out under point 3 of Part D, relating to price undercutting:

'The investigation revealed undercutting levels between 43.2% and 55.7%, which slightly differ from what was provisionally found …'

24 Article 1 of Regulation No 917/2011 provides:

'A definitive anti-dumping duty is hereby imposed on imports of glazed and unglazed ceramic flags and paving, hearth or wall tiles; glazed and unglazed ceramic mosaic cubes and the like, whether or not on a backing, currently falling within codes 6907 10 00, 6907 90 20, 6907 90 80, 6908 10 00, 6908 90 11, 6908 90 20, 6908 90 31, 6908 90 51, 6908 90 91, 6908 90 93 and 6908 90 99 [of the Combined Nomenclature set out in Annex I to Council Regulation (EEC) No 2658/87 of 23 July 1987 on the tariff and statistical nomenclature and on the Common Customs Tariff (OJ 1987 L 256, p. 1), as amended ("the CN")], and originating in the People's Republic of China.'

25 According to paragraph 2 of that article, the rate of the definitive anti-dumping duty applicable to the net, free-at-Union-frontier price, before duty, ranges from 26.3% to 69.7%, according to the manufacturing company.

26 Pursuant to Article 2 of Regulation No 917/2011, amounts secured by way of provisional anti-dumping duties on imports of ceramic tiles originating in China imposed by the provisional regulation are to be definitively collected.

The dispute in the main proceedings and the question referred for a preliminary ruling

27 On 7 May 2010 the Commission received a complaint that imports of ceramic tiles originating in China were being dumped and were thus causing significant injury to the Union industry.

28 Consequently, it gave notice on 19 June 2010 of the initiation of an anti-dumping proceeding concerning imports of ceramic tiles originating in the People's Republic of China (OJ 2010 C 160, p. 20). The investigation extended to all the ceramic tiles imported under headings 6907 and 6908 of the CN.

29 On 16 March 2011 the Commission adopted the provisional regulation.

30 In July 2011 Fliesen-Zentrum imported into the customs territory of the European Union unglazed ceramic tiles manufactured in China, falling under tariff heading 6907 9020 of the CN. On 15 July 2011 it requested that they be released into free circulation by filing various simplified customs declarations with the Hauptzollamt, which were supplemented on 18 July 2011. By a notice of 2 August 2011, the Hauptzollamt fixed, together with customs duties and value added tax, a security for provisional anti-dumping duty at a rate of 32.3% in the sum of EUR 9 479.09, which Fliesen-Zentrum paid.

31 By letter of 5 August 2011, Fliesen-Zentrum lodged an objection against that notice with the Hauptzollamt, which was dismissed by decision of 19 October 2011.

32 On 12 September 2011 the Council adopted Regulation No 917/2011.

33 By notice of 4 November 2011, the Hauptzollamt made a definitive assessment of anti-dumping duty in the amount of EUR 9 479.09 and set off against that duty the full amount of the security paid in respect of provisional anti-dumping duty. Fliesen-Zentrum also lodged an objection against that notice, which the Hauptzollamt dismissed by a decision of 3 February 2012.

34 Fliesen-Zentrum brought an action for the annulment of that notice before the referring court, pleading the invalidity of Regulation No 917/2011. The referring court considers that four of the pleas put forward by Fliesen-Zentrum in support of its action may be well founded.

35 In that context, the referring court expresses doubts as to the validity of Regulation No 917/2011. More specifically, that court is unsure, in the first place, whether the fact that the Council chose, in that regulation, the United States as analogue country in order to determine the normal value of products similar to the tiles at issue in the main proceedings is contrary to the second subparagraph of Article 2(7)(a) and Article 18 of the basic regulation. Referring to the case-law of the Court on the selection of an appropriate market economy third country for the purposes of determining the normal value of products imported from a country without such an economy, the referring court notes that the Union institutions are required to take account of essential factors for the purpose of establishing the appropriate nature of the third country chosen and to examine them with due care. In the present case, it questions whether the selection of the United States as analogue country is reasonable within the meaning of the provisional regulation and Regulation No 917/2011, given that the American and Chinese markets for ceramic tiles differ enormously from one another. It explains, in that regard, that other feasible reference countries had been expressly mentioned by the parties involved in the administrative anti-dumping procedure. Moreover, the Commission could have chosen such a reference country and determined the normal value of the products in question on the basis of publicly available data.

36 In the second place, the referring court asks whether, in using the data of a single similar producer when calculating the normal value of imported products, the Commission infringed the combined provisions of Article 2(1) and (7)(a) of the basic regulation, according to which that calculation must be carried out on the basis of the data of more than one producer, particularly where it involves carrying out that calculation by reference to a reference country. According to that court, the taking into account of a single analogue producer did not ensure that the information was representative.

37 In the third place, the referring court wonders about the reliability of the calculation of the normal value and, consequently, about the possible infringement in that regard of Article 2(7)(a) and (10) of the basic regulation. Furthermore, that court asks whether the Union institutions failed in their obligation to state reasons and thereby violated the rights of defence of the applicant in the main proceedings, the vague information provided by the Commission on the exact calculation of the normal value making it impossible for substantiated comments to be submitted.

38 In the fourth place, the referring court asks whether, in the selection of the samples of Chinese exporting producers and of Union producers, the Commission infringed the combined provisions of Articles 3 and 17 of the basic regulation. In that regard, first, it would appear that small and medium Chinese enterprises could not be represented or could be represented only very poorly in the sample. According to the referring court, that is in contradiction with the high fragmentation of the Chinese ceramic tile industry, which is mostly composed of small and medium enterprises, as is stated in recital 73 of Regulation No 917/2011. Second, in the selection of the samples of the Union producers, the Commission took into account the high fragmentation of the Union ceramic tile industry and included all sectors, namely small, medium and large enterprises. Moreover, only producers from western European countries were included in the sample of Union producers, whereas producers from Member States with lower price levels were not represented. Consequently, the selection of those two samples has, in the referring court's view, led to the comparing of samples of Chinese and Union producers which were not actually comparable.

39 In those circumstances, the Finanzgericht München decided to stay the proceedings and to refer the following question to the Court for a preliminary ruling:

'Is [Regulation No 917/2011] valid?'

The question referred for a preliminary ruling

Preliminary observations

40 In the first place, Fliesen-Zentrum puts forward, in its written observations, in the alternative, two grounds of invalidity in respect of Regulation No 917/2011, in addition to the four pleas which it raised before the referring court and which the latter has referred to in its request for a preliminary ruling. It alleges a failure to state reasons and a violation of the rights of the defence in the absence of communication of essential relevant information and, in particular, an infringement of Articles 19 to 21 of the basic regulation.

41 In that regard, it should be noted that, according to settled case-law, the procedure laid down in Article 267 TFEU is based on a clear separation of functions between the national courts and the Court of Justice, with the result that it is solely for the national court before which the dispute has been brought, and which must assume responsibility for the subsequent judicial decision, to determine in the light of the particular circumstances of the case both the need for a preliminary ruling in order to enable it to deliver judgment and the relevance of the questions which it submits to the Court (see, inter alia, judgment in *Hoesch Metals and Alloys*, C-373/08, EU:C:2010:68, paragraph 59).

42 It is also apparent from settled case-law that Article 267 TFEU does not make available a means of redress to the parties to a case pending before a national court, so that the Court cannot be compelled to evaluate the validity of Union law on the sole ground that that question has been put to it by one of the parties in its written observations (see judgment in *MSD Sharp & Dohme*, C-316/09, EU:C:2011:275, paragraph 23 and the case-law cited).

43 In those circumstances, the inquiry into the validity of Regulation No 917/2011 should not be extended to those other grounds of invalidity, which the referring court has not raised (see, by analogy, judgment in *Hoesch Metals and Alloys*, C-373/08, EU:C:2010:68, paragraph 60).

44 In the second place, according to settled case-law, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the Union institutions enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine. The judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (see judgment in *Simon, Evers & Co.*, C-21/13, EU:C:2014:2154, paragraph 29 and the case-law cited).

The selection of the United States as analogue third country

45 By its question, the referring court asks whether the Union institutions' selection of the United States as appropriate market economy third country in order to calculate the normal value of the products affected by the importation at issue in the main proceedings constitutes an infringement of the second subparagraph of Articles 2(7)(a) and 18 of the basic regulation.

46 The referring court asks, in particular, whether the selection is appropriate in view of, first, the significant differences between the US and Chinese ceramic tile markets. The appropriateness of the selection could be disputed, since, second, US exporters export very little and supply only a small sector at the upper end of the domestic market, three quarters being supplied essentially by imports. Third, the selection could also be debatable, since it is not certain that the Commission exercised due care, exhaustively investigated other potential analogue countries and took account of other publicly available statistical information to guide its choice.

47 Fliesen-Zentrum is of the view that the selection of the United States as analogue country was not appropriate. Relying on the judgment in *Nölle* (C-16/90, EU:C:1991:402, paragraph 35), it submits that the Union institutions must, when selecting a reference country, examine the appropriateness of that country with due care. In the present case, the Commission was informed, during the proceeding that led to the adoption of Regulation No 917/2011, of the incomparable nature of the US and Chinese markets and of the fact that the United States was not an appropriate analogue country for the purposes of the anti-dumping investigation. In particular, Fliesen-Zentrum argues that the Commission could also have considered other third countries for reference country, such as the United Arab Emirates, the Arab Republic of Egypt, Malaysia and the Tunisian Republic.

48 In that regard, Article 2(7)(a) of the basic regulation provides that in the case of imports from non-market economy countries, in derogation from the rules set out in Article 2(1) to (6), normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country. The aim of that provision is to prevent account being taken of prices and costs in non-market economy countries which are not the normal result of market forces (see judgments in *Rotexchemie*, C-26/96, EU:C:1997:261, paragraph 9, and *GLS*, C-338/10, EU:C:2012:158, paragraph 20).

49 Under the second subparagraph of Article 2(7)(a) of the basic regulation, an appropriate market economy third country is to be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Indeed, it is for the Union institutions, whilst taking account of the possible alternatives, to try to find a third country in which the prices for a like product are formed in circumstances which are as similar as possible to those in the country of export, provided that it is a market economy country (judgment in *GLS*, C-338/10, EU:C:2012:158, paragraph 21).

50 The Court has already held that it is apparent from the wording and scheme of that provision that the aim of according priority to the main methodology prescribed by that provision, namely determining the normal value of a product, in the case of imports from non-market economy countries, from 'the price or constructed value in a market economy third country' or 'the price from such a third country to other countries, including the [European Union]', is to obtain a reasonable determination of the normal value in the country of export by choosing a third country in which the price for a like product is formed in circumstances which are as similar as possible to those in the country of export, provided that it is a market economy country (judgment in *GLS*, C-338/10, EU:C:2012:158, paragraphs 24 and 25).

51 In addition, according to the case-law cited in paragraph 44 of the present judgment, the exercise of the Union institutions' discretion when selecting the reference third country is subject to review by the Court. It is necessary, in particular, to verify that those institutions have not neglected to take account of essential factors for the purpose of establishing the appropriate nature of the country chosen and that the information contained in the file in the case was considered with all the care required for it to be held that the normal value was determined in an appropriate and not unreasonable manner (see, to that effect, judgments in *Nölle*, C-16/90, EU:C:1991:402, paragraphs 12 and 13, and *GLS*, C-338/10, EU:C:2012:158, paragraph 22).

52 In the present case, as regards, first of all, the search for analogue countries, it follows from the documents submitted to the Court that the party that lodged the complaint which triggered the anti-dumping proceeding suggested the United States as analogue country, as it was entitled to do under Article 2(7)(a) of the basic regulation. Thus, the Commission, in the notice of the initiation of the anti-dumping proceeding of 19 June 2010, envisaged the use of the United States as appropriate market economy third country and invited the parties to the investigation to submit their comments on the subject. Thus, recital 47 of the provisional regulation stated that 'several other countries were proposed to serve as an alternative, in particular Brazil, Turkey, Nigeria, Thailand, and finally Indonesia'. The Commission later requested producers of a certain size, in those latter States as well as in the United States, to reply to a questionnaire it sent them. As stated in recital 48 of the provisional regulation, only two producers of the product in question in the United States replied in a full manner to that questionnaire.

53 Furthermore, it is apparent from the documents submitted to the Court that the Federation of Russia had also been suggested, during the investigation procedure, as a possible third country, and recital 144 of the provisional regulation stated that the product subject to the anti-dumping investigation was manufactured in several third countries, such as the United Arab Emirates, the Arab Republic of Egypt and countries of South-East Asia.

54 Nevertheless, first, before concluding, in recital 54 of the provisional regulation, that 'the US is an appropriate and reasonable analogue country in accordance with Article 2(7) of the basic Regulation', the Commission set out, in recitals 49 to 53 of the provisional regulation, all the factors of the anti-dumping investigation that led to such a conclusion, also stating that the data submitted by the US producers that cooperated in the anti-dumping investigation were verified on the spot.

55 Second, it is apparent from the documents submitted to the Court that the Commission intended to take other countries into account as reference countries and tried in vain to contact producers in those third countries. Moreover, it should be pointed out that, given that the producers in the envisaged analogue third countries are not required to cooperate, the fact that they do not accept the Commission's invitation to cooperate cannot constitute a breach of the duty of care incumbent on that institution. Accordingly, it must be held that the Union institutions did carry out, with due care, the search for the appropriate analogue country.

56 In particular, as regards the argument that the Commission did not take into account certain publicly available statistical data during that search, the Court did indeed hold, in the judgment in *GLS* (C-338/10, EU:C:2012:158, paragraph 30), that the Union institutions must examine with all due care the information they possess, including, in particular, Eurostat statistics, in order to ascertain whether it is possible to select an analogue country for the purposes of Article 2(7)(a) of the basic regulation. Nevertheless, it is important to bear in mind that those considerations related to the obligations of the Commission where none of the undertakings contacted were willing to cooperate and where it applied the secondary methodology provided for in that provision whereby the normal value of the product in question is determined 'on any other reasonable basis'. It is undisputed that, in the present anti-dumping proceeding, a US undertaking agreed to cooperate with the Commission and that the Commission, on that basis, applied the main methodology set out by that provision, under which it did not have to examine those statistics.

57 Next, it is apparent from recitals 59, 67 and 68 of Regulation No 917/2011 that the Union institutions examined the differences between the Chinese and US ceramic tile markets. In that regard, it should be noted that they found that the US market is highly competitive and that there is no evidence of any non-tariff barriers that would be a substantial hindrance to competition on the market. It should also be noted that the United States' production covers a broad range of types of products comparable to those manufactured and exported by China.

58 In particular, as the Advocate General observed in point 71 of her Opinion, as regards the effect of competition on the market, a high level of competition exerts, in principle, a downward force on prices, so that data from a highly competitive market do not necessarily lead to a higher dumping margin than data from a country with lower costs but also lower competition. As regards the difference between those two markets at the level of technological development, a higher level of technological development is likely to offset lower labour costs, so that higher labour costs cannot necessarily be taken as an indication of higher prices and higher normal value.

59 Thus, in spite of that difference, the Union institutions were justified in relying on the high level of competition in the United States ceramic tile market for the purposes of choosing that country as the appropriate market economy third country.

60 It follows that the Union institutions examined, with due care, the differences between the Chinese and US ceramic tile markets and were justified in considering the United States as the analogue country, pursuant to Article 2(7)(a) of the basic regulation.

61 Last, with regard to the allegation that US exporters export very little and supply only a small sector of ceramic tiles at the upper end of the American market, it should be pointed out that, as was indicated in recitals 49 and 50 of the provisional regulation, the anti-dumping investigation showed that the ceramic tiles originating in China and the United States had basically the same physical characteristics and uses and that their production processes were similar.

62 In those circumstances, it must be held that the Union institutions selected in a not unreasonable manner, in accordance with the provisions of the basic regulation, the United States as the appropriate market economy third country to be used as analogue country, for the purposes of calculating the normal value.

Determining the normal value on the basis of information provided by a single producer

63 In the second place, by its question, the referring court expresses doubts as to the representativeness of the normal value determined on the basis of information provided by a single producer.

64 In particular, the referring court asks, first, whether it follows from the wording of Article 2(1) and (6) of the basic regulation that the normal value has to be established on the basis of the prices applied by more than one producer. It wishes to know, second, whether recourse to the data of a single producer nevertheless enables that value to be determined in a precise and objective way, in particular where there is a risk, as in the main proceedings, that the producer that provided its data is controlled by a Union producer and is therefore not economically independent. Third, given that the data from a single producer will be conditioned by company-specific policy decisions, it questions whether the Commission should not have to have recourse to external expertise.

65 First of all, so far as concerns the wording of Article 2(1) and (6) of the basic regulation, the referring court and Fliesen-Zentrum are of the view that the normal value must be established on the basis of the prices of several producers, since that provision makes reference to ‘the prices’ and to ‘other exporters or producers’ for the purposes of determining that value. However, it should be noted that, in the case of imports from countries that do not have a market economy, Article 2(7) of the basic regulation lays down a specific arrangement for determining the normal value, distinct from that provided for in paragraphs 1 to 6 of that article, so the wording of those latter paragraphs is not relevant in determining whether the normal value at issue in the main proceedings must be constructed from the prices of one producer or of more than one producer.

66 Next, as regards the determination of the normal value pursuant to Article 2(7)(a) of the basic regulation, the Commission has acknowledged, in its written observations, that recourse to the data of a number of producers in the analogue country, instead of those of a single producer, is, in principle, preferable. Nevertheless, the Court has already held that the mere fact that there is only one producer in the reference country does not in itself preclude the prices there from being the result of genuine competition, since such competition may just as well result, in the absence of price controls, from the presence of significant imports from other countries (judgment in *Rotexchemie*, C-26/96, EU:C:1997:261, paragraph 15).

67 Therefore, it must be held that the decisive factor, for the purposes of choosing the producer or the producers in the reference country, is whether the prices on the domestic market of the third country are the result of genuine competition. As has already been noted in paragraph 57 of this judgment, the Union institutions examined that issue during the anti-dumping investigation and found that the US market is competitive and that there is no evidence of any non-tariff barriers that would be a substantial hindrance to competition on the market.

68 As regards, in particular, the alleged risk that the producer that provided its data in the context of the anti-dumping proceeding is controlled by a Union producer and is therefore not economically independent, it must be considered that is unlikely, as the Advocate General observed in point 97 of her Opinion, that the data of a producer which sold to customers linked to it were taken into account, given that the Union institutions are criticised for having constructed an artificially high normal price. In any event, it should be noted that, as is indicated in recital 62 of Regulation No 917/2011, those data were verified on the spot by the services of the Commission.

69 Last, in relation to the Commission's recourse to external experts, it is important to point out that such recourse is not justified where, as in the case in the main proceedings, the data of one producer are representative. As the Advocate General stated in point 88 of her Opinion, in the absence of some specific reason to suppose otherwise, the Union institutions should in principle be regarded as capable of assessing the data adequately themselves.

70 In those circumstances, it must be held that the Union institutions were justified in determining the normal value on the basis of information provided by a single producer.

The obligation to state reasons and the rights of the defence, in relation to the calculation of the constructed normal value

71 In the third place, by its question, the referring court asks, essentially, whether it is incumbent on the Union institutions, when they make adjustments to the normal value determined on the basis of the prices of the producer of the analogue country, to base their decision on direct evidence (or at least on circumstantial evidence) pointing to the existence of the factor for which the adjustment was made, and to determine its effect on the comparability between the export price and the normal value. It therefore questions whether those institutions, in supplying vague information on how exactly the normal value was calculated and thus rendering impossible the submission of well-founded observations, failed in their obligation to state reasons and thereby violated the rights of defence of Fliesen-Zentrum.

72 Fliesen-Zentrum submits that, pursuant to Article 2(10) of the basic regulation, adjustments of the normal value must be made in order to take into account differences in factors that are demonstrated to affect prices and, consequently, their comparability, including differences in quality. Relying, in particular, on the judgment of the General Court of the European Union in *Kundan and Tata* v *Council* (T-88/98, EU:T:2002:280, paragraphs 95 and 96), Fliesen-Zentrum argues that the Union institutions must base their decision on such direct or circumstantial evidence. In the case in the main

proceedings, the normal value determined by the Commission is, in its view, so vague that it cannot serve as a basis for establishing any dumping. In that regard, Fliesen-Zentrum submits that the Commission did not demonstrate how that value was constructed.

73 As regards, in the first place, Fliesen-Zentrum, it is important to point out that it is agreed that that company did not participate in the dumping investigation procedure and is not linked to any Chinese producer. Therefore, it cannot itself claim any rights of defence in a procedure in which it did not participate.

74 In such circumstances, it is necessary to examine, in the second place, whether the reasons for the adjustments of the normal value determined on the basis of the prices of the producer of the analogue country meet the requirements arising from the obligation to state reasons laid down in Article 296 TFEU.

75 In that regard, the Court has already held that the statement of reasons required by Article 296 TFEU must be appropriate to the measure at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for it and to enable the competent Court of the European Union to exercise its power of review (see judgment in *Italy* v *Commission*, C-138/03, C-324/03 and C-431/03, EU:C:2005:714, paragraph 54 and the case-law cited).

76 That requirement must be appraised by reference to the circumstances of each case, in particular the content of the measure, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (judgment in *Italy* v *Commission*, C-138/03, C-324/03 and C-431/03, EU:C:2005:714, paragraph 55 and the case-law cited).

77 Similarly, in the case of a regulation, the statement of reasons may be limited to indicating the general situation which led to its adoption, on the one hand, and the general objectives which it is intended to achieve, on the other (judgments in *Abrias and Others* v *Commission*, 3/83, EU:C:1985:283, paragraph 30, and *Spain* v *Council*, C-342/03, EU:C:2005:151, paragraph 55). Consequently, it is not possible to require that the Union institutions should set out the various facts, which are often very numerous and complex, on the basis of which the regulation was adopted, or *a fortiori* that they should provide a more or less complete evaluation of those facts (see, to that effect, judgment in *Beus*, 5/67, EU:C:1968:13, paragraph 4).

78 It follows that, if the essential objective pursued by the institution is apparent from the measure of general application at issue, that measure does not need to include specific reasoning for each of the adjustments to the normal value of the product at issue.

79 In the case in the main proceedings, the reasons for which the normal value was adjusted were set out in recital 61 of the provisional regulation, which indicated that it was done 'for differences in characteristics … and for quality differences for certain types not produced by the analogue country producer … Further adjustments were made, where appropriate, in respect of ocean freight, insurance, handling and ancillary costs, packing, credit, bank charges and commissions in all cases where they were found to be reasonable, accurate and supported by verified evidence'. Regulation No 917/2011, restating in recitals 86 and 87 the reasons set out in recital 61 as to why the normal value was adjusted, adds that those adjustments were made where necessary to ensure a fair comparison between normal value and export price.

80 Consequently, it must be held that the reasons concerning the adjustments to the normal value determined on the basis of the prices of the producer of the analogue country meet the requirements arising from the obligation to state reasons.

The use of sampling

81 In the fourth place, by its question, the referring court questions whether, in order to determine the level of price undercutting, the samples of the Chinese exporting producers and of the Union producers and importers were properly selected or whether the Union institutions disregarded the combined provisions of Articles 3 and 17 of the basic regulation in that respect.

82 In particular, the referring court asks whether the levels of price undercutting indicated in recital 113 of Regulation No 917/2011 were determined precisely and objectively. It notes that where the Union institutions used sampling in order to determine the prices of the Union producers, they limited themselves, pursuant to Article 17(1) of the basic regulation, to a reasonable number of parties, products or transactions by using samples which were statistically valid on the basis of information available at the time of the selection. However, according to the referring court, in order to determine the prices applied by the Chinese producers, those institutions based their decision on the largest volume of production, sales or exports of the products concerned which can be investigated. The referring court queries whether such an approach is valid, since the sample of Union producers was composed essentially of a large number of small and medium producers and the sample of Chinese producers contained a small number of large producers, even though both markets are highly fragmented and composed largely of small and medium enterprises. Moreover, only producers of western European countries were included in the sample of Union producers, and not those of other, lower-priced Member States.

83 Fliesen-Zentrum adds that the act of comparing the prices applied by the large Chinese producers with the prices of the small and medium enterprises of the European Union violates the principle of equal treatment and infringes Articles 3(2) and 9(4) of the basic regulation. As regards the representativeness of the sample of Union producers, Fliesen-Zentrum submits that it should cover at least 25% of all Union production. With regard, in particular, to Article 9(4) of the basic regulation, which contains the so-called 'lesser duty' rule, the Union institutions incorrectly established the undercutting margins.

84 It should be pointed out that, according to Article 3(2) of the basic regulation, the determination of injury is to involve an 'objective examination' of the volume of the dumped imports, their effect on prices in the Union market and their impact on the Union industry. Article 3(3) of the basic regulation provides that, as regards the effect of the dumped imports on prices, consideration should be given to whether there has been significant price undercutting by the Chinese products as compared with the price of a like product of the Union industry.

85 In such circumstances, the Court must, in examining the validity of Regulation No 917/2011, verify whether the Union institutions were entitled to conclude that such undercutting did take place.

86 In that connection, it should be noted that, pursuant to Article 17(1) of the basic regulation, samples of parties, products or transactions must be statistically valid on the basis of information available at the time of the selection, or contain the largest volume of production, sales or exports which can reasonably be investigated within the time available.

87 It is important to point out that neither that provision, Article 3 of the basic regulation, nor the principle of equal treatment require the methodology used for selecting the sample of Chinese producers to be the same as the one used for selecting the sample of Union producers. On the contrary, Article 17(2) of the basic regulation states that the final selection of parties, types of products or transactions made under the sampling provisions is to rest with the Commission.

88 In the present case, as follows from recital 23 of Regulation No 917/2011, and as the Commission stated in its written observations, the use of two different methodologies for selecting the sample of Union producers, on the one hand, and Chinese exporting producers, on the other hand, is justified by the fact that those samples have different objectives. The objective of the sample of Chinese exporting producers is to include as large a number as possible of imports, in order to ensure that average import prices for each type of product are as close as possible to the real average and reflect as closely as possible the pressure on prices suffered by the Union industry. The sample of Union producers serves to verify whether the average import prices for each type of product have similar effects on all Union producers or whether there is a specific category of Union producers particularly affected.

89 Next, as regards, in particular, the sample of Union producers, it should be noted that it followed from recital 11 of the provisional regulation that that sample represented 24% of total production by the cooperating producers and 7% of total Union production. Moreover, according to recital 13 of that regulation, notwithstanding the withdrawal of the sample of the Polish producer, the representativeness of the sample of Union producers remained high having regard to all of the criteria used to compile it.

90 In addition, it follows from recital 18 of Regulation No 917/2011 that a sample does not necessarily have to reflect the exact geographical spread and weight of the producing Member States in order to be representative, that spread being only one of the factors to take into account to ensure representativeness. Accordingly, the Union institutions were not required to include a central or eastern European undertaking in order to ensure representativeness in respect of that sample.

91 In any event, as is indicated in recital 31 of Regulation No 917/2011 and stated by the Commission in its written observations, the Union sample accounts for approximately 80% of Union production and publicly available data showed that the inclusion of a producer of those Member States would have made little difference to the determination of injury.

92 Last, with regard to the doubts expressed by the referring court owing to the fact that a lower duty might have been imposed if the undercutting margin had been established on a different basis, it is important to note that that margin and the margin of dumping are two different concepts. In particular, pursuant to Article 9(4) of the basic regulation, the amount of the anti-dumping duty must not exceed the margin of dumping established, if such lesser duty would be adequate to remove the injury to the Union industry. As is made clear in recital 198 of Regulation No 917/2011, the margin of dumping should serve as the basis to establish the level of duty in accordance with the lesser-duty rule. It follows that the margin of undercutting is irrelevant to the use of the lesser-duty rule contained in Article 9(4).

93 Therefore, it must be held that, in using the samples, the Union institutions, in view of their broad discretion, did not infringe the combined provisions of Articles 3 and 17 of the basic regulation or violate the principle of equal treatment.

94 In the light of all the foregoing considerations, the answer to the question referred for a preliminary ruling is that consideration of that question has disclosed no factor of such a kind as to affect the validity of Regulation No 917/2011.

Costs

95 Since these proceedings are, for the parties to the main proceedings, a step in the action pending before the national court, the decision on costs is a matter for that court. Costs incurred in submitting observations to the Court, other than the costs of those parties, are not recoverable.

On those grounds, the Court (Third Chamber) hereby rules:

Consideration of the question referred for a preliminary ruling has disclosed no factor of such a kind as to affect the validity of Council Implementing Regulation (EU) No 917/2011 of 12 September 2011 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ceramic tiles originating in the People's Republic of China.

[Signatures]