Commission Implementing Regulation (EU) 2016/223 of 17 February 2016 establishing a procedure for assessing certain market economy treatment and individual treatment claims made by exporting producers from China and Vietnam, and implementing the judgment of the Court of Justice in joined cases C-659/13 and C-34/14

COMMISSION IMPLEMENTING REGULATION (EU) 2016/223

of 17 February 2016

establishing a procedure for assessing certain market economy treatment and individual treatment claims made by exporting producers from China and Vietnam, and implementing the judgment of the Court of Justice in joined cases C-659/13 and C-34/14

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 Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community[(1)] ('the basic Regulation'), and in particular Article 14 thereof,

Whereas:

A. **PROCEDURE**

(1) On 23 March 2006, the Commission adopted Commission 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 Council 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 ('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 Implementing Regulation (EU) No 1294/2009[(6)], namely 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 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 judgments of the General Court'), 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 Court of Justice set aside the judgments of the General Court. 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 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 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 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, which would be put into question by the adoption of the Commission proposal.

(11) Two importers of the product concerned, C&J Clark International Ltd. and Puma SE 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 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, contrary to the requirements laid down in Articles 2(7)(b) and 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] ('the judgments').

(13) 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 ('Asteris judgment')[11].

(14) 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]. 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.

(15) 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.

(16) In this case, the illegality occurred after initiation. Hence, the Commission decided to resume this anti-dumping proceeding that was still open 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.

(17) For imports of C&J Clark International Ltd. and Puma SE, the Commission will assess all MET and IT claims submitted.

(18) It is appropriate to order the national customs authorities, on the basis of Article 14 of the basic Regulation, not to reimburse those duties in the meantime. The Commission will make that assessment within eight months from the date of the judgment.

(19) For imports of other importers that did not have standing themselves to bring an action for annulment, and which hence can rely on the judgment in their applications for re-imbursement of anti-dumping duties pursuant to Article 236 Community Customs Code, the Commission will, for the sake of efficient use of resources, only assess MET and IT claims of those exporting producers which are concerned by re-imbursement claims that have been filed with national customs authorities in due time and form. The Commission notes that according to Article 236(2) of the Community Customs Code Import duties or export duties shall be repaid or remitted upon submission of an application to the appropriate customs office within a period of three years from the date on which the amount of those duties was communicated to the debtor. The Commission also notes that the invalidation of a regulation imposing anti-dumping duties does not constitute unforeseeable circumstances within the meaning of that provision, allowing an extension of the three-year time-limit during which an importer can request the repayment of import duties paid pursuant to that regulation.

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

(20) If an act of the Institutions has been declared invalid by a preliminary ruling of the Court of Justice, such judgment has *erga omnes* effects[(14)], namely. it is not limited to the applicant before the national court which then raises the question to the Court of Justice. In such a situation, the Commission is thus obliged to implement the judgement with regard to all the parties affected by the illegality which led to the annulment of the measure.

(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[(15)].

(22) In order to ensure an efficient use of resources, the Commission refrains from investigating all the MET and IT claims made by non-sampled Chinese and Vietnamese exporting producers during the investigation which led to the adoption of the contested Regulation. Instead, it considers it appropriate to oblige national customs authorities, which have to decide on an application for re-imbursement of anti-dumping duties on