Commission Implementing Regulation (EU) 2017/423 of 9 March 2017 re-imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam and produced by Fujian Viscap Shoes Co. Ltd, Vietnam Ching Luh Shoes Co. Ltd, Vinh Thong Producing-Trading-Service Co. Ltd, Qingdao Tae Kwang Shoes Co. Ltd, Maystar Footwear Co. Ltd, Lien Phat Company Ltd, Qingdao Sewon Shoes Co. Ltd, Panyu Pegasus Footwear Co. Ltd, PanYu Leader Footwear Corporation, Panyu Hsieh Da Rubber Co. Ltd, An Loc Joint Stock Company, Qingdao Changshin Shoes Company Limited, Chang Shin Vietnam Co. Ltd, Samyang Vietnam Co. Ltd, Qingdao Samho Shoes Co. Ltd, Min Yuan, Chau Giang Company Limited, Foshan Shunde Fong Ben Footwear Industrial Co. Ltd and Dongguan Texas Shoes Limited Co. implementing the judgment of the Court of Justice in Joined Cases C-659/13 and C-34/14

COMMISSION IMPLEMENTING REGULATION (EU) 2017/423

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THE EUROPEAN COMMISSION,

Having regard to the Treaty on the Functioning of the European Union ('TFEU'), and in particular to Article 266 thereof,

Having regard to Regulation (EU) 2016/1036 of the European Parliament and the Council of 8 June 2016 on protection against dumped imports from countries not members of the European Union[(1)] ('the basic Regulation'), and in particular Article 9(4) and 14(1) and (3) thereof,

Whereas:

A. PROCEDURE

(1) On 23 March 2006, the Commission adopted Regulation (EC) No 553/2006[(2)] imposing provisional anti-dumping measures on imports of certain footwear with uppers of leather ('footwear') originating in the People's Republic of China ('PRC' or 'China') and Vietnam ('the provisional Regulation').

(2) By Regulation (EC) No 1472/2006[3] the Council imposed definitive anti-dumping duties ranging from 9,7 % to 16,5 % on imports of certain footwear with uppers of leather, originating in Vietnam and in the PRC for two years ('Regulation (EC) No 1472/2006' or 'the contested Regulation').

(3) By Regulation (EC) No 388/2008[4] the Council extended the definitive anti-dumping measures on imports of certain footwear with uppers of leather originating in the PRC to imports consigned from the Macao Special Administrative Region ('SAR'), whether declared as originating in the Macao SAR or not.

(4) Further to an expiry review initiated on 3 October 2008[5], the Council further extended the anti-dumping measures for 15 months by Implementing Regulation (EU) No 1294/2009[6], i.e. until 31 March 2011, when the measures expired ('Implementing Regulation (EU) No 1294/2009').

(5) Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co Ltd as well as Zhejiang Aokang Shoes Co. Ltd ('the applicants') challenged the contested Regulation in the Court of First Instance (now: the General Court). By judgments of 4 March 2010 in Case T-401/06 Brosmann Footwear (HK) and Others v Council and of 4 March 2010 in Joined Cases T-407/06 and T-408/06 Zhejiang Aokang Shoes and Wenzhou Taima Shoes v Council the General Court rejected those challenges.

(6) The applicants appealed those judgments. In its judgments of 2 February 2012 in case C-249/10 P Brosmann Footwear (HK) and Others v Council and of 15 November 2012 in case C-247/10P Zhejiang Aokang Shoes v Council ('the Brosmann and Aokang judgments'), the Court of Justice set aside those judgments. It held that the General Court erred in law in so far as it held that the Commission was not required to examine requests for market economy treatment ('MET') under Article 2(7)(b) and (c) of the basic Regulation from non-sampled traders (paragraph 36 of the judgment in Case C-249/10 P and paragraph 29 and 32 of the judgment in Case C-247/10 P).

(7) The Court of Justice then gave judgment itself in the matter. It held that '*the Commission ought to have examined the substantiated claims submitted to it by the appellants pursuant to Article 2(7)(b) and (c) of the basic regulation for the purpose of claiming MET in the context of the anti-dumping proceeding [which is] the subject of the contested regulation. It must next be found that it cannot be ruled out that such an examination would have led to a definitive anti-dumping duty being imposed on the appellants other than the 16,5 % duty applicable to them pursuant to Article 1(3) of the contested regulation. It is apparent from that provision that a definitive anti-dumping duty of 9,7 % was imposed on the only Chinese trader in the sample which obtained MET. As is apparent from paragraph 38 above, had the Commission found that the market economy conditions prevailed also for the appellants, they ought, when the calculation of an individual dumping margin was not possible, also to have benefited from the same rate*' (paragraph 42 of the judgment in Case C-249/10 P and paragraph 36 of the judgment in Case C-247/10 P).

(8) As a consequence, it annulled the contested Regulation, in so far as it relates to the applicants concerned.

(9) In October 2013, the Commission, by means of a notice published in the *Official Journal of the European Union*[(7)], announced that it had decided to resume the anti-dumping proceeding at the very point at which the illegality occurred and to examine whether market economy conditions prevailed for the applicants for the period from 1 April 2004 to 31 March 2005. That notice invited interested parties to come forward and make themselves known.

(10) In March 2014, the Council, by Implementing Decision 2014/149/EU[(8)], rejected a Commission proposal to adopt a Council Implementing Regulation re-imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on certain footwear with uppers of leather originating in the People's Republic of China and produced by Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd, Risen Footwear (HK) Co Ltd and Zhejiang Aokang Shoes Co. Ltd and terminated the proceedings with regard to these producers. The Council took the view that importers having bought shoes from those exporting producers, to whom the relevant customs duties had been reimbursed by the competent national authorities on the basis of Article 236 of Council Regulation (EEC) No 2913/1992[(9)] ('the Community Customs Code'), had acquired legitimate expectations on the basis of Article 1(4) of the contested Regulation, which had rendered the provisions of the Community Customs Code, and in particular its Article 221, applicable to the collection of the duties.

(11) Three importers of the product concerned, C & J Clark International Ltd ('Clark'), Puma SE ('Puma') and Timberland Europe BV ('Timberland') ('the importers concerned') challenged the anti-dumping measures on imports of certain footwear from China and Vietnam invoking the jurisprudence mentioned in recitals (5) to (7) before their national Courts, which referred the matters to the Court of Justice for a preliminary ruling.

(12) On 4 February 2016, in the Joined Cases C-659/13 C & J Clark International Limited and C-34/14 Puma SE[(10)], the Court of Justice declared Regulation (EC) No 1472/2006 and Implementing Regulation (EU) No 1294/2009 invalid in so far as the European Commission did not examine the MET and individual treatment ('IT') claims submitted by exporting producers in the PRC and Vietnam that were not sampled ('the judgments'), contrary to the requirements laid down in Articles 2(7)(b) and 9(5) of Council Regulation (EC) No 384/96[(11)].

(13) Regarding Case C-571/14 Timberland Europe, the Court of Justice decided on 11 April 2016 to remove the case from the register at the request of the referring national court.

(14) Article 266 TFEU provides that the institutions must take the necessary measures to comply with the Court's judgments. In case of annulment of an act adopted by the institutions in the context of an administrative procedure, such as anti-dumping,

compliance with the Court's judgment consists in the replacement of the annulled act by a new act, in which the illegality identified by the Court is eliminated.[12]

(15) According to the case-law of the Court, the procedure for replacing the annulled act may be resumed at the very point at which the illegality occurred.[13] That implies in particular that in a situation where an act concluding an administrative procedure is annulled, that annulment does not necessarily affect the preparatory acts, such as the initiation of the anti-dumping procedure. In a situation where a regulation imposing definitive anti-dumping measures is annulled, that means that, subsequent to the annulment, the anti-dumping proceeding is still open, because the act concluding the anti-dumping proceeding has disappeared from the Union legal order[14], except if the illegality occurred at the stage of initiation.

(16) Apart from the fact that the institutions did not examine the MET and IT claims submitted by exporting producers in the PRC and Vietnam that were not sampled, all other findings made in Regulation (EC) No 1472/2006 and Implementing Regulation (EU) No 1294/2009 remain valid.

(17) In the present case, the illegality occurred after initiation. Hence, the Commission decided to resume the present anti-dumping proceeding that was still open following the judgments at the very point at which the illegality occurred and to examine whether market economy conditions prevailed for the exporting producers concerned for the period from 1 April 2004 to 31 March 2005, which was the investigation period ('investigation period'). The Commission also examined, where appropriate, whether the exporting producers concerned qualified for IT in accordance with 9(5) of Council Regulation (EC) No 1225/2009[15] (the 'basic Regulation prior to its amendment')[16].

(18) By Commission Implementing Regulation (EU) 2016/1395[17], the Commission re-imposed a definitive anti-dumping duty and collected definitely the provisional duty imposed on imports of Clark and Puma of certain footwear with uppers of leather originating in the PRC and produced by 13 Chinese exporting producers that have submitted MET and IT claims but that had not been sampled.

(19) By Commission Implementing Regulation (EU) 2016/1647[18], the Commission re-imposed a definitive anti-dumping duty and collected definitely the provisional duty imposed on imports of Clark, Puma and Timberland of certain footwear with uppers of leather originating in Vietnam and produced by certain Vietnamese exporting producers that had submitted MET and IT claims, but had not been sampled.

(20) By Commission Implementing Regulation (EU) 2016/1731[19] the Commission re-imposed a definitive anti-dumping duty and collected definitely the provisional duty imposed on imports of Puma and Timberland of certain footwear with uppers of leather originating in the People's Republic of China and produced by General Footwear Ltd and certain footwear with uppers of leather originating in Vietnam and produced by Diamond Vietnam Co. Ltd and Ty Hung Footgearmex/Footwear Co. Ltd ('Ty Hung Co. Ltd') that submitted MET and IT claims, but had not been sampled.

(21) The validity of Implementing Regulations (EU) 2016/1395, (EU) 2016/1647 and (EU) 2016/1731 has been challenged by Puma and Timberland at the General Court in Cases T-781/16 Puma and Others v Commission and T-782/16 Timberland Europe v Commission. Furthermore, the validity of Implementing Regulation (EU) 2016/1395 has also been challenged at the General Court by Clark in Cases T-790/16 C & J Clark International v Commission and T-861/16 C & J Clark International v Commission.

(22) In view of the implementation of the judgment in Joined Cases C-659/13 C & J Clark International Limited and C-34/14 Puma SE mentioned above in recital (12), the Commission adopted Implementing Regulation (EU) 2016/223[(20)]. In Article 1 of that regulation, the Commission instructed national customs authorities to forward all requests for reimbursement of the definitive anti-dumping duties paid on imports of footwear originating in China and Vietnam made by importers based on Article 236 of the Community Customs Code and based on the fact that a non-sampled exporting producer had requested MET or IT in the investigation that lead to the imposition of the definitive measures by Regulation (EC) No 1472/2006 ('original investigation'). The Commission shall assess the relevant MET or IT claim and re-impose the appropriate duty rate. On this basis the national customs authorities should subsequently decide on the request for repayment and remission of the anti-dumping duties.

(23) The validity of Implementing Regulation (EU) 2016/223 is subject to a preliminary ruling request lodged by the Finanzgericht Düsseldorf on 9 May 2016 (Case C-256/16 Deichmann). The above request for a preliminary ruling was made in the context of a dispute between Deichmann, a German importer of footwear and the relevant national customs authority, the Hauptzollamt Duisburg. The dispute concerns the reimbursement of anti-dumping duties paid by Deichmann on imports of footwear from, inter alia, its Chinese supplier Chengdu Sunshine Shoes Co. Ltd which lodged an MET and IT claim and was not sampled. A second preliminary ruling request on the validity of Implementing Regulation (EU) 2016/223 was lodged by the UK First-tier Tribunal (Tax Chamber) on 28 November 2016 (Case C-612/16 C & J Clark International).

(24) Furthermore, following a notification from the French customs authorities in accordance with Article 1 of Implementing Regulation (EU) 2016/223, the Commission analysed MET/IT claims from three Chinese exporting producers, Chengdu Sunshine Shoes Co. Ltd, Foshan Nanhai Shyang Yuu Footwear Ltd and Fujian Sunshine Footwear Co. Ltd

(25) As a result of the above, by Implementing Regulation (EU) 2016/2257[(21)], the Commission re-imposed a definitive anti-dumping duty and collected definitely the provisional duty imposed on imports certain footwear with uppers of leather originating in the People's Republic of China and produced by three exporting producers that had submitted MET and IT claims but that had not been sampled.

(26) On 12 July 2016, in accordance with Article 1 of Implementing Regulation (EU) 2016/223, the customs authorities of the United Kingdom notified the