

# No circumvention of EU tariffs by relocating production

## The Harley-Davidson decision of the CJEU

12 December 2024

On 21 November, the European Court of Justice (**CJEU**) issued a far-reaching ruling on the legal treatment of production relocations under the Union Customs Code (*Harley-Davidson Europe – C-297/23 P*). The decision has been rendered against the backdrop of globally growing protectionist tendencies in international trade policy.

### Key Takeaways

- A coincidence in timing between the adoption of an EU trade policy measure (e.g. the levying of tariffs by the EU) and an operational measure (e.g. the relocation of a production plant) is sufficient to assume that the operational measure was carried out with the intention to circumvent the application of the respective EU trade policy measure. It is then up to the economic operator concerned to refute this presumption.
- The subjective element of the intention to circumvent an EU trade policy measure must be inferred from sufficient objective facts. If objective indications substantiate the existence of an intention to circumvent, alternative lines of reasoning – in particular economic arguments – cannot be relied upon to refute this inference.

### Facts of the Case

In response to the US imposing tariffs on steel and aluminum imports from the EU, the European Commission (**Commission**) imposed tariffs on imports of various goods from the US, effective from 22 June 2018. These tariffs also applied to motorcycles manufactured by the US company Harley-Davidson Inc (*Harley-Davidson*). On 25 June 2018, Harley-Davidson informed the US Securities and Exchange Commission (**SEC**) that the tariffs in the EU on its goods had increased from 6% to 31%. Harley-Davidson also stated that it is now implementing a plan to "circumvent the tariffs" levied by the EU. As part of this plan, the company announced the (partial) relocation of production to Thailand.

### Procedural Basis of the Decision

Harley-Davidson had obtained binding origin information (**BOI**) decisions in Belgium. These are binding decisions by the national customs authority in the respective EU Member State confirming the country of origin of a product under EU customs law. The Belgian customs authorities thus certified that Thailand was the country of origin of the

Harley-Davidson motorcycles in question. Accordingly, EU tariffs on US goods were not applied to these vehicles.

By decision of 31 March 2021, the Commission ordered Belgium to revoke its BOI decisions in relation to Harley-Davidson. The Commission's order to revoke these decisions ultimately gave rise to the present CJEU ruling.

## Decision of the CJEU

In these troubled times for foreign trade policy, the CJEU has paved the way for more effective enforcement of EU trade measures, in particular for (punitive) tariffs. At the core of this judgement lies the question of whether the relocation of production from the US to Thailand by Harley-Davidson was to be disregarded when determining the country of origin of the motorcycles, as implicitly prescribed by Article 33 of Delegated Regulation (EU) 2015/2446.

Under Article 33 of Delegated Regulation (EU) 2015/2446, any processing or working operation carried out in another country 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 EU trade policy measures. Hence, the conclusion that the relocation was intended to circumvent an EU trade policy measure leads to the legal presumption that the operational measure was economically not justified. This would mean in practice that the motorcycles in question were, in fact, subject to EU tariffs on US imports.

With its judgment, the CJEU systematically reinforced its case law that objective circumstances are required to establish a legal presumption. In particular, the establishment of the presumption of subjective elements – such as the intention to circumvent a law or measure – must be based on objective evidence (the CJEU already ruled similarly in view of tax structuring models, Judgment of 21 February 2006, *Halifax u.a. – C-255/02*). Article 33 of Delegated Regulation (EU) 2015/2446 requires establishing the economic operator's intention to avoid the application of a trade policy measure using objective evidence. In the present case, the Court found that Harley-Davidson's statements to the SEC, explaining that the relocation of production was intended to avoid tariffs, provided a sufficient factual basis for the presumption of circumvention. In its reasoning, the CJEU also refuted any criticism claiming that it had improperly transformed objective criteria into subjective criteria.

If there are objective indications from which it can be concluded that the **principal and dominant purpose** of an operational measure is to **circumvent EU trade measures**, any supplementing purposes pursued, in particular economic purposes, cannot be relied upon to disprove the intention to circumvent the respective trade measure(s). The CJEU has thus adopted a broad interpretation of the concept of circumvention. Citing additional reasons, including economic reasons, for carrying out an operational measure, will not suffice to refute the presumption of circumvention. With the same notion, the Court

rejects a narrow understanding of circumvention. Harley-Davidson's argument that a circumvention may only be established if the circumvention of trade policy measures would be the only reasonable justification for an operational measure was rejected by the CJEU. In doing so, the Court protects the effectiveness of Article 33 of Delegated Regulation 2015/2446 and hence of EU customs law overall. As operational measures, including the relocation of production, in most cases may be explained by multiple purposes, it would hardly be possible to establish a circumvention when following the above outlined narrow interpretation.

Finally, the CJEU did not object to the rules of evidence as applied by the Commission. In particular, the court did not overrule how the Commission constructed the legal presumption of intent to circumvent trade policy measures. The Court confirmed that, in accordance with its case law, it is in principle permissible to infer an intention to circumvent on the basis of a coincidence in time between the adoption of a trade policy measure and an operational measure. In the present case, only three days elapsed between the imposition of the EU tariffs and Harley-Davidson's notification to the SEC announcing the relocation of its production. Harley-Davidson therefore failed to refute the presumption of circumvention.

## Consequences of the Decision

The CJEU has strengthened the effectiveness of the EU's trade policy measures by broadly defining the concept of circumvention in Article 33 of Delegated Regulation 2015/2446. The present decision gives guidance on how to properly assess whether the relocation of production is relevant under EU customs law when determining the origin of a product. The judgment also addresses under what circumstances a relocation of production is to be considered a circumvention of a trade policy measures and is therefore irrelevant for the determination of the country of origin. Lastly, it also emphasizes that an (accompanying) economic justification for the relocation is not sufficient if the intention to circumvent can be established from objective evidence.

For companies, navigating between trade policies of different countries and economic regions it is becoming increasingly challenging to comply fully with the respective regulatory frameworks. Tariffs levied by one side may more often provoke so-called retaliatory tariffs from the respective other side. Consequently, businesses often find themselves having to react to conflicting trade policies. Strategic corporate decisions on location, production and supply chain setups are economically complex and require nuanced considerations of regulatory effects, in particular foreign trade and customs law. Especially in light of the expected increase in US tariffs under the recently elected President Donald Trump, these issues will become ever more relevant.

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to advise you on all aspects of EU foreign trade law. If you have any questions, please do not hesitate to contact Roland M. Stein, Leonard von Rummel and Ines Florinde Horn.

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