Commission Implementing Regulation (EU) 2016/1731 of 28 September 2016 reimposing 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 General Footwear Ltd (China), Diamond Vietnam Co. Ltd and Ty Hung Footgearmex/Footwear Co. Ltd and implementing the judgment of the Court of Justice in Joined Cases C-659/13 and C-34/14

COMMISSION IMPLEMENTING REGULATION (EU) 2016/1731

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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 and 14 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 upper 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)

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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 [2010] ECR II-671 and of 4 March 2010 in Joined Cases T-407/06 and T-408/06 Zhejiang Aokang Shoes and Wenzhou Taima Shoes v Council [2010] ECR II-747, 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 et al and of 15 November 2012 in case C-247/10P Zhejiang Aokang Shoes Co. Ltd ('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: '*[...] 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 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 and 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

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reimposing 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 2913/92[(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[(10)], 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) In the Joined Cases C-659/13 C & J Clark International Limited and C-34/14 Puma SE, 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 the third case C-571/14, Timberland Europe BV against Inspecteur van de Belastingdienst, kantoor Rotterdam Rijnmond, 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

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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 in the investigation that led to the imposition of definitive duties mentioned in recitals (1) and (2) ('the original investigation'). 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 reimposed 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 thirteen Chinese exporting producers that submitted MET and IT claims in the investigation that lead to the imposition of definitive duties (the 'original investigation') but that had not been sampled during that investigation.

(19) By Commission Implementing Regulation (EU) 2016/1647[18], the Commission reimposed 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 submitted MET and IT claims in the original investigation, but had not been sampled during that investigation.

(20) Subsequently, two additional suppliers of Puma in Vietnam, Diamond Vietnam Co. Ltd and Ty Hung Footgearmex/Footwear Co. Ltd ('Ty Hung Co. Ltd') were identified that provided MET/IT claim forms during the original investigation. Concerning Ty Hung Co. Ltd it is noted that in Puma's file before the national Court, one of the Vietnamese suppliers was identified as 'Lac Hung Co. Ltd', while the information available pointed to a possible name change between the original investigation and the application before the national Court. It appeared that the company at stake was formerly named 'Ty Hung Footgearmex/Footwear Co. Ltd' ('Ty Hung Co. Ltd').

(21) Regarding imports of Timberland one of the two Chinese suppliers identified in the case C-571/14, General Shoes Ltd was in fact established in Vietnam and assessed as such. Findings with regard to this company were published by the abovementioned Implementing Regulation (EU) 2016/1647 (recital (19)). This was contested by the Federation of the European Sporting Goods Industry ('FESI') that claimed that General

Shoes Ltd was in fact a Chinese supplier. FESI claimed that the MET/IT request of the Chinese company General Footwear Ltd should also be assessed. The Commission notes that although the relevant MET/IT claim form was ambiguous as to whether the company at stake is in fact Chinese or Vietnamese, for the sake of completeness the MET/IT claim form of General Footwear Ltd was now also assessed.

(22) For imports of Puma and Timberland from China and Vietnam the Commission assessed the MET and IT claims provided by the relevant abovementioned non-sampled exporting producers that submitted these claims in the original investigation.

B. IMPLEMENTATION OF THE JUDGMENTS OF THE COURT OF JUSTICE IN JOINED CASES C-659/13 AND C-34/14 FOR IMPORTS FROM VIETNAM AND THE PRC

(23) The Commission has the possibility to remedy the aspects of the contested Regulation which led to its annulment, while leaving unchanged the parts of the assessment which are not affected by the judgment[19].

(24) The present Regulation seeks to correct the aspects of the contested Regulation found to be inconsistent with the basic Regulation, and which thus led to the declaration of invalidity in so far as certain exporting producers from Vietnam and the PRC are concerned.

(25) All other findings made in the contested Regulation, which were not declared invalid by the Court of Justice, remain valid and are herewith incorporated into the present Regulation.

(26) Therefore, the following recitals are limited to the new assessment necessary in order to comply with the judgments.

(27) The Commission has examined whether MET and IT prevailed for the three exporting producers, suppliers of Puma and Timberland, mentioned above in recitals (20) and (21) which submitted MET/IT requests in the original investigation, during the period from 1 April 2004 to 31 March 2005. The purpose of this determination is to ascertain the extent to which the two importers concerned are entitled to receive a repayment of the anti-dumping duty paid with regard to anti-dumping duties paid on exports of these suppliers.

(28) Should the analysis reveal that MET or IT was to be granted to the Chinese and Vietnamese exporting producers concerned whose exports were subject to the anti-dumping duty paid by either of the two importers concerned, an individual duty rate would have to be attributed to that exporting producer and the repayment of the duty would be limited to an amount corresponding to a difference between the duty paid and the individual duty rate, i.e. in case of China, the difference between 16,5 % and the duty imposed on the only exporting company in the sample that has obtained MET, i.e. *Golden Step*, namely 9,7 %; and in in case of Vietnam, the difference between 10 % and the individual duty rate calculated for the exporting producer concerned, if any.