Harley Davison Motor Company Inc

Motorcycles for Europe

Case written by prof. dr. Albert Veenstra

March 2022

This case was written by Albert Veenstra for classroom discussion.
The work for the case was financially supported by the Topsector Logistics

Introduction

President Donald J. Trump started a trade war with China and Europe, and thereby countered years of gradual reduction of import duties. In 2018, the United States government used an ancient trade law from the Cold War era to introduce tariffs on European steel and aluminium. The main argument allowed by this law is 'national security'.

The EU retaliated by imposing tariffs on iconic American products: jeans, bourbon whiskey, peanut butter, ànd … Harley Davidson motorcycles.

The trade war intensified as a result of another round of tariff increases by Trump, but American – EU trade discussions in advance of the visit of the new president, Joe Biden, to Brussels in June 2021, put a halt to the second round of EU retaliations. Trump ran out of time, and the world came back to its senses.

However, against this background, Harley Davidson still attempted to re-engineer its supply chain to avoid paying the higher tariffs on its motorcycles sold in Europe.

The Company

The Harley Davidson company makes truly iconic, and very recognizable, motorcycles.

The company started in Milwaukee, Wisconsin in 1903, by three Davidsons (Walter, Arthur and William) and engineer William Harley. Harley designed the first motorcycle engine, based on a French de Dion-Bouton engine. While Arthur Davidson and William Harley started working on the motorcycle design, Arthur's brothers Walter and William – both mechanics – eventually built it in 1904. They started racing with this motorcycle almost immediately. Harley-Davidson was one of the first companies to sponsor a racing team (called the Wrecking Crew).

The company caught some headwind when well-known delivery company USPS started using the motorcycles for their deliveries. Also, the US army used Harley Davidsons. Finally, many policy departments across the nation included the motorcycles in their fleets of vehicles.

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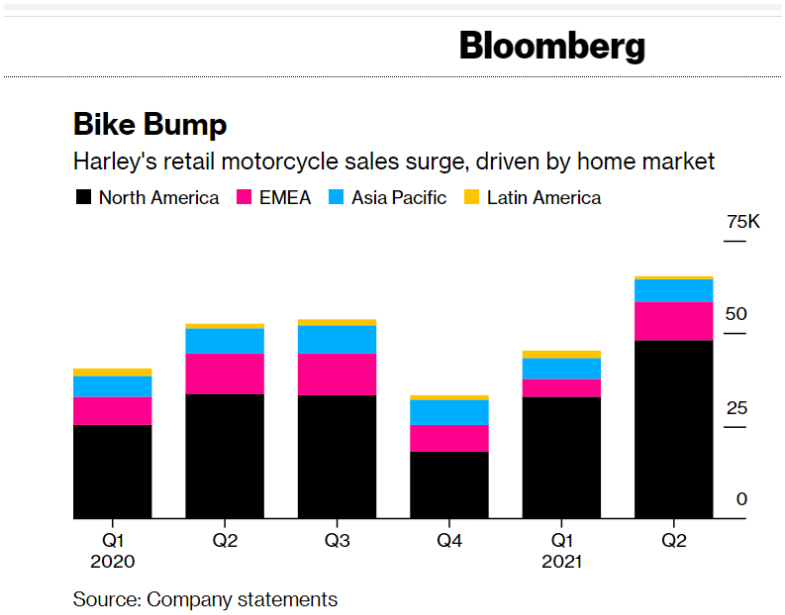
Since the 'police' look of the motorcycles, with the saddle bags, boots and breaches, captured the imagination of many, the brand gained wide interest and a cult following. The company branched out into clothing, insurance and other brand related products.

Harley Davidson has not only seen success. It also has a history of significant challenges. In the 1970s-1980s, the company was challenged by considerable quality problems. To solve these problems, they had to revamp their entire manufacturing and quality control approach. In more recent years, Harley Davidson is seeing serious slumps in sales. In Q2 2020, sales fell by 27%, and this was the 14th quarter of falling sales in a row. As a result, the company launched a 5-year strategic plan in 2021: The Hardwire. This plan aims to increase profitability of the company, expansion in several segments of motoring (touring, large cruisers, trike), a brand licensing strategy (*Harley-Davidson-Certified*™), and a promotional campaign to increase employee ownership of the company. The company also introduced an electrical motorcycle (LiveWire®).

Current supply chain challenges are related to chip shortages, increasing prices of basic materials such as aluminium and steel, and the unreliability of global shipping.



The Supply Chain

Harley Davidson has two major business lines: (1) Motorcycle Manufacturing and Related Products, and (2) Financial Services. The first business line comprises manufacturing of motorcycles, parts and accessories, general merchandise, and licensing, as well as additional services to dealers (for instance, general management training and software). Harley Davidson Financial Services provides financing arrangements to dealers and their customers, as well as insurance products.

Harley Davidson had manufacturing sites in York-Pennsylvania, Milwaukee-Wisconsin, Manaus (Brazil), Bawal (India) and Pluak Daeng (Vietnam). The factories outside the USA are a relatively new

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phenomenon. The factory in Brazil was opened in 1998, to cater for the southern hemisphere. The factory in India was opened in 2009, to avoid paying the Indian 100% tariff on foreign motorcycles. This plant was closed in 2020 due to disappointing sales. Harley Davidson also closed a plant in Kansas City. Much of the work of this plant was transferred to the plant in Vietnam and the plant in York PA.

The plant in Vietnam was developed in the period 2016-2017 to target a growing Asian market. High import tariffs in countries like China and Malaysia for American motorcycles made it imperative to supply these markets with locally produced motorcycles. Unions in the USA see this differently. They argued that moving jobs overseas is just an attempt to cut costs.

The factory in Vietnam enables selling motorcycles in a market where imported motorcycles fetch a tariff of 60%. Also, Vietnam is partner in ASEAN, and that means reduced tariffs in another 10 neighbouring countries. ASEAN also has a free trade agreement with China, which significantly reduces tariffs for exports from Vietnam to China. Shipments will also take less time (5-7 days, instead of 45-60 days from the USA) and fetch lower costs. As a counter move, Trump stopped the Trans-Pacific Partnership (TPP) that would have lowered tariffs on American products in ASEAN countries to zero. The Vietnam factory would assemble bikes from imported kits (so-called complete knockdown kits of CKDs).

The manufacturing supply chains contain around 580 direct suppliers. These suppliers are, among others, responsible for the required documentation on conflict minerals. In line with its Conflict Minerals Compliance Process, Harley Davidson has developed, as one of the control measures, a Country of Origin Inquiry that all suppliers have to fill in.

Harley Davidson's sales strategy is largely based on a dealer network. With this approach, dealers around the world are selling Harley Davidsons from their showroom or from a catalogue. Harley Davidson is changing its strategy to become more order driven, instead of having many motorcycles and parts in stock in logistics facilities, or at dealers. This will mean less working capital tied up in stock, but also longer waiting times for customers. Harley Davidson has seen sales grow in international markets, but slump in the home market (although the Corona pandemic is scrambling the numbers a bit).

Response to the trade war

The trade war mentioned at the start of this case hit Harley Davidson in different ways. First, higher tariffs imposed by Trump on steel and aluminium increased costs of production in the US. The retaliating measures of the EU then increased the trade costs of Harley Davidsons in Europe by 25%, with a further 25% in the coming. Trump's reaction to these increased tariffs led to further increased in tariffs on imported prices of steel and aluminium.

In 2018, Harley Davison announced it was moving some activities for the EU market to the factory in Vietnam. This was in fact recorded in their 2018 Form 8-K submitted to the SEC. In this form, Harley Davidson estimates the cost impact of the first tariff hike to be about $ 90-100 mln on an annual basis. The filing then says: "To address the substantial cost of this tariff burden long-term, Harley-Davidson will be implementing a plan to shift production of motorcycles for EU destinations from the US to its international facilities to avoid the tariff burden." Production capacity in Vietnam would need to be ramped up, and this was estimated to take 9-18 months.

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Harley Davidson intended to import the motorcycles from Vietnam into the EU through Belgium. It obtained a binding origin information (BOI) statement from Belgium Customs in 2018. This BOI stipulated that for Harley Davidson motorcycles imported with an HS code 87115000 from the country Vietnam, the regular 6% tariffs would apply, thus avoiding the 25% tariff increase as a result of the trade war.

The dispute

The European Commission, by means of decision EU 2021/563 of 31 March 2021, ordered Belgium Customs to rescind the Harley Davidson BOI. The main reasoning is that the activities in Vietnam to manufacture the motorcycles was not economically justifiable, because the manufacturing activities were moved to Vietnam to expressly avoid paying the higher tariffs on imports in Europe. The statement from Harley Davidson's own SEC filing was used as evidence in the EU Decision.

The trade war between EU and USA ended on 30 October 2021, when Joe Biden and Ursula von der Leyen announced the roll-back of the tariffs on steel and aluminium, as well as the EU tariffs on American products. At this time, the EU also decided not to implement the additional 25% tariff hike it has announced earlier.

Both the Harley Davidson, incorporated in the UK, and its logistics partner, based in Belgium, then sued to European Commission in 2021. They demanded that the court annul the European Commission's decision to annul the binding tariff decision of Belgium Customs. The Court of Justice published their decision on 1 March 2023, and completely vindicated the European Commission.

Discussion points

- Was it a sensible strategy of Harley Davidson to move the production of motorcycles for the EU to Vietnam?
- When the EU ordered Belgium Customs to withdraw the BOI, what alternatives would Harley Davidson have to avoid paying the higher tariffs on complete motorcycles?
- In the context of this tariff war, would it have made sense for Harley Davidson to set up a factory in Europe?

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ANNEXES

1. Harley Davidson SEC form 8-K June 2018
2. European Commission EU 2021/563 revoking BTU of Belgium Customs
3. European Court of Justice case T 324/21 a March 2023

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UNITED STATES
SECURITIES AND EXCHANGE COMMISSION

Washington, D.C. 20549

FORM 8-K

CURRENT REPORT

Pursuant to Section 13 or 15(d) of the
Securities Exchange Act of 1934

Date of Report (Date of earliest event reported): June 25, 2018

Harley-Davidson, Inc.

(Exact name of registrant as specified in its charter)

Wisconsin	1-9183	39-1382325
(State or other jurisdiction of incorporation)	(Commission File Number)	(IRS Employer Identification No.)

3700 West Juneau Avenue, Milwaukee, Wisconsin 53208
(Address of principal executive offices, including zip code)

(414) 342-4680
(Registrant's telephone number, including area code)

Not Applicable
(Former name or former address, if changed since last report)

Check the appropriate box below if the Form 8-K filing is intended to simultaneously satisfy the filing obligation of the registrant under any of the following provisions:

□ Written communications pursuant to Rule 425 under the Securities Act (17 CFR 230.425)

□ Soliciting material pursuant to Rule 14a-12 under the Exchange Act (17 CFR 240.14a-12)

□ Pre-commencement communications pursuant to Rule 14d-2(b) under the Exchange Act (17 CFR 240.14d-2(b))

□ Pre-commencement communications pursuant to Rule 13e-4(c) under the Exchange Act (17 CFR 240.13e-4(c)

Indicate by check mark whether the registrant is an emerging growth company as defined in Rule 405 of the Securities Act of 1933 (§230.405 of this chapter) or Rule 12b-2 of the Securities Exchange Act of 1934 (§240.12b-2 of this chapter).

Emerging growth company □

If an emerging growth company, indicate by check mark if the registrant has elected not to use the extended transition period for complying with any new or revised financial accounting standards provided pursuant to Section 13(a) of the Exchange Act. □

Item 7.01 Regulation FD Disclosure.

The European Union has enacted tariffs on various U.S.-manufactured products, including Harley-Davidson motorcycles. These tariffs, which became effective June 22, 2018, were imposed in response to the tariffs the U.S. imposed on steel and aluminum exported from the EU to the U.S.

Consequently, EU tariffs on Harley-Davidson motorcycles exported from the U.S. have increased from 6% to 31%. Harley-Davidson expects these tariffs will result in an incremental cost of approximately $2,200 per average motorcycle exported from the U.S. to the EU.

Harley-Davidson believes the tremendous cost increase, if passed onto its dealers and retail customers, would have an immediate and lasting detrimental impact to its business in the region, reducing customer access to Harley-Davidson products and negatively impacting the sustainability of its dealers' businesses. Therefore, Harley-Davidson will not raise its manufacturer's suggested retail prices or wholesale prices to its dealers to cover the costs of the retaliatory tariffs. In the near-term, the company will bear the significant impact resulting from these tariffs, and the company estimates the incremental cost for the remainder of 2018 to be approximately $30 to $45 million. On a full-year basis, the company estimates the aggregate annual impact due to the EU tariffs to be approximately $90 to $100 million.

To address the substantial cost of this tariff burden long-term, Harley-Davidson will be implementing a plan to shift production of motorcycles for EU destinations from the U.S. to its international facilities to avoid the tariff burden. Harley-Davidson expects ramping-up production in international plants will require incremental investment and could take at least 9 to 18 months to be fully complete.

Harley-Davidson maintains a strong commitment to U.S.-based manufacturing which is valued by riders globally. Increasing international production to alleviate the EU tariff burden is not the company's preference, but represents the only sustainable option to make its motorcycles accessible to customers in the EU and maintain a viable business in Europe. Europe is a critical market for Harley-Davidson. In 2017, nearly 40,000 riders bought new Harley-Davidson motorcycles in Europe, and the revenue generated from the EU countries is second only to the U.S.

Harley-Davidson's purpose is to fulfill dreams of personal freedom for customers who live in the European Union and across the world, and the company remains fully engaged with government officials in both the U.S. and the EU helping to find sustainable solutions to trade issues and rescind all tariffs that restrict free and fair trade.

Harley-Davidson will provide more details of the financial implications and plans to mitigate the impact of retaliatory EU tariffs during the company's second quarter earnings conference call on July 24, 2018, at 8:00AM CDT.

The company intends that certain matters discussed in this report are "forward-looking statements" intended to qualify for the safe harbor from liability established by the Private Securities Litigation Reform Act of 1995. These forward-looking statements can generally be identified as such because the context of the statement will include words such as the company "believes," "anticipates," "expects," "plans," or "estimates" or words of similar meaning. Similarly, statements that describe future plans, objectives, outlooks, targets, guidance or goals are also forward-looking statements. Such forward-looking statements are subject to certain risks and uncertainties that could cause actual results to differ materially, unfavorably or favorably, from those anticipated as of the date of this report. Such risks and uncertainties include the following, among other factors: (i) uncertainties regarding the quantity and mix of motorcycles that the company exports from the U.S. during the periods in question; (ii) uncertainties regarding the import prices of motorcycles; (iii) whether the EU tariffs apply to shipments that had already commenced at the effective time of the tariffs; (iv) uncertain timing associated with shifting production from the U.S. to international facilities; and (v) uncertainties regarding the size and duration of EU tariffs. Shareholders, potential investors, and other readers are urged to consider these factors in evaluating the forward-

looking statements and cautioned not to place undue reliance on such forward-looking statements. The forward-looking statements included in this report are only made as of the date of this report, and the company disclaims any obligation to publicly update such forward-looking statements to reflect subsequent events or circumstances.

SIGNATURES

Pursuant to the requirements of the Securities Exchange Act of 1934, the registrant has duly caused this report to be signed on its behalf by the undersigned hereunto duly authorized.

HARLEY-DAVIDSON, INC.

June 25, 2018 By: /s/ Stephen W. Boettinger

Stephen W. Boettinger

Assistant Secretary

COMMISSION IMPLEMENTING DECISION (EU) 2021/563

of 31 March 2021

on the validity of certain decisions relating to binding origin information

(notified under document C(2021) 2072)

(Only the French and Dutch texts are authentic)

THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (hereinafter 'the Code') ([1]), and in particular Article 34(11) and point (a) of the first subparagraph of Article 37(2) thereof,

After consulting the Customs Code Committee,

Whereas:

(1) Article 33(1) of the Code provides for that the customs authorities shall, upon application, take decisions relating to binding origin information (BOI decisions). Article 19(1) of Commission Implementing Regulation (EU) 2015/2447 ([2]) stipulates that the customs authorities shall transmit to the Commission the relevant details of the BOI decisions taken, on a quarterly basis.

(2) The BOI decisions referred to in the Annex contain a determination of the non-preferential origin of goods, incompatible with Article 60(2) of the Code. In particular, those BOI decisions are incompatible with the rules on the acquisition of origin laid down in that Article, as the processing or working operations carried out in the last country of production are not economically justified within the meaning of Article 33 of Commission Delegated Regulation (EU) 2015/2446 ([3]).

(3) Article 60(2) of the Code stipulates that goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically-justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture.

(4) Article 33 of Delegated Regulation (EU) 2015/2446 stipulates that any processing or working operation carried out in another country or territory shall be deemed not to be economically justified if it is established on the basis of the available facts that the purpose of that operation was to avoid the application of the measures referred to in Article 59 of the Code.

(5) Commission Implementing Regulation (EU) 2018/886 ([4]) introduced certain commercial policy measures concerning certain products originating in the United States of America. The products to which these commercial policy measures apply are listed in Annex I to that Regulation. Motorcycles with reciprocating internal combustion piston engine of a cylinder capacity exceeding 800 cm3 falling under CN code 8711 50 00 are among the products listed in that Annex. The measures set up by Regulation (EU) 2018/886 are measures referred to in Article 59 of the Code.

([1]) OJ L 269, 10.10.2013, p. 1.

([2]) Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation (EU) No 952/2013 of the European Parliament and of the Council laying down the Union Customs Code (OJ L 343, 29.12.2015, p. 558).

([3]) Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation (EU) No 952/2013 of the European Parliament and of the Council as regards detailed rules concerning certain provisions of the Union Customs Code (OJ L 343, 29.12.2015, p. 1).

([4]) Commission Implementing Regulation (EU) 2018/886 of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724 (OJ L 158, 21.6.2018, p. 5).

(6) Subsequent to the publication of the European Union's commercial policy measures, the producer of the motorcycles falling under CN code 8711 50 00 and covered by the BOI decisions referred to in the Annex, reported with a Form 8-K ([5]) current report submitted to the United States Securities and Exchange Commission on 25 June 2018 its plan to shift production of certain motorcycles destined to the European Union's market from the United States of America to its international facilities in another country to avoid the European Union's commercial policy measures.

(7) Even if the avoidance of the commercial policy measures may not necessarily be the only purpose of the shift of production, the conditions mentioned in the first paragraph of Article 33 of Delegated Regulation (EU) 2015/2446 are met based on the available facts. The processing or working operations carried out in the last country of production shall therefore be deemed not to be economically justified. As a result, the determination of the non-preferential origin of the motorcycles is to be based on the third paragraph of the same Article 33.

(8) According to this provision, where the last working or processing is deemed not to be economically justified, the goods shall be considered to have undergone their last substantial, economically justified processing or working, resulting in the manufacture of a new product or representing an important stage of manufacture, in the country or territory where the major portion of the materials originated, as determined on the basis of the value of the materials.

(9) Since the determination of the non-preferential origin of the motorcycles covered by the BOI decisions referred to in the Annex is not based on the rule laid down in the third paragraph of Article 33 of Delegated Regulation (EU) 2015/2446, the Commission deems this determination of non-preferential origin to be incompatible with Article 60(2) of the Code, in conjunction with Article 33 of Delegated Regulation (EU) 2015/2446.

(10) According to Article 23(3) of the Code, the customs authorities, which took a decision, may at any time annul, amend or revoke it where it does not conform to the customs legislation. However, the customs authorities, which took the BOI decisions referred to in the Annex, did not revoke them.

(11) Therefore, to ensure a correct and uniform determination of the non-preferential origin of goods, the BOI decisions concerned should be revoked. The customs authority which took the BOI decisions should therefore revoke them as soon as possible following the notification of this Decision and notify the Commission to that effect,

HAS ADOPTED THIS DECISION:

Article 1

1. The BOI decisions referred to in column 1 of the table set out in the Annex taken by the customs authority specified in column 2 of that table for the product specified in column 3 of that table shall be revoked in accordance with paragraph 2.

2. The customs authority specified in column 2 of the table set out in the Annex shall revoke the BOI decisions referred to in column 1 of that table and notify the holder thereof at the earliest possible date and in any case not later than 10 days from the notification of this Decision.

3. When the customs authority revokes the BOI decisions and makes the notification pursuant to paragraph 2, it shall notify the Commission thereof.

Article 2

This Decision is addressed to the Kingdom of Belgium.

([5]) https://sec.report/Document/0000793952-18-000038

Done at Brussels, 31 March 2021.

For the Commission
Paolo GENTILONI
Member of the Commission

ANNEX

Binding origin information — reference no	Customs authority	CN code of the product
1	2	3
BE-20192406001	Direction générale Analyses Economiques et Economie internationale Service Commerce et Investissements internationaux bâtiment Atrium C Rue du Progrès 50 1210 Bruxelles Belgique Federale Overheidsdienst Economie, KMO, Middenstand en Energie Algemene Directie Economische Analyses en Internationale Economie Dienst internationale handel en investeringen City Atrium C Vooruitgangsstraat 50 1210 Brussel België	8711 50 00
BE-20192406002	Direction générale Analyses Economiques et Economie internationale Service Commerce et Investissements internationaux bâtiment Atrium C Rue du Progrès 50 1210 Bruxelles Belgique Federale Overheidsdienst Economie, KMO, Middenstand en Energie Algemene Directie Economische Analyses en Internationale Economie Dienst internationale handel en investeringen City Atrium C Vooruitgangsstraat 50 1210 Brussel België	8711 50 00

Reports of Cases

JUDGMENT OF THE GENERAL COURT (Eighth Chamber, Extended Composition)

1 March 2023 *

(Customs union – Regulation (EU) No 952/2013 – Determination of the non-preferential origin of certain motorcycles manufactured by Harley-Davidson – Commission Implementing Decision requesting the revocation of decisions relating to binding origin information adopted by the national customs authorities – Concept of 'processing or working operations which are not economically justified' – Right to be heard)

In Case T-324/21,

Harley-Davidson Europe Ltd, established in Oxford (United Kingdom),

Neovia Logistics Services International, established in Vilvoorde (Belgium),

represented by O. van Baelen, G. Lebrun, lawyers, and T. Lyons KC,

applicants,

v

European Commission, represented by F. Clotuche-Duvieusart and M. Kocjan, acting as Agents,

defendant,

THE GENERAL COURT (Eighth Chamber, Extended Composition),

composed, at the time of the deliberations, of S. Papasavvas, President, J. Svenningsen, M. Jaeger, C. Mac Eochaidh (Rapporteur) and T. Pynnä, Judges,

Registrar: I. Kurme, Administrator,

having regard to the written part of the procedure,

further to the hearing on 21 September 2022,

gives the following

* Language of the case: English.

Judgment

1 By the present action under Article 263 TFEU, the applicants, Harley-Davidson Europe Ltd (together with the group to which it belongs, 'Harley-Davidson') and Neovia Logistics Services International ('Neovia') seek the annulment of Commission Implementing Decision (EU) 2021/563 of 31 March 2021 on the validity of certain decisions relating to binding origin information (OJ 2021 L 119, p. 117; 'the contested decision'), addressed to the Kingdom of Belgium. By that decision, the European Commission requested the revocation of two decisions concerning binding origin information ('the BOI decisions'), adopted in respect of Neovia on behalf of Harley-Davidson, concerning the importation into the European Union, through Belgium, of certain categories of motorcycle manufactured by Harley-Davidson in Thailand.

I. Legal context

2 In accordance with Article 1 of Regulation (EU) No 952/2013 of the European Parliament and of the Council of 9 October 2013 laying down the Union Customs Code (OJ 2013 L 269, p. 1; 'the Customs Code'), that regulation establishes the Union Customs Code, laying down the general rules and procedures applicable to goods brought into or taken out of the customs territory of the European Union.

3 Title II of the Customs Code, headed 'Factors on the basis of which import or export duty and other measures in respect of trade in goods are applied', lays down, inter alia, rules for determining the origin of goods, which serve in particular to determine the import duty and other measures that apply to specific goods.

4 In particular, under Article 56(1) of the Customs Code, in Title II thereof, the import and export duty due is to be based on the Common Customs Tariff, and other measures prescribed by EU provisions governing specific fields relating to trade in goods are, where appropriate, to be applied in accordance with the tariff classification of those goods.

A. The origin of goods

5 The Customs Code lays down three categories of rules for the determination of the origin of goods, namely rules on the non-preferential origin of goods, rules on the preferential origin of goods and rules for determining the origin of specific goods.

6 In particular, Article 59 of the Customs Code provides that Articles 60 and 61 are to lay down rules for the determination of the non-preferential origin of goods for the purposes of applying, first, the Common Customs Tariff, with the exception of the measures referred to in Article 56(2)(d) and (e); secondly, measures, other than tariff measures, established by EU provisions governing specific fields relating to trade in goods; and, thirdly, other EU measures relating to the origin of goods.

7 Thus, Article 60 of the Customs Code, relating to the acquisition of the non-preferential origin of goods, provides:

'1. Goods wholly obtained in a single country or territory shall be regarded as having their origin in that country or territory.

2. Goods the production of which involves more than one country or territory shall be deemed to originate in the country or territory where they underwent their last, substantial, economically justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture.'

8 According to Article 62 of the Customs Code, the Commission is to be empowered to adopt delegated acts in accordance with Article 284, laying down the rules under which goods, whose determination of non-preferential origin is required for the purposes of applying the EU measures referred to in Article 59, are considered as wholly obtained in a single country or territory or to have undergone their last, substantial, economically justified processing or working, in an undertaking equipped for that purpose, resulting in the manufacture of a new product or representing an important stage of manufacture in a country or territory, in accordance with Article 60.

9 On that basis, the Commission adopted Commission Delegated Regulation (EU) 2015/2446 of 28 July 2015 supplementing Regulation No 952/2013 as regards detailed rules concerning certain provisions of the Union Customs Code (OJ 2015 L 343, p. 1; 'the UCC-DA').

10 Article 33 of the UCC-DA gives details of processing or working operations which are not economically justified. That article provides:

'Any processing or working operation carried out in another country or territory shall be deemed not to be economically justified if it is established on the basis of the available facts that the purpose of that operation was to avoid the application of the measures referred to in Article 59 of the [Customs Code, which concerns the application of the Common Customs Tariff and other Union tariff or non-tariff measures relating to the origin of goods imported into the European Union].

…'

B. Decisions on origin

11 Article 33 of the Customs Code, concerning decisions relating to binding information, provides:

'1. The customs authorities shall, upon application, take decisions relating to binding tariff information (BTI decisions), or [BOI decisions].

…

3. BTI or BOI decisions shall be valid for a period of three years from the date on which the decision takes effect.

…'

12 Article 19 of Commission Implementing Regulation (EU) 2015/2447 of 24 November 2015 laying down detailed rules for implementing certain provisions of Regulation No 952/2013 (OJ 2015 L 343, p. 558) establishes an exchange of data relating to BOI decisions and states, in particular, in paragraph 1, that 'the customs authorities shall transmit to the Commission the relevant details of the BOI decisions [adopted by them] on a quarterly basis'.

13 Article 34(11) of the Customs Code provides:

'The Commission may adopt decisions requesting Member States to revoke BTI or BOI decisions, to ensure a correct and uniform tariff classification or determination of the origin of goods.'

14 Article 37(2) of the Customs Code states, inter alia, that the Commission is to adopt the decisions requesting Member States to revoke BOI decisions by means of implementing acts adopted in accordance with the advisory procedure referred to in Article 285(2) of the Customs Code.

15 It is apparent from those provisions that, essentially, national customs authorities may, at the request of importers who wish to obtain guarantees as to the interpretation of the rules for defining the non-preferential origin of goods imported into the European Union, adopt decisions formally recognising the geographical origin of those goods. Moreover, the Commission, which is regularly informed of such decisions by those authorities, may, if it subsequently considers that the customs authorities' determination of origin is incorrect, request that they revoke the decisions adopted.

C. Commercial policy measures

16 Under Article 5(36) of the Customs Code, 'commercial policy measures' are non-tariff measures established, as part of the common commercial policy, in the form of EU provisions governing international trade in goods.

17 In that regard, the EU legislature adopted Regulation (EU) No 654/2014 of 15 May 2014 concerning the exercise of the Union's rights for the application and enforcement of international trade rules and amending Council Regulation (EC) No 3286/94 laying down Community procedures in the field of the common commercial policy in order to ensure the exercise of the Community's rights under international trade rules, in particular those established under the auspices of the World Trade Organisation (OJ 2014 L 189, p. 50).

18 Article 4(1) of Regulation No 654/2014 provides that where action is necessary to safeguard the European Union's interests in the cases referred to in Article 3 of that regulation, the Commission is to adopt implementing acts determining the appropriate commercial policy measures.

19 On the basis of Regulation No 654/2014, particularly Article 4(1) thereof, the Commission adopted, specifically, Implementing Regulation (EU) 2018/886 of 20 June 2018 on certain commercial policy measures concerning certain products originating in the United States of America and amending Implementing Regulation (EU) 2018/724 (OJ 2018 L 158, p. 5).

II. Background to the dispute

20 In June 2018, the Government of the United States of America introduced additional customs duties of 25% and 10% on imports of steel and imports of aluminium, respectively, from the European Union ('tariffs imposed under section 232 of the Trade Expansion Act of 1962'), with the aim of promoting and increasing domestic production of those products.

21 In response to the introduction of the tariffs imposed under section 232 of the Trade Expansion Act of 1962 the Commission adopted Regulation 2018/886 on 20 June 2018, providing for the application of additional customs duties on the importation of products originating in the United States as listed in Annexes I and II to that regulation.

22 According to Article 2(a) of, and Annex I to, Regulation 2018/886, it was envisaged that products corresponding to the nomenclature code 8711 50 00, namely 'motorcycles … with reciprocating internal combustion piston engine of a cylinder capacity exceeding 800 cm^3' were to be subject, at a first stage, to additional customs duty of a rate of 25% from 22 June 2018.

23 Furthermore, according to Article 2(b) of, and Annex II to, Regulation 2018/886, which also covered products corresponding to nomenclature code 8711 50 00, those products were, at a second stage, to be subject to additional customs duty of a rate of 25%, with effect, in essence, from 1 June 2021 at the latest.

24 Following the publication in the *Official Journal of the European Union* of Regulation 2018/886, Harley-Davidson, an American undertaking specialising in the construction of motorcycles, was therefore informed of the application of additional customs duties, on products imported into the European Union from the United States, of 25% from 22 June 2018, and then of a further 25% from 1 June 2021 at the latest, in addition to the conventional rate of duty of 6%, amounting to a total rate, for its motorcycles, of 31% from 22 June 2018, and then of 56% from 1 June 2021 at the latest.

25 On 25 June 2018, Harley-Davidson issued a 'Form 8-K Current Report' ('Form 8-K') to the United States Securities and Exchange Commission ('SEC'). That Form 8-K was intended to inform its shareholders of the application of the additional customs duties referred to in paragraph 24 above and of their consequences for its business. In that form, Harley-Davidson stated its intention to transfer production of certain motorcycles for the EU market from the United States to its international facilities in another country, in order to avoid the EU commercial policy measures at issue.

26 In the Form 8-K, Harley-Davidson stated, in particular:

'The European Union has enacted tariffs on various U.S.-manufactured products, including Harley-Davidson motorcycles. These tariffs, which became effective June 22, 2018, were imposed in response to the tariffs the U.S. imposed on steel and aluminum exported from the [European Union] to the U.S.

Consequently, EU tariffs on Harley-Davidson motorcycles exported from the U.S. have increased from 6% to 31%. Harley-Davidson expects these tariffs will result in an incremental cost of approximately [USD] 2 200 per average motorcycle exported from the U.S. to the [European Union].

…

To address the substantial cost of this tariff burden long-term, Harley-Davidson will be implementing a plan to shift production of motorcycles for EU destinations from the U.S. to its international facilities to avoid the tariff burden. Harley-Davidson expects ramping-up production in international plants will require incremental investment and could take at least 9 to 18 months to be fully complete'.

27 Following publication of the Form 8-K, Harley-Davidson chose its factory in Thailand as a production site for some of its motorcycles for the EU market.

28 Harley-Davidson wished to obtain assurances regarding the determination of the country of origin of the motorcycles produced in its factory in Thailand for the EU market. Thus, Harley-Davidson and Neovia, an intermediary which provides Harley-Davidson with logistic support services in connection with the latter's importation of motorcycles into the European Union through Belgium, jointly lodged, on 25 January 2019, two initial formal applications for BOI decisions, concerning two families of motorcycles, with the Belgian customs authorities. Three further applications for BOI decisions, concerning three other families of motorcycles, were lodged subsequently.

29 On 31 January 2019, the Belgian authorities took part in a meeting with the Commission regarding the applications for BOI decisions concerning the importation into the European Union of two families of motorcycles assembled in the Harley-Davidson factory in Thailand. At the end of that meeting, the Commission gave an informal opinion to the effect that the economic justification test, within the meaning of Article 33 of the UCC-DA, might not be met because of the information contained in the Form 8-K.

30 The Belgian authorities requested a discussion with the Member States regarding the applicability of Article 33 of the UCC-DA, a discussion which took place during the meeting of the Customs Expert Group – Origin Section on 8 April 2019. At that meeting, the Belgian authorities explained that there had been a change of country of assembly of some of the motorcycles produced by Harley-Davidson and that that relocation had taken place following the introduction of additional customs duties on goods originating in the previous country of production, namely the United States. The minutes of that meeting state that 'some delegates confirmed that based on the available information the origin is to be determined by applying Article 33 of [the] UCC-DA, other delegates did not share the view. [The Commission] is of the opinion Article 33 may apply, moreover the producer has indicated in public statements that the purpose of relocation of the operation was to avoid the application of the measures in the EU'. Despite the Belgian authorities' requests, however, the Commission never gave a formal opinion on the applicability of Article 33 of the UCC-DA to the facts of the present case.

31 On 24 June 2019, pursuant to Article 33(1) of the Customs Code, the Belgian customs authorities adopted two BOI decisions, by which they acknowledged and certified that certain categories of Harley-Davidson motorcycle imported into the European Union, corresponding to the two families of motorcycles referred to in paragraph 28 above, originated in Thailand. The three other applications for BOI decisions also referred to in paragraph 28 above were subsequently dealt with in the same way by the Belgian customs authorities.

32 The BOI decisions at issue were notified to the Commission by the Belgian customs authorities on 21 August 2019.

33 On 5 October 2020, the Commission informed the Belgian authorities of its intention to request them to revoke the first two BOI decisions. On 13 November 2020, the Belgian authorities replied to the Commission that they were opposed to such a request for revocation.

34 On 22 December 2020, the Commission launched a formal procedure for adoption of the contested decision. On 5 March 2021, the Commission submitted the draft contested decision to all the national delegations of the Customs Code Committee – Origin Section under the advisory procedure and by written procedure. Four Member States submitted observations on the draft contested decision and opposed the opinion expressed by the Commission in that draft.

35 On 29 March 2021, the Commission sent a note to the Customs Code Committee – Origin Section, in which it stated that the 23 Member States which had not expressed a view had given their tacit support for the draft contested decision.

36 On 31 March 2021, the Commission adopted the contested decision, which it notified to the Kingdom of Belgium on 6 April 2021 and which was published in the *Official Journal of the European Union* the following day, requesting the Belgian authorities to revoke the first two BOI decisions.

37 In the contested decision, the Commission stated:

'(6) Subsequent to the publication of the European Union's commercial policy measures, [Harley-Davidson] reported with [the] Form 8-K … submitted to the [SEC] on 25 June 2018 its plan to shift production of certain motorcycles destined to the European Union's market from the United States of America to its international facilities in another country to avoid the European Union's commercial policy measures.

(7) Even if the avoidance of the commercial policy measures may not necessarily be the only purpose of the shift of production, the conditions mentioned in the first paragraph of Article 33 of [the UCC-DA] are met based on the available facts. The processing or working operations carried out in the last country of production shall therefore be deemed not to be economically justified. …

(9) Since the determination of the non-preferential origin of the motorcycles covered by the BOI decisions referred to in the Annex is not based on the rule laid down in the third paragraph of Article 33 of [the UCC-DA], the Commission deems this determination of non-preferential origin to be incompatible with Article 60(2) of the [Customs] Code, in conjunction with Article 33 of [the UCC-DA].'

38 Following the adoption of the contested decision, the Belgian authorities informed the applicants, by letter of 16 April 2021 addressed to Neovia, that they were revoking the five BOI decisions adopted in respect of the importation into the European Union of motorcycles manufactured in Thailand by Harley-Davidson.

III. Forms of order sought

39 The applicants claim that the Court should:

– annul the contested decision;

– give guidance to the customs authorities of the European Union as to the useful consequences they should draw from the judgment and how they should act so as to give effect to it;

– order such measures of organisation of procedure or inquiry as it deems appropriate;

– order the Commission to pay the costs.

40 The Commission contends that the Court should:

– dismiss the action;

– order the applicants to pay the costs.

IV. Law

A. Jurisdiction of the General Court

41 The Commission contends that the applicants' second head of claim is inadmissible.

42 The applicants nevertheless consider that it might be useful for guidance to be given as to how the judgment is to be complied with.

43 In that regard, it is sufficient to note that, in a review of legality under Article 263 TFEU, the Court has no jurisdiction to issue directions to the institutions, bodies, offices and agencies of the European Union, even where they concern the manner in which its judgments are to be complied with (orders of 22 September 2016, *Gaki* v *Commission*, C-130/16 P, not published, EU:C:2016:731, paragraph 14, and of 19 July 2016, *Trajektna luka Split* v *Commission*, T-169/16, not published, EU:T:2016:441, paragraph 13).

44 It follows that the second head of claim must be rejected on the ground of lack of jurisdiction.

B. Substance

45 The applicants put forward six pleas in law in support of their action.

46 The Court considers it appropriate to examine the third plea, followed by the fourth, first, second, fifth and sixth pleas.

1. The third plea in law, alleging misuse of the power of revocation in that it is based on an incorrect interpretation and application of Article 33 of the UCC-DA

47 By the third plea in law, the applicants submit that the Commission erred in law in its interpretation of Article 33 of the UCC-DA.

48 In particular, the applicants argue that earlier versions of the legislation provided that the economic justification test was not met where the 'sole object' of an operation was avoidance, and that different language versions of Article 33 of the UCC-DA always mention a 'purpose' in the singular, which should be understood, at the very least, as a 'single dominant purpose' or an 'essential aim'. They add that the case-law of the Court of Justice has confirmed that the existence of any non-avoidance reason for an operation would suffice for the economic justification test to be met. In that regard, they refer, in particular, to the judgment of 13 December 1989, *Brother International* (C-26/88, EU:C:1989:637), in which the Court held that

'the transfer of assembly from the country in which the parts were manufactured to another country in which use [was] made of existing factories [did] not in itself justify the presumption that the sole object of the transfer was to circumvent the applicable provisions'. However, according to the applicants, the Commission did not give them the opportunity to prove the existence of other purposes, nor is there any evidence as to whether the Commission considered the information which they had provided to the Belgian authorities in order to demonstrate that the economic justification test had been met.

49 Regarding that last point, the applicants maintain that Harley-Davidson's decision to produce motorcycles for the EU market in Thailand was underpinned by a range of strong and genuine commercial drivers and was not an artificial decision whose essential aim was to circumvent the additional customs duties.

50 The applicants also compare the concept of 'avoidance' for the purposes of Article 33 of the UCC-DA with the concepts of 'avoidance', 'abuse', 'manipulation' and 'circumvention' as clarified by the case-law. Thus, referring to various judgments of the Court of Justice in which those concepts have been addressed and clarified, in particular in tax law or anti-dumping law, the applicants claim that even if Harley-Davidson's manufacturing of EU-destined motorcycles in Thailand were predominantly to avoid the additional customs duties, it was necessary to check whether there was no other legitimate business aim underlying the relocation operations, which the Commission did not do. Proceeding also by analogy, the applicants note that the Court of Justice has confirmed on a number of occasions that, in the EU market, traders have considerable freedom and are, for example, entitled to structure their business in a way that limits their tax liability.

51 Thus, the applicants take the view that the Commission's application of Article 33 of the UCC-DA has changed the economic justification test from what was originally an objective test to a subjective test. According to the applicants, the Commission's interpretation alters the focus of Article 60(2) of the Customs Code so that origin must be established not on the basis of objective matters, that is the nature of the operation being carried out, but on the basis of subjective matters, namely the reasoning or motives of the producer. Assessing 'the purpose' of a relocation operation should entail an objective analysis of the elements and context of the operation itself, an analysis which the Commission did not carry out.

52 The Commission contests those arguments.

53 In the present case, it is necessary to ascertain whether, in adopting the contested decision on the basis of Article 33 of the UCC-DA, the Commission erred in law by taking the view that the operation to relocate, to Thailand, the manufacture of certain categories of Harley-Davidson motorcycle for the EU market could not be classified as 'economically justified' since, according to the Commission, it was intended to avoid EU commercial policy measures adopted from 2018 onwards in respect of products originating in the United States.

54 In that regard, it must be borne in mind that, in accordance with settled case-law, in interpreting provisions of EU law, it is necessary to consider not only their wording but also their context and the objectives pursued by the rules of which they form part. The origins of a provision of EU law may also provide information relevant to its interpretation (see judgment of 2 September 2021, *CRCAM*, C-337/20, EU:C:2021:671, paragraph 31 and the case-law cited).

55 According to Article 60(2) of the Customs Code (see paragraph 7 above), in order for a country or territory to be regarded as the place of origin of goods, for the purposes of applying EU measures relating to the origin of imported goods, the last substantial working or processing must be carried out in that place and must be 'economically justified'.

56 Article 33 of the UCC-DA, headed 'Processing or working operations which are not economically justified', states, in the first paragraph, that 'any processing or working operation carried out in another country or territory shall be deemed not to be economically justified if it is established on the basis of the available facts that the purpose of that operation was to avoid the application of the [Union] measures' relating to the origin of the goods.

57 Thus, first of all, it follows from the wording of Article 33 of the UCC-DA, in particular from the use of the term 'deemed' in that article, that, in certain circumstances, namely where the purpose of a particular operation was to avoid the application of the measures referred to in Article 59 of the Customs Code, the Commission and the customs authorities of the European Union must consider the condition relating to economic justification to be one that cannot be satisfied.

58 Next, with regard specifically to the use of the expression 'the purpose of that operation was to avoid' in Article 33 of the UCC-DA, the Court considers that the use of the term 'purpose' in the singular must be understood, in situations in which the implementation of a particular relocation operation may have had several purposes, as referring to the idea of a 'principal' or 'dominant purpose'. Therefore, it may be that that purpose is not the only one, but it must be decisive in terms of the decision to relocate production to another country or territory.

59 It is apparent from Article 33 of the UCC-DA, and in particular from the reference to the 'measures referred to in Article 59' of the Customs Code, read in the light of recital 21 of the UCC-DA and the consolidated draft delegated act submitted by the Commission prior to the adoption of the UCC-DA, that Article 33 of the UCC-DA applies when the European Union has adopted commercial policy measures. Those commercial policy measures may consist in tariff measures such as those adopted in the present case, that is, additional customs duties applying to certain goods originating in the United States introduced by Regulation 2018/886 pursuant to Article 4(1) of Regulation No 654/2014.

60 Thus, Article 33 of the UCC-DA is intended to ensure the full implementation of EU commercial policy measures by preventing the goods covered by such measures from acquiring a new origin where the principal or dominant purpose of an operation, such as a transfer of production to another country or territory, was to avoid the application of those measures.

61 Lastly, the use of the expression 'on the basis of the available facts' in Article 33 of the UCC-DA refers to the facts available to the authority responsible for checking whether the purpose of a relocation operation was to avoid the application of EU measures relating to the origin of the goods.

62 It follows from the foregoing that Article 33 of the UCC-DA must be interpreted as meaning that if, on the basis of the available facts, it appears that the principal or dominant purpose of a relocation operation was to avoid the application of EU commercial policy measures, then that operation must be considered incapable, as a matter of principle, of being economically justified.

63 Accordingly, it is for the economic operator concerned to prove that the principal or dominant purpose of a relocation operation was not, at the time when the decision concerning that operation was taken, to avoid the application of EU commercial policy measures. Such proof differs from the search, after the event, for an economic justification or rationale for that relocation operation. If proof that it was not the principal or dominant purpose of a relocation operation to avoid the application of commercial policy measures could be adduced merely by demonstrating that there was an economic justification, Article 33 of the UCC-DA would be rendered redundant.

64 In the present case, it is apparent from the documents before the Court that the available facts, within the meaning of Article 33 of the UCC-DA, are the assertions made by Harley-Davidson in the Form 8-K, set out in paragraph 26 above, and the information which the applicants sent to the Belgian customs authorities in support of their applications for BOI decisions.

65 As regards the information sent to the Belgian customs authorities, the applicants state that, in autumn 2018, they provided an overview of the various reasons why production in Thailand was, in their view, 'economically justified', an overview which was supplemented by them on 26 March 2019 – that is to say nine months after publication of the Form 8-K – by further explanations.

66 It is apparent from an analysis of those documents, annexed to the present action, that they were drawn up by the applicants in the context of their discussions with the Belgian customs authorities with a view to obtaining BOI decisions recognising the Thai origin of the motorcycles manufactured by Harley-Davidson for the EU market. Those discussions began in September 2018, that is to say, several months after the publication of the Form 8-K publicly announcing the relocation operation in question. Those documents, which neither pre-date nor are contemporaneous with the Form 8-K, and which were drawn up for the sole purpose of securing the Belgian customs authorities' recognition of the Thai origin of the motorcycles manufactured by Harley-Davidson, do not enable a definitive conclusion to be drawn as to whether a decision to relocate the manufacture of motorcycles for the EU market to Thailand may indeed have existed prior to the introduction of the additional customs duties (see paragraph 21 above) or been based on perfectly rational economic reasoning unconnected with the introduction of those additional customs duties.

67 It follows from the available facts, that is to say, Harley-Davidson's own assertions in the Form 8-K, that it was in order 'to address the substantial cost of [the] tariff burden [caused by the introduction of the additional customs duties] long-term [that] Harley-Davidson [implemented] a plan to shift production of motorcycles for EU destinations from the U.S. to its international facilities'. It thus appears, on reading the Form 8-K, that the introduction of the additional customs duties was the event that gave rise to the announcement of the relocation decision in question. The applicants, moreover, acknowledged at the hearing, in response to a question put by the Court, that the coming into effect of those additional customs duties had 'accelerated' the taking of a decision to relocate production for the EU market to Thailand.

68 In addition, the applicants were unable, whether in the evidence of their discussions with the Belgian customs authorities, or in the pleadings lodged in the present proceedings, or in response to the questions put by the Court at the hearing, to demonstrate that the decision to relocate the production of Harley-Davidson motorcycles for the EU market to Thailand pre-dated the entry into force of Regulation 2018/886 or formed part of an overall strategy aimed specifically at reducing the production costs of motorcycles intended for the EU market by the relocation of

production to Asia. At most, the applicants confined themselves to asserting in vague and abstract terms that Harley-Davidson had, for several years, been pursuing a strategy designed to grow its commercial presence outside the United States, which they substantiated by producing documents intended for the SEC, from which it is apparent only, without further details, that international growth was essentially part of the undertaking's overall long-term strategy.

69 The applicants did not produce any document, such as copies of decisions of Harley-Davidson's board of directors, showing that the specific decision to relocate production of motorcycles for the EU market to Thailand pre-dated the introduction of the additional customs duties at issue. On the contrary, it is apparent from one of the documents produced by the applicants, mentioned in paragraph 68 above, dated 28 February 2019 and intended for the SEC, that the production of motorcycles in the factory in Thailand only commenced in 2018 and that that production was, at least until 31 December 2018, intended exclusively for certain Asian markets, not for the EU market.

70 In any event, as the only reason given in the Form 8-K for relocating its production was 'to avoid the tariff burden' arising from the commencement of the additional customs duties, the Court finds that Harley-Davidson's principal or dominant purpose was to avoid the application of those commercial policy measures. It is clear from the subject matter and content of the Form 8-K that this form, dated 25 June 2018, was issued in direct response to the publication of Regulation 2018/886, only five days after publication and three days after its entry into force. The Court notes that there is a coincidence in time between the announcement of the relocation operation in question and the entry into force of Regulation 2018/886. Such a coincidence in time is capable, according to the case-law, of justifying the presumption that a relocation operation is intended to avoid the application of commercial policy measures (see, to that effect, judgment of 13 December 1989, *Brother International*, C-26/88, EU:C:1989:637, paragraph 29).

71 It is also apparent from the case-law that, consequently, where there is such a coincidence in time, the economic operator concerned must prove that there were reasonable grounds, other than avoiding the consequences of the provisions in question, for carrying out the manufacturing operations in the country to which production was relocated (see, to that effect, judgment of 13 December 1989, *Brother International*, C-26/88, EU:C:1989:637, paragraph 29). As has been pointed out in paragraphs 65 to 68 above, the applicants were unable to provide proof of reasonable grounds, prior to or contemporaneous with the announcement of the decision to relocate to Thailand, that would substantiate the claim that there might have been some justification for that relocation other than that of avoiding the consequences of the introduction of the additional customs duties.

72 It appears, therefore, that the introduction of the additional customs duties was the event giving rise to the relocation decision in question that was disclosed by the publication of the Form 8-K and that, having regard to that context, the decision was indeed based, at least principally or predominantly, on the intention to avoid the financial burden caused by those duties.

73 It follows that the Commission did not err in concluding that the principal purpose of that relocation was to avoid the commercial policy measure which the additional customs duties constituted.

74 Consequently, all of the applicants' arguments relating to the existence of an economic justification for the relocation operation in question are ineffective in so far as the Commission was not required to seek such justification in the present case. The same applies to the applicants' arguments concerning the reality and the substantial nature of the production operations in Thailand.

75 As regards the applicants' argument that the Commission changed a test that was originally objective to a subjective test, it is sufficient to note that the finding, in the contested decision, that the relocation to Thailand had been carried out in order, at least principally, to avoid the application of EU commercial policy measures is a finding based on objective evidence. In that regard, in its examination of Harley-Davidson's conduct for the purpose of identifying any circumvention of those commercial policy measures, the Commission was required to rely on all the relevant and available facts. In that context, the Commission was entitled to assess the strategy pursued by that undertaking. In so doing, the Commission was justified in referring to subjective factors, namely the underlying motives of the strategy in question, in so far as those factors were unambiguously and objectively clear from the Form 8-K. Thus, contrary to the applicants' contention, an intention to circumvent the commercial policy measures at issue could constitute one of the objective factual circumstances capable of being taken into account for the purposes of determining whether such circumvention occurred.

76 It follows from the foregoing that the third plea in law is to be rejected.

2. The fourth plea in law, alleging that Article 33 of the UCC-DA is invalid

77 In the context of the fourth plea, the applicants claim that Article 33 of the UCC-DA is invalid in that it goes beyond the scope of what may be passed by means of a delegated act under Article 290 TFEU, and breaches the principles of legal certainty and proportionality.

(a) The first part of the fourth plea, alleging infringement of Article 290 TFEU

78 The applicants maintain that Article 33 of the UCC-DA, however interpreted, exceeds the limits of delegated legislation. In that regard, they argue, in essence, that the 'economic justification' test cannot be regarded as a test providing more specificity on how a substantive provision should be applied, but that it is, on the contrary, a fundamental rule on determination of origin. As such, the rule in Article 33 of the UCC-DA should sit alongside Article 60(2) of the Customs Code in primary legislation, which contains the general rule for determining the origin of goods involving more than one country of processing.

79 The Commission contests those arguments.

80 The possibility of delegating powers provided for in Article 290 TFEU aims to enable the legislature to concentrate on the essential elements of a piece of legislation and on the non-essential elements in respect of which it finds it appropriate to legislate, while entrusting the Commission with the task of 'supplementing' certain non-essential elements of the legislative act adopted or 'amending' such elements within the framework of the power delegated to it (see judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 58 and the case-law cited).

81 It follows that the essential rules on the matter in question must be laid down in the basic legislation and cannot be delegated (see judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 59 and the case-law cited).

82 It is apparent from the case-law that the essential elements of basic legislation are those which, in order to be adopted, require political choices falling within the responsibilities of the EU legislature (see judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 61 and the case-law cited).

83 Identifying the elements of a matter which must be categorised as essential must be based on objective factors amenable to judicial review, and requires account to be taken of the characteristics and particular features of the field concerned (see judgment of 11 May 2017, *Dyson* v *Commission*, C-44/16 P, EU:C:2017:357, paragraph 62 and the case-law cited).

84 In the present case, Article 60 of the Customs Code lays down rules for determining the non-preferential origin of goods, which vary depending on whether the goods were obtained in a single country or territory, or their production involved more than one country or territory. Those two categories of rule are laid down in Article 60(1) and (2) respectively.

85 The present case concerns only the second category of rules.

86 Furthermore, as regards that second category of rules, the Commission adopted Article 33 of the UCC-DA pursuant to the power provided for in Article 62 of the Customs Code, read in conjunction with Article 284 of the Customs Code. Thus, Article 62 empowers the Commission to adopt delegated acts with a view to laying down, in essence, the rules for implementing the conditions laid down in Article 60(2) of the Customs Code.

87 It follows that, in the light of the general scheme of the Customs Code, the condition relating to economic justification, which is being examined in the present case, is laid down in the Customs Code itself and constitutes only one of the conditions laid down by one of the rules on acquisition of non-preferential origin.

88 In that context, as regards the scope of the delegation conferred on the Commission in Article 62 of the Customs Code, by empowering the Commission to 'lay down' rules, that provision authorises the Commission to 'supplement' the Customs Code, within the meaning of Article 290 TFEU. Thus, although the Commission is not authorised by that article to amend the elements already adopted in the Customs Code, it is authorised by that article to supplement the Customs Code by developing elements which have not been defined by the legislature, whilst remaining under an obligation to comply with the provisions laid down by the Customs Code.

89 Thus, even if the rules for determining origin are essential elements of the Customs Code, Article 33 of the UCC-DA is intended merely to supplement Article 60 of the Customs Code by providing a number of clarifications. Therefore, it cannot be held that Article 33 exceeds the limits of the delegation conferred on the Commission by Article 62 of the Customs Code or that the Commission amended an essential rule of the Customs Code.

90 Moreover, in so far as Article 33 of the UCC-DA is intended solely to ensure, as is apparent from recital 21 of the UCC-DA, the effective application of the commercial policy measures introduced under other provisions of EU law, it must be held that the adoption of that article did not, as such, involve political choices falling within the responsibilities of the EU legislature.

91 It follows from the foregoing that the first part of the fourth plea must be rejected.

(b) The second part of the fourth plea, alleging breach of the principles of legal certainty and proportionality

92 The applicants submit that introducing such a substantive change to the legal test of 'economic justification' via a delegated act is inconsistent with general principles of EU law, in particular those of legal certainty and proportionality.

93 In that regard, they maintain that, by taking the position, in Article 33 of the UCC-DA, that a multiplicity of reasons may be considered in order to assess the economic justification of a relocation operation, the Commission introduced into this test a form of subjectivity which is inconsistent with the objective nature of the basic regulation. They also claim that the Commission had no ground to expand and change the test as set out in primary legislation or the case-law.

94 The Commission rejects those claims.

95 The Court observes that the applicants' arguments are based on the premiss that Article 33 of the UCC-DA provides that a multiplicity of reasons may be taken into consideration for the purposes of determining whether there is any 'economic justification', and that the assessment of the respective importance of those different reasons falls within the sole discretion of the Commission. However, that premiss is based on a misinterpretation of Article 33 of the UCC-DA.

96 As has been established in paragraphs 54 to 63 above, Article 33 of the UCC-DA provides that it is sufficient that the 'purpose', that is to say, the principal or dominant purpose, of a relocation operation is to avoid the application of EU commercial policy measures, for that relocation operation to be considered not to be economically justified within the meaning of the applicable legislation.

97 Consequently, it must be held that, contrary to the applicants' contention, Article 33 of the UCC-DA does not provide for a 'multiplicity of reasons' to be weighed up or taken into consideration for the purposes of determining whether there is any 'economic justification', but merely provides that there cannot, as a matter of principle, be any such justification if there is a strategy in place that is aimed principally at avoiding the application of EU commercial policy measures.

98 Accordingly, the applicants' arguments must be rejected.

99 It follows from the foregoing that the second part of the fourth plea and, therefore, the fourth plea in its entirety, must be rejected.

3. The first plea in law, alleging infringement of the obligation to state reasons and of the advisory procedure prior to the adoption of the contested decision

100 In the context of the first plea, the applicants claim, first, that the Commission infringed essential procedural requirements in that the contested decision does not contain a statement of reasons or contains an inadequate statement of reasons and, secondly, that the Commission failed to comply with the advisory procedure prior to the adoption of the contested decision.

(a) The first part of the first plea, alleging infringement of the obligation to state reasons

101 The applicants maintain that the contested decision does not tell them what the Commission thinks of the assembly operations conducted in Thailand, or what the Commission thinks about Harley-Davidson's reasons for manufacturing its products in Thailand, or how the Commission applied the economic justification test, and that therefore the Court is unable to exercise its power of review.

102 The applicants also claim that the contested decision fails to explain why the Commission's position differed from that of the Belgian customs authorities, and that the reasoning set out in recital 7 of that decision amounts to no more than a peremptory statement. They argue in that regard that, given the technical nature of the matter, the very significant investments at stake and the unprecedented nature of a decision such as the contested decision, clear reasoning was particularly important.

103 The Commission rejects those claims.

104 It is apparent from settled case-law that the scope of the duty to state reasons depends on the nature of the measure in question and on the context in which it was adopted. The statement of reasons must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure, so as to enable the persons concerned to ascertain the reasons for it so that they can defend their rights and ascertain whether or not the measure is well founded and to enable the EU judicature to exercise its power of review. It is not necessary for the statement of reasons to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 296 TFEU must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question. In particular, the Commission is not obliged to adopt a position on all the arguments relied on by the parties concerned and it is sufficient if it sets out the facts and the legal considerations having decisive importance in the context of the decision (see judgment of 12 May 2011, *Région Nord-Pas-de-Calais and Communauté d'agglomération du Douaisis* v *Commission*, T-267/08 and T-279/08, EU:T:2011:209, paragraph 43 and the case-law cited).

105 In the present case, the Commission indicated, in the contested decision and in the terms set out in paragraph 37 above, the reason why certain categories of motorcycle manufactured by Harley-Davidson and imported into the European Union from Thailand could not be regarded as having originated in that country, namely the fact that that manufacture in Thailand was not economically justified, since it was principally aimed at avoiding EU commercial policy measures adopted from 2018 onwards in respect of products originating in the United States.

106 In addition, in recital 9 of the contested decision, the Commission complained that the Belgian customs authorities had not applied Article 33 of the UCC-DA correctly since, in both BOI decisions, they had accepted Thailand as the place of origin of the motorcycles in question.

107 Thus, the contested decision contains an adequate statement of reasons in that respect, mentioning as it does the reasons why the Commission found that the Belgian customs authorities had adopted BOI decisions that were not consistent with EU customs legislation.

108 Furthermore, it may be observed that some of the applicants' arguments set out in paragraph 102 above are indissociable from criticism of the substance of the contested decision. The duty to state adequate reasons in decisions is an essential procedural requirement which must be distinguished

from the question whether the reasoning is well founded. The reasoning of a decision consists in a formal statement of the grounds on which that decision is based. If those grounds are vitiated by errors, the latter will vitiate the substantive legality of the decision, but not the statement of reasons in it, which may be adequate even though it sets out reasons which are incorrect (see judgment of 10 July 2008, *Bertelsmann and Sony Corporation of America* v *Impala*, C-413/06 P, EU:C:2008:392, paragraph 181 and the case-law cited).

109 It follows that the first part of the first plea must be rejected.

(b) The second part of the first plea, alleging failure to comply with the advisory procedure prior to the adoption of the contested decision

110 The applicants submit that the Commission was required to consult the relevant advisory committee prior to the adoption of the contested decision and that the consultation of that committee by means of a written procedure alone was, in the present case, inadequate, especially given that the Commission failed to share anything of the factual and legal context in order to allow the members of the committee to form an opinion. Moreover, according to the applicants, the fact that, in the consultation conducted by a written procedure, four Member States expressed their opposition to the draft contested decision should have resulted in the Commission 'taking the utmost account' of those comments, within the meaning of Article 4(2) of Regulation (EU) No 182/2011 of the European Parliament and of the Council of 16 February 2011 laying down the rules and general principles concerning mechanisms for control by Member States of the Commission's exercise of implementing powers (OJ 2011 L 55, p. 13).

111 The Commission contests those claims.

112 It is apparent from Article 285 of the Customs Code that the Customs Code Committee is a committee within the meaning of Regulation No 182/2011. In addition, it follows from the second and third subparagraphs of Article 37(2) of the Customs Code, read in conjunction with Article 285(2) and (6) of that code, that decisions, such as the contested decision, requesting Member States to revoke BOI decisions are to be adopted in accordance with the advisory procedure referred to in Article 4 of Regulation No 182/2011.

113 Article 4 of Regulation No 182/2011, headed 'Advisory procedure', provides:

'1. Where the advisory procedure applies, the committee shall deliver its opinion, if necessary by taking a vote. If the committee takes a vote, the opinion shall be delivered by a simple majority of its component members.

2. The Commission shall decide on the draft implementing act to be adopted, taking the utmost account of the conclusions drawn from the discussions within the committee and of the opinion delivered.'

114 As regards the complaint concerning the use of a procedure conducted in writing in the present case, there is nothing in Regulation No 182/2011 that prohibits the Commission from conducting an advisory procedure by that particular method. On the contrary, Article 3(5) of Regulation No 182/2011 expressly provides that the opinion of a committee, in the context of an advisory procedure, may be obtained by written procedure.

115 As regards the complaint that the advisory committee did not have sufficient factual and legal information when it examined the draft contested decision, it should be noted that the applicants did not substantiate that complaint and that, in any event, the Member States primarily concerned made no criticism in that respect, so that there is no evidence to support the conclusion that the delegations were not able to adopt their positions in full knowledge of the facts. Accordingly, this complaint must be rejected.

116 So far as concerns the account taken of the observations made by the Member States which expressed their opposition to the draft decision, it should be noted that the requirement laid down in Article 4(2) of Regulation No 182/2011 is not binding. Accordingly, the Commission, which retains a measure of discretion, is not bound by the opinion delivered by the committee or, a fortiori, by the dissenting minority opinions expressed by some of its members.

117 The expression 'taking the utmost account' in Article 4(2) of Regulation No 182/2011 highlights the non-binding nature of the conclusions drawn from the discussions within the committee, including the opinions expressed by only some of its members, and of the committee's final opinion. If such conclusions or opinions were binding, it would not be sufficient for the Commission to take the utmost account of them, at the risk of distorting the wording and purpose of Article 4 of Regulation No 182/2011; it would have to comply with them (see, to that effect and by analogy, order of 9 July 2019, *VodafoneZiggo Group* v *Commission*, T-660/18, EU:T:2019:546, paragraph 44). That finding is supported by a comparison with the examination procedure provided for in Article 5 of that regulation, given that, as is apparent from recital 11 thereof, the latter procedure must ensure that implementing acts cannot be adopted by the Commission if they are not in accordance with the opinion of the relevant committee. That means that the opinion of the relevant committee is not binding on the Commission if, as in the present case, the advisory procedure applies.

118 However, as the applicants correctly point out, it has already been recognised by the case-law that the obligation to take 'the utmost account' imposed an obligation to state reasons in that the Commission had to be able to explain divergences in the light of the conclusions drawn from the discussions within the committee and the opinion delivered (see, to that effect and by analogy, order of 9 July 2019, *VodafoneZiggo Group* v *Commission*, T-660/18, EU:T:2019:546, paragraph 47).

119 In that regard, it must be observed that the contested decision was adopted at the end of the administrative procedure described in paragraphs 34 and 35 above. In particular, the Commission submitted the draft contested decision to the delegations of the committee dealing with the matter on 5 March 2021, and four Member States sent observations opposing the position adopted by the Commission in that draft.

120 It is apparent from the note sent by the Commission to the Customs Code Committee – Origin Section on 29 March 2021 (see paragraph 34 above), that 23 Member States had not commented on the draft contested decision. Thus, a large majority of delegations had given their tacit support for that draft contested decision, pursuant to Article 3(5) of Regulation No 182/2011, so that the opinion delivered by the committee regarding the draft contested decision could be regarded as a favourable opinion, in respect of which there was, therefore, no divergence for the Commission to explain.

121 It is apparent from the minutes of the meeting of the Customs Expert Group, Origin Section, on 20 April 2021 that, of the four delegations which opposed the draft contested decision, at least three expressed precise and detailed concerns.

122 In particular, those delegations expressed reservations concerning the failure to examine, in the draft contested decision, the overall economic rationale for the relocation operation and the question whether the concept of 'purpose', within the meaning of Article 33 of the UCC-DA, was to be understood as referring to a single aim or to an exclusive purpose and not merely as referring to one of a number of purposes.

123 Thus, those reservations may come within the scope of 'conclusions drawn from the discussions within the committee', within the meaning of Article 4(2) of Regulation No 182/2011, of which the Commission was required to take 'the utmost account' within the meaning of that provision.

124 However, it is apparent from recital 7 of the contested decision that 'even if the avoidance of the commercial policy measures may not necessarily be the only purpose of the shift of production, the conditions mentioned in the first paragraph of Article 33 of [the UCC-DA] are met based on the available facts'.

125 The Commission thereby implicitly but necessarily answered the question whether the concept of 'purpose', within the meaning of Article 33 of the UCC-DA, was to be understood as referring to one of a number of purposes, by finding that that purpose could therefore coexist with others. In addition, it was also fully entitled to find, implicitly but necessarily, that it was not necessary, having established that the principal or dominant purpose of a relocation operation was to avoid the application of EU commercial policy measures, to express a view on the question of the overall economic rationale for the relocation operation in question.

126 It follows from the foregoing that the second part of the first plea and, accordingly, the first plea in its entirety must be rejected.

4. The second plea in law, alleging a manifest error of assessment

127 The applicants maintain that the contested decision is based on a manifest error of assessment of the relevant facts in so far as the Commission failed to take account of the overall context and in so far as the context, content and purpose of the Form 8-K were not correctly assessed.

(a) The first part of the second plea, alleging a failure to analyse all the relevant facts

128 The applicants claim that the Commission made a manifest error of assessment in so far as it failed to examine all the relevant facts and, in particular, the date on which Harley-Davidson's decision to move certain manufacturing operations to Thailand was taken, the commercial and economic reasons which underscored that decision and the nature of the processes and operations carried out in Thailand.

129 The Commission contests those arguments.

130 It must be noted that the applicants' arguments concern the question whether the Commission erred in law in its application of Article 33 of the UCC-DA by not investigating the economic justification for the relocation at issue. That question has, however, already been examined in the context of the analysis of the third plea.

131 In that regard, it is apparent from the analysis in paragraphs 54 to 63 above that, in so far as the Commission correctly found, on the basis of the information available to it, that the principal purpose of the operation to relocate to Thailand the production of Harley-Davidson motorcycles intended for the EU market was to avoid the application of the commercial policy measures introduced by Regulation 2018/886, it was then reasonably entitled to conclude, in the context of its application of Article 33 of the UCC-DA, that that operation was not economically justified, without there being any need to examine the facts in relation to any other possible purposes of the relocation operation.

132 It follows that the first part of the second plea is to be rejected.

(b) The second part of the second plea, alleging a manifest error of assessment of the context, content and purpose of the Form 8-K

133 The applicants claim that the Commission disregarded the context in which the Form 8-K was published. In that regard, the applicants maintain that the Commission attached too much importance to the statement that the relocation at issue was to make it possible to 'avoid the tariff burden' caused by the additional customs duties, when other factors justified that relocation. Thus, the applicants submit that the Commission ascribed definitive probative value to a single statement, failing to consider the context in which the statement was made or the audience to whom it was addressed and whom it sought to reassure, to the exclusion of any other evidence. Lastly, the applicants argue that even if one of the factors underlying the relocation were to avoid application of the additional customs duties, the Commission did not weigh that purpose against other purposes of the relocation at issue.

134 The Commission rejects those claims.

135 In the present case, as is apparent from the facts set out in paragraphs 24 and 25 above, in response to the entry into force of Regulation 2018/886, Harley-Davidson submitted to the SEC, on 25 June 2018, the Form 8-K which was intended to inform its shareholders of the application, since 22 June 2018, of additional customs duties on its products imported into the European Union from the United States. In that form, Harley-Davidson also stated its intention to transfer the production of certain motorcycles for the EU market from the United States to its international facilities, in order to avoid the commercial policy measures of the European Union at issue.

136 In particular, the Form 8-K contains the following wording: 'to address the substantial cost of this tariff burden long-term, Harley-Davidson will be implementing a plan to shift production of motorcycles for EU destinations from the U.S. to its international facilities to avoid the tariff burden'.

137 It follows from this that at least one of the factors underlying the relocation in question was avoidance of the application of the additional customs duties, which the applicants do not dispute. Furthermore, it has been established, in paragraphs 64 to 72 above, that that intention to avoid the application of the additional customs duties was the principal or dominant purpose of the relocation decision in question.

138 Consequently, the Commission cannot be accused of having made a manifest error of assessment when it stated, in the contested decision, that it was 'subsequent to the publication of the European Union's commercial policy measures [that Harley-Davidson had] reported with [the] Form 8-K … submitted to the [SEC] on 25 June 2018 its plan to shift production of certain motorcycles destined to the European Union's market from the United States … to its international facilities in another country to avoid the European Union's commercial policy measures', while at the same time noting that '… the avoidance of the commercial policy measures [in question] may not necessarily [have been] the only purpose of the shift of production …'.

139 As regards the question whether other factors should have been taken into account by the Commission, such as contextual elements, the purpose of the Form 8-K or even the other purposes of the relocation in question, it must be observed that this concerns whether the Commission erred in law in its interpretation of Article 33 of the UCC-DA by basing its conclusion on the finding that the dominant purpose of that relocation was to avoid the application of the additional customs duties, which has already been examined and rejected in the analysis of the third plea in law and the first part of the present plea.

140 It follows from the foregoing that the second part of the second plea and, therefore, the second plea in its entirety must be rejected.

5. The fifth plea in law, alleging breach of general principles of EU law and of the Charter of Fundamental Rights of the European Union

141 In the context of the fifth plea, the applicants claim that the contested decision breaches the principles of legal certainty and legitimate expectations, the principles of non-discrimination and proportionality, the right to good administration, the freedom to conduct a business and the right to property.

(a) The first part of the fifth plea, alleging breach of the principles of legal certainty and legitimate expectations

142 The applicants submit that the contested decision was not foreseeable, and neither were its application and effects, in particular as regards the Belgian authorities, as is evident from the fact that the Belgian authorities revoked all five BOI decisions which had been granted to the applicants, not only the two listed in the contested decision. Moreover, they maintain that the Commission's failure to revoke the BOI decisions at the time they were granted amounted to a course of conduct on the basis of which a legitimate expectation was formed, and note that the Court of Justice has previously held that a period of two years between the publication of an incorrect decision and the Commission's attempt to correct it was unreasonable. They also submit that the Commission's Guidance on Binding Origin Information states that the revocation of a BOI decision is subject to the conditions of Article 22(6) of the Customs Code relating to the right to be heard, so that they could legitimately have expected that the

Commission would engage with them under the procedure that led to the adoption of the contested decision. Lastly, the applicants maintain that there was no overriding public interest that should have prevailed over their private interests.

143 The Commission contests those arguments.

144 The BOI decisions, taken pursuant to Article 33 of the Customs Code, are decisions by which national customs authorities certify, in response to requests from importers seeking guarantees as to the interpretation of the rules for defining the origin of imported goods, the geographical origin of certain products imported into the European Union. The aim of binding origin information is to enable the trader to proceed with certainty where there are doubts as to the geographical origin of goods imported into the European Union, thereby protecting the trader against any subsequent change in the position adopted by the national customs authorities for a fixed period (see, to that effect and by analogy, judgment of 29 January 1998, *Lopex Export*, C-315/96, EU:C:1998:31, paragraph 28). However, such binding origin information cannot have the aim or effect of definitively guaranteeing to the trader that the geographical origin to which it refers will not subsequently be amended, in particular as a result of the revocation, at the request of the Commission, of the BOI decision obtained, on the ground set out in Article 34(11) of the Customs Code, namely the need to ensure a correct determination of the origin of goods.

145 In addition, the Court of Justice has previously held that the principle of the protection of legitimate expectations cannot be relied upon against an unambiguous provision of EU law; nor, therefore, can the conduct of a national authority responsible for applying EU law, which acts in breach of that law, give rise to a legitimate expectation on the part of a trader of beneficial treatment contrary to EU law (see, to that effect, judgment of 7 April 2011, *Sony Supply Chain Solutions (Europe)*, C-153/10, EU:C:2011:224, paragraph 47 and the case-law cited).

146 In the present case, it is apparent from the analysis of the third plea that Article 33 of the UCC-DA regulates with sufficient precision the condition relating to the economically justified nature of processing or working operations. In addition, it is apparent from the wording of Article 60(2) of the Customs Code that that provision regulates with sufficient precision the other conditions that must be satisfied in order for the origin of goods imported into the European Union to be determined.

147 It follows that, by adopting the BOI decisions, the Belgian customs authorities responsible for applying EU law acted in breach of EU law and that that conduct could not give rise to a legitimate expectation on the part of the applicants.

148 As regards the question of the time which elapsed between the date on which the Commission became aware of the existence of the BOI decisions at issue and the date on which it requested the Belgian customs authorities to revoke them, a question which actually falls within the third part of the present plea, this will be addressed in the examination of that part of the plea, alleging infringement of the right to good administration.

149 With regard, lastly, to the applicants' claim that they could legitimately have expected that the Commission would engage with them before adopting the contested decision, it is sufficient to note, in rejecting it, that, in the context of the first part of the fifth plea, that claim is based on an interpretation of Article 22(6) of the Customs Code, which concerns only the procedure to be followed by the national customs authorities, not the procedure to be followed by the Commission.

150 It follows from the foregoing that the first part of the fifth plea must be rejected.

(b) The second part of the fifth plea, alleging breach of the principles of non-discrimination and proportionality

151 The applicants claim that it is apparent from the statements of the former President of the Commission, but also of the then Commissioner for Trade, that Harley-Davidson was specifically targeted, alongside other American brands, for inclusion in the retaliatory tariffs at issue in order to apply pressure on certain American politicians in particular, and not on the basis of objective criteria. They add that the impact of the contested decision has been disproportionate to the objective sought and that less onerous alternatives were available or safeguards could have been provided, such as giving the applicants warning that the Commission was planning to re-examine the interpretation of the test in Article 33 of the UCC-DA as applied by the Belgian authorities, while giving the applicants the opportunity to make representations.

152 The Commission rejects those claims.

153 The Court observes that the applicants go beyond the scope of the present dispute in so far as they claim, in essence, that they have been discriminated against because Harley-Davidson was specifically targeted by public statements made by senior EU officials, alongside other American brands, for inclusion in the retaliatory tariffs at issue.

154 That criticism by the applicants does not in fact relate to the contested decision, but directly concerns Regulation 2018/886, which introduced the additional customs duties and which, in their view, unfairly designated Harley-Davidson. Furthermore, and in any event, Regulation 2018/886 does not refer to Harley-Davidson by name but refers, inter alia, to products corresponding to nomenclature code 8711 50 00, that is, 'motor cycles … with reciprocating internal combustion piston engine of a cylinder capacity exceeding 800 cm^3'. While that category of products does indeed correspond to the motorcycles manufactured by Harley-Davidson, it cannot be ruled out that motorcycles manufactured by other US-based undertakings may also fall within that objectively defined category which makes no reference to a particular brand, as the applicants confirmed at the hearing by naming another American manufacturer.

155 As regards the issue of the proportionality and the discriminatory nature of the contested decision, suffice it to note that, by that decision, the Commission merely requested the national customs authorities to revoke the BOI decisions because those decisions had not been adopted in accordance with EU law. First, a request for compliance with the applicable legislation is not disproportionate. Secondly, the applicants have neither established nor even claimed that the Commission waived its right to request that national authorities modify BOI decisions concerning another producer of products corresponding to nomenclature code 8711 50 00. There is, moreover, nothing to indicate that the Commission would not have acted in exactly the same way had there been other BOI decisions that did not comply with EU law.

156 It follows that the second part of the fifth plea must be rejected.

(c) The third part of the fifth plea, alleging infringement of the right to good administration and of the right to be heard

157 The applicants submit that the Commission failed to carry out its decision-making impartially and that the contested decision can only be political in origin. They also claim that the Commission failed to adopt the contested decision within a reasonable time frame and failed to engage with them, even through the Belgian authorities, prior to adopting that decision. In that regard, the applicants point out that the right to be heard is a general principle of EU law and a right which any commercial operator must be afforded, irrespective of the terms of the applicable legislation.

158 The Commission contests those arguments.

159 Article 41 of the Charter of Fundamental Rights provides that every person has the right, inter alia, to have his or her affairs handled impartially by the institutions of the European Union. That requirement of impartiality encompasses subjective impartiality, in so far as no member of the institution concerned who is responsible for the matter may show bias or personal prejudice, and objective impartiality, in so far as there must be sufficient guarantees to exclude any legitimate doubt as to bias on the part of the institution concerned (see judgment of 11 July 2013, *Ziegler* v *Commission*, C-439/11 P, EU:C:2013:513, paragraph 155 and the case-law cited).

160 In the present case, it is true that it is apparent from the remarks made in March 2018 by the former President of the Commission, as reported in the press, that '[additional] tariffs [were to be imposed] on motorcycles, Harley Davidson, on blue jeans, Levis, on Bourbon'. However, the applicants cannot infer from those spontaneous assertions alone that the Commission had breached the requirement of impartiality. First of all, the Commission confined itself, by the contested decision adopted in March 2021, to requesting, in the context of its subsequent verification of the BOI decisions adopted by the national customs authorities, that the Belgian customs authorities revoke the BOI decisions at issue, since the Commission, correctly, considered those decisions to be contrary to EU law. On the basis of Article 33 of the UCC-DA, the Commission adopted the contested decision with the sole aim of ensuring a correct determination of the origin of the motorcycles manufactured by Harley-Davidson, and cannot therefore be criticised for the lack of impartiality of which the applicants complain. Furthermore, and in any event, the applicants do not refer to any other matters related to the adoption of the contested decision – save for general and abstract considerations relating to an allegedly political intention to introduce the additional customs duties at issue – in order to demonstrate the Commission's lack of objectivity and impartiality.

161 It should also be borne in mind in that respect that, according to Article 41(2)(a) of the Charter of Fundamental Rights, the right to good administration includes the right of every person to be heard, before any individual measure which would affect him or her adversely is taken. The right to be heard is one of the rights of the defence, a general principle of EU law which is applicable even in the absence of any specific rules in that regard. That principle requires that the addressees of decisions which significantly affect their interests should be placed in a position in which they may effectively make known their views with regard to the evidence on which those decisions are based (see judgment of 28 October 2021, *Vialto Consulting* v *Commission*, C-650/19 P, EU:C:2021:879, paragraph 122 and the case-law cited).

162 It is also apparent from the case-law that, in order for an infringement of the right to be heard to result in the annulment of the measure in question, there must be a possibility that the administrative procedure could have resulted in a different outcome (see, to that effect, judgment

of 5 May 2022, *Zhejiang Jiuli Hi-Tech Metals* v *Commission*, C-718/20 P, EU:C:2022:362, paragraph 49). Thus, it is for the applicant to prove, by putting forward specific evidence or at least sufficiently reliable and precise arguments or indicia, that the Commission's decision might have been different, thus making it possible to establish specifically that there was an infringement of the rights of the defence (see, to that effect and by analogy, judgment of 29 June 2006, *SGL Carbon* v *Commission*, C-308/04 P, EU:C:2006:433, paragraph 98).

163 Lastly, it is a general principle of EU law that the conduct of an administrative procedure should be of reasonable duration. Further, the fundamental requirement of legal certainty, which precludes the Commission from being able to postpone the exercise of its powers indefinitely, means that the Court has to assess whether the progress of the administrative procedure indicates excessively belated action on the part of that institution (see judgment of 22 April 2016, *France* v *Commission*, T-56/06 RENV II, EU:T:2016:228, paragraph 44 and the case-law cited).

164 The reasonableness of the period taken up by proceedings is to be appraised in the light of the circumstances specific to each case, such as its complexity and the conduct of the parties (see judgment of 13 June 2013, *HGA and Others* v *Commission*, C-630/11 P to C-633/11 P, EU:C:2013:387, paragraph 82 and the case-law cited).

165 The third part of the fifth plea must be examined in the light of those principles.

(1) Infringement of the right to be heard

166 As regards the infringement of the right to be heard, it is common ground that the Commission did not give the applicants an opportunity to submit observations in the procedure that culminated in the adoption of the contested decision, a decision which, by requiring the Belgian authorities to revoke the first two BOI decisions at issue, and given that it was not possible for those authorities to fail to comply, constitutes an individual measure which affects the applicants adversely. The Commission's argument that the procedure for adopting the contested decision envisages only a bilateral exchange between the Commission and the Member State concerned cannot succeed, in view of the fact, as noted in paragraph 161 above, that that right applies even in the absence of any specific rules. Furthermore, the fact that the applicants were or would have been able to submit their observations to the Belgian customs authorities both before the adoption of the BOI decisions at issue and also, according to the Commission, between the adoption of the contested decision and the adoption of the decision actually revoking those BOI decisions does not permit the inference that the Commission complied with its obligation to hear the applicants before adopting the contested decision.

167 However, that irregularity can result in the annulment of the contested decision in the present case only where there is a possibility that, because of that irregularity, the administrative procedure could have resulted in a different outcome and thus could have affected the rights of the defence adversely.

168 As it is, by confining itself in the contested decision to requesting, in the context of its subsequent verification of the BOI decisions adopted by the national customs authorities, that the Belgian customs authorities revoke the BOI decisions that incorrectly applied Article 33 of the UCC-DA, the Commission merely exercised the power conferred on it by Article 34(11) of the Customs Code to request a Member State to revoke BOI decisions in order to ensure a correct and uniform determination of the origin of goods.

169 The contested decision entails an interpretation and application of a rule of EU law, namely Article 33 of the UCC-DA, which, it has been held in paragraphs 53 to 73 above, were not vitiated by any error. Thus, even if the applicants had been able to submit observations in the procedure which led to the adoption of the contested decision, the Commission's interpretation and application of Article 33 of the UCC-DA in that decision could not have been different. Indeed, it is only on account of differences as regards the interpretation of Article 33 of the UCC-DA disclosed by the correspondence between the Belgian authorities and the Commission, which the Commission produced in response to a measure of organisation of procedure of 30 June 2022, that the outcomes respectively identified with regard to the application of that article to the facts of the present case differed.

170 In any event, as has already been pointed out in paragraphs 65 and 66 above, the applicants have not produced before the Court any specific evidence that the relocation in question was justified mainly on the basis of considerations unconnected with the introduction of the additional customs duties, although the burden of proof rests with them, as noted in paragraph 162 above.

(2) Breach of the reasonable time principle

171 As regards the alleged failure to act within a reasonable time in the administrative procedure that led to the adoption of the contested decision, it should be noted at the outset that Article 34(11) of the Customs Code, which authorises the Commission to request a Member State to revoke BOI decisions in order to ensure a correct and uniform determination of the origin of goods, does not, as the Commission moreover rightly points out, prescribe any time limit, even indicative, for the examination by the Commission of BOI decisions notified to it under Article 19 of Regulation 2015/2447 (see paragraph 12 above).

172 However, the mere fact that the Commission is not subject to any time limit for requesting a Member State to revoke BOI decisions does not prevent the EU judicature from determining whether the Commission failed to take a reasonable amount of time.

173 In the present case, it must be noted that the BOI decisions at issue were notified to the Commission by the Belgian customs authorities on 21 August 2019, and that the Commission contacted those authorities on 5 October 2020 to inform them of its intention to request that they revoke those decisions.

174 Following an exchange with the Belgian authorities, in which they submitted comments by email on 13 November 2020, the Commission initiated a procedure on 22 December 2020 with a view to adopting the contested decision, which led it to raise queries with various directorates-general. On 5 March 2021, the Commission submitted the draft contested decision to all the delegations of the Customs Code Committee – Origin Section in the context of the advisory procedure and by written procedure. On 29 March 2021, the Commission sent a note to the Customs Code Committee – Origin Section, before going on to adopt the contested decision on 31 March 2021.

175 Thus, although it is true that a little over 13 months elapsed between the notification by the Belgian customs authorities of the BOI decisions at issue and the Commission's first contact with those authorities concerning a possible request for revocation of the decisions, it cannot be concluded that the period of 16 months which elapsed between that notification and initiation of the formal internal procedure for adoption of the contested decision is excessive in circumstances such as those of the present case, which, moreover, were characterised by the unprecedented

nature of the Commission's use of the power conferred on it by Article 34(11) of the Customs Code to request a Member State to revoke BOI decisions to ensure a correct and uniform determination of the origin of goods.

176 In addition, it must be observed that the Commission subsequently adopted the contested decision after an administrative procedure which lasted less than four months, in the course of which many institutional parties had to be consulted and were able to make representations, which shows a certain expeditiousness.

177 It follows that the third part of the fifth plea must be rejected.

(d) The fourth part of the fifth plea, alleging infringement of the freedom to conduct a business and of the right to property

178 The applicants claim that the Commission interpreted Article 33 of the UCC-DA in such a way as to deny commercial operators a legitimate choice as to the location of their operations, which infringes their freedom to conduct business and their right to property. According to the applicants, any interference by the Commission in commercial decisions taken by businesses must go no further than necessary to achieve a legitimate objective, and while policing the trade and customs regime of the European Union is a legitimate objective, it is to be pursued within strict limits if it is to avoid constituting arbitrary interference for political purposes.

179 The Commission rejects those claims.

180 In that regard, it should be recalled that, in paragraphs 41 to 46 of its judgment of 22 January 2013, *Sky Österreich* (C-283/11, EU:C:2013:28), the Court of Justice recalled that the protection afforded by Article 16 of the Charter of Fundamental Rights covers the freedom to exercise an economic or commercial activity, the freedom of contract and free competition. Furthermore, in accordance with the Court's case-law, the freedom to conduct a business is not absolute, but must be viewed in relation to its social function. On the basis of that case-law and in the light of the wording of Article 16 of the Charter of Fundamental Rights, which differs from the wording of the other fundamental freedoms laid down in Title II thereof, yet is similar to that of certain provisions of Title IV of the Charter of Fundamental Rights, the freedom to conduct a business may be subject to a broad range of interventions on the part of public authorities which may limit the exercise of economic activity in the public interest.

181 Under Article 17(1) of the Charter of Fundamental Rights, everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. Furthermore, the use of property may be regulated by law in so far as is necessary for the general interest.

182 Given that the rights guaranteed by Article 16 and Article 17(1) of the Charter of Fundamental Rights are not absolute, their exercise may be subject to limitations that are justified by objectives of general interest pursued by the European Union. In accordance with Article 52(1) of the Charter of Fundamental Rights, any limitation on the exercise of the rights and freedoms recognised by the Charter of Fundamental Rights must be provided for by law, respect their

essence and, subject to the principle of proportionality, be necessary and genuinely meet objectives of general interest recognised by the European Union or the need to protect the rights and freedoms of others.

183 In the present case, the applicants do not specify the facts that might support their claims in the context of the present part of the plea and that might demonstrate that the contested decision disproportionately limited their right to property or their freedom to conduct a business.

184 Moreover, first, any limitation of those fundamental rights, even if it were established, would not be the consequence of the contested decision. In reality, such a limitation, assuming it to be established, would arise from Regulation 2018/886, which introduced the additional customs duties. Yet, as is apparent from the file, the applicants have not called into question the legality of that regulation in the context of the present action. Secondly, it must also be held that, since it has not been established that the contested decision would prevent the applicants from marketing, in the European Union, the motorcycles manufactured by Harley-Davidson, that decision does not disproportionately interfere with the applicants' enjoyment of their right to pursue economic activities on the EU market, or the exercise of their property rights in the production and marketing of the motorcycles in question.

185 In the light of all the foregoing considerations, the fourth part of the fifth plea must be rejected, as, therefore, must the fifth plea in its entirety.

6. The sixth plea in law, alleging abuse of powers by the Commission for political ends

186 The applicants submit that the timing of the contested decision makes abundantly clear that the conduct of the Commission was politically motivated. They thus claim that the Commission abused its power – which permits it to ensure that the origin of goods imported into the European Union is correctly determined by requesting national customs authorities to revoke BOI decisions – exclusively or principally for purposes other than those for which the power was conferred, thereby undermining the intended purpose of the power, which is to ensure a correct and harmonised 'level playing field' for economic operators.

187 The Commission contests those claims.

188 The Court observes that, under the guise of an alleged 'abuse of power', the applicants, by their claims, are in fact asserting in the context of this sixth plea that the Commission misused its powers. By their arguments, the applicants claim in essence that the contested decision constitutes a commercial policy measure in disguise, designed to exert pressure on the United States Government to waive the tariffs imposed under section 232 of the Trade Expansion Act of 1962.

189 It is clear from settled case-law that a measure is vitiated by misuse of powers only if it appears on the basis of objective, relevant and consistent evidence to have been taken with the exclusive purpose, or at any rate the main purpose, of achieving an end other than those pleaded or of evading a procedure specifically prescribed by the Treaty for dealing with the circumstances of the case (see judgment of 20 March 2019, *Foshan Lihua Ceramic* v *Commission*, T-310/16, EU:T:2019:170, paragraph 176 and the case-law cited).

190 The applicants have adduced no specific evidence, other than vague and abstract claims, capable of establishing that the Commission adopted that decision to achieve an end other than those pleaded, namely to ensure the correct and uniform determination of the origin of goods imported into the European Union. While the applicants have produced press articles, some of which, moreover, post-date the adoption of the contested decision, it must be noted that those articles do not concern either the contested decision or similar decisions. Rather, those articles indicate a concern on the part of the Commission about a possible escalation of the dispute between the European Union and the United States in the context of the imminent entry into force of the additional customs duties provided for in Annex II to Regulation 2018/886.

191 Therefore, by merely claiming that the contested decision was adopted for 'political ends', the applicants are relying on pure assertion.

192 Thus, there is no evidence to support the notion that the procedure that culminated in the adoption of the contested decision was initiated with the exclusive purpose, or at any rate the main purpose, of achieving objectives other than that referred to in paragraph 190 above.

193 It follows that the sixth plea must be rejected.

194 It follows from all of the foregoing that the claim for annulment of the contested decision must be dismissed.

C. Application for measures of organisation of procedure or of inquiry

195 The Commission contends that the applicants' third head of claim, by which they request the Court to order the measures of organisation of procedure or of inquiry which it deems appropriate, has become devoid of purpose, given that the documents to which the applicants refer were made public in response to their request to that effect under Regulation (EC) No 1049/2001 of the European Parliament and of the Council of 30 May 2001 regarding public access to European Parliament, Council and Commission documents (OJ 2001 L 145, p. 43).

196 The applicants submit that the General Court might, however, consider it helpful to ask the Commission to produce further evidence, since the documents made public by the Commission do not provide sufficient support for its claims.

197 As regards the assessment of applications made by a party for measures of organisation of procedure or inquiry, it must be pointed out that the General Court is the sole judge of any need to supplement the information available to it concerning the cases before it (see judgment of 22 November 2007, *Sniace* v *Commission*, C-260/05 P, EU:C:2007:700, paragraph 77 and the case-law cited).

198 In the present case, the applicants do not state precisely the reasons for that application for measures of organisation of procedure or of inquiry, as required by Article 88(2) of the Rules of Procedure of the General Court.

199 In any event, it should be noted that the information in the file is sufficient to enable the Court to give a ruling, the Court having been able to rule on the basis of the forms of order sought, the pleas in law and the arguments put forward during the proceedings, and in the light of the documents lodged by the parties.

200 Accordingly, the application for measures of organisation of procedure or of inquiry must be refused.

201 It follows that the action is to be dismissed in its entirety, without there being any need to rule on the admissibility of the document produced by the Commission, for the purposes of the hearing, comprising the transcript of a conference call conducted on 24 July 2018 between Harley-Davidson and representatives of its shareholders.

Costs

202 Under Article 134(1) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

203 Since the applicants have been unsuccessful, they must be ordered to pay the costs, in accordance with the form of order sought by the Commission.

On those grounds,

THE GENERAL COURT (Eighth Chamber, Extended Composition)

hereby:

1. **Dismisses the action;**

2. **Orders Harley-Davidson Europe Ltd and Neovia Logistics Services International to pay the costs.**

Papasavvas Svenningsen Jaeger

Mac Eochaidh Pynnä

Delivered in open court in Luxembourg on 1 March 2023.

E. Coulon S. Papasavvas
Registrar President