Reports of Cases

OPINION OF ADVOCATE GENERAL
KOKOTT
delivered on 30 May 2024[1]

Case C-297/23 P

Harley-Davidson Europe Ltd.
and
Neovia Logistics Services International
v

European Commission

(Appeal – Customs union – Regulation (EU) No 952/2013 – Customs Code – Trade disputes between States – Determination of the non-preferential origin of certain motorcycles – Concept of economically justified processing or working operations – Delegated Regulation (EU) 2015/2446 – Avoidance or circumvention of a customs duty – Manipulation of origin – Delegated regulatory power)

I. Introduction

1. Ever since the film 'Easy Rider' at the latest, Harley-Davidson has stood for the typical American motorcycle. But is a Harley-Davidson from Thailand still an American motorcycle? It may come as a surprise, but that is essentially the Commission's view, which is vehemently disputed by Harley-Davidson in these proceedings. The background is a trade dispute between the United States of America and the European Union, in which both sides had imposed prohibitive additional customs duties on certain goods of the other side, the European Union in particular on the motorcycles referred to. Harley-Davidson subsequently relocated its production for the European market from the United States to Thailand. However, by Implementing Decision (EU) 2021/563 of 31 March 2021 on the validity of certain decisions relating to binding origin information ('the implementing decision at issue'),[2] the Commission refused to recognise that country as the place of origin.

2. By the judgment under appeal,[3] the General Court dismissed the action brought by Harley-Davidson against the implementing decision at issue. In the present appeal proceedings, it must be determined, in particular, whether the Commission may refuse to recognise a relocation of production solely on the ground that that relocation is intended to escape customs duties imposed in connection with a trade dispute between States.

[1] Original language: German.

[2] OJ 2021 L 119, p. 117.

[3] Judgment 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').

II. Legal framework

A. Customs Code

3. Article 33 of the Customs Code[4] allows customs authorities to take decisions relating to binding origin information. Under Article 34(11), the Commission may request Member States to revoke such decisions 'to ensure a correct and uniform tariff classification or determination of the origin of goods'.

4. Article 59 of the Customs Code sets out the determinations to which the rules on the origin of goods apply:

'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:

(a) the Common Customs Tariff, with the exception of the measures referred to in points (d) and (e) of Article 56(2);

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

(c) other Union measures relating to the origin of goods.'

5. Article 56(2)(d) and (e) of the Customs Code specifies the preferential tariff measures.

6. Article 60 of the Customs Code governs the origin of goods for the purposes of applying the customs tariff:

'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.'

7. Article 62 of the Customs Code empowers the Commission '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.'

[4] 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), as amended by Regulation (EU) 2019/632 of the European Parliament and of the Council of 17 April 2019 (OJ 2019 L 111, p. 54) ('the Customs Code').

B. Delegated Regulation 2015/2446 supplementing the Customs Code

8. Article 33 of Delegated Regulation 2015/2446[5] specifies when processing or working operations are to be deemed not economically justified within the meaning of Article 60(2) of the Customs Code:

'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 Code.

For goods covered by Annex 22-01, the Chapter residual rules for those goods shall apply.

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.'

9. Recital 21 of Delegated Regulation 2015/2446 clarifies Article 33 as follows:

'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.'

10. The motorcycles at issue are not referred to in Annex 22-01 to Delegated Regulation 2015/2446.

C. The rules on trade disputes between States

1. Regulation No 654/2014

11. The basis for the customs duties at issue is Regulation (EU) No 654/2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules.[6] Recitals 2 and 3 clarify the objective of such measures:

'(2) It is essential that the Union possess appropriate instruments to ensure the effective exercise of the Union's rights under international trade agreements in order to safeguard its economic interests. This is particularly the case in situations where third countries enact trade restrictive measures that diminish the benefits accruing to the Union's economic operators

[5] 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), as amended by Commission Delegated Regulation (EU) 2021/234 of 7 December 2020 (OJ 2021 L 63, p. 1).

[6] 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), as amended by Regulation (EU) 2015/1843 of the European Parliament and of the Council of 6 October 2015 laying down Union procedures in the field of the common commercial policy in order to ensure the exercise of the Union's rights under international trade rules, in particular those established under the auspices of the World Trade Organization (codification) (OJ 2015 L 272, p. 1).

under international trade agreements. The Union should be in a position to react swiftly and in a flexible manner in the context of the procedures and deadlines set out by the international trade agreements which it has concluded. There is therefore a need for rules defining the framework for exercising the Union's rights in certain specific situations.

(3) The dispute settlement mechanisms set up by the Agreement establishing the World Trade Organization (WTO) and by other international trade agreements, including regional or bilateral agreements, aim at finding a positive solution to any disputes arising between the Union and the other party or parties to those agreements. The Union should, nevertheless, be able to suspend concessions or other obligations, in accordance with those dispute settlement mechanisms, when other avenues to find a positive solution to a dispute have proven unsuccessful. Action by the Union in such cases should serve the purpose of inducing compliance of the third country concerned with the relevant international trade rules in order to restore a situation of reciprocal benefits.'

12. Recital 8 of Regulation No 654/2014 concerns the design of commercial policy measures:

'Commercial policy measures adopted under this Regulation should be selected and designed on the basis of objective criteria, including the effectiveness of the measures in inducing compliance of third countries with international trade rules, their potential to provide relief to economic operators within the Union affected by third country measures, and the aim of minimising negative economic impacts on the Union, including with regard to essential raw materials.'

13. The subject matter of Regulation No 654/2014 is defined in Article 1:

'This Regulation lays down rules and procedures to ensure an effective and timely exercise of the Union's rights to suspend or withdraw concessions or other obligations under international trade agreements, with the intention of:

(a) responding to breaches by third countries of international trade rules which affect the Union's interests, with a view to seeking a satisfactory solution that restores benefits for the Union's economic operators;

(b) rebalancing concessions or other obligations in the trade relations with third countries, when the treatment accorded to goods from the Union is altered in a way that affects the Union's interests.'

2. Implementing Regulation 2018/724

14. By Implementing Regulation 2018/724,[7] the Commission announced the customs duties at issue and stated the reasons for them, in particular in recitals 1 to 3 and 6 thereof:

'(1) On 8 March 2018 the United States of America ("United States") adopted safeguard measures in the form of a tariff increase on imports of certain steel and aluminium products, effective from 23 March 2018 and with an unlimited duration. On 22 March the effective date of the tariff increase with respect to the European Union was deferred to 1 May 2018.

[7] 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).

(2) Notwithstanding the United States' characterisation of these measures as security measures, they are in essence safeguard measures. They consist of remedial action that disturbs the balance of concessions and obligations resulting from the World Trade Organisation ("WTO") Agreement and restricts imports for the purpose of protecting domestic industry against foreign competition, for the sake of that industry's commercial prosperity. The security exceptions of the General Agreement on Tariffs and Trade 1994 ("GATT 1994") do not apply to or justify such safeguard measures, and have no bearing on the right of rebalancing under the relevant provisions of the WTO Agreement.

(3) The WTO Agreement on Safeguards provides for the right of any exporting Member affected by a safeguard measure to suspend the application of substantially equivalent concessions or other obligations to the trade of the WTO Member applying the safeguard measure, provided that no satisfactory solution is reached in consultations and the WTO Council for Trade in Goods does not disapprove.

…

(6) The Commission exercises the right to suspend the application of substantially equivalent concessions or other obligations with the intention of rebalancing concessions or other obligations in the trade relations with third countries, on the basis of Article 4(1) of Regulation (EU) No 654/2014. The appropriate action takes the form of commercial policy measures which may consist of, inter alia, the suspension of tariff concessions and the imposition of new or increased customs duties.'

D. The applicable customs duties

15. The motorcycles at issue come under heading 8711 50 00 of the Combined Nomenclature,[8] which includes 'motorcycles (including mopeds) and cycles fitted with auxiliary motor, with or without side-cars, and side-cars with reciprocating internal combustion piston engine of a cylinder capacity exceeding 800 cm^3'. The Common Customs Tariff provides for customs duty of 6% for such goods.

16. The Commission laid down the additional customs duties at issue by Implementing Regulation (EU) 2018/886:[9]

'Article 1

The Union shall apply additional customs duties on imports into the Union of the products listed in Annex I and Annex II to this Regulation and originating in the United States of America ("United States").

[8] 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 by Commission Implementing Regulation (EU) 2018/507 of 26 March 2018 amending Annex I to Council Regulation (EEC) No 2658/87 (OJ 2018 L 83, p. 11).

[9] Implementing Regulation 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).

Article 2

The application of additional customs duties on these products shall be as follows:

(a) at the first stage, additional ad valorem duty of a rate of 10% and 25% shall be applied on imports of products listed in Annex I, as specified therein, from the date of entry into force of this Regulation;

(b) at the second stage, further additional ad valorem duty of a rate of 10%, 25%, 35% and 50% shall be applied on imports of products listed in Annex II as specified therein:

– from 1 June 2021 …'

17. According to Annex I to Implementing Regulation (EU) 2018/886, goods coming under heading 8711 50 00 are subject to an additional customs duty of 25% at the first stage and, according to Annex II, to a further additional customs duty of 25% at the second stage. Accordingly, the motorcycles of the appellant Harley-Davidson imported from the United States to Europe were to be subject to, instead of the standard rate of 6%, an overall rate of 31% from 22 June 2018 and an overall rate of 56% from 1 June 2021.

18. However, the European Union has not yet applied the second-stage customs duties, but suspended them before they became applicable.[10] Since 1 January 2022, it has also suspended the first-stage customs duties.[11]

III. Background to the appeal

19. The applicant at first instance and appellant, Harley-Davidson Europe Ltd, is part of the Harley-Davidson group. This is a well-known US undertaking, which specialises in the manufacture of motorcycles. The other applicant at first instance and also appellant, Neovia Logistics Services International, is Harley-Davidson's customs agent.

A. The facts

20. The facts, as set out in paragraphs 20 to 38 of the judgment under appeal, may be summarised as follows.

21. In response to the introduction of additional steel and aluminium tariffs by the United States, the Commission likewise introduced, by Implementing Regulation (EU) 2018/886 of 20 June 2018, additional customs duties of initially 25% and later 50% on 'typical' goods from the United States, which also apply to motorcycles manufactured by Harley-Davidson.

[10] First by Commission Implementing Regulation (EU) 2021/866 of 28 May 2021 suspending commercial policy measures concerning certain products originating in the United States of America imposed by Implementing Regulation (EU) 2018/886 (OJ 2021 L 190, p. 94) and subsequently by the regulations referred to in footnote 11.

[11] First by Commission Implementing Regulation (EU) 2021/2083 of 26 November 2021 suspending commercial policy measures concerning certain products originating in the United States of America imposed by Implementing Regulations (EU) 2018/886 and (EU) 2020/502 (OJ 2021 L 426, p. 41), and now by Commission Implementing Regulation (EU) 2023/2882 of 18 December 2023 suspending commercial policy measures concerning certain products originating in the United States of America imposed by Implementing Regulations (EU) 2018/886 and (EU) 2020/502 (OJ L, 2023/2882).

22. On 25 June 2018, Harley-Davidson informed its shareholders about the consequences of those additional tariffs on its business activities by means of a Form 8-K Current Report ('Form 8-K'), which it submitted to the US Securities and Exchange Commission (SEC). In that form, Harley-Davidson stated that 'to address the substantial cost of this tariff burden long-term' it would 'be implementing a plan to shift production of motorcycles for EU destinations from the United States to its international facilities to avoid the tariff burden'.[12] More specifically, Harley-Davidson subsequently relocated the production of its motorcycles for the EU market to a factory in Thailand.

23. On 25 January 2019, the appellants lodged two formal requests with the Belgian authorities for binding origin information decisions for motorcycles from two of the motorcycle families manufactured in Thailand. Although the Commission expressed doubts as to whether origin in Thailand could be recognised, on 24 June 2019, the Belgian authorities adopted two binding origin information decisions, acknowledging Thailand as the country of origin of the motorcycles from the two Harley-Davidson motorcycle families.

24. The Commission was notified thereof on 21 August 2019 and adopted the implementing decision at issue.[13] By that decision, it required the Belgian authorities to revoke the decisions. The Belgian authorities complied with that implementing decision and revoked the two decisions by a letter of 16 April 2021.

B. The judgment under appeal

25. By application of 11 June 2021, the appellants requested that the implementing decision at issue be annulled.

26. In that regard, they relied on five pleas in law. First, they alleged that the Commission had infringed essential procedural requirements, namely, by stating inadequate reasons for the implementing decision at issue and by failing to comply with the Commission's advisory committee procedure. Second, they claimed that the implementing decision at issue was based on a manifest error on the part of the Commission in its assessment of the facts. Third, according to them, the Commission had misused its power of revocation under Article 34(11) of the Customs Code by misinterpreting Article 33 of Delegated Regulation 2015/2446. Fourth, they stated that Delegated Regulation 2015/2446 was incompatible with the conditions relating to delegation laid down in Article 290 TFEU. Fifth, they submitted that the implementing decision at issue infringed general principles of EU law and the Charter of Fundamental Rights of the European Union.

27. By the judgment under appeal of 1 March 2023, the General Court dismissed the action and ordered the appellants to pay the costs of the proceedings.

[12] Reproduced in paragraph 26 of the judgment under appeal.

[13] OJ 2021 L 119, p. 117.

IV. The procedure before the Court of Justice and the forms of order sought

28. On 11 May 2023, the appellants lodged the present appeal and claim that the Court of Justice should:

– set aside the judgment under appeal;

– annul the implementing decision at issue; and

– order the Commission to pay the appellants' costs before this Court and before the General Court.

29. The European Commission contends that the Court of Justice should:

– dismiss the appeal, and

– order the appellants to pay the costs.

30. The parties have submitted written observations. In accordance with Article 76(2) of its Rules of Procedure, the Court has refrained from holding a hearing as it considers that it has sufficient information to give a ruling.

V. Legal assessment

31. The present dispute arises from the fact that the Commission refuses to recognise Thailand as the place of origin of motorcycles which Harley-Davidson has subjected to their last processing or working operation there.

32. Under Article 60(2) of the Customs Code, goods the production of which involves more than one country or territory are to 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.

33. To avoid misunderstanding, it should be made clear that the parties are not in dispute as to whether Harley-Davidson carries out genuine processing or working in Thailand, that is to say, whether it is so substantial within the meaning of Article 60(2) of the Customs Code that it can in principle justify the assumption of origin in Thailand. The Belgian authorities state that they examined that before establishing that origin.[14] However, neither the Commission nor the General Court have made any statements on this matter.

34. Rather, the General Court confirmed the Commission's view that the processing or working operation carried out in Thailand was not economically justified under the first paragraph of Article 33 of Delegated Regulation 2015/2446.

[14] Information provided by the Belgian authorities on 13 November 2020, Annex E.3 to the Commission's reply of 18 July 2022 to questions put to it by the General Court.

35. Under the first paragraph of Article 33 of Delegated Regulation 2015/2446, 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 Customs Code. [15]

36. On the basis of Harley-Davidson's own statements, the Commission's view is prima facie justified because, according to paragraph 26 of the judgement under appeal, the undertaking expressly stated in the Form 8-K that the purpose of the relocation of production to Thailand was 'to avoid the tariff burden'.

37. Nevertheless, it must be pointed out that the German-language version of the first paragraph of Article 33 of Delegated Regulation 2015/2446, the implementing decision at issue and the judgment under appeal employ a different term, 'umgehen', and it is the *only* version to do so. That German term would be translated in English, for instance, as 'to circumvent', or in French as 'contourner'.

38. No objection could be raised to construing the first paragraph of Article 33 of Delegated Regulation 2015/2446, within the meaning of the German-language version, as a *prohibition of circumvention*. [16] However, the circumvention of a rule can only be assumed if that rule should be applied in accordance with its objective, but that application is prevented. [17] I will show below that recognising the relocation of production to Thailand is not contrary to the purpose of those customs duties.

39. In *all* other language versions of the three texts, however, first the Commission and then the General Court use terms such as 'to avoid' in English [18] or 'éviter' in French, [19] which in German should be translated rather as 'zu vermeiden'. Harley-Davidson has also used the wording 'to avoid the tariff burden' in the Form 8-K.

40. The General Court and the Commission therefore consider the first paragraph of Article 33 of Delegated Regulation 2015/2446 to be a *prohibition of avoidance*. That would have a significantly broader scope than a prohibition of circumvention. It would cover all measures, without exception, which are aimed at escaping a duty, the objective of the duty being immaterial.

[15] Since the additional customs duties at issue are part of the Common Customs Tariff, they constitute measures under Article 59 of the Customs Code.

[16] In this context, Schumann, G., in Krenzler, H.G., Herrmann, C., Niestedt, M., *EU-Außenwirtschafts- und Zollrecht*, 22nd supplement, last updated in December 2023, C.H. Beck, Munich, Art. 60 UZK, paragraph 8, construes the first paragraph of Article 33 of Delegated Regulation 2015/2446 as an anti-abuse clause.

[17] See, on this use of the term 'circumvention', judgments of 12 December 2006, *Germany* v *Parliament and Council* (C-380/03, EU:C:2006:772, paragraph 113); of 21 May 2019, *Commission* v *Hungary* (*Usufruct over agricultural land*) (C-235/17, EU:C:2019:432, paragraph 76); of 26 October 2021, *PL Holdings* (C-109/20, EU:C:2021:875, paragraph 47); and of 11 April 2024, *Triferto* (C-654/22, EU:C:2024:298, paragraph 51).
See also the case-law on the objective characteristic of abusive practice: judgments of 14 December 2000, *Emsland-Stärke* (C-110/99, EU:C:2000:695, paragraph 52); of 28 January 2015, *Starjakob* (C-417/13, EU:C:2015:38, paragraph 56); of 26 February 2019, *T Danmark and Y Denmark* (C-116/16 and C-117/16, EU:C:2019:135, paragraph 97); and of 7 April 2022, *Avio Lucos* (C-176/20, EU:C:2022:274, paragraph 70). Codified in respect of tax law by Article 6(1) of Council Directive (EU) 2016/1164 of 12 July 2016 laying down rules against tax avoidance practices that directly affect the functioning of the internal market (OJ 2016 L 193, p. 1).

[18] It can be assumed that the Commission worked mainly in that language in the procedure for adopting Delegated Regulation 2015/2446 and the implementing decision at issue; the proceedings before the General Court were also conducted in that language.

[19] Working language of the Court.

41. The assumption of such a prohibition is surprising, especially as a concrete expression of economic justification, since the avoidance of tariff burdens of 25% or even 50% is prima facie a legitimate economic objective.

42. I will explain below that the appellants are therefore correct in objecting to the first paragraph of Article 33 of Delegated Regulation 2015/2446 being construed as a prohibition of avoidance. That provision should either be interpreted differently (first ground of appeal) or the Commission should not have adopted it (second ground of appeal). However, the third ground of appeal, alleging infringements of the rights of the defence, legal certainty and the protection of legitimate expectations, is less promising.

A. First ground of appeal – interpretation of the first paragraph of Article 33 of Delegated Regulation 2015/2446

43. By their first ground of appeal, the appellants criticise many of the General Court's findings [20] regarding the interpretation and application of the first paragraph of Article 33 of Delegated Regulation 2015/2446. However, they are all based on the central consideration set out in paragraph 62, and also paragraph 57, of the judgment under appeal, that is to say, that, under that provision, the objective of *avoiding* a customs duty is already sufficient to preclude the economic justification of the measure in question. The General Court consequently regards that provision as a prohibition of avoidance.

44. The fact that the German-language version of the judgment under appeal uses the term 'umgehen' (circumvent) does not change that since the binding version of the judgment in the English language of the proceedings uses the term 'to avoid' and the French version, namely the working language of the Court, uses the term 'éviter'. Moreover, the General Court does not examine whether Harley-Davidson is seeking to circumvent the duty, but limits itself to establishing the purpose of avoiding it.

45. By the first part of their first ground of appeal, the appellants argue that the General Court's interpretation misinterprets the purpose and the schematic context of the first paragraph of Article 33 of Delegated Regulation 2015/2446. By the second part, they criticise the result of the General Court's interpretation that a commercially motivated response to additional customs duties is precluded in practice. The third part is directed against the consequences with regard to the burden of proof, which mean, in essence, that the undertaking concerned must prove an entirely different main objective where a relocation of production coincides with the imposition of additional customs duties.

46. This argument is convincing, as demonstrated by an examination of the first paragraph of Article 33 of Delegated Regulation 2015/2446 using conventional methods of interpretation.

1. Wording

47. As regards the wording of the first paragraph of Article 33 of Delegated Regulation 2015/2446, the abovementioned differences between the language versions and the concept of economic justification must be noted.

[20] They criticise in particular paragraphs 58, 60, 62 to 63, 66, 68 to 71 and 74 of the judgment under appeal.

(a) Different language versions

48. As regards the wording of the first paragraph of Article 33 of Delegated Regulation 2015/2446, I have already shown that the German-language version is worded as a prohibition of circumvention, whilst all other language versions are worded as a prohibition of avoidance. [21]

49. Although the German-language version of the first paragraph of Article 33 of Delegated Regulation 2015/2446 stands in isolation, it cannot simply be overridden by the other language versions since no language version takes precedence over the other language versions. [22] Instead, they must be given a uniform interpretation. [23] Therefore, in such cases, the general scheme and purpose of the provision [24] and, in some circumstances, the origins [25] are of particular relevance.

(b) Economic justification

50. In addition, it must be borne in mind that the first paragraph of Article 33 of Delegated Regulation 2015/2446 infers from the objective of avoidance or circumvention that the processing or working operation concerned is not to be deemed to be economically justified.

51. It is true that not every economic interest can justify a measure. The concept of justification implies a legally recognised overriding interest. That generally does not exist in the case of unlawful measures or the improper circumvention of rules, [26] such as customs duties.

52. On the other hand, the mere avoidance of customs duties is not in itself unlawful or open to criticism on other grounds. As the appellants submit, on the contrary, the Court of Justice has acknowledged in the sphere of VAT law that the taxable person may, in principle, choose to structure his or her business so as to limit his or her tax liability. [27] Therefore, taxable persons are generally free to choose the organisational structures and the form of transactions which they consider to be most appropriate for their economic activities and for the purposes of limiting their tax burdens. [28]

53. In the present case, the application of a prohibition of avoidance would constitute significant interference with Harley-Davidson's competitive position. An additional customs duty of 25% or even 50% significantly reduces sales potential. In the Form 8-K, Harley-Davidson estimates the average burden of the additional 25% customs duty at 2 200 United States dollars (USD) per motorcycle and the annual burden to the undertaking at approximately USD 90 to 100 million. It

[21] See points 37 to 41 above.

[22] Judgments of 27 March 1990, *Cricket St Thomas* (C-372/88, EU:C:1990:140, paragraph 18), and of 26 January 2021, *Hessischer Rundfunk* (C-422/19 and C-423/19, EU:C:2021:63, paragraph 65).

[23] Judgments of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraphs 13 and 14); of 27 March 1990, *Cricket St Thomas* (C-372/88, EU:C:1990:140, paragraph 19); and of 6 October 2021, *Consorzio Italian Management and Catania Multiservizi* (C-561/19, EU:C:2021:799, paragraph 43).

[24] Judgments of 27 October 1977, *Bouchereau* (30/77, EU:C:1977:172, paragraph 13 and 14), and of 17 January 2023, *Spain* v *Commission* (C-632/20 P, EU:C:2023:28, paragraph 42).

[25] Judgments of 22 October 2009, *Zurita García and Choque Cabrera* (C-261/08 and C-348/08, EU:C:2009:648, paragraph 57); of 27 November 2012, *Pringle* (C-370/12, EU:C:2012:756, paragraph 135); of 3 October 2013, *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625, paragraph 50); and of 20 December 2017, *Acacia and D'Amato* (C-397/16 and C-435/16, EU:C:2017:992, paragraph 31).

[26] See point 38 above.

[27] Judgments of 21 February 2006, *Halifax and Others* (C-255/02, EU:C:2006:121, paragraph 73), and of 17 December 2015, *WebMindLicenses* (C-419/14, EU:C:2015:832, paragraph 42).

[28] Judgment of 22 December 2010, *RBS Deutschland Holdings* (C-277/09, EU:C:2010:810, paragraph 53).

is highly doubtful that measures other than the avoidance of that customs duty could have a comparable impact on the price and competitive position of the products concerned. Such a burden can therefore economically justify a great effort to avoid it.

54. The fundamental economic justification for a relocation of production is also illustrated by the comparison of an undertaking which, as a direct reaction to the introduction of additional customs duties, relocates the last substantial processing or working operation in respect of the goods from the country concerned to another country, with other undertakings, which maintain such production there. If those undertakings have already done so beforehand or set up identical production there for the first time at a later date – possibly implicitly in the light of the additional customs duties – the first paragraph of Article 33 of Delegated Regulation 2015/2446 would not be relied on against them, including if interpreted as a prohibition of avoidance. However, those undertakings are no different in economic terms.

55. An interpretation of the first paragraph of Article 33 of Delegated Regulation 2015/2446 as a prohibition of avoidance thus does not give concrete expression to the concept of economic justification, but rather severely restricts it contrary to its meaning.

2. Purpose

56. An indication against interpreting the first paragraph of Article 33 of Delegated Regulation 2015/2446 as a prohibition of avoidance is also given by its purpose, as set out in recital 21 of that delegated regulation. According to that recital, the provision is intended to prevent manipulation of the origin of imported goods with the purpose of avoiding the application of commercial policy measures.

57. As regards the term 'Umgehung' (circumvention) used in the German-language version of recital 21 of Delegated Regulation 2015/2446, the same applies as with regard to the use of that term in the first paragraph of Article 33 thereof. [29]

58. However, according to the recital 21 of Delegated Regulation 2015/2446 in all language versions, [30] Article 33 thereof is only intended to prevent the origin of imported goods from being *manipulated*.

59. Etymologically, the term manipulation refers to the use of the hand, in Latin *manus*, in the broader sense of handling or processing an item, which is also expressed in practical usage in some languages. [31] However, it seems inconceivable that the term in recital 21 of Delegated Regulation 2015/2446 is intended to have that meaning since there is no handling or processing of the place of origin and certainly no use of hands is meant.

[29] See points 37 to 41 above.

[30] The term 'manipulation' is used in almost all language versions and even on the basis of the same root. Only in Greek and Finnish are other terms used, but the Greek 'χειραγώγηση' seems to have the same meaning as manipulation and the Finnish 'vilpillisesti' seems to lean even more towards deception.

[31] See, to that effect, for example, the French-language versions of the judgments of 21 June 2007, *Omni Metal Service* (C-259/05, EU:C:2007:363, paragraphs 33 and 37), and of 27 September 2007, *Medion and Canon Deutschland* (C-208/06 and C-209/06, EU:C:2007:553, paragraphs 40 to 42), as well as the French-language version of Article 3(1)(c) of European Parliament and Council Directive 94/62/EC of 20 December 1994 on packaging and packaging waste (OJ 1994 L 365, p. 10).

60. Rather, it can be assumed that, in accordance with its more frequent use, it is to be understood as exerting influence, often through deception. [32] In that sense, Article 12 of and Annex I to the Market Abuse Regulation [33] give concrete expression to the concept of (prohibited) manipulation of financial markets with regard to a large number of scenarios, in particular the giving of false or misleading signals (Article 12(1)(a)(i) and (c)), and the employment of a fictitious device or any other form of deception or contrivance (Article 12(1)(b) and (d)). The concept of manipulation is also linked to the concept of deception in other EU regulations. [34] Lastly, manipulation is also frequently referred to in claims concerning cartels, [35] usually with regard to prices.

61. Recital 21 of Delegated Regulation 2015/2446 thus shows that the first paragraph of Article 33 thereof is not intended to preclude the economic justification relating to the last substantial processing or working on the basis of the mere avoidance of customs duties, but only if that is achieved by manipulation of the origin.

3. Schematic context

62. From a schematic point of view, consideration must be given to the fact that the Commission adopted the first paragraph of Article 33 of Delegated Regulation 2015/2446 in the exercise of a delegated power, as well as to the subject matter and purpose of the customs duties at issue in the present case and the residual rules on origin laid down in the third paragraph of Article 33 thereof.

(a) Limits of the delegated power

63. When adopting Delegated Regulation 2015/2446, the Commission exercised a delegated power. As that power is limited to supplementing or amending certain non-essential elements of a legislative act under Article 290(1) TFEU, Article 33 of Delegated Regulation 2015/2446 must be interpreted in such a way that no essential amendment of Article 60(2) of the Customs Code is made. Otherwise, Article 33 of that delegated regulation would be invalid.

[32] By way of illustration, see judgments of 7 December 2010, *R* (C-285/09, EU:C:2010:742, paragraph 48), and of 9 July 2020, *Verein für Konsumenteninformation* (C-343/19, EU:C:2020:534, paragraphs 24, 29 and 35).

[33] Regulation (EU) No 596/2014 of the European Parliament and of the Council of 16 April 2014 on market abuse (OJ 2014 L 173, p. 1), as amended by Regulation (EU) 2023/2869 (OJ L 2023/2869). Similarly, the definition of market manipulation in Article 2(2) of Regulation (EU) No 1227/2011 of the European Parliament and of the Council of 25 October 2011 on wholesale energy market integrity and transparency (OJ 2011 L 326, p. 1).

[34] See, for example, Article 47a of Directive 2001/83/EC of the European Parliament and of the Council of 6 November 2001 on the Community code relating to medicinal products for human use (OJ 2001 L 311, p. 67), as amended by Directive (EU) 2022/642 of the European Parliament and of the Council of 12 April 2022 (OJ 2022 L 118, p. 4); Article 8 of Regulation (EU) No 1173/2011 of the European Parliament and of the Council of 16 November 2011 on the effective enforcement of budgetary surveillance in the euro area (OJ 2011 L 306, p. 1); Article 8(6) of Directive 2014/45/EU of the European Parliament and of the Council of 3 April 2014 on periodic roadworthiness tests for motor vehicles and their trailers (OJ 2014 L 127, p. 51); Article 5(6) of Regulation (EU) 2019/1150 of the European Parliament and of the Council of 20 June 2019 on promoting fairness and transparency for business users of online intermediation services (OJ 2019 L 186, p. 57); Article 34(2) of Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market for Digital Services (Digital Services Act) (OJ 2022 L 277, p. 1); and Article 54(2) of Regulation (EU) 2023/2053 of the European Parliament and of the Council of 13 September 2023 establishing a multiannual management plan for bluefin tuna in the eastern Atlantic and the Mediterranean (OJ 2023 L 238, p. 1).

[35] See judgments of 6 December 2012, *Commission* v *Verhuizingen Coppens* (C-441/11 P, EU:C:2012:778, paragraph 48), on the manipulation of bids; of 14 January 2021, *Kilpailu- ja kuluttajavirasto* (C-450/19, EU:C:2021:10, paragraph 35), on the manipulation of tendering procedures; and of 12 January 2023, *HSBC Holdings and Others* v *Commission* (C-883/19 P, EU:C:2023:11, in particular paragraph 108 et seq.), on manipulation of the Euribor interbank reference rates.

64. It is clear from Article 60(2) of the Customs Code that the European Union does not recognise every last substantial processing or working operation as the basis for the place of origin. Rather, it must be an *economically justified* measure. Moreover, Article 62 expressly empowers the Commission to lay down rules under which goods are deemed to have undergone such processing or working in a country or territory in accordance with Article 60(2) thereof.

65. The Commission was therefore entitled to use the first paragraph of Article 33 of Delegated Regulation 2015/2446 to give concrete expression to what is meant by 'economic justification'. Nevertheless, in accordance with Article 290(1) TFEU, it could not ascribe a new meaning to the term 'economic justification', since it could thus significantly change, and in particular reduce, the scope of Article 60(2) of the Customs Code.

66. If the first paragraph of Article 33 of Delegated Regulation 2015/2446 prevents the avoidance of customs duties, doubts could arise as to whether the Commission has complied with that limit on its powers. As explained above,[36] it can be economically rational and legitimate to avoid customs duties.

67. If, on the other hand, that provision only prohibits the circumvention of customs duties or the manipulation of origin, there is no reason to believe that the delegated powers have been exceeded. Neither circumvention nor manipulation can be justified by an economic interest.

(b) Subject matter and purpose of the additional customs duties

68. The subject matter and purpose of the customs duties at issue also militate in favour of not construing the first paragraph of Article 33 of Delegated Regulation 2015/2446 as a comprehensive prohibition of avoidance, but rather as limiting that provision to a prohibition of circumvention.

69. The *purpose* of the customs duties concerned is not to burden individual producers. In particular, they are not intended to place a burden on undertakings established in the United States.

70. Rather, the European Union imposed the customs duties concerned pursuant to Regulation (EU) No 654/2014, in response to trade restrictions imposed by *another country*, in the present case the United States.[37] The purpose of those additional duties is to place the other country at a disadvantage by worsening the competitive position of goods produced there. According to recital 3 of that regulation, they are intended to induce compliance of the third country concerned with the relevant international trade rules in order to restore a situation of reciprocal benefits. The disadvantages for the market position of the goods subject to the customs duties or the undertakings concerned are only intended to the extent that they affect the country of their origin.

71. The additional customs duties are therefore primarily intended to reduce economic activity in the country against which they are directed. Whether that activity decreases due to lower sales of goods in the European Union or because the undertakings concerned relocate economic activities to other countries is irrelevant to the intended effect of the additional customs duties.

[36] See points 50 to 53 above.

[37] Recitals 2 and 3 of Implementing Regulation 2018/724.

72. In other words, by relocating production to another country, Harley-Davidson has done exactly what the additional customs duties were intended to achieve.

73. Before the General Court, the Commission did correctly rely on the fact that the customs duties at issue are calculated in such a way that they are roughly equivalent to the additional tariffs imposed by the United States on EU goods. That balance is affected if Harley-Davidson avoids the application of the present duties to its imports into the European Union by no longer supplying the EU market from the United States but from Thailand. In this case, the EU measures appear at first sight to have less weight than the US measures. However, that does not alter the fact that Harley-Davidson has reduced its economic activities in the United States as a result of the additional customs duties. Whether that actually affects the balance and whether the Commission can restore it by imposing further customs duties, as the appellants argue, need not be decided in the present case.

74. On the other hand, it may not be a purpose of a customs duty under Regulation (EU) No 654/2014 to cause disadvantages for the economy of other countries that are not involved in the trade dispute, to which an undertaking relocates its production in order to avoid the additional customs duties. Rather, such disadvantages could cause new trade disputes and lead to a failure on the part of the European Union to comply with its obligations under international law.

(c) No compensation through the third paragraph of Article 33 of Delegated Regulation 2015/2446

75. However, the Commission states that, by the third paragraph of Article 33 of Delegated Regulation 2015/2446, it has laid down a residual rule for determining the origin of goods, which is applied where the economic justification relating to the last substantial processing or working must be rejected. Such a rule could, in principle, ensure that customs duties are only enforced to the extent that they are necessary on the basis of their respective purposes, in the present case the trade conflict.

76. The third paragraph of Article 33 of Delegated Regulation 2015/2446 cannot, however, fulfil that function. According to that provision, the origin of the goods is in the country or territory where the major portion of the materials originated, as determined on the basis of the value of the materials. Only the value of the materials in relation to each other, and not in relation to the total value of the goods, is relevant here.

77. In practice, this type of regulation will often result, when the last processing or working operation is relocated, in the origin of the goods remaining in the country where that step in production was previously carried out. That is because it is unlikely that the supply chains will be comprehensively reorganised along with production. Therefore, the materials will often continue to originate predominantly in the country where the last processing or working operation was previously carried out.

78. However, if what matters is the value of the materials alone, the share of value added by the last substantial processing or working operation in respect of the goods is ignored completely.

79. If there is very little added value in that last step, that would indeed be unobjectionable. However, the rules of origin laid down in Article 60(2) of the Customs Code require in any event that the last processing or working operation constitutes an appreciable part of the value

embodied in the goods, as, in accordance with international practice,[38] the Court of Justice has ruled.[39] In Article 34 of Delegated Regulation 2015/2446, the Commission has therefore also listed so-called minimal operations which are not recognised as a substantial processing or working. The economic justification and thus the first paragraph of Article 33 thereof is therefore only of crucial importance if the processing or working operation concerned is associated with significant added value.

80. The criterion relating to significant added value is also relevant to the objective of customs duties in trade disputes. That criterion can be used to assess whether a relocation of the last processing or working operation sufficiently reduces the economic activity in the country on which the European Union is imposing the duty, in order to justify a change in the origin of the goods.

81. Since the third paragraph of Article 33 of Delegated Regulation 2015/2446 does not allow account to be taken of the value added by the last processing or working operation, that provision cannot offset the overreach of the broad interpretation on the part of the General Court of the first paragraph of Article 33 as a prohibition of avoidance.

(d) Interim conclusion of the schematic interpretation

82. It must therefore be stated that the schematic context of the first paragraph of Article 33 of Delegated Regulation 2015/2446 also does not make it possible to infer from the purpose of avoiding a customs duty alone that the last substantial processing or working operation is not economically justified.

4. Origin of the rule and the predecessor rules

83. Since Delegated Regulation 2015/2446 was not adopted in a legislative procedure involving the Council and Parliament, there are no public documents on its origins. Nonetheless, in response to questions from the General Court, the Commission explained that Article 33 of Delegated Regulation 2015/2446 replaced earlier provisions which are no longer contained in the new Customs Code.

84. Those were Article 25 of the old Customs Code[40] and the predecessor provision of Article 6 of Regulation (EEC) No 802/68.[41] Under both provisions, any processing or working in respect of which it was established, or in respect of which the facts as ascertained justified the presumption, that its sole object had been to circumvent the provisions applicable in the Community to goods from specific countries was under no circumstances to be deemed to confer on the goods thus produced the origin of the country where it was carried out. In all language versions of those

[38] Then Article 5 of the International Convention on the simplification and harmonisation of customs procedures, concluded by Council Decision 75/199/EEC of 18 March 1975 (OJ 1975 L 100, p. 1), now Specific Annex K to the revised convention; however, the European Union has not ratified that annex. See also Article 2(a) and (c) of the Agreement on Rules of origin (OJ 1994 L 336, p. 144) adopted by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

[39] Judgments of 13 December 1989, *Brother International* (C-26/88, EU:C:1989:637, paragraphs 20 to 23, in particular paragraph 22); of 8 March 2007, *Thomson and Vestel France* (C-447/05 and C-448/05, EU:C:2007:151, paragraphs 27, 28, 31 and 45); and of 13 December 2007, *Asda Stores* (C-372/06, EU:C:2007:787, paragraphs 37, 38 and 41).

[40] Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code (OJ 1992 L 302, p. 1).

[41] Regulation (EEC) No 802/68 of the Council of 27 June 1968 on the common definition of the concept of the origin of goods (Official Journal, English Special Edition 1968 (I), p. 165).

provisions – unlike in almost all language versions of the first paragraph of Article 33 of Delegated Regulation 2015/2446[42] – terms were used which correspond to the German term 'Umgehung' (circumvention).

85. The Commission stated that the new wording of the first paragraph of Article 33 of Delegated Regulation 2015/2446 was intended to avoid difficulties in applying the previously applicable rules. That intention is understandable as it is not easy to prove intent to circumvent.

86. However, such difficulties do not allow the concept of economic justification to be restricted excessively and the application of customs duties imposed in connection with trade disputes between States to be extended far beyond their objective. This is the case because by doing so, it would not be only the bad-faith actors referred to by the Commission that would be subject to customs duties.

87. Furthermore, the Commission also states in those observations that the purpose of the first paragraph of Article 33 of Delegated Regulation 2015/2446 is merely to combat manipulation of origin, as is also apparent from recital 21 thereof. However, for this to be achieved, the first paragraph of Article 33 thereof does not have to be construed as a comprehensive prohibition of avoidance.

5. Interim conclusion concerning the first ground of appeal

88. The appellants are thus correct in their view that the judgment under appeal is based on errors of law in the interpretation of the first paragraph of Article 33 of Delegated Regulation 2015/2446. Contrary to what the General Court found, in particular in paragraph 62 (but also 57) of the judgment under appeal, that provision cannot be understood as meaning that the objective of mere avoidance of the customs duties at issue is sufficient to preclude economic justification relating to the last substantial processing or working operation.

89. The first paragraph of Article 33 of Delegated Regulation 2015/2446 must be interpreted instead as meaning that the economic justification of a processing or working operation only ceases to apply if its purpose is to circumvent the application of customs duties by manipulating the origin. As has already been stated, such a circumvention presupposes that failure to apply the duty in question is contrary to that duty's objective.[43]

90. Consequently, in the case of the additional customs duty at issue in connection with a trade dispute between States, what matters is whether the processing or working operation in question in a particular country or territory is intended to create the deception that the product in question – not the producer – actually originates in another country or territory, on which the European Union has imposed an additional duty as a result of a trade dispute. Conversely, in respect of working or processing operations aimed at avoiding other duties, such as anti-dumping duties, or at benefiting from preferential tariffs, the circumvention may call for a different assessment.

91. The first and second part of the first ground of appeal are therefore well founded.

[42] See points 37 to 41 above.

[43] See point 38 above.

92. Since this error of law also covers the conclusions drawn by the General Court from the established facts, the third part of the first ground of appeal is also successful. It is directed against the fact that the General Court concluded, in particular in paragraphs 66, 68 to 71 and 74 of the judgment under appeal, from the coincidence in time between the imposition of the customs duties concerned and the announcement of the relocation of production by Harley-Davidson, that that relocation was intended to avoid the customs duties concerned within the meaning of the first paragraph of Article 33 of Delegated Regulation 2015/2446.

93. It is true that the Court of Justice has already inferred from such coincidence in time that the trader concerned must prove that there were reasonable grounds, other than avoiding the consequences of the provisions in question, for carrying out the assembly operations in the country from which the goods were exported.[44] However, that finding concerned duties with a different purpose, namely anti-dumping duties, and is also explained by the fact that that case concerned the continuation of a practice that existed *before* the duty in question was introduced.[45]

94. In any event, that presumption cannot be applied to the present case concerning a customs duty resulting from a trade conflict, since the relocation of a last substantial processing or working operation to another country is consistent with the objectives of the duty.[46]

95. Consequently, the third part of the first ground of appeal is also well founded.

96. The judgment under appeal is therefore based on successive errors in law and must consequently be set aside.

97. For this reason, I do not consider it necessary to adjudicate on the two other grounds of appeal. I will therefore address them only very briefly.

B. In the alternative: second ground of appeal – lawfulness of Article 33 of Delegated Regulation 2015/2446

98. By their second ground of appeal, the appellants claim that the General Court failed to find that Article 33 of Delegated Regulation 2015/2446 is unlawful on the ground that the Commission exceeded its power to give concrete expression to Article 60(2) of the Customs Code.

99. However, if the Court of Justice agrees with my interpretation of the first paragraph of Article 33 of Delegated Regulation 2015/2446, that provision remains within the scope of the Commission's delegated powers.

100. If, on the other hand, the Court of Justice were to conclude that the Commission actually sought to adopt a broad prohibition of avoidance and therefore rejects my proposed interpretation, the Commission would indeed have infringed its power under Article 290 TFEU to give concrete expression to general legal concepts. The concept of economic justification and the scope of Article 60(2) of the Customs Code would then be excessively restricted by Article 33 of Delegated Regulation 2015/2446.[47] In that case, the judgment of the General Court would have to be set aside on the ground that that court failed to rule that that provision is unlawful.

[44] Judgment of 13 December 1989, *Brother International* (C-26/88, EU:C:1989:637, paragraph 28).

[45] Judgment of 13 December 1989, *Brother International* (C-26/88, EU:C:1989:637, paragraphs 3 and 6).

[46] See points 68 to 74 above.

[47] See points 62 to 65 above.

C. In the alternative: third ground of appeal – rights of the defence, legal certainty and legitimate expectations

101. By the third ground of appeal, the appellants claim that the rights of the defence and legal certainty and the protection of legitimate expectations have been infringed. However, this argument by the appellants cannot be upheld if the Court of Justice does not concur with my view and construes the first paragraph of Article 33 of Delegated Regulation 2015/2446 as a prohibition of avoidance.

102. It is true that, in paragraph 166 of the judgment under appeal, the General Court found that the Commission had failed to hear Harley-Davidson before adopting the implementing decision at issue. However, in accordance with the settled case-law of the Court of Justice, the General Court pointed out that an infringement of the rights of the defence results in the annulment of the contested measure only if, without such an irregularity, the outcome of the procedure might have been different, which it is for the undertaking concerned to show. [48] The appellants are unable to provide such evidence since it is clear from the K-8 form that Harley-Davidson intended to avoid the application of the customs duties concerned in any event by relocating production. Therefore, if the first paragraph of Article 33 of Delegated Regulation 2015/2446 were to be construed as a prohibition of avoidance, no other Commission decision would have been possible.

103. As regards legal certainty and protection of legitimate expectations, the appellants claim that they were entitled to entertain a legitimate expectation in respect of the binding origin information provided by the Belgian authorities. At the very least, the procedure for adopting the implementing decision at issue took too long (16 months) and therefore showed that the decisions of the Belgian authorities were not manifestly unlawful.

104. However, the General Court correctly stated in paragraph 144 of the judgment under appeal that a binding origin information decision issued by national authorities pursuant to Article 33 of the Customs Code cannot definitively guarantee to the trader the geographical origin of the goods concerned. Under Article 34(11), the Commission may order the revocation of that decision with effect for the future, where the national authorities have incorrectly determined the origin.

105. The appellants were not entitled, in principle, to entertain a legitimate expectation that the Commission would not exercise that power. Therefore, the General Court's supplementary reasoning in paragraph 145 of the judgment under appeal that the Belgian authorities' decisions infringed an unambiguous provision of EU law in the first paragraph of Article 33 of Delegated Regulation 2015/2446 is irrelevant. However, if that were relevant, there could be doubt as to whether that provision is sufficiently clear in the light of the present considerations concerning the first ground of appeal.

VI. The action before the General Court

106. In accordance with the first paragraph of Article 61 of the Statute of the Court of Justice of the European Union, the Court of Justice may, where it has quashed the decision of the General Court, either itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the General Court.

[48] Judgment of 16 June 2016, *SKW Stahl-Metallurgie and SKW Stahl-Metallurgie Holding* v *Commission* (C-154/14 P, EU:C:2016:445, paragraph 69, with further references).

107. The state of the proceedings does permit judgment to be given as it has been established that the Commission based the implementing decision at issue on the same misinterpretation of the first paragraph of Article 33 of Delegated Regulation 2015/2446 as the General Court. The only reason for the application of that provision, which the Commission provides in recital 6 of the implementing decision at issue, lies in the statement in the Form 8-K that Harley-Davidson seeks to avoid application of the customs duties concerned. On the other hand, the Commission does not find that the customs duty is being improperly circumvented by manipulation of the origin.

108. The Commission did attempt to argue before the General Court that Harley-Davidson also engaged in circumvention or an abusive arrangement. However, in that regard it referred only to the fact that the relocation of the last processing or working operation was at the undertaking's discretion and essentially served to avoid the customs duty. On the other hand, it did not comment on whether the purpose of the duty was thereby adversely affected. Therefore, that argument likewise cannot provide grounds for rejecting the economic justification.

109. Consequently, the forms of order sought by the appellants should be granted and the implementing decision at issue should be annulled.

VII. Costs

110. Under Article 184(2) of its Rules of Procedure, where the appeal is well founded and it itself gives final judgment in the case, the Court of Justice is to make a decision as to the costs.

111. Under Article 138(1) of the Rules of Procedure, which applies *mutatis mutandis* to appeal proceedings pursuant to Article 184(1) of those rules, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

112. Consequently, the Commission must pay the costs incurred by the appellants and bear its own costs.

VIII. Conclusion

113. I therefore propose that the Court should:

(1) set aside the judgment of the General Court of 1 March 2023, *Harley-Davidson Europe and Neovia Logistics Services International* v *Commission* (T-324/21, EU:T:2023:101);

(2) annul Implementing Decision (EU) 2021/563 of 31 March 2021 on the validity of certain decisions relating to binding origin information; and

(3) order the European Commission to pay the costs incurred by Harley-Davidson Europe Ltd and Neovia Logistics Services International in the proceedings before the General Court and the Court of Justice and declare that it is to bear its own costs.