EUROPEAN
COMMISSION

Brussels, 19.2.2014
SWD(2014) 46 final

COMMISSION STAFF WORKING DOCUMENT

Compliance with the judgments of the Court of Justice of 2 February 2012 in Case C-249/10 P Brosmann and of 15 November 2012 in Case C-247/10P Zhejiang Aokang

Accompanying the document

Proposal for a COUNCIL IMPLEMENTING REGULATION

Re-imposing 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 Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd, Risen Footwear (HK) Co Ltd and Zhejiang Aokang Shoes Co. Ltd

{COM(2014) 87 final}

COMMISSION STAFF WORKING DOCUMENT

Compliance with the judgments of the Court of Justice of 2 February 2012 in Case C-249/10 P Brosmann and of 15 November 2012 in Case C-247/10P Zhejiang Aokang

Accompanying the document

Proposal for a COUNCIL IMPLEMENTING REGULATION

Re-imposing 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 Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd, Risen Footwear (HK) Co Ltd and Zhejiang Aokang Shoes Co. Ltd

(1) In its judgments of 2 February 2012 in Case C-249/12 P Brosmann[1] and of 15 November 2012 in Case C-247/10 P Zhejiang Aokang[2] (hereinafter: the judgments), the Court has annulled Council Regulation (EC) No 1472/2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with upper leather originating in the People's Republic of China and Vietnam[3] in so far as it relates to the appellants in those cases.

(2) In the part of the judgment where it ruled on the substance of the action at first instance, the Court 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. [...H]ad 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*".[4]

(3) Article 266 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) provides that the institution whose act has been declared void shall be required to take the necessary measures to comply with the Court's judgments. That provision reflects the fact that under Union law, the Court can normally[5] not substitute itself to the investigating authority, but only has the power to remand a case to that authority so that it can adopt a new act conform to the Court's judgment. That also explains why the judgements do not contain an explicit remand of the Regulation to the institutions, as that mechanism is provided for in a general way in Article 266 itself.

(4) In the present case, the Court held that the Commission ought to have examined the substantiated claims for MET[6] submitted by the appellants pursuant to Article 2(7)(b) and (c) of the basic Regulation[7]. It also held that the Council ought to have, if the appellants' MET claims were justified and if the institutions did not have time to investigate fully whether and by how much the appellants were dumping, imposed a definitive anti-dumping duty of 9.7% (the duty applicable to the only Chinese trader in the sample with obtained MET), instead of a duty of 16.5% (the weighted average duty of those in the sample).

---

1 Case C-249/12 P *Brosmann a.o.* v *Council* [2012] ECR I-0000.

2 Case C-247/10 P *Zhejiang Aokang* v *Council* [2012] ECR I-0000.

3 OJ L 275, 6.10.2006, p. 1

4 Paragraph 42 of the judgement in Case C-249/10 P and paragraph 36 of the judgement in Case C-247/10 P

5 This is different in certain sectors, such as Union competition law, where – using Article 261 TFEU – the Union legislator have given the court what is known as "full" or "unlimited" jurisdiction so that, for instance, the Court can in its judgment itself set the fine as what it considers the appropriate level. However, the basic anti-dumping Regulation, referred to in footnote 7 below, does not provide such a power to the Court, since an anti-dumping duty is not a sanction (Article 261 TFEU relates to Union Regulations imposing sanctions).

6 The abbreviation "MET" stands for "market economy treatment".

7 Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended.

(5) In order to comply with the judgments, the Commission has therefore examined the substantiated claims for MET. For the reasons set out in section B.1 of the Proposal for a Council Implementing Regulation Re-imposing 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 Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd, Risen Footwear (HK) Co Ltd and Zhejiang Aokang Shoes Co. Ltd (hereinafter: the Commission proposal), the Commission services have concluded that none of the appellants had demonstrated that market economy conditions prevailed for them. Therefore, the Commission services have consulted the Anti-Dumping and Anti-Subsidy Committee on a draft proposal for a Council Regulation re-imposing a definitive anti-dumping duty of 16.5% on the appellants.

(6) None of the appellants has, in their submissions following disclosure and during the hearing with the hearing officer, contested the analysis of the Commission services as to the merit of their claims for MET.

(7) The appellants have, however, contested that the Council has the possibility of re-imposing a definitive anti-dumping duty. They have advanced a number of arguments, which are presented and rebutted in sections B.2 to B.5 of the Commission proposal.

(8) In the meeting of the Anti-Dumping and Anti-Subsidy Committee on 16 January 2014, several delegations have asked the Commission services to provide a more detailed legal analysis with regards to the precise content of the duties that Article 266 TFEU imposes on the Commission and the Council in the present case. The present Commission staff working document aims to provide the requested analysis. It has been prepared jointly by all Commission services in charge of anti-dumping and customs procedures. In order to facilitate the reading of the document, the questions raised by delegations have been summarized and re-ordered. The Commission services have tried to cover all points raised by delegations, but are at the disposal of delegations in case of need for further clarifications.

1. ARE THE INSTITUTIONS UNDER AN OBLIGATION TO ADOPT AN ACT CLOSING THE ANTI-DUMPING PROCEDURE WITH REGARDS TO THE APPELLANTS?

(9) Delegations have asked whether the institutions are under an obligation to adopt any act at all in the present situation, or whether they could simply do nothing and inform national customs authorities accordingly.

(10) First, it is important to stress that the judgments remove only Council Regulation (EC) No 1472/2006, in so far is it concerns the appellants, from the legal order of the Union. All preparatory acts, i.e. the notice of initiation[8] and Commission Regulation (EC) No 553/2006 imposing provisional anti-dumping measures on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam[9], remain valid also in so far as they concern the appellants.[10] In other words, the legal effect of the judgments is that the anti-dumping procedure remains to this day open in so far as the appellants are concerned.

---

8 OJ C 166, 7.7.2005, p. 14.

9 OJ L 98, 6.4.2006, p. 3.

10 Case C-415/96 *Spain* v *Commission* [1998] ECR I-6993, paragraph 31; Case C-458/98 P *Industrie des Poudres Sphériques* v *Council* [2000] I-8147, paragraphs 80 to 85.

(11) Second, it is a general principle of the Union's administrative law that the institutions are under a duty to close investigations that have been triggered by a complaint. The complainant is entitled to a final decision of the competent institution closing the investigation in accordance with the applicable procedural rules.[11]

(12) Therefore, the Commission services take the view that the institutions are under an obligation vis-à-vis the complainants (that is the Union producers that had requested the Commission to initiate the present anti-dumping investigation) to adopt an act closing the anti-dumping procedure with regard to the appellants. It is for that reason that the Commission services have examined the substantiated claims for MET, in order to enable the Commission to make a proposal to the Council for closing the anti-dumping procedure with regard to the appellants. As the institutions are obliged to adopt an act closing the anti-dumping procedure, the adoption of such an act cannot constitute, as has been claimed by one delegation, a *détournement de pouvoir*. Rather, the institutions meet their obligations by doing so.

2. DOES THE COUNCIL ENJOY DISCRETION WITH REGARDS TO THE CONTENT OF THE ACT CLOSING THE ANTI-DUMPING PROCEDURE WITH REGARDS TO THE APPELLANTS?

(13) According to the case-law, the institutions enjoy, in the field of trade defence, a very wide discretion to decide, in terms of the interests of the Community, any measures needed to deal with the situation which they have established.[12]

(14) They need to provide, however, a statement of reasons pursuant to Article 296 TFEU for their choice.[13] That statement of reasons is subject to judicial review by the Court, which is limited to verifying whether relevant procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers.[14]

(15) In the present case, the Council has established in Council Regulation (EC) No 1472/2006 dumping, injury and Union interest in the imposition of measures. The General Court[15] as well as the WTO Dispute Settlement Body[16] upheld the reasoning

---

11 See for anti-dumping and anti-subsidy procedures Case 191/82 *Fediol* v *Commission* [1983] ECR 2914, paragraphs 15 to 26; Case C-76/01 P *Eurocoton* v *Council* [2003] ECR I-10091, paragraphs 54 to 74. It should be noted that the latter judgment finds that acts adopted by the Council to conclude an anti-dumping or anti-subsidy investigation are legislative acts, which, however, have to be assimilated to administrative acts. Following the entry into force of the Treaty of Lisbon, regulations adopted by the Council to conclude anti-dumping and anti-subsidy procedures are no longer legislative acts, but implementing acts (and therefore administrative acts). The case-law on administrative acts is therefore directly applicable. See for other fields for example for State aid Case C-521/06 P *Athinaiki Techniki* v *Commission* [2008] ECR I-5829, paragraph 40, for competition Case 282/95 P *Guérin automobiles* v *Commission* [1997] ECR I-1503, paragraph 36.

12 Case 191/82 *Fediol* v *Commission* [1983] ECR 2914, paragraph 26.

13 Case C-76/01 P *Eurocoton* v *Council* [2003] ECR I-10091, paragraphs 87 to 95.

14 Case 240/84 *NTN Toyo Bearing* v *Council* [1987] ECR 1809, paragraph 19; Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 63; and Case C-150/94 *United Kingdom* v *Council* [1998] ECR I-7235, paragraph 54.

15 Case T-401/06 *Brosmann* v *Council* [2010] ECR II-671; Case T-407/06 *Aokang* v *Council* [2010] ECR II-747.

16 WT/DS405/R. The violations which were found by the Dispute Settlement Body related to individual treatment and the treatment of confidential information; those points were not subject to the Court proceedings before the Union Courts and would in any event not necessarily have triggered the annulment of findings related to dumping, injury and Union interest in Council Regulation (EC) No 1472/2006.

of the Council in that regard. As will be explained below in section 5, contrary to the view taken by interested parties, the Court has not put into question the rulings of the General Court and the decision of the WTO Dispute Settlement Body, in particular not with regards to (lack of) legal consequences of the violation of the three month deadline for deciding requests for MET.

(16) The Commission services see no reason to depart from the findings and the reasoning set out in Council Regulation (EC) No 1472/2006 with regards to dumping, injury and Union interest. The Commission also notes that neither the General Court, nor the Court of Justice, nor the WTO Dispute Settlement Body have put into doubt the validity of the reasoning of the institutions in that regard. Therefore, the Commission proposal confirms Council Regulation (EC) No 1472/2006 in that regard.

(17) If the Council wanted to refrain from re-imposing definitive duties with regards to the appellants, it would have to explain why it was necessary to reverse the finding of dumping, injury and Union interest in Council Regulation (EC) No 1472/2006. The Commission services have not carried out any additional investigation in that regard, for the reasons set out in recitals 10, 11 and 15 to 18 of the Commission proposal and in the notice published in the Official Journal[17]. Their new work has been limited to the assessment of the MET claim. The Council would therefore have to come today to a different assessment of the same facts that it had before it when it adopted Council Regulation (EC) No 1472/2006. In the alternative, it would have to provide reasons as to why a general principle of Union law would stand in the way of such re-imposition of duties, despite the finding of dumping, injury and Union interest in Council Regulation (EC) No 1472/2006. The Commission services will address the general principle of Union law that has been evoked (protection of legitimate expectations in case of retroactive application) below in section 4.

(18) At this stage, it is appropriate to point out that two general principles of Union law militate in favour of re-imposing duties. First, the general principle of Union law of equal treatment seems to require that all exporting producers which are subject to an anti-dumping investigation are treated in the same manner, except where particular circumstances – such as a successful MET claim – justify a differentiated treatment. The fact that the appellants have launched successful Court action does not appear sufficient to warrant a different treatment than for the other exporting producers. Secondly, refraining from re-imposing the definitive anti-dumping duty appears to create unjust enrichment, which would run counter a general principle of Union law. Had the institutions immediately assessed the MET claims of the appellants, they would have imposed the weighted average duty of those producers that were not granted MET in the sample, i.e. 16.5%. The mere fact of a successful Court challenge would not seem to provide justification for unjust enrichment.

3. IS THE DRAFT PROPOSAL OF THE COMMISSION SERVICES IN LINE WITH THE DECISIONAL PRACTICE OF THE COUNCIL?

(19) Delegations have queried whether the action proposed by the Commission services is in line with the decisional practice of the Council.

(20) Past annulments have concerned the finding of dumping, injury and Union interest (either with regard to the establishment of facts, with regard to the assessment of the facts, or with regard to rights of defence).

---

17 OJ C 295, 11.10.2013, p.6

(21) Those annulments have either been partial or complete.

(22) The Union Courts use the technique of partial annulment where they can conclude themselves on the basis of the facts in the file that the institutions ought to have granted a certain adjustment or should have used a different method for a certain calculation, which would have resulted in the imposition of a lower duty (but did not put into question the findings of dumping, injury and Union interest). The (lower) duty remains in force both for the time prior to annulment and for the time after annulment.[18] In order to comply with the judgment, the institutions re-calculate the duty and amend the Regulation imposing the duty accordingly for the past and for the future. They also instruct national customs authorities to reimburse the difference, where such claims had been made in due time.[19]

(23) The Union Courts proceed to complete annulment where they cannot establish themselves on the basis of the facts in the file whether or not the institutions were right in assuming that there was dumping, injury and Union interest, because the institutions had to re-do part of their investigation. As the Union Courts are not competent for carrying out the investigation at the place of the Commission and the Council, they annulled the regulations imposing definitive duties completely. As a consequence, the institutions validly established the presence of the three conditions necessary for the imposition of measures only after the judgment annulling the duties. For imports that took place prior to the valid establishment of dumping, injury and Union interest, the imposition of definitive duties is prohibited both by the basic Regulation and by the Anti-dumping Agreement. Therefore, the acts adopted by the institutions to close those investigations imposed definitive duties only for the future.[20]

(24) The present case is different from past (partial or complete) annulments in so far, as it does not concern the very presence of dumping, injury and Union interest, but merely the choice of the appropriate duty rate (that is the choice between the duty rate applicable to the only company in the sample having received MET and the residual duty rate). What is at dispute is therefore not the very principle of imposing a duty, but only the precise amount (in other words: a modality) of the duty. And the adjustment, if any, can only be downwards.

(25) Contrary to the cases of partial annulment in the past discussed above in paragraph 22, the Court has not been able to decide as to whether a new (reduced) duty rate had to be granted, because that decision requires first an assessment of the MET claim. That task of assessing the MET claim falls within the prerogatives of the

---

18 See for example Case T-221/05 *Huvis* v *Council* [2008] ECR II-124 and Case T-249/06 *Interpipe Nikopolsky* v *Council* [2009] ECR II-303.

19 See for example Council Regulation (EC) No 412/2009 of 18 May 2009 amending Regulation (EC) No 428/2005 imposing a definitive anti-dumping duty on imports of polyester staple fibres originating in the People's Republic of China and Saudi Arabia, amending Regulation (EC) No 2852/2000 imposing a definitive anti-dumping duty on imports of polyester staple fibres originating in the Republic of Korea and terminating the anti-dumping proceeding in respect of such imports originating in Taiwan, OJ L 125, 25.1.2009, p. 1 (compliance with *Huvis*); Council Implementing Regulation (EU) No 540/2012 of 21 June 2012 amending Regulation (EC) No 954/2006 imposing a definitive anti-dumping duty on imports of certain seamless pipes and tubes, of iron or steel originating in Croatia, Romania, Russia and Ukraine, OJ L 165, 26. 6.2012, p. 1 (compliance with *Interpipe Nikopolsky*).

20 See for example Case C-338/10 *Gruenwald Logistik Services* [2012] ECR I-0000 and the re-imposition of duties by Council Implementing Regulation (EU) Nr. 158/2013 reimposing a definitive anti-dumping duty on imports of certain prepared or preserved citrus fruits (namely mandarins, etc.) originating in the People's Republic of China (OJ L 49, 22.2.2013, p. 29).

Commission. Hence, the Court cannot carry out this part of the investigation at the place of the Commission without overstepping its competences.

(26) Contrary to cases of complete annulment in the past, the findings on dumping, injury, causality and Union interest have not been annulled. Therefore, dumping, injury, causality and Union interest have been validly established at the time of adoption of Council Regulation (EC) No 1472/2006. Therefore, there is no reason to limit the re-imposition of definitive anti-dumping duties to the future.

(27) The draft proposal of the Commission services does therefore not depart from the decisional practice of the Council.

4. DOES THE DRAFT PROPOSAL BY THE COMMISSION SERVICES LEAD TO A RETROACTIVE IMPOSITION OF ANTI-DUMPING DUTIES?

(28) Delegations have voiced the concern that the draft proposal by the Commission services may constitute a retroactive imposition of anti-dumping duties, which is prohibited by Article 10 (1) of the basic Regulation and Article 10.1 of the Anti-dumping Agreement.

(29) In that regard, it is, first, important to recall that Union law differentiates between the immediate application of the new rule to future of effects of an on-going situation[21] and the retroactive application of the new rule to a situation that had become definitive prior to its entry into force (also referred to as an existing situation).[22]

(30) Second, in the present case, the situation of the imports of the products produced by the appellants that occurred during the period of application of Council Regulation (EC) No 1472/2006 has not yet become definitive, for the following reason: When those imports took place, the institutions had established dumping, injury and Union interest. However, as a result of the (successful) Court challenge with regards to the lack of analysis of the MET claim, the precise anti-dumping duty applicable to them has not yet been definitively established.

(31) In that context, it is worth recalling that traders were warned that such a duty may be imposed by the publication of the notice of initiation, Commission Regulation (EC) No 553/2006 and the (not successfully contested) findings on dumping, injury and Union interest in Council Regulation (EC) No 1472/2006. At the request of the Commission, national customs authorities, when provisionally reimbursing duties following the judgments, did so with a clear *caveat* that duties may be re-imposed.

(32) Third, even if the proposed re-imposition of definitive anti-dumping duties was retroactive, *quod non*, the substantive rules of Union law may apply to the situations existing before their entry into force in so far as it clearly follows from their terms, objectives or general scheme that such effect must be given to the them.[23] In case of

---

21 C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR 1-9465, paragraph 53; Case T-176/01 *Ferrière Nord* v *Commission* [2004] ECR 11-3931, paragraph 139.

22 Case 68/69 *Bundesknappschaft* v *Brock* [1970] ECR 171, paragraph 6; Case 1/73 *Westzucker GmbH* v *Einfuhr- und Vorratsstelle für Zucker* [1973] 723, paragraph 5; Case 143/73 *SOPAD* v *FORMA a.o.* [1973] ECR 1433, paragraph 8; Case 96/77 *Bauche* [1978] ECR 383, paragraph 48; Case 125/77 *KoninklijkeScholten-Honig NV e.a.* v *Floofdproduktschaap voor Akkerbouwprodukten* [1978] ECR 1991, paragraph 37; Case 40/79 *P* v *Commission* [1981] ECR 361, paragraph 12; Case 270/84 *Licata* v *ESC* [1986] ECR 2305, paragraph 31; Case C-60/98 *Butterfly Music* v *CEDEM* [1999] ECR 1-3939, paragraph 24; C-334/07 P *Commission* v *Freistaat Sachsen* [2008] ECR 1-9465, paragraph 53; Case T-404/05 *Greece* v *Commission* [2008] ECR 11-272, paragraph 77.

23 Joined cases 212 to 217/80 *Meridionale Industria Salumi a.o.* [1981] ECR 2735, paragraph 9 and 10; Case 21/81 *Bout* [1982] ECR 381, paragraph 13; Case C-34/92 *GruSa Fleisch* v *Hauptzollamt*

such retroactive application, the legitimate expectations of those concerned have to be duly respected.[24]

(33) For the reasons set out in paragraph 31, traders could not harbour any legitimate expectations. In addition, it is standing case-law of the Union Courts that operators cannot acquire legitimate expectations until the institutions have adopted an act closing the administrative procedure, which has become definitive.[25]

(34) Therefore, if even the re-imposition of definitive anti-dumping duties in the present case was retroactive, it would not violate the general principle of Union law of protection of legitimate expectations and therefore not be illegal.

(35) The Commission observes, for the sake of completeness, that in certain national legal orders, the immediate application of the new rule to future effects of an on-going situation is qualified as false or artificial retroactive effect. In those legal orders, only the application of the new rule to new situations (which arise after the entry into force of the new rule) is considered to be free of any (even false or artificial) retroactive effect (and therefore possible without any particular restrictions).

(36) That idea of protecting traders in that manner against future changes of the law (which may impact on on-going situations) is foreign to Union law.[26]

(37) In any event, those legal orders that have a category of false or artificial retroactive effect do not prohibit, in an absolute manner, that a rule may have such false or artificial effect. They require for that a proportionality analysis, which takes into account the interest of those that have relied on the continued application of the old rule to the on-going situation. For the reasons set out above in paragraph 33, traders could not harbour any legitimate expectations in the present case. Therefore, even if Union law was to recognize false or artificial retroactive effect, that would not affect the legality of the proposed re-imposition of duties.

5. WHAT IS THE LEGAL CONSEQUENCE OF THE VIOLATION OF THE THREE-MONTH DEADLINE FOR DECIDING ON REQUESTS FOR MET?

(38) One delegation has expressed the view that the violation of the obligation of the Commission to decide on the request for MET within a period of three months cannot be "healed" by a decision of the institutions on that point at a later date. The delegation has not expressed any view as to what the precise legal consequence of the violation of the three month deadline would be. Interested parties have put forward two theories: Either the institutions could no longer impose any duties at all on that company, or they would have to treat that company as if it had been granted MET.

(39) If that legal view was correct, it would entail two consequences: First, dumping is no longer established, as the Commission has not determined MET for the companies within the sample within three months. Second, the institutions would be barred from carrying out the assessment of the MET claims of the appellants now. They either would have to refrain from imposing definitive anti-dumping duties, or they would

---

Hamburg-Jonas [1993] ECR I-4147, paragraph 22; Case T-42/96 *Eyckeler & Malt* v *Commission* [1998] ECR II-401, paragraphs 53 and 55 to 56.

[24] Case C-337/88 *Società agricola fattoria alimentare (SAFA)* [1990] ECR I-1, paragraph 13; Case T-180/01 *Euroagri* v *Commission* [2004] ECR II-369, paragraphs 36 to 37;

[25] Case C-169/95 *Spain* v *Commission* [1997] ECR I-135, paragraph 51 to 54; Joined Cases T-116/01 and T-118/01, *P&O European Ferries (Vizcaya) SA* v *Commission* [2003] ECR II-2957, paragraph 205.

[26] Case 245/81 *Edeka* v *Germany* [1982] ECR 2746, paragraph 27.

have to impose the duty rate which has been granted to the company in the sample that had obtained MET.

(40) However, the Court has in neither of the judgments overturned the earlier case-law of the Union Courts, pursuant to which the violation of the three month deadline does not entail any legal consequences.[27] The reference to the three month period in the judgments merely has the function of showing that the basic Regulation grants exporting producers which have made a request for MET an individual right to an MET determination, even if they are not part of the sample.

(41) That analysis is also confirmed by the following consideration: If the absence of an MET determination within three months was to entail the legal consequence that MET has to be granted, irrespective of the merits of the claim, the Court would have annulled Council Regulation (EC) No 1472/2006 only partially in so far as the appellants are concerned. In that case, it could have set itself the applicable duty rate, which would have been the duty rate which has been granted to the company in the sample that had obtained MET.

(42) The Court has not done so. The plausible explanation for the decision of the Court to completely annul Council Regulation (EC) No 1472/2006 in so far as the appellants are concerned is that in the view of the Court, it was still up to the Commission and the Council to assess the MET claims. The Court could not do so at their place.

6. MAY THE COUNCIL SET ASIDE ARTICLE 221 OF THE COMMUNITY CUSTOM CODE?

(43) Delegations have questioned whether the Council may set aside Article 221 of the Community Custom Code.

(44) In that regard, it is first of all necessary to explain the relationship between the Community Customs Code and anti-dumping rules in general. The basic Regulation does not contain any provision that would make the Community Customs Code applicable to the perception of anti-dumping duties. The only place where the basic Regulation deals with the question of the perception of duties is in Article 14 of the basic Regulation. Article 14(1) stipulates: "*Provisional or definitive anti-dumping duties shall be imposed by Regulation, and collected by Member States in the form, at the rate specified and according to the other criteria laid down in the Regulation imposing such duties. Such duties shall also be collected independently of the customs duties, taxes and other charges normally imposed on imports.*"

(45) The basic Regulation therefore only decides that the perception of duties is carried out by Member States. It does not, however, render applicable the rules of the Community Custom Code to the perception of those duties. Rather on the contrary: Form, rate and other criteria of the perception shall be laid down in the Regulation imposing anti-dumping duties.

(46) Therefore, all Regulations imposing anti-dumping duties contain an article that renders applicable the rules set out in the Community Customs Code. That article typically reads: "*Unless otherwise specified, the provisions in force concerning customs duties shall apply*."[28]

---

[27] Case C-141/08 P *Foshan Shunde Yongjian Housewares & Hardware Co. Ltd* v. *Council* [2009] ECR I-9147, paragraph 94 and following; Case T-299/05 *Shanghai Exceli M&E Enterprise and Shanghai Adeptech Precision* v *Council* [2009] ECR II-565, paragraph 116 to 146.

[28] Constant Council decision practice since Article 1(1) of Council Regulation (EEC) No 1778/77 of 26 July 1977 concerning the application of the anti-dumping duty on ball bearings and tapered roller

(47) The Community Customs Code therefore is not automatically applicable to the perception of anti-dumping duties, as neither the Community Customs Code itself nor the basic Regulation contains a provision that would foresee such an automatic applicability.

(48) The Community Customs Code is only applicable to the extent that the Regulation imposing anti-dumping duties renders the Community Customs Code applicable. In the present case, the Council would not decide to set aside Article 221 Community Customs Code. It would decide not render Article 221 Community Customs Code applicable in the first place. That decision is motivated by the fact that rendering Article 221 Community Customs Code applicable would make the re-imposition of the anti-dumping duty in most situations impossible, and therefore hinder compliance with the judgments.

(49) In any event, even if the Community Customs Code was automatically applicable, and the provision in the Regulations imposing anti-dumping duties merely declaratory and not constitutive of its application, Article 14(3) of the basic Regulation would still provide a legal basis for setting aside Article 221 of the Community Customs Code.

---

bearings, originating in Japan, OJ L 196, 3.8.1977, p. 1; see for example also Article 1(4) of Council Regulation (EC) Nr. 1472/2006.