Reports of Cases

JUDGMENT OF THE COURT (Eighth Chamber)

15 June 2017*

(Reference for a preliminary ruling — Dumping — Regulation (EC) No 1472/2006 — Imports of certain footwear with uppers of leather originating in China and Vietnam — Validity of Implementing Regulation (EU) No 1294/2009 — Expiry review of anti-dumping measures — Unrelated importers — Sampling — European Union interest)

In Case C-349/16,

REQUEST for a preliminary ruling under Article 267 TFEU from the Nederlandstalige rechtbank van eerste aanleg Brussel (Dutch-language Court of First Instance, Brussels, Belgium), made by decision of 3 June 2016, received at the Court on 24 June 2016, in the proceedings

T.KUP SAS

v

Belgische Staat,

THE COURT (Eighth Chamber),

composed of M. Vilaras (Rapporteur), President of the Chamber, M. Safjan and D. Šváby, Judges,

Advocate General: M. Szpunar,

Registrar: A. Calot Escobar,

having regard to the written procedure,

after considering the observations submitted on behalf of:

— T.KUP SAS, by A. Tallon and D. Geernaert, advocaten,

— the Belgian Government, by C. Pochet and M. Jacobs, acting as Agents,

— the Council of the European Union, by H. Marcos Fraile, acting as Agent, and by N. Tuominen, avocată,

— the European Commission, by J.-F. Brakeland and T. Maxian Rusche, acting as Agents,

having decided, after hearing the Advocate General, to proceed to judgment without an Opinion,

gives the following

* Language of the case: Dutch.

Judgment

1 This request for a preliminary ruling concerns the assessment of the validity of Council Implementing Regulation (EU) No 1294/2009 of 22 December 2009 imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in Vietnam and originating in the People's Republic of China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96 (OJ 2009 L 352, p. 1), in the light of Article 2, Article 3, Article 11(2), (5) and (9), Article 17(1) and Article 21 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2002 L 77, p. 12) ('the Basic Anti-Dumping Regulation').

2 The request has been made in proceedings between T.KUP SAS and the Belgian State concerning the reimbursement of anti-dumping duties which it paid in relation to the import of footwear from China and Vietnam.

Legal context

3 Article 6(8) of the Basic Anti-Dumping Regulation provides:

'Except in the circumstances provided for in Article 18, the information which is supplied by interested parties and upon which findings are based shall be examined for accuracy as far as possible.'

4 Article 11 of that regulation provides:

'…

(2) A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury. Such an expiry review shall be initiated on the initiative of the Commission, or upon request made by or on behalf of Community producers, and the measure shall remain in force pending the outcome of such review.

An expiry review shall be initiated where the request contains sufficient evidence that the expiry of the measures would be likely to result in a continuation or recurrence of dumping and injury. Such a likelihood may, for example, be indicated by evidence of continued dumping and injury or evidence that the removal of injury is partly or solely due to the existence of measures or evidence that the circumstances of the exporters, or market conditions, are such that they would indicate the likelihood of further injurious dumping.

In carrying out investigations under this paragraph, the exporters, importers, the representatives of the exporting country and the Community producers shall be provided with the opportunity to amplify, rebut or comment on the matters set out in the review request, and conclusions shall be reached with due account taken of all relevant and duly documented evidence presented in relation to the question as to whether the expiry of measures would be likely, or unlikely, to lead to the continuation or recurrence of dumping and injury.

A notice of impending expiry shall be published in the *Official Journal [of the European Union*] at an appropriate time in the final year of the period of application of the measures as defined in this paragraph. Thereafter, the Community producers shall, no later than three months before the end of the five-year period, be entitled to lodge a review request in accordance with the second subparagraph. A notice announcing the actual expiry of measures pursuant to this paragraph shall also be published.

…

(5) The relevant provisions of this Regulation with regard to procedures and the conduct of investigations, excluding those relating to time limits, shall apply to any review carried out pursuant to paragraphs 2, 3 and 4 of this Article. Reviews carried out pursuant to paragraphs 2 and 3 shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review. In any event, reviews pursuant to paragraphs 2 and 3 shall in all cases be concluded within 15 months of initiation. Reviews pursuant to paragraph 4 shall in all cases be concluded within nine months of the date of initiation. If a review carried out pursuant to paragraph 2 is initiated while a review under paragraph 3 is ongoing in the same proceeding, the review pursuant to paragraph 3 shall be concluded at the same time as foreseen above for the review pursuant to paragraph 2.

The Commission shall submit a proposal for action to the Council not later than one month before the expiry of the above deadlines.

If the investigation is not completed within the above deadlines, the measures shall:

— expire in investigations pursuant to paragraph 2,

— expire in the case of investigations carried out pursuant to paragraphs 2 and 3 in parallel, where either the investigation pursuant to paragraph 2 was initiated while a review under paragraph 3 was ongoing in the same proceeding or where such reviews were initiated at the same time, or

— remain unchanged in investigations pursuant to paragraphs 3 and 4.

A notice announcing the actual expiry or maintenance of the measures pursuant to this paragraph shall then be published in the *Official Journal of the European Union*.

…

(9) In all review or refund investigations carried out pursuant to this Article, the Commission shall, provided that circumstances have not changed, apply the same methodology as in the investigation which led to the duty, with due account being taken of Article 2, and in particular paragraphs 11 and 12 thereof, and of Article 17.

…’

5 According to Article 17(1) of that regulation:

‘In 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’.

6 Article 21 of that regulation provides:

‘(1) A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.

(2) In order to provide a sound basis on which the authorities can take account of all views and information in the decision as to whether or not the imposition of measures is in the Community interest, the complainants, importers and their representative associations, representative users and representative consumer organizations may, within the time limits specified in the notice of initiation of the anti-dumping investigation, make themselves known and provide information to the Commission. Such information, or appropriate summaries thereof, shall be made available to the other parties specified in this Article, and they shall be entitled to respond to such information.

(3) The parties which have acted in conformity with paragraph 2 may request a hearing. Such requests shall be granted when they are submitted within the time limits set in paragraph 2, and when they set out the reasons, in terms of the Community interest, why the parties should be heard.

(4) The parties which have acted in conformity with paragraph 2 may provide comments on the application of any provisional duties imposed. Such comments shall be received within one month of the application of such measures if they are to be taken into account and they, or appropriate summaries thereof, shall be made available to other parties who shall be entitled to respond to such comments.

(5) The Commission shall examine the information which is properly submitted and the extent to which it is representative and the results of such analysis, together with an opinion on its merits, shall be transmitted to the Advisory Committee. The balance of views expressed in the Committee shall be taken into account by the Commission in any proposal made pursuant to Article 9.

(6) The parties which have acted in conformity with paragraph 2 may request the facts and considerations on which final decisions are likely to be taken to be made available to them. Such information shall be made available to the extent possible and without prejudice to any subsequent decision taken by the Commission or the Council.

(7) Information shall only be taken into account where it is supported by actual evidence which substantiates its validity.’

7 According to recitals 12, 13, 34 to 38, 489, 490 and 502 of Regulation No 1294/2009:

‘(12) In view of the large number of exporting producers in the countries concerned, of Union producers and of importers involved in the investigation, the application of sampling was envisaged in the Notice of initiation in accordance with Article 17 of the basic [Anti-Dumping] Regulation.

(13) In order to enable the Commission to decide whether sampling would be necessary and, if so, to select a sample, exporting producers and representatives acting on their behalf, Union producers and importers were requested to make themselves known and to provide information as specified in the Notice of initiation.

…

(34) Based on the information available, 139 importers were contacted. 22 unrelated importers replied to the sampling form, out of which 21 agreed to be included in the sample. According to the data they submitted, these 21 importers accounted for 12% of imports of the product concerned from the [People's Republic of China] and 40% of those imports from Vietnam (in the [review and investigation period]).

(35) The five largest importers (Adidas, Clarks, Nike, Puma and Timberland) accounted for about 18% of the imports concerned as they all reported significant imports from both countries. It was therefore considered that a sample composed of these five companies would be representative within the meaning of Article 17(1) of the basic [Anti-Dumping] Regulation, i.e. in terms of volume of imports.

(36) However, in order to better reflect the geographical spread of importers and the differences in the types of footwear imported, three other importers were selected in addition. In this respect, from the sampling returns it appeared that many of the importers that replied operated on a much smaller scale in terms of volume and they imported less known/fashionable brand shoes or higher value shoes. The business model and traded product segments of these smaller importers appeared to be distinct from the largest importers and these smaller importers could altogether account for an important share of the imports concerned. It was therefore considered important to have these importers also represented, as these companies' economic reality might be different from those of the large importers mentioned in recital 35 above.

(37) On these grounds, a sample of eight importers including the five largest importers and three smaller importers was selected. They represented around 10% of imports from the [People's Republic of China] and around 34% of imports from Vietnam.

(38) All cooperating importers which had indicated their willingness to cooperate were given an opportunity to comment on the selection of the sample. Questionnaires were sent for completion to the sampled companies. Seven of the sampled importers replied within the given deadlines. In view of its non-cooperation, the eighth sampled importer eventually had to be excluded from the sample.

…

(489) On the other hand, the impact of the anti-dumping duties from 2006 until the [review and investigation period] on importers, retailers/distributors and consumers was not disproportionate. Should measures continue and assuming that consumer demand will further weaken in the wake of the economic crisis, the impact of the anti-dumping duties on all players will in all likelihood be higher than in the past. However, given the generally healthy state and proven flexibility of the importers and the general strong market position of retailers/distributors that can diversify their product mix considerably, it can be assumed that those operators will not disproportionately suffer in the short to medium term. As regards consumers, there was no noticeable price-increase following the imposition of the anti-dumping duties and, also taking into account the results of the post-[review and investigation period] analysis, there are no indications that consumer prices will increase disproportionately in the future.

(490) To conclude, the review investigation did not bring to light any compelling reasons why the anti-dumping measures should not be maintained.

…

(502) It was claimed that an analysis of potential benefits of discontinuation of measures to importers was missing. In this regard, it is noted that based on the wording of Article 21 of the basic anti-dumping Regulation, it has to be analysed if there are compelling reasons not to impose anti-dumping measures. In the framework of an expiry review this means that it has to be analysed if there exist compelling reasons not to maintain the measures, i.e. negative effects of a prolongation of those measures have to be identified and those effects have to be balanced against the benefits of the Union industry in order to assess if those negative effects are disproportionate. Thus, from a legal point of view, the opposite scenario, i.e. letting measures expire, would only need to be further analysed if there are specific indications in the case that this would constitute a disproportionate burden for importers, retailers or consumers. No such indications were found. However, and for the sake of the argument only, the following could be said about the likely effects on importers, retailers and consumers if measures would lapse. As regards importers, the investigation showed that a certain part of their loss of profitability from 2005 until the [review and investigation period] could be attributed to the anti-dumping duties paid. Should measures lapse and all other costs remain stable, these costs would disappear and in that respect, the profit levels might increase to a level higher than the roughly 20% found during the investigation. For retailers, it is unclear from the information on file whether they would benefit from an expiry of the measures, because the sampled importers did not always adapt their resale prices in case the import prices dropped, as it can be seen by a comparison of the arithmetic average import price and arithmetic average resale price from 2007 to the [review and investigation period].

As regards the effect on consumers, it is even more unlikely that an expiry of the measures would lead to decreasing prices, given that retail prices remained largely stable despite the price movements at import level from 2005 until the [review and investigation period]. Moreover, it is unlikely as well that consumers would benefit via an increased choice given that there is no evidence on file demonstrating that the choice for the consumers was affected by the imposition of anti-dumping duties. In any event, all this cannot alter the overall conclusions that there are no compelling reasons not to maintain the measures.'

8 Article 1(1) of Regulation No 1294/2009 provides:

'A definitive anti-dumping duty is hereby imposed on imports of footwear with uppers of leather or composition leather, excluding sports footwear, footwear involving special technology, slippers and other indoor footwear and footwear with a protective toecap, originating in the People's Republic of China and Vietnam and falling within CN codes: 6403 20 00, ex 6403 51 05, ex 6403 51 11, ex 6403 51 15, ex 6403 51 19, ex 6403 51 91, ex 6403 51 95, ex 6403 51 99, ex 6403 59 05, ex 6403 59 11, ex 6403 59 31, ex 6403 59 35, ex 6403 59 39, ex 6403 59 91, ex 6403 59 95, ex 6403 59 99, ex 6403 91 05, ex 6403 91 11, ex 6403 91 13, ex 6403 91 16, ex 6403 91 18, ex 6403 91 91, ex 6403 91 93, ex 6403 91 96, ex 6403 91 98, ex 6403 99 05, ex 6403 99 11, ex 6403 99 31, ex 6403 99 33, ex 6403 99 36, ex 6403 99 38, ex 6403 99 91, ex 6403 99 93, ex 6403 99 96, ex 6403 99 98 et ex 6405 10 00 …

…'

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

9 In the period between 28 June 2006 and 24 January 2011, T.KUP, the registered office of which is located in Toulouse (France), imported, through the Port of Antwerp, 26 consignments of shoes produced in China, purchased from the Taiwanese distributor Eastern Shoes Collection Co. Ltd, in respect of which anti-dumping duties were levied at a rate of 16.5%, in accordance with Commission Regulation (EC) No 553/2006 of 23 March 2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and

Vietnam (OJ 2006 L 98, p. 3), with Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam (OJ 2006 L 275, p. 1 and corrigendum OJ 2007 L 130, p. 48), and with Regulation No 1294/2009.

10 On 27 June 2012, T.KUP brought a request for reimbursement of anti-dumping duties thus paid before the Customs Inspectorate of Antwerp (Belgium), relying on the judgment of 2 February 2012, *Brosmann Footwear (HK) and Others* v *Council* (C-249/10 P, EU:C:2012:53).

11 On 14 September 2012, that request was the subject of a rejection decision. On 25 February 2013, T.KUP lodged an appeal against that decision before the Regional Directorate of Customs and Excise of Antwerp (Belgium). On 18 April 2013, that directorate notified T.KUP of its intention to reject its appeal.

12 On 7 June 2013, that directorate notified T.KUP that it would delay taking a decision pending a number of pilot cases.

13 On 24 October 2013, T.KUP lodged an administrative appeal challenging the failure to take a decision within the prescribed deadline, then, on 2 September 2014, brought an action before the referring court against the failure to take a decision in that administrative appeal.

14 In those circumstances, the Nederlandstalige Rechtbank van eerste aanleg Brussel (Dutch-language Court of First Instance, Brussels, Belgium) decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Is Regulation No 1294/2009 invalid in respect of an importer such as that in the present case, on the ground of infringement of Article 17(1) of the basic regulation, given that the Commission, in its review, used a sample of only eight importers, notwithstanding the fact that a manageable number of 21 importers ought to have been examined?

(2) Is Regulation No 1294/2009 invalid in respect of an importer such as that in the present dispute, on the ground of infringement of the third subparagraph of Article 11(2) of the basic regulation, given that the Commission, in its review, did not take sufficient account of the evidence supplied in that it included five large importers in the sample as against only three small importers, and in that it primarily took into account the information provided by the five large importers?

(3) Is Regulation No 1294/2009 invalid in respect of an importer such as that in the present dispute, on the ground of infringement of Articles 2 and 3 of the basic regulation and/or of Article 11(2), (5) and (9) of the basic regulation, given that the Commission, in its review, had before it inadequate information to enable it to determine that there were continued imports resulting in dumping and injury?

(4) Is Regulation No 1294/2009 invalid in respect of an importer such as that in the present dispute, on the ground of infringement of Article 21 of the basic regulation, given that the Commission, in its review, requires that there be specific indications that an importer is being disproportionately burdened by an extension?

Admissibility of the request for a preliminary ruling

15 The Council of the European Union maintained, in its written observations, that the request for a preliminary ruling had to be rejected as inadmissible, in so far as the referring court had failed to independently verify the validity of Regulation No 1294/2009, and merely reiterated the doubts expressed by T.KUP in that regard.

16 It should be noted that it follows from the spirit of cooperation which must prevail in the operation of the preliminary reference procedure that it is essential that the national court sets out in its order for reference the precise reasons why it considers a reply to its questions concerning the interpretation or validity of certain provisions of EU law to be necessary to enable it to give judgment (see judgments of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 24, and *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 47 and the case-law cited).

17 It is therefore important that the national court should set out, in particular, the precise reasons which led it to question the validity of certain provisions of EU law and set out the grounds of invalidity which, consequently, appear to it capable of being upheld. Such a requirement also arises under Article 94(c) of the Rules of Procedure of the Court (see judgments of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 25, and *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 48 and the case-law cited) and the recommendations to national courts and tribunals in relation to the initiation of preliminary ruling proceedings (OJ 2012 C 338, p. 1, paragraph 22) (see, to that effect, order of 11 January 2017, *Boudjellal*, C-508/16, not published, EU:C:2017:6, paragraph 22).

18 Furthermore, according to the Court's settled case-law, the information provided in orders for reference not only enables the Court to give useful answers but also serves to ensure that the governments of the Member States and other interested persons are given an opportunity to submit observations in accordance with Article 23 of the Statute of the Court of Justice of the European Union. It is for the Court to ensure that that opportunity is safeguarded, given that, under Article 23, only the orders for reference are notified to the interested parties, accompanied by a translation in the official language of each Member State, but excluding any case file that may be sent to the Court by the national court (see judgments of 4 May 2016, *Pillbox 38*, C-477/14, EU:C:2016:324, paragraph 26, and *Philip Morris Brands and Others*, C-547/14, EU:C:2016:325, paragraph 49 and the case-law cited).

19 It follows, admittedly briefly but nevertheless clearly, from the order for reference that the referring court examined the pleas in law by which T.KUP alleged the invalidity of Regulation No 1472/2006 and Regulation No 1294/2009. First, it rejected as unfounded the principal arguments alleging the invalidity of Regulation No 1472/2006 and consequently refused to refer to the Court for a preliminary ruling the question that T.KUP requested it to refer. By contrast and secondly, it examined the arguments relating to the invalidity of Regulation No 1294/2009 raised in the alternative and held that those arguments were not irrelevant.

20 Moreover, the Council, the European Commission as well as the Belgian Government were perfectly able to present their observations relating to the questions raised by the referring court.

21 It follows that the request for a preliminary ruling is admissible.

Substance

The first three questions

22 By its first three questions, which are connected and should be examined together, the referring court asks, in essence, whether Regulation No 1294/2009 is invalid, on the ground that the selection of the sample of importers chosen by the institutions was not sufficiently representative in the light of the requirements of the third subparagraph of Article 11(2) and Article 17(1) of the Basic Anti-Dumping Regulation, so that they did not dispose of sufficient information to allow them to conclude that dumping had taken place and therefore that injury had been caused to Union industry.

23 In that regard, it should be noted, in the first place, that, as follows from recitals 12 and 13 of Regulation No 1294/2009, it was envisaged, in the notice of initiation, to carry out sampling, in accordance with Article 17 of the Basic Anti-Dumping Regulation, in the light of the large number of exporting producers in the countries concerned, of Union producers and of importers concerned by the investigation.

24 It should be noted, in the second place, that Article 17(1) of the Basic Anti-Dumping Regulation provides for two sampling methods. The investigation may be limited either to a reasonable number of parties, products or transactions, 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 (see, to that effect, judgment of 10 September 2015, *Fliesen-Zentrum Deutschland*, C-687/13, EU:C:2015:573, paragraph 86).

25 In this case, it follows from recitals 34 to 37 of Regulation No 1294/2009 that, out of 139 importers contacted on the basis of available information and out of the 22 unrelated importers who responded to the sampling form, the Commission decided to select a sample composed of the five most important unrelated importers, namely Adidas, Clarks, Nike, Puma and Timberland, representing 18% of the imports at issue, as well as three other importers, in order to better reflect the geographical spread of importers and the differences in the types of footwear imported. That sample represented 10% of the imports from China and approximately 34% of the imports from Vietnam. Recital 38 of Regulation No 1294/2009 states, however, that only seven of the eight importers selected responded to the questionnaire which was sent to them, so that the eighth was finally excluded from the sample.

26 As the Council and the Commission pointed out in their written observations, the sample of importers was compiled on the basis of the second of the sampling methods provided for by Article 17(1) of the Basic Anti-Dumping Regulation, since the Commission relied principally on the volume of imports in order to compile the sample, by choosing to include in that sample the five main importers, as follows from recital 35 of Regulation No 1294/2009. It is, however, stated in recital 36 of that regulation that the Commission also decided to supplement that initial selection by taking into account three additional importers, in order to better reflect their geographical spread and the range of their imports.

27 It should be noted, moreover, that the Court has already held that the institutions enjoyed a broad discretion in the choice of sampling (see, to that effect, judgment of 10 September 2015, *Fliesen-Zentrum Deutschland*, C-687/13, EU:C:2015:573, paragraph 93), so that the EU Courts must, in the context of their review, restrict themselves to verifying that that choice is not based on incorrectly established facts or vitiated by a manifest error of appraisal.

28 In that regard, it must be noted that, although the number of 21 unrelated importers prepared to participate in the sample, out of a total of 139 importers contacted, does not, in absolute terms, seem to be very high, the fact remains that T.KUP has adduced no evidence capable of leading to the conclusion that, by deciding to carry out the sample, the institutions manifestly exceeded the bounds of their discretion.

29 However, it is not so much the choice to carry out sampling that T.KUP contests, but rather the selection of that sample, which it considers to be insufficiently representative.

30 In that regard, it should be noted that, in accordance with Article 17(1) of the Basic Anti-Dumping Regulation, in cases where the number of complainants, exporters or importers, of types of product or transactions is large, the composition of a sample is likely to be determined according to two alternative methods. The investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically representative on the basis of information

available at the time of the selection. It may however, at the discretion of the institutions, also be limited to the largest volume of production, sales or exports which can reasonably be investigated within the time available.

31 It follows that, where they select the second sampling method, the institutions of the Union have some discretion, relating to the prospective assessment of what it is reasonably possible for them to accomplish in the conduct of their investigation within the prescribed time-limit.

32 The reviews must, in accordance with Article 11(5) of the Basic Anti-Dumping Regulation, be carried out expeditiously and normally be concluded within 12 months of the date of their initiation, stating that the institutions are also required, under Article 6(8) of the Basic Anti-Dumping Regulation, to examine for accuracy as far as possible the information provided by the parties and upon which their findings are based.

33 In the circumstances of the main proceedings, the sample chosen by the Commission, although consisting of only eight importers, represented 10% of imports originating in China and 34% of imports originating in Vietnam, which seems significant. The Commission's assessment was based on data reflecting a third of imports originating in Vietnam. Moreover, although the rate of 10% of imports originating in China can seem low at first sight, it must be assessed in relation to the volume of Chinese exports in that field. In addition, the Council and the Commission selected the five largest importers as well as three other importers in order to better reflect their geographical spread and the range of footwear imported.

34 Finally, neither the referring court nor T.KUP adduced any evidence capable of establishing that the inclusion in the sample of other importers was essential for that sample to be regarded as being actually representative of the geographic spread of importers or of the range of footwear imported.

35 In those circumstances, it does not appear that the institutions at issue, in the context of selecting the sample of importers, breached the rules of law to which they are subject or that they exceeded the bounds of the discretion granted to them by those rules.

36 The examination of the first three questions has consequently disclosed nothing capable of affecting the validity of Regulation No 1294/2009.

The fourth question

37 By its fourth question, the referring court asks, in essence, whether Regulation No 1294/2009 is unlawful, in so far as the Commission, in breach of Article 21 of the Basic Anti-Dumping Regulation, required unrelated importers, such as T.KUP, to show, by means of stronger evidence, that the extension of anti-dumping duties constitutes a disproportionate burden for them.

38 In its written observations, T.KUP specifically claimed that recitals 406, 458 and 502 of Regulation No 1294/2009, in particular, demonstrated that, in the context of its assessment of the Union interest in the maintenance of the measures, the Commission had considered importers to be less important than producers, leading thus to unequal treatment constituting an infringement of Article 21 of the Basic Anti-Dumping Regulation.

39 In that regard, it should be noted, first of all, that the Council and the Commission examined the question of Union interest in recitals 388 to 490 of Regulation No 1294/2009 and the interest of unrelated importers in recitals 408 to 458 thereof. Those institutions stated, in recital 489 of that regulation, that the impact of the anti-dumping duties on importers, in particular, between the date of

their imposition and the review investigation period, had not been disproportionate. They concluded, in recital 490 of that regulation, that the review investigation had not brought to light any compelling reasons why the anti-dumping measures should not be maintained.

40 In addition, those institutions examined the observations presented by the parties following disclosure relating to recitals 497 to 504 of Regulation No 1294/2009.

41 The Council and the Commission in particular stated, in recital 502 of that regulation, that, in accordance with the terms of Article 21 of the Basic Anti-Dumping Regulation, they are required to examine, in the context of an expiry review, whether there are compelling reasons not to maintain the measures, and therefore to establish the negative effects of an extension of those measures and to balance those effects with the advantages of such a maintenance to Union industry, in order to assess whether those effects were disproportionate. Therefore, the opposite scenario, that is to say the examination of whether lifting the measures should be authorised, would apply only where there existed 'specific indications' in the file indicating that the maintenance of measures would constitute a 'disproportionate burden' for importers. In this case, no indication of that type has been identified. That recital states moreover that, in any event, the investigation had revealed that the loss of profitability of the importers could be attributed, in part, to anti-dumping duties paid and that if the measures were lifted, profits could exceed the level of approximately 20% established during the investigation.

42 It should be noted, next, that Article 21(1) of the Basic Anti-Dumping Regulation requires the institutions of the Union, which are called upon to determine whether it is in the Union interest to adopt or to extend anti-dumping measures, to appreciate all the interests at stake taken as a whole, including the interests of the Union industry and users and consumers, paying particular attention to the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition. Such a determination may be made only if all the parties have been given the opportunity to make their views known pursuant to Article 21(2) thereof.

43 Article 21(2) of the Basic Anti-Dumping Regulation thus provides for the right of various parties, including importers, first, to make their views known and to submit information to the Commission and, secondly, to present observations on the information submitted by the other parties. Article 21(3) of that regulation provides also for the right of all the parties, at their request, to be heard by the Commission, under certain conditions.

44 The examination of the Union interest in the adoption or maintenance of an anti-dumping measure thus constitutes a very strict procedural operation which requires a balancing of the interests of all the parties and the assessment of complex economic situations implying a limited review by the European Union judicature.

45 It is, however, not contested, in the main proceedings, that the institutions at issue respected the various procedural rights granted to the parties referred to in Article 21(2) and (3) of the Basic Anti-Dumping Regulation, including in particular the importers, allowing them to defend their interests in the context of the assessment of the Union interest in the maintenance of anti-dumping measures.

46 The referring court's fourth question, which is clarified by T.KUP's written observations, does not, however, relate to the respect for procedural requirements imposed on the institutions of the Union, but to the nature of the examination carried out by those institutions for the purpose of finding the existence of a Union interest in the maintenance of the anti-dumping measures at issue in the main proceedings and, more particularly, to the burden of proof that they impose on importers seeking to obtain recognition of their interest in having those measures lifted.

47 It should, however, be noted in that regard that, although the institutions must take all the different interests into account, by ensuring that the parties had the possibility to express their point of view, it is for those parties to adduce evidence in support of their claims. Article 21(7) of the Basic Anti-Dumping Regulation provides thus that information is only to be taken into account where it is supported by actual evidence which substantiates its validity.

48 In those circumstances, it cannot be claimed that the institutions considered, in recital 502 of Regulation No 1294/2009, that, in the absence of specific indications that the maintenance of anti-dumping measures would constitute a disproportionate burden for importers, it was not incumbent on them to examine in detail whether they had to authorise the expiry of those measures.

49 In that regard, it should be added that neither the referring court in its order for reference, nor T.KUP in its written observations, has put forward any evidence capable of establishing that the declaration of an absence of a disproportionate burden for importers was based on materially inaccurate findings.

50 It follows that the examination of the fourth question has disclosed nothing capable of affecting the validity of Regulation No 1294/2009.

Costs

51 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 (Eighth Chamber) hereby rules:

The examination of the questions referred has disclosed nothing capable of affecting the validity of Council Implementing Regulation (EU) No 1294/2009 of 22 December 2009 imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in Vietnam and originating in the People's Republic of China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96.

[Signatures]