Reports of Cases

OPINION OF ADVOCATE GENERAL
CRUZ VILLALÓN
delivered on 27 February 2014[1]

Case C-374/12

'Valimar' OOD
v
Nachalnik na Mitnitsa Varna
(Request for a preliminary ruling

from the Varhoven administrativen sad (Bulgaria))

(Common commercial policy — Dumping — Regulation (EC) No 384/96 — Iron or steel ropes and cables originating in Russia — Regulation (EC) No 1601/2001 — Price undertakings — Interim review — Expiry review — Regulation (EC) No 1279/2007 — Determination of the export price — Reliability of export prices to the European Community — Consideration of price undertakings — Change in circumstances — Application of a method different from that used at the time of the original investigation — Assessment of validity)

1. In the present case, the Court has before it, primarily, a request for a preliminary ruling on the validity of Council Regulation (EC) No 1279/2007 of 30 October 2007 imposing a definitive anti-dumping duty on certain iron or steel ropes and cables originating in the Russian Federation, and repealing the anti-dumping measures on imports of certain iron or steel ropes and cables originating in Thailand and Turkey.[2]

2. The question of validity essentially depends on the interpretation of Article 11(9) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community,[3] a provision which the Court has only rarely had occasion to interpret and apply,[4] unlike the General Court.[5]

1 — Original language: French.

2 — OJ 2007 L 285, p. 1, and corrigendum OJ 2009 L 96, p. 39. See, on this regulation, Case T-369/08 *EWRIA and Others* v *Commission* [2010] ECR II-6283.

3 — OJ 1996 L 56, p. 1, 'the basic regulation'.

4 — See Case C-15/12 P *Dashiqiao Sanqiang Refractory Materials* v *Council and Commission* [2013] ECR.

5 — In its judgment of 8 July 2008 in Case T-221/05 *Huvis* v *Council*, paragraphs 38 to 60, the General Court annulled a regulation imposing a definitive anti-dumping duty on the ground that the institutions had infringed Article 11(9) of the basic regulation as they had not demonstrated that the change in the method of comparing the export price and the normal value used at the time of the original investigation and the review was justified by the existence of a change in circumstances. By its judgment in Case T-143/06 *MTZ Polyfilms* v *Council* [2009] ECR II-4133, the General Court annulled a regulation terminating the review of an anti-dumping measure in so far as the institutions had determined the export prices in it by departing from the method laid down by Article 2(8) and (9) of the basic regulation without mentioning any change in circumstances within the meaning of Article 11(9) of that regulation. See also, on that provision, Case T-132/01 *Euroalliages and Others* v *Commission* [2003] ECR II-2359, paragraphs 39 to 44; Case T-299/05 *Shanghai Excell M&E Enterprise and Shanghai Adeptech Precision* v *Council* [2009] ECR II-565, paragraphs 176 to 178; Case T-423/09 *Dashiqiao Sanqiang Refractory Materials* v *Council* [2011] ECR II-8369, paragraphs 54 to 65; and Case T-118/10 *Acron* v *Council* [2013] ECR. This case is the subject-matter of an appeal, Case C-216/13 *Acron* v *Council*, which is pending before the Court.

3. The Court is, more specifically, called upon to answer the question to what extent the EU institutions, when reviewing an anti-dumping measure imposed on an export undertaking, may use a 'methodology' for determining its export prices which is different from that used in the regulation establishing the initial measure, and therefore to define what is covered by the 'change in circumstances' referred to in Article 11(9) of the basic regulation.

I – **Legal framework**

A – *International law*

4. The Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994,[6] which is contained in Annex 1A to the Agreement establishing the World Trade Organisation, signed in Marrakesh on 15 April 1994, was approved 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).[7]

5. Since the aim of the basic regulation was, as is clear from recital 5 in the preamble thereto, in particular, to transpose, as far as possible, the new, detailed rules contained in the 1994 Anti-dumping Code into EU law,[8] the provisions of the latter relevant to the resolution of the dispute in the main proceedings will be cited, as appropriate, in the course of the following reasoning.

B – *EU law*

1. The basic regulation

6. The basic regulation was applicable on the date of the facts in the main proceedings,[9] the relevant principal provisions being Article 2(8) and (9) and Article 11(3) and (9).

7. Article 2(8) and (9) of the basic regulation provided:

'8. The export price shall be the price actually paid or payable for the product when sold for export from the exporting country to the Community.

9. In cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.

…'

6 — OJ 1994 L 336, p. 103, 'the 1994 Anti-dumping Code'.

7 — OJ 1994 L 336, p. 1.

8 — See in particular Case C-76/00 P *Petrotub and Republica* [2003] ECR I-79, paragraph 56.

9 — This regulation has since been replaced by 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 and corrigendum OJ 2010 L 7, p. 22). The principal provisions of the basic regulation at issue in this case have remained unchanged in the new regulation.

8. Article 11(9) of the basic regulation provided:

'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.'

9. The other relevant provisions of the basic regulation will be cited, as appropriate, in the course of the following reasoning.

2. The initial anti-dumping regulation and the decision accepting price undertakings

10. On 2 August 2001, the Council of the European Union adopted Regulation (EC) No 1601/2001 imposing a definitive anti-dumping duty and definitively collecting the provisional anti-dumping duty imposed on imports of certain iron or steel ropes and cables originating in the Czech Republic, Russia, Thailand and Turkey.[10] Under Article 1(2) thereof, an anti-dumping duty at the rate of 50.7% was applied to imports of certain iron or steel ropes and cables originating in Russia.

11. Recital 87 in the preamble to Regulation No 1601/2001 states that, in the absence of any new information on export price, the provisional findings as described in recital 107 of the provisional regulation[11] are confirmed. Recital 107 stated that, for the cooperating exporting producer, the export price was established by reference to the prices paid or payable.

12. On 26 July 2001, the Commission adopted Decision 2001/602/EC accepting undertakings offered in connection with the anti-dumping proceeding concerning imports of certain iron or steel ropes and cables originating in the Czech Republic, the Republic of Korea, Malaysia, Russia, Thailand and Turkey and terminating the proceeding in respect of imports originating in the Republic of Korea and Malaysia.[12] Article 1 of that decision states that the price undertakings offered by, among others, Cherepovetsky Staleprokatny Zavod OAO, a public limited liability company,[13] are accepted.

3. The regulation reviewing the initial anti-dumping duties and the decision repealing the decision accepting the price undertakings

13. In 2004, ChSPZ requested a partial interim review under Article 11(3) of the basic regulation.[14]

14. On 10 August 2004, the Commission initiated the review proceeding requested.[15]

15. On 1 January 2006, ChSPZ became the Closed Joint Stock Company Severstal-Metiz,[16] with a registered office in Cherepovets (Russian Federation), after its merger with the Open Joint Stock Company Orlovsky Staleprokatny Zavod and SSM.[17]

10 — OJ 2001 L 211, p. 1.

11 — Commission Regulation (EC) No 230/2001 of 2 February 2001 imposing a provisional anti-dumping duty on certain iron or steel ropes and cables originating in the Czech Republic, Russia Thailand and Turkey and accepting undertakings offered by certain exporters in the Czech Republic and Turkey (OJ 2001 L 34, p. 4).

12 — OJ 2001 L 211, p. 47.

13 — 'ChSPZ.'

14 — See recitals 4 to 7 in the preamble to Regulation No 1279/2007.

15 — See notice of initiation of a partial interim review of the anti-dumping measures applicable to imports of certain iron or steel ropes and cables originating in Russia (OJ 2004 C 202, p. 12).

16 — 'SSM.'

17 — See notice concerning the anti-dumping measures in force in respect of imports into the Community of certain iron or steel ropes and cables originating, inter alia, in Russia: change of the name of a company from which an undertaking was accepted (OJ 2006 C 51, p. 2).

16. On 3 August 2006, the Commission also initiated an expiry review of anti-dumping measures established by Council Regulation (EC) No 1601/2001. [18]

17. On 30 October 2007, the Council adopted Regulation (EC) No 1279/2007 terminating both the expiry review and the partial interim review requested by SSM, among others. Under Article 1(2) of that regulation, imports into the European Union of certain iron or steel ropes or cables manufactured by SSM were subject to a definitive anti-dumping duty at the rate of 9.7%. That regulation also states that the price undertakings offered, in particular, by SSM following definitive disclosure were not acceptable undertakings within the meaning of Article 8(2) of the basic regulation. [19]

18. The principle recitals in the preamble to Regulation No 1279/2007 relevant to the resolution of the dispute in the main proceedings on the determination of SSM's export prices will be reproduced as necessary in the following reasoning.

19. By decision of the same date, the Commission repealed Decision 2001/602 accepting SSM's price undertakings. [20]

C – *Bulgarian law*

20. Article 214 of the Zakon na Mitnitsite (Bulgarian Customs Law), 'ZM', governing the repayment of customs duties, provides:

'(1) The refund of customs duties shall consist in the full or partial repayment of the import or export duties paid.

(2) Repayment shall take place if it is found that the duties were not payable at the date of payment or the reason for paying them no longer existed.'

II – **Facts giving rise to the dispute in the main proceedings**

21. 'Valimar' OOD [21] is a Bulgarian company whose business consists mainly in the importation of and trading in wires, cables, ropes and similar steel goods from various countries, including those produced by SSM.

22. On the introduction into Bulgaria (on an unknown date), under the procedure for release into free circulation for their end-use of stainless steel ropes and cables originating in Russia and exported by SSM, Valimar had to pay, pursuant to Regulation No 1279/2007, a definitive anti-dumping duty of 9.7% amounting to a total of BGN 2117.01.

18 — Notice of initiation of an expiry review of the anti-dumping measures applicable to imports of certain iron or steel ropes and cables originating in Russia, Thailand and Turkey and a partial interim review of the anti-dumping measures applicable to imports of certain iron or steel ropes and cables originating in Turkey (OJ 2006 C 181, p. 15).

19 — See recital 202 in the preamble to Regulation No 1279/2007.

20 — Commission Decision 2007/704/EC of 30 October 2007 repealing Decision 2001/602/EC (OJ 2007 L 285, p. 52).

21 — 'Valimar.'

23. On 25 January 2011, Valimar filed an application with the Teritorialno Mitnichesko upravlenie Varna (Customs Administration Varna) for a declaration that the anti-dumping duties were not payable within the meaning of Article 214 of the ZM and Article 236 of Council Regulation (EEC) No 2913/92 of 12 October 1992 establishing the Community Customs Code.[22] It argued that Regulation No 1279/2007 was invalid and that the anti-dumping duties which it had paid should be refunded.

24. By decision of 24 February 2011, the Nachalnik na Mitnitsa Varna (Director of Customs Office, Varna) rejected the application as unfounded and devoid of purpose. That decision was upheld by decision of the Director of the Customs Agency of 12 April 2011.

25. By judgment of 8 November 2011, the Administrativen sad Varna (Administrative Court, Varna) dismissed the action brought before it by Valimar against the decision of 24 February 2011.

26. Consequently, Valimar lodged an appeal on a point of law with the Varhoven administrativen sad (Supreme Administrative Court), submitting, in particular, that Regulation No 1279/2007 was invalid in so far as it had, in particular, been adopted contrary to Article 11(9) of the basic regulation, read in conjunction with Article 2(8) thereof. In fact, the Council had used a different method from that used in Regulation No 1601/2001 imposing the initial anti-dumping duty to determine the SSM export prices without justifying that difference by a change in circumstances within the meaning of Article 11(9) of the basic regulation.

III – **Questions referred for a preliminary ruling and procedure before the Court of Justice**

27. In those circumstances, the Varhoven administrativen sad decided to stay the proceedings and refer the following questions to the Court of Justice for a preliminary ruling:

‘(1) Is Article 11(9) and the first sentence of Article 11(10) of [the basic regulation] in conjunction with Article 2(8) and (9) of that regulation to be interpreted as meaning that, if no change in circumstances is proved for the purpose of Article 11(9), those provisions take precedence over any implicit powers of the institutions arising from Article 11(3) of the basic regulation for determining the export price, including — as in the case of … Regulation … No 1279/2007 — the implicit power of the institutions to assess the reliability of the export prices of [SSM] in the future by making a comparison with the minimum prices according to the price undertaking and the selling prices in third countries? Is the reply to that question affected if, as in the case of [SSM] and … Regulation … No 1279/2007, the institutions decide, when exercising their powers in connection with assessing the stability of the change in circumstances regarding the existence of dumping in accordance with Article 11(3) of the basic regulation, to vary the anti-dumping measure (reduce the duty rate)?

(2) Does it follow from the reply to the first question that, in the circumstances which are described in the part of Council Regulation … No 1279/2007 relating to the determination of the export price of [SSM], and in view of the fact that in that regulation a change [of circumstances] for the purpose of Article 11(9) of the basic regulation was not expressly proved which would justify the application of a new methodology, the Commission ought to have applied the method for determining the export price which was used in the context of the original investigation, in the present case in accordance with Article 2(8) of the basic regulation?

(3) Taking into consideration the replies to the first and second questions: Was that part of Council Regulation … No 1279/2007 which concerns the determination and imposition of individual anti-dumping measures in relation to imports of steel ropes and cables manufactured by [SSM]

22 — OJ 1992 L 302, p. 1.

adopted contrary to Article 11(9) and (10) in conjunction with Article 2(8) of the basic regulation or on an invalid legal basis and, as such, is Council Regulation (EC) No 1279/2007 to be regarded as invalid in that part?'

28. The defendant in the main proceedings, the Bulgarian Government, the Council and the Commission submitted written observations. Valimar, the defendant in the main proceedings, the Bulgarian Government, the Council and the Commission also presented oral argument at the public hearing held on 13 November 2013.

IV – **The admissibility of the request for a preliminary ruling**

29. The defendant in the main proceedings and the Bulgarian Government claim that the request for a preliminary ruling is inadmissible in accordance with the *TWD Textilwerke Deggendorf* case-law.[23] Valimar, as the sole importer from SSM, is directly and individually concerned by Regulation No 1279/2007 within the meaning of the fourth paragraph of Article 230 EC, with the result that it should have directly contested the validity of that regulation by bringing an application for annulment of that measure within the period laid down by the fifth paragraph of Article 230 EC. However, the referring court ruled otherwise, stating in particular that Valimar was an independent importer unrelated to SSM and that it had not participated in the procedure to adopt that regulation. Neither the Council nor the Commission objected that the request for a preliminary ruling was inadmissible.

30. During the hearing, Valimar stated, first, that, although it imported SSM products, among others, into Bulgaria, it could not be considered, as such, as its commercial representative or as having concluded a sole distributorship contract with it. It further stated that, on the date of initiation of the review proceeding,[24] the Republic of Bulgaria was not yet a member of the European Union[25] and was not importing the products in question, so that it could not be regarded as having *locus standi* to bring an action against Regulation No 1279/2007 on the date of its adoption.

31. It follows from the judgment in *TWD Textilwerke Deggendorf* that a natural or legal person who pleads, by way of an objection, the unlawfulness of an EU act must be declared time-barred where it could have contested that act by way of a direct action for annulment under Article 263 TFEU and failed to do so within the period laid down in that provision. A request for an assessment of validity made in such a context must therefore be declared inadmissible.

23 — Case C-188/92 [1994] ECR I-833.

24 — It took place, in fact, on 10 August 2004.

25 — The Treaty of Accession of the Republic of Bulgaria to the European Union, signed in Luxembourg on 25 April 2005, entered into force under Article 4 thereof on 1 January 2007 (OJ 2005 L 157, p. 11), at the same time as the Act concerning the conditions of accession of the Republic of Bulgaria and Romania and the adjustments to the Treaties on which the European Union is founded (OJ 2005 L 157, p. 203).

32. However, it is also apparent from the Court's case-law that this 'parallel action objection' can be put forward against a natural or legal person [26] only on condition that it is 'self-evident' [27] that it would have been admissible in a direct action for annulment or in so far as it is established that it could 'undoubtedly' have brought such an action for annulment [28] or that it had an unquestionable or indisputable [29] right to bring such an action for annulment and had been informed of it. [30]

33. The Court held in this regard that an import undertaking which was associated with an undertaking subject to an anti-dumping duty whose resale prices for the goods in question were used to construct the export price applied by the regulation imposing that duty had to be regarded as being directly and individually concerned by that regulation and 'undoubtedly' had a right of action before the courts of the European Union. [31]

34. However, Valimar, as is clear both from its oral submissions and from the statements of the referring court, is not associated with SSM, and its resale prices were not used to determine SSM's export prices, so that it cannot be regarded as being in a situation similar to that of the undertaking in question in *Nachi Europe*.

35. In so far as it cannot be considered that a direct action for annulment of Regulation No 1279/2007 brought by Valimar would undoubtedly have been admissible, the reference for a preliminary ruling cannot be declared inadmissible. It might also be added in this regard that, in so far as Valimar was affected by the provisions of Regulation No 1279/2007 through the national measures implementing it, it could not have relied on the provisions of the fourth paragraph of Article 263 TFEU, assuming that they were applicable, under which natural or legal persons may bring an action against regulatory acts which are of direct concern to them and do not entail implementing measures. [32]

V – **Preliminary observations on the subject-matter of the dispute in the main proceedings and the formulation of the questions referred**

36. In its request for a preliminary ruling, the referring court asks the Court two questions concerning, essentially, the interpretation of Article 11(3) and (9) of the basic regulation and one question concerning the assessment of the validity of Regulation No 1279/2007 which are closely linked and not devoid of a certain complexity. As that complexity arises from the dual nature of Regulation No 1279/2007, it is appropriate, before answering the questions, to place that regulation in the regulatory context in which it occurs.

26 — This objection can apply only where the request for assessment of validity has not been made at the request of a natural or legal person but raised by the referring court of its own motion; see Case C-222/04 *Cassa di Risparmio di Firenze and Others* [2006] ECR I-289, paragraphs 72 to 74.

27 — Case C-241/95 *Accrington Beef and Others* [1996] ECR I-6699, paragraph 15; Case C-408/95 *Eurotunnel and Others* [1997] ECR I-6315, paragraph 29; and Joined Cases C-346/03 and C-529/03 *Atzeni and Others* [2006] ECR I-1875, paragraphs 30 to 34.

28 — Case C-178/95 *Wiljo* [1997] ECR I-585, paragraph 21; Case C-239/99 *Nachi Europe* [2001] ECR I-1197, paragraph 30; Case C-390/98 *Banks* [2001] ECR I-6117, paragraph 111; Case C-241/01 *National Farmers' Union* [2002] ECR I-9079, paragraphs 35 and 36; Case C-119/95 *Lucchini* [2007] ECR I-6199, paragraphs 54 to 56; Case C-550/09 *E and F* [2010] ECR I-6213, paragraphs 46 to 48; Case C-494/09 *Bolton Alimentari* [2011] ECR I-647, paragraphs 22 and 23; Joined Cases C-71/09 P, C-73/09 P and C-76/09 P *Comitato 'Venezia vuole vivere' and Others* v *Commission* [2011] ECR I-4727, paragraph 58; and Case C-370/12 *Pringle* [2012] ECR, paragraphs 41 and 42.

29 — *E and F*, paragraph 52.

30 — *Eurotunnel and Others*, paragraph 28.

31 — *Nachi Europe*, paragraphs 38 to 40.

32 — See, by analogy, Case C-274/12 P *Telefónica* v *Commission* [2013] ECR, paragraphs 36 and 58.

A – *The principal provisions of the basic regulation concerning the review of anti-dumping measures*

37. Article 11(1) of the basic regulation, concerning, in particular, the duration and review of anti-dumping measures, states that an anti-dumping measure will remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury. Thus, Article 11(2) provides that an anti-dumping measure will, in principle, expire five years from its imposition and states that an expiry review may be initiated either on the initiative of the Commission, or upon request made by or on behalf of European Union producers. Such review may result either in the maintenance or the expiry of the measure.

38. Moreover, the first subparagraph of Article 11(3) of the basic regulation provides that an anti-dumping measure may also, where warranted, be reviewed before its expiry on the initiative of the Commission or at the request of a Member State, any exporter or importer, or the European Union producers concerned, provided that, in such a case, a period of time of at least one year has elapsed since the imposition of the definitive measure and that the request contains sufficient evidence substantiating the need for such an interim review.

39. The second subparagraph of Article 11(3) of the basic regulation states that an interim review of a definitive anti-dumping measure can take place only where the request contains sufficient evidence that 'the continued imposition of the measure is no longer necessary to offset dumping' and/or that 'the injury would be unlikely to continue or recur if the measure were removed or varied', or that 'the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury'.

40. The third subparagraph of Article 11(3) of the basic regulation states that the Commission may, in particular, consider, during an interim review investigation, 'whether the circumstances with regard to dumping and injury have changed significantly'[33] or 'whether existing measures are achieving the intended results in removing the injury', taking account of all relevant evidence.[34]

41. Finally, Article 11(9) of the basic regulation establishes the general rule that the Commission must, 'provided that circumstances have not changed', apply the same methodology in all review investigations as that used in the original investigation, with due account being taken, in particular, of Article 2 of the regulation.

B – *The complexity of Regulation No 1279/2007*

42. As is clear from the above presentation of the legal framework, Regulation No 1279/2007 is both a 'regulation on the partial interim review' of the anti-dumping duty imposed on SSM by Regulation No 1601/2001, which took place at the request of SSM in particular,[35] and a 'regulation on the expiry review of definitive anti-dumping measures' also imposed by Regulation No 1601/2001, which took place at the request of the Liaison Committee of EU Wire Ropes Industries.[36]

43. Therefore, Regulation No 1279/2007 was adopted on the basis, respectively, of Article 11(3) of the basic regulation, as regards the partial interim review, and Article 11(2) of the basic regulation, as regards the expiry review.[37]

33 — It must provisionally be stated here that the change in circumstances referred to in the third subparagraph of Article 11(3) of the basic regulation does not necessarily correspond to the change in circumstances referred to in Article 11(9) of the regulation.

34 — See the third subparagraph of Article 11(3) of the basic regulation.

35 — See recital 4 in the preamble to Regulation No 1279/2007.

36 — See recital 13 in the preamble to Regulation No 1279/2007.

37 — Regulation No 1279/2007 mentions both provisions of the basic regulation in the citations.

44. The complexity of Regulation No 1279/2007 explains, in turn, the complexity of the referring court's questions.

45. It should be noted first of all in this regard that, unlike expiry reviews, which only allow the duty imposed to be abolished or maintained at the same level, interim reviews can result in duties being changed.[38] This difference between the two procedures casts some light, as we shall see, on the meaning and scope of the first question referred by the national court.

46. Moreover, on the basis of the same available data and their analysis, the institutions decided the outcome both of the partial interim review and of the expiry review of the measures adopted in Regulation No 1601/2001, notwithstanding the fact that the periods covered by the respective investigations do not coincide.

47. Recital 41 in the preamble to Regulation No 1279/2007 states in this regard that 'for reasons of consistency', the institutions, as a first step, examined whether dumping was taking place during the review investigation periods and whether the expiry of the measures would be likely to lead to a continuation of dumping. As a second step, the institutions examined, on a country-by-country basis, 'the possible implications of the interim reviews on the findings of the original Regulation'.

C – *My approach to the issue raised by the present case*

48. The preceding points are essential to an understanding of the meaning and scope of the questions referred by the national court in its request for a preliminary ruling, some of which are not without a certain complexity.

49. The first question consists of two parts. In the first part, starting from the premise that the existence of a change in circumstances justifying a change in the method for determining export prices within the meaning of Article 11(9) of the basic regulation has not been demonstrated, the referring court asks whether, in such a situation, the provisions of Article 11(3) of that regulation, in particular, those concerning the reliability and viability of the export prices, are applicable. In the second part, the court asks whether, in order to answer the previous question, it is relevant to take account of the fact that the institutions changed the SSM anti-dumping duties and, specifically, reduced them.

50. The second question referred by the national court is formulated in much simpler terms. It asks whether, in view of the fact that Regulation No 1279/2007 does not expressly prove a change in circumstances justifying a change in the method for determining SSM's export prices within the meaning of Article 11(9) of the basic regulation, the institutions should have used the same method as that used in the original investigation.

51. The third question is even simpler, in that it relates to the consequences to be drawn from the answer to the first two questions. The referring court asks whether Regulation No 1279/2007, in so far as it changed the method for determining SSM's export prices without having proved the existence of a change in circumstances, must be partially annulled as its legal basis is invalid.

52. I shall answer as follows the questions in this request for a preliminary ruling as thus put forward. I must begin by, very directly, answering the first part of the first question, as worded, in the negative, and in the following terms: the question whether the rule in Article 11(9) of the basic regulation that a change in the method for determining export prices can be made only in the event of a change in

38 — This is explicitly indicated by the third subparagraph of Article 11(3) of the basic regulation, which provides for the case where the existing anti-dumping measure is not, or is no longer, sufficient to counteract the dumping which is causing injury. See, in this regard, Case C-373/08 *Hoesch Metals and Alloys* [2010] ECR I-951, paragraphs 76 to 78.

circumstances has been complied with does not 'take precedence' over the question whether there was a change in circumstances justifying the removal or variance of the anti-dumping measure under Article 11(3) of that regulation. Contrary to what the referring court seems to be suggesting by its first question, the existence of a change in circumstances within the meaning of Article 11(9) of the basic regulation is not a condition of applicability of Article 11(3) of that regulation. On the other hand, the question of the possible application of Article 11(9) of the regulation must indeed be examined in the context of the application of Article 11(3) thereof.

53. The first part of the first question, as worded, must therefore be answered in the negative: the finding that the circumstances have not changed within the meaning of Article 11(9) of the basic regulation cannot lead the institutions to disregard the provisions of Article 11(3) thereof. That said, and for the reasons set out below, I do not consider that answer to be, in itself, sufficient.

54. In fact, in order to provide the national court with an answer that is helpful to it, it is necessary to examine, first, whether Regulation No 1279/2007 is correct in its conclusion that, in so far as the circumstances had not significantly changed within the meaning of Article 11(3) of the basic regulation, the anti-dumping duties should not be abolished. It might be objected that the referring court did not question the manner in which Regulation No 1279/2007 examined the reliability of SSM's export prices but only the change in method of calculating the duty. However, it is essential, in my view, to take into account the manner in which Regulation No 1279/2007 examined the reliability of SSM's export prices in order to assess correctly the manner in which it approached the question of the method for determining the export prices.

55. I will therefore, only secondly, examine, on the basis of the findings made in connection with the question which has just been outlined, the central issue raised by the referring court, namely, whether the change in the method for determining the export prices was made in accordance with Article 11(9) of the basic regulation. I will finally examine in this connection whether it is relevant to take into consideration the fact that Regulation No 1279/2007 reduced the measure imposed on SSM and whether it is decisive that that regulation did not expressly prove a change in circumstances within the meaning of Article 11(9) of the basic regulation. The answer to the referring court's third question will immediately follow from the answer to the first two questions.

56. Finally, account must be taken in this examination of the Court's settled case-law, according to which, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the EU institutions must enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine,[39] so that the courts of the European Union must limit their judicial review to verifying whether relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers.[40]

VI – **Existence of a significant change in circumstances within the meaning of Article 11(3) of the basic regulation**

57. An export undertaking covered by an anti-dumping measure which requests its removal must furnish proof that the circumstances concerning the dumping and the injury have significantly changed.

39 — See, in particular, Case 191/82 *Fediol* v *Commission* [1983] ECR 2913, paragraph 26, and Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40.

40 — See Case 240/84 *NTN Toyo Bearing and Others* v *Council* [1987] ECR 1809, paragraph 19, and *Ikea Wholesale*, paragraph 41.

58. The review which the Commission must conduct in this regard may lead it to carry out not only a 'retrospective analysis' of the developing situation from the imposition of the original definitive measure in order to assess the need for its continuance or amendment to counteract the dumping which is causing injury, but also a 'prospective analysis' of the probable development of the situation from the adoption of the review measure in order to assess the likely effect of removing or varying the definitive measure. [41]

59. In the present case, the institutions considered that, in order to assess the appropriateness of the review requested by SSM, they needed, in view of the price undertakings which it had entered into, to carry out a comprehensive analysis of the reliability and viability of its export prices. They therefore examined SSM's export prices both in the context of the assessment of the continuation and/or recurrence of dumping [42] and in the context of the assessment of the lasting nature of the change in circumstances. [43]

60. They considered that, in view of the price undertakings entered into by SSM, the export prices to the Community that it had applied during the period of the interim review investigation [44] were artificial, unviable and therefore unreliable [45], that they could not therefore be used to determine its dumping margin and that they must consequently be constructed on the basis of its export prices to third countries.

61. It is stated that account was taken, in this regard, both of SSM's past behaviour (retrospective analysis) and of its likely future behaviour (prospective analysis). [46]

62. In fact, this conclusion is based, first, as regards the past, on the finding that the export prices applied by SSM in the Member States of the Community of 15, being constrained by the price undertakings, were 'lower' than those applied, before their accession, in the ten Member States which acceded to the European Union during the interim review investigation [47] and 'significantly lower' or 'on average substantially lower' than those applied in third States [48] where the quantities exported were, moreover, significantly bigger. [49] It is even stated that the investigation had 'concluded that the product concerned was sold at dumped prices to non-EU countries'. [50]

63. The conclusion of the institutions is based, second, as regards the future, on the prospective assessment of the future behaviour of SSM exports [51] and, more specifically and essentially, on the likelihood that, upon the cessation of the price undertaking [52] and on the basis of its production capacity, SSM would sell its products in large quantities on the EU market at dumped prices. [53]

41 — On this double review, see bkp Development, Research & Consulting, *Evaluation of the European Union's Trade Defence Instruments*, Final Evaluation Study, 27 February 2012, Contract No SI2.581682, in particular p. 402.

42 — Recitals 41 to 102 and more particularly 59 to 63 in the preamble to Regulation No 1279/2007.

43 — Recitals 103 to 134 and more particularly 107 to 112 in the preamble to Regulation No 1279/2007.

44 — Recital 28 in the preamble to Regulation No 1279/2007 states that the period extended from 1 July 2003 to 30 June 2004.

45 — See recital 61 in the preamble to Regulation No 1279/2007.

46 — See recital 61 in the preamble to Regulation No 1279/2007.

47 — The Treaty of Accession of the ten Member States in question to the European Union, signed in Athens on 16 April 2003, entered into force, under Article 2(2) thereof, on 1 May 2004 (OJ 2003 L 236, p. 17), at the same time as the Act concerning the conditions of accession of the Czech Republic, the Republic of Estonia, the Republic of Cyprus, the Republic of Latvia, the Republic of Lithuania, the Republic of Hungary, the Republic of Malta, the Republic of Poland, the Republic of Slovenia and the Slovak Republic and the adjustments to the Treaties on which the European Union is founded OJ 2003 L 236, p. 33).

48 — See recital 63 in the preamble to Regulation No 1279/2007.

49 — See recital 107 in the preamble to Regulation No 1279/2007.

50 — See recital 110 in the preamble to Regulation No 1279/2007.

51 — See the last sentence of recital 61 in the preamble to Regulation No 1279/2007.

52 — See recital 108 in the preamble to Regulation No 1279/2007.

53 — The institutions reach the same conclusion when examining the possibility of the anti-dumping measures being repealed. See recital 126 in the preamble to Regulation No 1279/2007.

64. It is therefore clear from the above reasoning that the institutions concluded that the anti-dumping measures imposed on SSM should not be withdrawn, as it had not established the continuance of a 'change in circumstances' within the precise meaning of Article 11(3) of the basic regulation in respect of its export prices,[54] on the basis of the finding that the existence of the price undertakings that it had entered into constituted a 'change in circumstances' within the specific meaning of Article 11(9) of the basic regulation, justifying a change in the method for determining its export prices for the purpose of calculating its dumping margin.

65. It should be noted that the key aspects of this analysis have not been challenged.

66. Thus, it has not been argued that, by relying on these data, which are not, moreover, disputed, in order to conclude that SSM's export prices to the Community were both unreliable and unviable, the EU institutions had committed a manifest error of assessment.

67. It has not been disputed either that the institutions, when assessing the appropriateness of the review requested by SSM, could, or should, have carried out a prospective analysis of SSM's likely behaviour on the basis of the data available in order to assess, in particular, the likelihood of a continuance or recurrence of the injury and the lasting nature of the alleged change in circumstances within the meaning of the second subparagraph of Article 11(3) of the basic regulation.

68. Therefore, subject to the strict observance of the rules of procedure laid down by the basic regulation, which will be examined below, it is not apparent that, in the factual and procedural circumstances of this case and in view of the broad discretion which they enjoy, the institutions have committed any manifest errors.

VII – **Existence of a change in circumstances within the meaning of Article 11(9) of the basic regulation justifying a change in the method for determining export prices**

69. By its second question, the referring court asks the Court very specifically whether, in the light of the answer to its first question, the institutions should, in the absence of 'express proof' of the existence of a change in circumstances within the meaning of Article 11(9) of the basic regulation, have applied the same method for determining SSM's export prices in the review as that used during the original investigation, namely that referred to in Article 2(8) of the basic regulation. In this context, account may be taken of the second part of the referring court's first question, in which it asks, essentially, whether it is relevant to take into consideration the fact that the institutions decided to reduce the anti-dumping rate imposed on SSM.

70. As the Court has emphasised,[55] Article 11(9) of the basic regulation must, in principle, in that it provides for a derogation from the general rule that the Commission must apply the same method as that used in the original investigation in all review investigations, be interpreted strictly,[56] it being stated that this requirement cannot permit the institutions to interpret and apply the provision in a manner inconsistent with its wording and purpose.[57]

71. However, the basic regulation does not provide any further explanation of the rationale behind the general rule thus laid down by Article 11(9) or any clarification of the exact purpose of the 'method' to which it refers or any guidance on the precise conditions on which derogation is allowed or on the nature of the circumstances referred to or on the extent of the changes required.

54 — See, in particular, the conclusion in recital 112 in the preamble to Regulation No 1279/2007.

55 — See *Dashiqiao Sanqiang Refractory Materials* v *Council and Commission*, paragraph 17.

56 — See also to that effect *Huvis* v *Council and Commission*, paragraph 41.

57 — See *Dashiqiao Sanqiang Refractory Materials* v *Council and Commission*, paragraph 19.

72. It is therefore for the Court to interpret that provision, taking into consideration, in accordance with its case-law, not only its wording but also its context and the objectives pursued [58] as well as the scheme and purpose of the basic regulation. [59] Its origins may, where appropriate, also provide information relevant to its interpretation. [60]

73. It should be noted, in the latter regard, that the rule laid down in Article 11(9) of the basic regulation appeared in the rules applicable to the review of anti-dumping measures [61] with the adoption of Regulation (EC) No 3283/94 [62] and that it is reproduced in identical form in all the subsequent regulations. [63]

74. However, the drafting history does not provide any guidance on the interpretation of that provision, as the Commission's initial proposal [64] was not materially amended. [65] It may also be noted that the 1994 GATT Anti-dumping Code does not contain any provisions equivalent to those in Article 11(9) of the basic regulation, with the result that the rule that it contains cannot be regarded as a transposition of one of the detailed rules of that code which must be interpreted in accordance with it. [66]

75. Moreover, it cannot go unmentioned that, in the context of the revision of Regulation No 1225/2009, [67] the Commission proposed that this general rule be abolished, arguing, first, that its application had created uncertainty in practice, particularly as regards the change in circumstances required, and, second, that it had sometimes led to the continued use of methodologies which were clearly outmoded.

76. The fact remains that the provisions of Article 11(9) of the basic regulation were applicable on the date of adoption of Regulation No 1279/2007, that they were binding on the institutions and that it is therefore for the Court to interpret and apply it in the context of the present reference for a preliminary ruling.

58 — See, in particular, Case C-136/91 *Findling Wälzlager* [1993] ECR I-1793, paragraph 11.

59 — See, in particular, Case C-288/07 *Isle of Wight Council and Others* [2008] ECR I-7203, paragraph 25.

60 — See *Pringle*, paragraph 135, and Case C-583/11 P *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* [2013] ECR, paragraph 50.

61 — The previous basic regulations did not contain any equivalent provisions. See, in particular, Article 14 of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1). However, a similar rule was contained in Article 16 of that regulation concerning the refund of duties wrongly paid.

62 — Council Regulation of 22 December 1994 on protection against dumped imports from countries not members of the European Community (OJ 1994 L 349, p. 1), Article 11(9).

63 — See, apart from the basic regulation, Article 11(9) 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).

64 — See Commission Communication of 5 April 1994, entitled Uruguay Round Implementing Legislation, COM(1994) 414 final, p. 160 et seq. and, in particular, p. 212.

65 — On the European Parliament's amendments, see Legislative resolution embodying Parliament's opinion on the proposal for a Council Regulation on protection against dumped imports from countries not members of the European Community (OJ 1995 C 18, p. 66).

66 — On this requirement, see *Petrotub and Republica*, paragraph 56.

67 — Communication from the Commission to the Council and the European Parliament of 10 April 2013 on Modernisation of Trade Defence Instruments — Adapting trade defence instruments to the current needs of the European economy, COM(2013) 191 final. Article 1(5)(b) of the Proposal for a Regulation of the European Parliament and of the Council amending, in particular, Regulation No 1225/2009, (COM(2013) 192 final), submitted on 10 April 2013, accordingly proposes the deletion of Article 11(9) of the basic regulation. The process of adopting the new regulation is still ongoing.

77. It can be inferred from a reading of the whole of Article 11 of the basic regulation, and in particular from paragraphs 1, 3 and 9 thereof, in the light of the scheme of the basic regulation that use of the same method is, first, logically necessary in order to determine whether the dumping, as established during the original investigation, is continuing, and whether the measures initially adopted should be maintained in their form and level, amended or withdrawn.[68] Second, use of the same method affords undertakings affected by anti-dumping measures a degree of predictability, and hence some kind of legal certainty, in the implementation of EU anti-dumping regulations.

78. In the present case, it is not disputed that, in Regulation No 1279/2007, the institutions have not used the same method for determining SSM's export prices as in Regulation No 1601/2001. Being of the view that SSM's export prices to the Community, which had been used during the original investigation, were neither reliable nor viable in view of the price undertakings that they had entered into, they constructed the export prices on the basis of its export prices to third countries.

79. It is also not disputed that Regulation No 1279/2007 does not expressly mention the existence of a 'change in circumstances' within the meaning of Article 11(9) of the basic regulation justifying the change made in the method for determining SSM's export prices. This fact alone does not, for all that, lead to the conclusion that the regulation is unlawful.

80. In fact, it is implicitly but clearly apparent from the recitals in the preamble to Regulation No 1279/2007 referred to above that the existence of the price undertakings entered into by SSM was considered to be the principal constituent element of the change.

81. The question which arises, then, is whether it is correct to consider that the price undertakings, in themselves, constitute a change in circumstances within the meaning of Article 11(9) of the basic regulation. It appears, however, that Regulation No 1279/2007 covered this question at some length,[69] explaining in detail that SSM's export prices to the Community were neither reliable nor of a lasting nature, specifically owing to the existence of the price undertakings. In other words, the reasons why it considered that the circumstances concerning the dumping had not changed within the meaning of Article 11(3) of the basic regulation are the same as those justifying the need to abandon the method for determining the export prices initially used pursuant to Article 11(9) of that regulation. Put more simply, the method initially used ceased to be reliable in the context of the review. In such a situation, the only conclusion which can be reached is that the institutions were no longer required to apply the rule laid down in Article 11(9) of the basic regulation obliging them to use the same method.

82. The answer to the second question, as formulated by the referring court, is therefore that Article 11(9) of the basic regulation must be interpreted as meaning that it does not oblige the Commission to use in the review of an anti-dumping measure the same method for determining export prices as that used in the original investigation, where it has been legally established that the export prices determined by that method were neither reliable nor of a lasting nature specifically owing to the existence of price undertakings.

83. This leads finally to the additional question of the legality of the specific method used by the institutions to determine SSM's export prices, which was raised by the referring court in its request for a preliminary ruling although it is not included in its questions[70] and is not expressly answered by Article 11(9) of the basic regulation.

68 — See, in particular, Müller W., Khan, N. and Scharf, T., *EC and WTO Anti-Dumping Law*, Oxford University Press, 2009, No 11.41, 2nd ed., in particular p. 521.

69 — See, in particular, recitals 107 to 112 in the preamble to Regulation No 1279/2007.

70 — The national court refers, without citing it, to the judgment in *Huvis* v *Council*. It should also be noted that the Court's judgment in *Dashiqiao Sanqiang Refractory Materials* v *Council and Commission*, was delivered on a date subsequent to that on which it submitted to the Court the present request for a preliminary ruling.

84. The Council stated in its written observations that, in the present case, the institutions had not applied Article 2(9) of the basic regulation but only Article 11(3) of the regulation and that, in view of the change in circumstances brought about by the price undertakings, they had chosen to use SSM's export prices to third countries. It added that Article 11(9) of the basic regulation afforded the institutions some discretion in their choice of method for establishing export prices, as only 'due account' had to be taken of the provisions of Article 2 thereof.

85. In that regard, it should be noted, first of all, that it is, in fact, true that, as regards SSM,[71] Regulation No 1279/2007 does not refer at any time, either explicitly or implicitly, to Article 2(9) of the basic regulation.

86. It should then be noted, first and as already stated, that Article 11 of the basic regulation does not provide any guidance on the method by which export prices, in particular, should be determined in a review procedure in the event of a change in circumstances within the meaning of paragraph 9 thereof.[72]

87. In these circumstances, it cannot be considered that the institutions have manifestly exceeded the limits of the broad discretion which they enjoy in implementing the basic regulation by filling the gaps in it.

88. Second, although the provisions of Article 2(9) of the basic regulation, which do not apply to the initial imposition of an anti-dumping duty, cannot simply be applied in a review, they provide a point of reference. The first paragraph of Article 2(9) of the basic regulation provides, in fine, that export prices may, provided that the conditions provided for elsewhere are fulfilled, be determined on 'any reasonable basis'.

89. It can be inferred from this that, as the institutions were legitimately able to conclude that SSM's export prices were unreliable following a change in circumstances within the meaning of Article 11(9) of the basic regulation, they could depart from the letter of Article 2(8) of the regulation and use any method for determining export prices provided that it was still reasonable.

90. It is not apparent, nor has it been alleged, that it was unreasonable for the institutions to construct SSM's export prices by using its export prices to third countries.

91. It must also be borne in mind that Regulation No 1279/2007, far from concluding that the initial anti-dumping measure imposed on SSM needed to be maintained in the light of the absence of any significant change in circumstances within the meaning of Article 11(3) of the basic regulation, ultimately reduced the anti-dumping duty applied to SSM. That being the case, and in the light of the second part of the referring court's first question, it must be concluded that Regulation No 1279/2007 fully fulfils the fundamental objective pursued by the basic regulation, namely that the imposition of an anti-dumping measure must be strictly necessary to remove the dumping which is causing injury.

92. In those circumstances, it is not apparent that, by deciding to construct SSM's export prices on the basis of its export prices to third countries, among others, the institutions chose a manifestly inappropriate or unreasonable method.[73]

71 — That provision was, on the other hand, applied with regard to other undertakings. See recitals 49, 81 and 87 in the preamble to Regulation No 1279/2007.

72 — As the 1994 Anti-dumping Code does not contain any rule equivalent to that in Article 11(9) of the basic regulation, it is naturally silent in this regard.

73 — See, by analogy, Case C-16/90 *Nölle* [1991] ECR I-5163, paragraphs 11 to 13, and Case C-26/96 *Rotexchemie* [1997] ECR I-2817, paragraphs 9 to 12.

93. It should therefore be concluded that the examination of the questions referred by the national court has disclosed nothing capable of affecting the validity of Regulation No 1279/2007.

VIII – **Conclusion**

94. In the light of the foregoing arguments, I propose that the Court should answer the questions referred by the Varhoven administrativen sad as follows:

(1) Article 11(9) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community must be interpreted as not obliging the European Commission to use in the review of an anti-dumping measure the same method for determining export prices as that used in the original investigation, where it has been legally established that the export prices determined by that method were neither reliable nor of a lasting nature, specifically owing to the existence of price undertakings.

(2) The examination of the questions referred by the national court has disclosed nothing capable of affecting the validity of Council Regulation (EC) No 1279/2007 of 30 October 2007 imposing a definitive anti-dumping duty on certain iron or steel ropes and cables originating in the Russian Federation, and repealing the anti-dumping measures on imports of certain iron or steel ropes and cables originating in Thailand and Turkey.