Case C-104/19

Summary of the request for a preliminary ruling pursuant to Article 98(1) of the Rules of Procedure of the Court of Justice

Date lodged:

11 February 2019

Referring court:

Hoge Raad der Nederlanden (Netherlands)

Date of the decision to refer:

8 February 2019

Applicant:

Donex Shipping and Forwarding B.V.

Other party:

Staatssecretaris van Financiën

Subject of the action in the main proceedings

The subject of the action in the main proceedings is the anti-dumping duties payable by Donex Shipping and Forwarding B.V. on certain types of iron or steel fasteners from China.

Subject and legal basis of the request for a preliminary ruling

The present request under Article 267 TFEU concerns the validity of Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

Questions referred

1. Is Regulation (EC) No 91/2009 invalid in respect of an EU importer due to the infringement of Article 2(11) of Regulation (EC) No 384/96 in so far as the Council, in determining the dumping margin for the relevant products of non-

cooperating Chinese exporting producers, excluded the export transactions of certain types of the product from the comparison referred to in that article?

2. Is Regulation (EC) No 91/2009 invalid in respect of an EU importer due to the infringement of Article 2(10) of Regulation (EC) No 384/96 in so far as, in the context of calculating the magnitude of the dumping margin for the products concerned, the institutions of the Union refused to take into account, when comparing the normal value of the products of an Indian producer with the export prices of similar Chinese products, adjustments relating to import duties on raw materials and indirect taxes in the analogue country India and to differences in production (costs) and/or in so far as the institutions of the Union, during the investigation, did not provide cooperating Chinese exporting producers (in a timely manner) with all the data of the Indian producer with regard to the determination of the normal value?

Provisions of European Union law cited

Council Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

Council Implementing Regulation (EU) No 924/2012 of 4 October 2012 amending Council Regulation (EC) No 91/2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China.

Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community.

Brief summary of the facts and the procedure in the main proceedings

1 Donex Shipping and Forwarding B.V. ('applicant') filed a declaration in 2011 for the release into free circulation of iron or steel fasteners. On 1 February 2009, pursuant to Regulation No 91/2009, a definitive anti-dumping duty of 85% was imposed on such fasteners from China. On 4 June 2014, the applicant received an invitation to pay those duties.

2 Following a complaint from China to the World Trade Organization ('WTO'), the Council set the anti-dumping duty at a lower rate pursuant to Implementing Regulation No 924/2012 and extended it to other companies. Subsequently, those anti-dumping measures, which the Council had imposed for five years in 2009, were maintained by Implementing Regulation 2015/519. However, following a ruling by the WTO Appellate Body, they were repealed by Implementing Regulation 2016/278.

3 The applicant brought an appeal before the Rechtbank (District Court) Noord-Holland and then before the Gerechtshof (Court of Appeal) Amsterdam. The Gerechtshof rejected the applicant's assertion that Regulation No 91/2009 should be declared invalid in respect of it because it was adopted in breach of the provisions of Article 3(2) and Article 4(1) and of Article 2(10) and (11) and Article 9(4) of Regulation (EC) No 384/96 ('the basic regulation'), respectively. The Gerechtshof found that the validity of the regulation in question, contrary to the applicant's view, could not be reviewed against the rulings of the WTO Appellate Body. On the basis of that finding, the Gerechtshof decided not to request a preliminary ruling from the Court of Justice by means of which the Court of Justice would be able to rule on the invalidity of Regulation No 91/2009. The issue on appeal in cassation is whether the Gerechtshof erred in not asking the Court of Justice a question on validity because the Gerechtshof failed to consider, on the basis of a direct assessment based on the basic regulation, that there was doubt as to the validity of Regulation No 91/2009 in respect of the applicant.

Main submissions of the parties to the main proceedings

4 The questions referred for a preliminary ruling by the referring court in the appeal in cassation relate solely to the applicant's first ground of appeal which argued that the Gerechtshof had erred in not referring a question to the Court of Justice on the validity of Regulation No 91/2009. That ground of appeal consists of three parts.

5 First, according to the applicant, the Commission followed an unacceptable method of determining the extent of the injury suffered by the Union industry as a result of Chinese imports. The data used in the anti-dumping investigation originated from producers who supported the complaint by which an operator had requested that investigation. Those producers wanted to cooperate fully in that investigation from the outset and wanted to be included in a possible sample. As a result, the investigation method followed led to a process of self-selection in violation of Articles 3(2) and 4(1) of the basic regulation, resulting in a distorted picture of the extent of the injury.

6 In the second part, the applicant submits that Regulation No 91/2009 must be declared invalid because the Commission carried out its investigation into possible dumping margins for the products concerned in violation of Article 2(11) of the basic regulation. Under that article, the existence of dumping margins must be established on the basis of a comparison of a weighted average normal value as referred to in Article 2(1) of the basic regulation with a weighted average of prices of all [comparable] export transactions to the Community, or by a comparison of individual normal values and individual export prices to the Community on a transaction-to-transaction basis. According to the second part, the Commission wrongly disregarded certain Chinese export transactions when making that determination.

7 The cause of that failure to include certain transactions lay in the specific Chinese market situation. If a company when importing from non-market economy countries, such as China, cannot demonstrate that a product is produced and sold under market conditions, then, under Article 2(7) of the basic regulation, the price must in principle be determined on the basis of the price or constructed value in a market economy third country. In the present case, India was that analogue country. However, some of the products exported from China were not manufactured there, such that no normal value was available for those products. The Commission therefore decided not to include those products in the calculation of the dumping margins and 'appropriate adjustments' were applied to the normal value (see recital 98 of Regulation No 91/2009). According to the applicant, that resulted in an invalid calculation.

8 In the third part, the applicant submits that Regulation No 91/2009 must be declared invalid because the comparison of the export price and the normal value was carried out in breach of Article 2(10) of the basic regulation. Failing to follow the correct procedure when making the comparison, the Commission refused to apply adjustments for various factors that could affect prices and price comparability. Furthermore, in not providing them in a timely manner with the necessary information including, in particular, the information regarding the Indian producer, the Commission did not give the Chinese producers the opportunity to substantiate their request for corrections.

Brief summary of the reasons for the referral

9 In agreement with the applicant, the referring court considers that the Court of Justice should be asked for a preliminary ruling on the validity of Regulation No 91/2009. Admittedly, it is of the view that the first part of the first ground of appeal did not justify this, but the second and third parts did.

First part: determination of the injury caused by dumping to the Community industry

10 With regard to the first part, the referring court refers to the judgment of the Court of Justice of 15 November 2018, *Baby Dan A/S*, C-592/17,EU:C:2018:913 ('*Baby Dan* judgment'). In that judgment, the Court of Justice clarified that, in so far as the definition of the Community industry may be limited to only those Community producers which have supported the complaint at the origin of the anti-dumping investigation, that fact alone does not appear to be of such as nature as to make the method followed, in accordance with Article 4(1) of the basic regulation, when adopting Regulation No 91/2009, insufficiently objective and therefore invalid (see *Baby Dan* judgment, paragraphs 80 to 83).

11 In addition, the limitation of the definition of the Community industry to only those Community producers which have supported the complaint at the origin of the anti-dumping investigation does not, in itself, and in the absence of any other

element capable of calling into question the representativeness of those producers, justify the conclusion that the determination in Regulation No 91/2009 of the existence of the injury to the Community industry is not based on positive evidence and does not involve an objective examination, within the meaning of Article 3(2) of the basic regulation (see *Baby Dan* judgment, paragraph 84).

The applicant has not produced any other information capable of calling into question the representativeness of Community producers as referred to in paragraph 84 of the *Baby Dan* judgment. Therefore, it cannot be considered that the Commission's investigation failed to comply with the requirements and safeguards applicable under the basic regulation in order to objectively determine the extent of the injury suffered by the Union industry.

Second part: existence and determination of dumping margins

12 The referring court proceeds on the assumption that, for the purposes of assessing the adoption of Regulation No 91/2009, not only the recitals of that regulation but also those of Implementing Regulation 924/2012 are relevant. It is clear from recital 7 of the latter regulation that the definitive findings of the original investigation were reassessed when that amended regulation was adopted.

13 Implementing Regulation 924/2012 was annulled by the Court of Justice to the extent that it concerned two Chinese exporting producers who had brought an appeal before the General Court (ECJ, 5 April 2017, *Changshu City Standard Parts Factory* and *Ningbo Jinding Fastner Co. Ltd*, Joined Cases C-376/15P and C-377/15P, EU:C:2017:269, 'the *Changshu* judgment'). It follows from that judgment that Article 2(11) of the basic regulation does not allow export transactions to the Union relating to certain types of the product under consideration to be excluded from the calculation of the dumping margin. Instead, either the definition of the product under consideration must be amended so as to exclude those product types or the normal value for those missing product types should be construed so as to take into account export transactions of that same product type for the purposes of calculating the dumping margin (cf. *Changshu*, paragraphs 57, 61, 67, 68, 70, 72 and 75).

14 The *Changshu* judgment concerned the products of two Chinese exporting producers who both cooperated fully with a view to securing individual treatment and who were both included by the Commission in the sample for purposes of calculating the dumping margin. By contrast, the present proceedings were initiated by an importer in the Union and furthermore, the imported products were purchased from Chinese exporting producers who did not cooperate in an investigation into the existence of dumping margins.

15 The referring court raises the question whether the interpretation of Article 2(11) of the basic regulation in the *Changshu* judgment and the invalidity of Implementing Regulation 924/2012 to which it gave rise in respect of the two Chinese exporting producers concerned, also applies in respect of an importer in

the Union who has purchased products from Chinese exporting producers who have not cooperated. If so, the question arises whether the infringement of Article 2(11) of the basic regulation referred to is so serious that Regulation No 91/2009 must be declared invalid in relation to the Union importer concerned, in which case there would be no legal basis for the anti-dumping duties imposed on that importer.

16 On the one hand, it could be argued that Regulation No 91/2009 must also be declared invalid in respect of the applicant (as an importer) because certain product types are excluded and, as a result, the existence of dumping has not been established for those product types. That exclusion may also have affected the level of the weighted average dumping margin for all the products concerned of all other non-cooperating Chinese exporting producers. From that perspective, the anti-dumping margin established for those exporting producers cannot justify the 85% anti-dumping duty imposed and that rate has not been validly determined.

17 If that line of argument is correct, Regulation No 91/2009 would have to be declared invalid in respect of the applicant and the anti-dumping duties would have to be considered to have been wrongfully levied (cf. ECJ 15 March 2018, *Deichmann SE*, C-256/16,EU:C:2018:187, paragraph 62).

18 On the other hand, it could be argued that the exclusion of certain product types is not substantial enough to invalidate Regulation No 91/2009 in respect of importers such as the applicant. Even if the weighted average dumping margin for all the products under consideration was thereby set too high, the fact remains that that determination inevitably contained uncertainties because the level of cooperation in the investigation was low.

19 The referring court also asks whether, as an importer, the applicant can only successfully plead infringement of Article 2(11) of the basic regulation if it specifically imported the excluded product types and is able to plausibly argue that anti-dumping duties were imposed precisely for those imports. That might be inferred from the *Changshu* judgment. The point of departure in paragraph 20 was that, as a result of the exclusion of certain types of the product under consideration, a substantial part of the export sales of the two Chinese exporting producers were not taken into account for the calculation of their dumping margin. That demonstrated that the infringement was of considerable importance to them. If such an interest must be demonstrated, it would mean that Regulation No 91/2009 should only be declared invalid in respect of the applicant if and to the extent that it can demonstrate that anti-dumping duties were imposed on it for excluded product types.

20 In the light of the foregoing, however, the referring court expresses doubt as to whether Article 2(11) of the basic regulation has been infringed in respect of the applicant in the sense that Regulation No 91/2009 must be declared invalid and that, as a result, the anti-dumping duties were wrongfully imposed. The referring court therefore submits the first question to the Court of Justice.

Third part: fair comparison of the export price and the normal value

21 Article 2(10) of the basic regulation concerns the comparability of the normal value as established and the export price. Where these are not comparable within the meaning of that provision, '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'.

22 The referring court refers to recitals 102 to 104 of Regulation No 91/2009, which set out how that comparison was made for the products which operators in the Union obtained from Chinese exporting producers not considered to be market-oriented. This shows that, in cases that were found to be reasonable, accurate and supported by verified evidence, the Commission made adjustments for costs including the quality control procedures applied by the Indian producer, transport, insurance, handling and ancillary costs, packing, credit, and bank charges.

23 However, the Commission rejected requests from Chinese producers to take into account adjustments for cost differences related to import duties and indirect taxes on raw materials sold in the analogue country India and for differences in production costs. Since the Commission took the view during the investigation that led to the adoption of Implementing Regulation 924/2012 that it did not have to take account of those differences, it is logical to assume that they were also not taken into account in the investigation on the basis of which Regulation No 91/2009 was adopted.

24 In *Changsu*, that application of Article 2(10) of the basic regulation was already dealt with in the context of Implementing Regulation 924/2012. The second ground of that appeal corresponds in substance to the third part of the present cassation proceedings. Point 89 of the Opinion of Advocate General P. Mengozzi (EU:C:2016:928) in *Changsu* shows that, according to the second part of the second plea, the General Court had erred in not finding that the Union institutions had infringed Article 2(10) of the basic regulation by rejecting the requests of the two Chinese exporting producers for adjustments of the export prices on the basis of the differences between their production costs and those of the Indian producer, and on the basis of the differences in consumption efficiency and productivity.

25 Furthermore, it follows from that Opinion that, by the third part of the second ground of appeal, the two Chinese exporting producers concerned are challenging the General Court's assessment that the institutions of the European Union were in breach of their obligation to indicate what information was necessary in order to request adjustments. The applicant also put forward that argument (cf. paragraph 8 above).

26 In points 101 to 103 of the aforementioned Opinion, Advocate General Mengozzi set out the factors which, on the basis of Article 2(10) of the basic regulation and in the light of Article 2(7)(a) of that regulation, do not need to be taken into account. He concluded that the third part of that ground of appeal regarding the

necessity of providing sufficient information for a request for adjustments should be upheld and that the other parts should be rejected (see section D, points 88 to 122 of the Opinion). The Court of Justice did not assess the second ground of appeal in the *Changshu* judgment.

27 The referring court is of the view that a decision of the Court of Justice is necessary in order to address the third part of the first ground of appeal in the present cassation proceedings. If, contrary to the Opinion of Advocate General Mengozzi, the Court of Justice were to find that the institutions of the Union, in their investigation into the existence of dumping, had infringed Article 2(11) of the basic regulation and/or if it were to find that the institutions of the Union did not provide the cooperating Chinese exporting producers (in a timely manner) with all the data of the Indian producer regarding the determination of the normal value, the question arises whether that infringement is sufficiently serious to declare Regulation No 91/2009 invalid in respect of importers such as the applicant. The referring court therefore submits the second question to the Court of Justice.