Reports of Cases

JUDGMENT OF THE COURT (First Chamber)

18 October 2018 *

(Reference for a preliminary ruling — Common commercial policy — Definitive anti-dumping duty on imports of certain goods originating in the People's Republic of China — Anti-dumping duty held to be incompatible with the General Agreement on Tariffs and Trade by the Dispute Settlement Body of the World Trade Organisation (WTO))

In Case C-207/17,

REQUEST for a preliminary ruling under Article 267 TFEU from the Commissione tributaria di primo grado di Bolzano (Tax Court of First Instance, Bolzano, Italy), made by decision of 4 April 2017, received at the Court on 21 April 2017, in the proceedings

Rotho Blaas Srl

v

Agenzia delle Dogane e dei Monopoli,

THE COURT (First Chamber),

composed of R. Silva de Lapuerta, Vice-President, acting as President of the First Chamber, J.-C. Bonichot, E. Regan, C.G. Fernlund and S. Rodin (Rapporteur), Judges,

Advocate General: Y. Bot,

Registrar: R. Schiano, Administrator,

having regard to the written procedure and further to the hearing on 1 March 2018,

after considering the observations submitted on behalf of:

– Rotho Blaas Srl, by P. Bellante and B. Bonafini, avvocati,

– the Italian Government, by G. Palmieri, acting as Agent, and by G. Albenzio, avvocato dello Stato,

– the Council of the European Union, by H. Marcos Fraile and E. Rebasti, acting as Agents, and by N. Tuominen, lawyer,

– the European Commission, by P. Stancanelli, N. Kuplewatzky and T. Maxian Rusche, acting as Agents,

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

* Language of the case: Italian.

gives the following

Judgment

1 This request for a preliminary ruling concerns the validity of Council Regulation (EC) No 91/2009 of 26 January 2009 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China (OJ 2009 L 29, p. 1), Council Implementing Regulation (EU) No 924/2012 of 4 October 2012, amending Regulation No 91/2009 (OJ 2012 L 275, p. 1) and Commission Implementing Regulation (EU) 2015/519 of 26 March 2015 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009 (OJ 2015 L 82, p. 78) (together 'the contested regulations').

2 That request has been made in proceedings between Rotho Blaas Srl and the Agenzia delle Dogane e dei Monopoli (Customs and Monopolies Authority) ('the Customs Authority') concerning the imposition, in the context of a recalculation, of customs duties, anti-dumping duties and value added tax (VAT), plus interest and penalties for late payment, for the import of screws for wood into the European Union.

Legal context

3 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), the Council of the European Union approved the Agreement establishing the World Trade Organization signed in Marrakesh on 15 April 1994 and the agreements in Annexes 1 to 3 of that agreement ('the WTO Agreements'), including those in the General Agreement on Tariffs and Trade (OJ 1994 L 336, p. 11, 'GATT 1994') and the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (OJ 1994 L 336, p. 103, 'the WTO Anti-Dumping Agreement').

4 By Regulation No 91/2009 the Council imposed a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in China.

5 On 28 July 2011, the Dispute Settlement Body of the WTO ('DSB') adopted an Appellate Body report and a special group report as modified by the Appellate Body report on the case 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China' ('WT/DS 397). Those reports stated, in particular, that the EU had acted in a manner incompatible with certain provisions of the WTO Anti-Dumping Agreement.

6 Following the DSB's decision of 28 July 2011, the Council adopted Implementing Regulation No 924/2012, on 4 October 2012, which amended Regulation No 91/2009 by reducing the rate of the anti-dumping duty provided for by the latter regulation.

7 By Council Implementing Regulation (EU) No 723/2011 of 18 July 2011 extending the definitive anti-dumping duty imposed by Regulation (EC) No 91/2009 on imports of certain iron or steel fasteners originating in the People's Republic of China to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not (OJ 2011 L 194, p. 6), as amended by Council Implementing Regulation (EU) No 693/2012 of 25 July 2012 (OJ 2012 L 203, p. 23), the anti-dumping measures were extended to imports of certain iron or steel fasteners sent from Malaysia, whether or not they were declared as originating in that country.

8 Following an expiry review of measures taken in accordance with Article 11(2) of Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51), the Commission, by Implementing Regulation 2015/519, maintained for another five years the anti-dumping duty as imposed and amended by Regulation No 91/2009 and Implementing Regulation No 924/2012 respectively.

9 By a decision of 12 February 2016, the DSB adopted new reports establishing non-compliance of the measures taken by the EU by means of Implementing Regulation No 924/2012 with certain provisions of the WTO Anti-Dumping Agreement ('the DSB decision of 12 February 2016').

10 On 26 February 2016, following the DSB decision of 12 February 2016, the Commission adopted Implementing Regulation (EU) 2016/278 repealing the definitive anti-dumping duty imposed on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not (OJ 2016 L 52, p. 24, 'the repealing regulation').

11 Article 1 of that regulation repeals the anti-dumping duties imposed by the contested regulation.

12 Under Article 2 of that regulation, the repeal of the anti-dumping duties referred to in Article 1 thereof are to take effect from the date of the entry into force of that regulation, as provided for in Article 3 of that regulation, and are not to serve as a basis for the reimbursement of the duties collected prior to that date.

13 The repealing regulation was adopted on the basis of Regulation (EU) 2015/476 of the European Parliament and of the Council of 11 March 2015 on the measures that the Union may take following a report adopted by the WTO Dispute Settlement Body concerning anti-dumping and anti-subsidy matters (OJ 2015 L 83, p. 6).

14 Article 1(1) of that regulation provides that, whenever the DSB adopts a report concerning a Union measure taken pursuant to its anti-dumping legislation, the Commission may repeal or amend the measure complained of, whichever it considers appropriate in that case.

15 Article 3 thereof expressly provides that 'any measures adopted pursuant to this Regulation shall take effect from the date of their entry into force and shall not serve as a basis for the reimbursement of the duties collected prior to that date, unless otherwise provided for'.

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

16 Rotho Blaas is a company with its registered office in Bolzano (Italy) and carries on business in the manufacture and marketing of advanced technology applicable to timber constructions.

17 Between 8 September 2011 and 28 February 2014, Rotho Blaas submitted to several Italian customs offices a large number of customs declarations relating to the final import from Thailand of screws for wood, producing certificates of origin issue by the Thai authorities.

18 On the basis of information received by the European Anti-Fraud Office (OLAF) relating to fraudulent import operations, in particular from Thailand, the Customs Office Bolzano carried out post-clearance controls of imports by Rotho Blaas and held that, contrary to the relevant certificates of origin, 75% of the goods imported were in fact of Chinese origin and that exemptions from customs duties had been improperly applied to the goods concerned.

19 Therefore, by an amending notice of assessment of 14 October 2016, the Customs Authority ordered Rotho Blaas to pay customs duties, anti-dumping duties and VAT, plus interest and penalties for late payment.

20 Rotho Blaas brought an action for annulment against that decision before the referring court, pleading the invalidity *ex tunc* of the contested regulations in the light of the EU's obligations under the WTO Anti-Dumping Agreement and, in particular, of the DSB decision of 12 February 2016, by which the non-conformity of the anti-dumping measures imposed by those regulations with that agreement had been confirmed.

21 In that connection, Rotho Blaas points out that following that decision the Commission repealed the anti-dumping duties imposed and amended by the contested regulations by the repealing regulation. However, it is exclusively for the Court to declare EU acts, such as those regulations, invalid.

22 Before the referring court, the Customs Authority submits that, contrary to Rotho Blaas' arguments, as a general rule, EU regulations only have effect *ex nunc* and not *ex tunc*. To allow the repealing regulation to repeal acts with retroactive effect would undermine the effectiveness of the regulations concerned.

23 Therefore, the referring court considers that it is necessary to ask the Court, first, about the validity of the contested regulations in the light of the DSB's decisions of 28 July 2011 and 12 February 2016 which established the incompatibility of the anti-dumping measures imposed and amended by those regulations with the WTO Anti-Dumping Agreement and the GATT 1994.

24 Second, if the contested regulations are held to be invalid, the question arises as to whether that invalidity has *ex tunc* effect, that is to say from the date of entry into force of the contested regulations or, to the contrary, *ex nunc* effect, so that the repeal of those regulations would take effect only from the entry into force of the repealing regulation.

25 In those circumstances, the Commissione tributaria di primo grado di Bolzano (Tax Court of First Instance, Bolzano, Italy), decided to stay the proceedings and to refer the following questions to the Court of Justice for a preliminary ruling:

'(1) Are [Regulation No 91/2009], [Implementing Regulation No 924/2012], and [Implementing Regulation 2015/519] invalid or illegal in the light of Article VI of the GATT of 1994 and the decision of the WTO DSB of 28 July 2011 or are they incompatible with that article or that decision?

(2) If [Regulation No 91/2009] and related implementing regulations Nos 924/2012 and 2015/519 are declared invalid, does the repeal of the anti-dumping duties imposed on the basis of the contested measures produce legal effects from the time the repealing regulation enters into force, or from the date on which the contested measure, that is to say, Regulation No 91/2009, entered into force?'

Consideration of the questions referred

The first question

Admissibility

26 In its observations submitted to the Court, the Italian Government expresses doubts as to whether Rotho Blaas is entitled to plead the invalidity of the contested regulations before the referring court and, as a consequence, as to the admissibility of the first question, given that that company could perfectly well, within the meaning of the case-law deriving from the judgment of 9 March 1994 *TWD Textilwerke Deggendorf* (C-188/92, EU:C:1994:90), have brought an action for annulment of those regulations before the EU judicature pursuant to Article 263, fourth paragraph, TFEU.

27 Rotho Blaas observes that it could not have challenged the legality of the contested regulations itself, since a regulation, by its nature, cannot in fact or in law be challenged by means of an individual action to have it annulled, unless that individual establishes that the contested regulation concerns him individually and directly so that it places him in a different position from operators in general (judgment of 15 July 1963, *Plaumann* v *Commission*, 25/62, EU:C:1963:17).

28 In that regard, it is settled case-law that the general principle which guarantees any litigant the right to plead, in an action brought against a national measure which adversely affects him, that the EU act forming the basis for that measure is invalid does not preclude such a right from being subject to the condition that the person concerned did not have the right to request the EU judicature directly to annul it, under Article 263 TFEU. However, it is only if it may be considered that a person has, beyond any doubt, the right to seek the annulment of the act concerned, that that person is prevented from pleading its invalidity before the national court with jurisdiction (see, to that effect, judgments of 9 March 1994, *TWD Textilwerke Deggendorf*, C-188/92, EU:C:1994:90, paragraph 23; of 18 September 2014, *Valimar*, C-374/12, EU:C:2014:2231, paragraphs 28 and 29; and of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 18).

29 In that context, it must be recalled at the outset that the admissibility of an action brought by a natural or legal person against an act which is not addressed to him, in accordance with the fourth paragraph of Article 263 TFEU, is subject to the condition that he is accorded standing to bring proceedings, which arises in two situations. First, such proceedings may be instituted if the act is of direct and individual concern to that person. Second, he may bring proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to him (see, in particular, judgments of 17 September 2015, *Mory and Others* v *Commission*, C-33/14 P, EU:C:2015:609, paragraphs 59 and 91, and of 13 March 2018, *Industria Químicas del Vallés* v *Commission*, C-244/16 P, EU:C:2018:177, paragraph 39).

30 First, it is therefore only if it were to be established that a legal person such as Rotho Blaas was, beyond any doubt, directly and individually concerned by the contested regulations, within the meaning of Article 263 TFEU, fourth paragraph, that he would be prevented from pleading before the referring court that those regulations are invalid (judgment of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74, paragraph 57).

31 In that connection, it must be observed that the regulations imposing anti-dumping duties, such as the contested regulations, are normative, in that they apply to all the interested economic operators (see, to that effect, judgments of 21 February 1984, *Allied Corporation and Others* v *Commission*, 239/82 and 275/82, EU:C:1984:68, paragraph 11, and of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 18).

32 However, it follows from the case-law that a regulation imposing an anti-dumping duty may individually concern several types of economic operators, without prejudice to the possibility that other traders are individually concerned by reason of certain attributes which are peculiar to them and which differentiate them from all other persons (see, to that effect, judgments of 16 May 1991, *Extramet Industrie* v *Council*, C-358/89, EU:C:1991:214, paragraph 16, and of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 22).

33 First, those of the producers and exporters of the product in question which have been charged with practising dumping on the basis of information relating to their business activities may be individually concerned (judgment of 18 September 2014, *Valimar*, C-374/12, EU:C:2014:2231, paragraph 30 and the case-law cited).

34 Secondly, that may also be so in the case of importers of that product whose resale prices were taken into account for the construction of export prices and which are consequently concerned by the findings relating to the existence of dumping (judgments of 14 March 1990, *Nashua Corporation and Others* v *Commission and Council*, C-133/87 and C-150/87, EU:C:1990:115, paragraph 15; of 14 March 1990, *Gestetner Holdings* v *Council and Commission*, C-156/87, EU:C:1990:116, paragraph 18; and of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 20).

35 Thirdly, that may further be so in the case of importers associated with exporters of the product in question, particularly where the export price has been calculated on the basis of those importers' resale prices on the Union market and where the anti-dumping duty itself has been calculated on the basis of those resale prices (judgments of 11 July 1990, *Neotype Techmashexport* v *Commission and Council*, C-305/86 and C-160/87, EU:C:1990:295, paragraphs 19 and 20, and of 16 April 2015, *TMK Europe*, C-143/14, EU:C:2015:236, paragraph 21).

36 There is no evidence in the present case that the contested regulations were adopted taking into account the individual situation of Rotho Blaas in the same way as one of the categories of economic operators identified in paragraphs 33 to 35 of the present judgment or that it is affected by those regulations for other reasons in a manner which distinguishes it from other importers of goods subject to the anti-dumping measures concerned.

37 It follows that it cannot be held that Rotho Blaas was, beyond any doubt, individually concerned by those regulations within the meaning of Article 263, fourth paragraph, TFEU.

38 Second, as regards the question whether Rotho Blaas could clearly have brought an action under the final limb of the fourth paragraph of Article 263 TFEU against the contested regulations in so far as they constitute regulatory acts which directly concern it and which do not entail implementing measures, within the meaning of that provision, it must be observed that it is by virtue of acts adopted by the competent national authorities that the payment of anti-dumping duties imposed by the contested regulations is imposed on the operators concerned, such as Rotho Blaas in the main proceedings.

39 Therefore, it cannot be held that the contested regulations manifestly do not entail implementing measures for the purposes of the final limb of the fourth paragraph of Article 263 TFEU.

40 Having regard to the foregoing, for the purposes of the case-law set out in paragraph 29 above, it cannot be held that Rotho Blaas could, beyond any doubt, have sought the annulment of the contested regulations under Article 263, fourth paragraph, TFEU, so that it would be prevented from pleading the invalidity of those regulations before the referring court.

41 It follows that the first question referred for a preliminary ruling is admissible.

Substance

42 By its first question, the referring court asks essentially whether the contested regulations are invalid in the light of Article VI of the GATT 1994 and the DSB decision of 28 July 2011.

43 As a preliminary point, it must be recalled that the provisions of an international treaty to which the European Union is a party can be invoked in support of an action for the annulment of an act of EU secondary law or a plea that such an act is unlawful only where the nature and broad logic of the treaty in question do not preclude this and where the treaty's provisions appear, as regards their content, to be unconditional and sufficiently precise (see, in particular, judgment of 13 January 2015, *Council and Others* v *Vereniging Milieudefensie and Stichting Stop Luxhtverontreiniging Utrecht*, C-401/12 P to C-403/12 P. It is therefore only when both those conditions are met that such provisions may be relied upon before the EU judicature as a criterion in order to assess the legality of an EU act.

44 As regards the WTO agreements, it is clear from settled case-law that, taking account of their nature and structure, they are not in principle among the rules in the light of which the Court is to review the legality of measures adopted by the EU institutions (see, in particular, judgments of 23 November 1999, *Portugal* v *Council*, C-149/96, EU:C:1999:574, paragraph 47; of 1 March 2005, *Van Parys*, C-377/02, EU:C:2005:121, paragraph 39; and of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74. paragraph 85).

45 In that regard, the Court has held, in particular, that to accept that the courts of the European Union have the direct responsibility for ensuring that EU law complies with the WTO rules would deprive the European Union's legislative or executive bodies of the discretion which the equivalent bodies of the European Union's commercial partners enjoy. It is not in dispute that some of the contracting parties, which are amongst the most important commercial partners of the European Union, have concluded from the subject matter and purpose of the WTO agreements that they are not among the rules applicable by their courts when reviewing the legality of their rules of domestic law. Such lack of reciprocity, if admitted, would risk introducing an anomaly in the application of the WTO rules (see, in particular, judgments of 23 November 1999, *Portugal* v *Council*, C-149/96, EU:C:1999:574, paragraphs 43 to 46; of 9 September 2008, *FIAMM and Others* v *Council and Commission*, C-120/06 P and C-121/06 P, EU:C:2008:476, paragraph 119; and of 18 December 2014, *LVP*, C-306/13, EU:C:2014, 2465, paragraph 46).

46 More particularly, the Court has had occasion to state that the possibility for an economic operator to argue before the courts of the European Union that EU legislation is incompatible with a decision of the DSB such as, in the present case, the DSB's decision of 28 July 2011, cannot be accepted. The recommendations or decisions of the DSB finding that the WTO rules have not been complied with cannot, in principle and whatever their legal scope, be fundamentally distinguished from the substantive rules reflecting the obligations agreed to by a member within the framework of the WTO. Therefore, a recommendation or decision of the DSB finding that those rules have not been complied with cannot in principle, any more than the substantive rules contained in the WTO agreements, be relied on before the EU judicature in order to determine whether an EU regulation is incompatible with that recommendation or decision (judgment of 10 November 2011, *X and X BV*, C-319/10 and C-320/10, not published, EU:C:2011:720, paragraph 37 and the case-law cited).

47 It is only in two exceptional situations, which are the result of the EU legislature's own intention to limit its discretion in the application of the WTO rules, that the Court has accepted that it is for the Courts of the European Union, if necessary, to review the legality of an EU measure and of the measures adopted for its application in the light of the WTO agreements or a decision of the DSB establishing non-compliance with those agreements (see, to that effect, judgment of 16 July 2015, *Commission* v *Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraph 40).

48 The first such situation is where the European Union intends to implement a particular obligation assumed in the context of those WTO agreements and the second is where the EU act at issue refers explicitly to specific provisions of those agreements (judgment of 16 July 2015, *Commission* v *Rusal Armenal*, C-21/14 P, EU:C:2015:494, paragraph 41 and the case-law cited).

49 Therefore, it is in the light of those criteria that it must be determined in the present case whether the validity of the contested regulations may be examined having regard to Article VI of the GATT 1994 and the DSB decision of 28 July 2011.

50 First of all, as regards Regulation No 91/2009, at issue in the main proceedings, it must be observed that that act does not expressly refer to the specific provisions of Article VI of the GATT 1994, and there is no evidence that, by adopting that regulation, the Council intended to implement a specific obligation assumed under that agreement or, more generally, the WTO agreements.

51 In so far as the referring court asks, more specifically, about the validity of the regulation in the light of the DSB decision of 28 July 2011, it suffices to state that that decision was adopted subsequently and therefore cannot constitute the legal basis for the regulation.

52 Finally, as regards Implementing Regulations No 924/2012 and 2015/519, although those regulations reflect, to some extent, the intention of the EU to act on the DSB's decision of 28 July 2011, having regard to the exceptional nature of the situations which allow a review of legality in the light of the WTO rules, as set out in paragraph 47 of the present judgment, it is not sufficient to hold that, by adopting those regulations, the EU intended to implement a specific obligation assumed within the framework of the WTO, which may justify an exception to the principle that WTO rules cannot be relied upon before the courts of the European Union and enabling those courts to review the legality of the EU provisions at issue having regard to those rules (see, to that effect, judgments of 1 March 2005, *Van Parys*, C-377/02, EU:C:2005:121, paragraphs 42 to 48, and of 4 February 2016, *C & J Clark International and Puma*, C-659/13 and C-34/14, EU:C:2016:74, paragraphs 93 to 98).

53 Implementing Regulation 2015/519 merely confirms for an additional five years the imposition of the anti-dumping duty after a review investigation of that duty before its expiry without mentioning the DSB decision of 28 July 2011. Furthermore, it does not specifically mention the obligations arising from the WTO rules.

54 Finally, as to Implementing Regulation No 924/2012, it is true that certain recitals in that regulation refer to that decision by mentioning the findings set out therein. However, there is no evidence of the intention of the EU to comply specifically with those findings other than to carry out, in the light of those findings, a re-examination of the anti-dumping duties concerned, while keeping its margin of discretion in the application of the relevant WTO rules.

55 Moreover, it is in same vein that that regulation refers in a general manner to the WTO Anti-Dumping Agreement.

56 In those circumstances, it cannot be held that the legality of the contested regulations may be determined in the light of Article VI of the GATT 1994 or in the light of the DSB decision of 28 July 2011.

57 Therefore, it must be held that examination of the first question has disclosed no factor of such a kind as to affect the validity of the contested regulations.

The second question

58 Since the second question was referred if the contested regulations were invalid, there is no need to answer it.

Costs

59 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 (First Chamber) hereby rules:

Examination of the first question has disclosed no factor of such a kind as to affect the validity of Council Regulation (EC) No 91/2009 of 26 January 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 Regulation No 91/2009, and Commission Implementing Regulation (EU) 2015/519 of 26 March 2015 imposing a definitive anti-dumping duty on imports of certain iron or steel fasteners originating in the People's Republic of China, as extended to imports of certain iron or steel fasteners consigned from Malaysia, whether declared as originating in Malaysia or not, following an expiry review pursuant to Article 11(2) of Regulation (EC) No 1225/2009.

[Signatures]