Commission Implementing Regulation (EU) 2016/1395 of 18 August 2016 reimposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and produced by Buckinghan Shoe Mfg Co. Ltd, Buildyet Shoes Mfg., DongGuan Elegant Top Shoes Co. Ltd, Dongguan Stella Footwear Co. Ltd, Dongguan Taiway Sports Goods Limited, Foshan City Nanhai Qun Rui Footwear Co., Jianle Footwear Industrial, Sihui Kingo Rubber Shoes Factory, Synfort Shoes Co. Ltd, Taicang Kotoni Shoes Co. Ltd, Wei Hao Shoe Co. Ltd, Wei Hua Shoe Co. Ltd, Win Profile Industries Ltd, and implementing the judgment of the Court of Justice in joined cases C-659/13 and C-34/14

COMMISSION IMPLEMENTING REGULATION (EU) 2016/1395

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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 of 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 Articles 9 and 14 thereof,

Whereas:

A. PROCEDURE

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

(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 2 years ('Council 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 Regulation (EU) No 1294/2009[6], i.e. until 31 March 2011, when the measures expired ('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 judgements 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 judgements. 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 judgement in Case C-249/10 P and paragraph 29 and 32 of the judgement in Case C-247/10 P).

(7) The Court of Justice then gave judgement 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 judgement in Case C-249/10 P and paragraph 36 of the judgement 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

***Changes to legislation:** There are currently no known outstanding effects for the Commission Implementing Regulation (EU) 2016/1395. (See end of Document for details)*

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 Council Implementing Decision 2014/149/EU[(8)], rejected a Commission proposal to adopt a Council Implementing Regulation 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 Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code[(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 B.V. ('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 Council Regulations (EC) No 1472/2006 and (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 Article 2(7)(b) and Article 9(5) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community[(10)].

(13) Regarding the third case C-571/14, Timberland Europe B.V. 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 judgement consists in the replacement of the annulled act by a new act, in which the illegality identified by the Court is eliminated[(11)].

(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[(12)].

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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[13], 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 Council Regulations (EC) No 1472/2006 and (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 the basic Regulation in its form prior to the entry into force of Regulation (EU) No 765/2012[14] (the 'basic Regulation prior to its amendment')[15].

(18) In a first step, for imports of Clark and Puma from the PRC, the Commission assessed all MET and IT claims provided by the non-sampled relevant exporting producers that submitted such claims in the original investigation.

(19) Regarding imports of Timberland from PRC, there were two suppliers in the PRC identified in the case C-571/14. One of those suppliers, Zhongshan Pou Yuen, was sampled in the original investigation and therefore no illegality occurred in the original investigation regarding this supplier. The second supplier, General Shoes Limited, was wrongly identified as a Chinese supplier whereas the company was established in Vietnam. As mentioned in recital 150 below, this was later contested by the Federation of the European Sporting Goods Industry ('FESI') that claimed that General Shoes Ltd was in fact a Chinese supplier.

(20) For imports of Puma, Clark and Timberland from Vietnam, the Commission is currently also carrying out an assessment of MET and IT claims provided by the relevant non-sampled exporting producers that submitted such claims in the original investigation. This investigation is still ongoing.

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

(21) 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[16].

(22) 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 the PRC are concerned.

(23) 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.

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

(25) The Commission has examined whether MET and IT prevailed for the Chinese exporting producers of Clark and Puma, which submitted MET and/or IT requests in that 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 their Chinese suppliers which requested MET and/or IT.

(26) Should the analysis reveal that MET was to be granted to the Chinese exporting producer whose exports were subject to the anti-dumping duty paid by either of the two importers concerned, the repayment of the duty would be limited to an amount corresponding to a difference between the duty paid, namely 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 %.

(27) Should the analysis reveal that IT was to be granted to the Chinese exporting producer for which MET was rejected, but 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 the exporting producer concerned and the repayment of the duty would be limited to an amount corresponding to a difference between the duty paid, and the individual duty calculated for the exporting producer concerned, if any.

(28) Conversely, should the analysis of such MET and IT claims reveal that both MET and IT should be rejected, no repayment of anti-dumping duties can be awarded.

(29) As explained in recital 12, the Court of Justice annulled the contested Regulation and Regulation (EU) No 1294/2009, inter alia, with regard to exports of certain footwear from 13 Chinese exporting producers, i.e. Buckinghan Shoe Mfg Co. Ltd, Buildyet Shoes Mfg., DongGuan Elegant Top Shoes Co. Ltd, Dongguan Stella Footwear Co. Ltd, Dongguan Taiway Sports Goods Limited, Foshan City Nanhai Qun Rui Footwear Co., Jianle Footwear Industrial, Sihui Kingo Rubber Shoes Factory, Synfort Shoes Co. Ltd, Taicang Kotoni Shoes Co. Ltd, Wei Hao Shoe Co. Ltd, Wei Hua Shoe Co. Ltd and Win Profile Industries Ltd ('the exporting producers concerned') to the Union and imported by Clark and Puma, in so far as the Commission did not examine the MET and IT claims submitted by, inter alia, the exporting producers in the PRC.