Reports of Cases

OPINION OF ADVOCATE GENERAL
BOT
delivered on 26 March 2015 [1]

Case C-511/13 P

Philips Lighting Poland SA
Philips Lighting BV
v

Council of the European Union

(Appeal — Dumping — Importation of integrated electronic compact fluorescent lamps (CFL-i) originating in China, Vietnam, Pakistan and the Philippines — Regulation (EC) No 1205/2007 — Injury to the Community industry — Definition of 'the Community industry' — Concept of 'major proportion' of total Community production)

1. By their appeal, Philips Lighting Poland SA [2] and Philips Lighting BV [3] seek to have set aside the judgment of the General Court of the European Union in *Philips Lighting Poland and Philips Lighting* v *Council* [4] dismissing their action for the annulment, to the extent that it applies to them, of Council Regulation (EC) No 1205/2007 of 15 October 2007 imposing anti-dumping duties on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China following an expiry review pursuant to Article 11(2) of Regulation (EC) No 384/96 and extending to imports of the same product consigned from the Socialist Republic of Vietnam, the Islamic Republic of Pakistan and the Republic of the Philippines. [5]

2. This case provides the Court with an opportunity to adopt a position on a number of tricky legal issues, the implications of which are significant. It calls for a ruling on:

— whether it is possible for the EU judicature to dismiss an action for annulment without first ruling on a preliminary plea alleging an absolute bar to proceeding on grounds of lack of standing to bring an action;

— the application *ratione temporis* of Article 263 TFEU;

— the standing of a Community producer to bring proceedings for the annulment of an anti-dumping regulation;

1 — Original language: French.

2 — 'Philips Poland.'

3 — Collectively, 'Philips Lighting' or 'the appellants'.

4 — T-469/07, EU:T:2013:370; 'the judgment under appeal'.

5 — OJ 2007 L 272, p. 1; 'the contested regulation'.

— whether it is possible for the EU institutions to continue the anti-dumping procedure where, as a result of a reduction in the support for the complaint, the conditions governing representativeness laid down in the regulation are no longer satisfied; and

— the definition of 'major proportion of the Community industry' for the purposes of determining injury.

3. In the present Opinion, I shall propose that the Court dismiss the appeal.

4. I shall ask the Court, first, to consider of its own motion to what extent Philips Lighting has standing to bring an action for annulment of the contested regulation.

5. In that regard, after proposing that the Court undertake that examination in the light of Article 263 TFEU, a provision which — I shall argue — is applicable *ratione temporis* even though the present action was brought before the entry into force of the Treaty of Lisbon, I shall set out the reasons why I believe that the contested regulation is of direct and individual concern to Philips Lighting, from which I shall conclude that it has standing to bring an action for annulment.

6. I shall then explain why, in my view, the General Court did not err in law in ruling that the EU institutions could continue with the review procedure even though, in the course of the investigation, the level of support for the request for a review had fallen below the representativeness threshold laid down in the legislation.

7. Lastly, I shall argue that, while the General Court erred in law in ruling that the expression 'major proportion of total Community production', as used in Article 4(1) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community,[6] as last amended by Council Regulation (EC) No 2117/2005 of 21 December 2005,[7] was to be understood as referring to the minimum threshold of 25% of total Community production, referred to in Article 5(4) of the basic regulation, it none the less did not err in law in not applying the threshold of 50% of the total production of the like product, also mentioned in that provision, inasmuch as those two thresholds, which were established solely for the purposes of assessing the representativeness of the complaint, are irrelevant to the definition of 'the Community industry' for the purposes of determining injury. Since Philips Lighting complains only that the General Court did not apply those two thresholds cumulatively, but does not also contend that that Court made a manifest error of assessment in ruling that a major proportion of total Community production could be constituted by a single Community producer representing some 48% of that production, I shall propose that the Court state that the grounds of appeal are unfounded and, in consequence, dismiss the appeal.

I – Legal framework

A – *The basic regulation*

8. The provisions governing the application of anti-dumping measures by the European Union which were in force at the material time were laid down in the basic regulation.

6 — OJ 1996 L 56, p. 1.

7 — OJ 2005 L 340, p. 17; 'the basic regulation'.

9. Paragraph 1 of Article 3 of the basic regulation, entitled 'Determination of injury', provided that, unless otherwise specified, the term 'injury' was to be taken to mean 'material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry'.

10. Paragraph 1 of Article 4 of the basic regulation, entitled 'Definition of Community industry', stated that the term 'Community industry' referred to 'the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products'.

11. Under Article 5 of the basic regulation, which governed the initiation of initial investigation proceedings to determine the existence, degree and effect of any dumping alleged in a complaint:

'1. Except as provided for in paragraph 6, an investigation to determine the existence, degree and effect of any alleged dumping shall be initiated upon a written complaint by any natural or legal person, or any association not having legal personality, acting on behalf of the Community industry.

…

4. An investigation shall not be initiated pursuant to paragraph 1 unless it has been determined, on the basis of an examination as to the degree of support for, or opposition to, the complaint expressed by Community producers of the like product, that the complaint has been made by or on behalf of the Community industry. The complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50% of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25% of total production of the like product produced by the Community industry.

…'

12. Article 9 of the basic regulation, concerning termination without measures and the imposition of definitive duties, stated:

'1. Where the complaint is withdrawn, the proceedings may be terminated unless such termination would not be in the Community interest.

…

4. Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council, acting on a proposal submitted by the Commission after consultation of the Advisory Committee. …

…'

13. Article 11 of the basic regulation provided:

'...

2. A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury. Such an expiry review shall be initiated on the initiative of the Commission, or upon request made by or on behalf of Community producers, and the measure shall remain in force pending the outcome of such review.

…

5. The relevant provisions of this Regulation with regard to procedures and the conduct of investigations, excluding those relating to time-limits, shall apply to any review carried out pursuant to paragraphs 2, 3 and 4. …

…'

B – *The regulations relating to integrated electronic compact fluorescent lamps*

14. Following an investigation initiated after the filing, on 4 April 2000, of a complaint by the European Lighting Companies Federation, the European Union adopted Council Regulation (EC) No 1470/2001 of 16 July 2001 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China. [8]

15. After an investigation had been initiated into a possible circumvention of those duties, the European Union also adopted Council Regulation (EC) No 866/2005 of 6 June 2005 extending the definitive anti-dumping measures imposed by Regulation (EC) No 1470/2001 on imports of integrated electronic compact fluorescent lamps (CFL-i) originating in the People's Republic of China to imports of the same product consigned from the Socialist Republic of Vietnam, the Islamic Republic of Pakistan and the Republic of the Philippines. [9]

16. Regulations Nos 1470/2001 and 866/2005 were subsequently amended by Council Regulation (EC) No 1322/2006 of 1 September 2006. [10]

II – Facts

17. Following the publication of a notice of the expiry of the measures adopted by Regulation No 1470/2001, the Commission received a request for a review from the Community Federation of Lighting Industry of Compact Fluorescent Lamps Integrated, which was acting on behalf of Osram GmbH. [11]

8 — OJ 2001 L 195, p. 8. Regulation as amended by Council Regulation (EC) No 1322/2006 of 1 September 2006 (OJ 2006 L 244, p. 1).

9 — OJ 2005 L 145, p. 1.

10 — OJ 2006 L 244, p. 1.

11 — 'Osram.'

18. On 12 June 2006, the Commission sent a questionnaire to the four Community producers of integrated electronic compact fluorescent lamps,[12] namely GE Hungary Ipari és Kereskedelmi Zrt,[13] Osram, Philips Lighting and SLI Sylvania Lighting International.[14] Osram and GE Hungary stated that they were in favour of the initiation of a review procedure, Philips Poland indicated its opposition to such a procedure and Sylvania did not reply to the questionnaire.

19. On the view that there was sufficient evidence to justify initiation of the review procedure, the Commission launched an investigation covering the period between 1 July 2005 and 30 June 2006.

20. On 26 November 2006, GE Hungary told the Commission that it was no longer in favour of the continued imposition of the anti-dumping measures in question, while Sylvania informed it on 19 December 2006 that, in its view, it was not in the Community's interest for the anti-dumping measures to be maintained.

21. On 10 July 2007, the Commission sent an information letter announcing its intention of proposing that the review be terminated. Among other things, the Commission explained in that letter that, although the request had been supported by a major proportion of Community production at the time when the review was initiated, the collective production of producers opposing the request accounted at the time of writing for just over 50% of total Community production. The Commission therefore concluded that the anti-dumping measures should be repealed and the procedure terminated.

22. On 24 and 25 July 2007, Philips Poland and the Community Federation of Lighting Industry of Compact Fluorescent Lamps Integrated submitted observations on that letter.

23. By a new information letter of 31 August 2007, the Commission informed the parties concerned that it had ultimately reached the conclusion that the period of application of the anti-dumping measures at issue should, in the interests of the Community, be extended by one year.

24. On 15 October 2007, the Council of the European Union adopted the contested regulation.

III – The proceedings before the General Court and the judgment under appeal

25. By application lodged at the Registry of the General Court on 21 December 2007, Philips Lighting sought annulment of the contested regulation.

26. In support of its action, it raised three pleas in law, the first two of which alleged infringement of Articles 3(1), 9(1) and (4) and 11(2) of the basic regulation.

27. In particular, Philips Lighting submitted that the EU institutions could not continue the anti-dumping procedure in the event of a fall in the level of support for the complaint and that the Council could not rely on the information supplied by Osram alone in order to assess the injury to the Community industry in so far as that company's production, which accounted for only 48% or so of total Community production, could not be regarded as constituting a 'major proportion' of that production.

12 — 'CFL-i.'

13 — 'GE Hungary.'

14 — 'Sylvania.'

28. As the Council had expressed doubts as to the admissibility of the action, disputing Philips Lighting's standing to bring proceedings, the General Court considered it appropriate in the interests of procedural economy to begin by examining the pleas in law, without first ruling on the admissibility of the action, since that action was in any event unfounded.

29. The General Court rejected the first two pleas in law after setting out a twofold line of reasoning.

30. First, the General Court examined whether the EU institutions could continue the review despite the fact that the level of support for the complaint had fallen below the 50% threshold mentioned in Article 5(4) of the basic regulation.

31. The General Court began by stating, in paragraphs 75 to 78 of the judgment under appeal, that, whereas the request for initiation of the review procedure had initially been supported by Osram and GE Hungary, which together represented over 50% of total Community CFL-i production, Philips Poland having expressed its opposition and Sylvania having failed to adopt a position, the situation had changed several months later when, during the investigation, GE Hungary and Sylvania had informed the Commission that they now opposed the continued imposition of the anti-dumping measures at issue, with the consequence that the level of support for the review request, although still comfortably above the 25% threshold mentioned in Article 5(4) of the basic regulation, had fallen slightly below the 50% threshold mentioned in that provision, since the only Community producer continuing to support that request, namely Osram, accounted for 48% of total Community production, with the three other producers which opposed it together accounting for the remaining 52%.

32. The General Court went on to point out, in paragraph 84 of the judgment under appeal, that it had already held that Article 5(4) of the basic regulation does not place any obligation on the Commission to terminate an anti-dumping procedure in progress where the level of support for the complaint falls below a minimum threshold of 25% of Community production, since that provision 'concerns only the degree of support for the complaint necessary for the Commission to be able to initiate a proceeding'. The General Court stated that it had relied on the wording of Article 9(1) of the basic regulation as the basis for the judgment in *Interpipe Niko Tube and Interpipe NTRP* v *Council* (T-249/06, EU:T:2009:62), even though, in the case giving rise to that judgment, the complaint had not been withdrawn but it was alleged that the level of support for that complaint had fallen in the course of the procedure. According to the General Court, '[t]hat approach is entirely logical since, if, under Article 9(1) of the basic regulation, the Commission is not under an obligation to terminate the procedure when a complaint is withdrawn, that must apply *a fortiori* when the degree of support for a complaint merely falls'.

33. In paragraph 86 of the judgment under appeal, the General Court found that Articles 5(4) and 9(1) of the basic regulation are applicable to review procedures, pursuant to Article 11(5) of that regulation, and inferred from this that the EU institutions were entitled to continue the review procedure notwithstanding the fact that it was possible that the 50% threshold referred to in Article 5(4) of the basic regulation was no longer met.

34. Lastly, the General Court held, in paragraph 88 of the judgment under appeal, that, in the interpretation which it had adopted of Article 9(1) of the basic regulation, the Council had not arrogated to itself any new powers, since it was 'only after determining, as required, that there was still dumping, that the expiry of the anti-dumping measures would be likely to result in the continuation of that dumping and of injury and that the continuation of the anti-dumping measures was in the Community interest that the Council decided to maintain the anti-dumping measures at issue for a further period of one year'. Nor, added the General Court, had that interpretation had the effect of rendering ineffective the requirement that there had to be proof of injury to the 'Community industry' in order for it to be possible to impose anti-dumping duties, since the Council had correctly defined the Community industry for the purposes of determining injury.

35. Consequently, the General Court concluded from this that no infringement of Article 9(1) of the basic regulation could be established in the case before it.

36. Secondly, the General Court examined the question of the definition of the Community industry for the purposes of determining injury.

37. The General Court pointed out first of all, in paragraph 91 of the judgment under appeal, that, under Article 11(2) of the basic regulation, an anti-dumping measure may continue to be imposed beyond the five-year period referred to in that provision only if its expiry would be likely to lead to a continuation or recurrence of dumping and injury, the term 'injury' being taken to mean, in accordance with Article 3(1) of that regulation, material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry.

38. The General Court stated next, in paragraph 92 of the judgment under appeal, that Article 4(1) of the basic regulation defines the term 'Community industry' as either 'the Community producers as a whole of the like products' or as 'those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4) [of that regulation], of the total Community production of those [like] products', and that the EU institutions have a broad discretion when choosing between the two options.

39. The General Court went on to explain, in paragraph 93 of the judgment under appeal, why it considered that the Community industry taken as the point of reference for the purposes of determining injury did not necessarily have to comprise the same Community producers as those making up the Community industry taken into account in order to establish whether the original complaint or the request for a review enjoyed sufficient support in accordance with Article 5(4) of the basic regulation. According to the Court, '[f]irstly, in the latter case, the Community industry may, in the light of the wording of Article 5(4), comprise only the Community producers supporting the complaint or request for a review, whereas, in the former case, the definition may include all Community producers, regardless of whether they have expressed such support. Secondly, the definition of the Community industry for the purposes of determining injury is carried out by the [EU] institutions after the procedure has been initiated'.

40. In paragraph 94 of the judgment under appeal, the General Court held that the possible situations covered, expressly or by implication, in Article 9(1) of the basic regulation presuppose, by definition, that the 50% threshold laid down in Article 5(4) of that regulation is no longer met, from which it inferred that 'the reference in [Article 4(1) of the basic regulation] to Article 5(4) of the basic regulation in general as regards the expression "a major proportion … of the total Community production" may only be construed as referring to the minimum threshold of 25%, and not to the 50% threshold'. For the General Court, '[s]uch an approach is all the more necessary because the requirement that the Community industry must constitute a major proportion of the total Community production aims at ensuring that the collective output of the producers included in that industry is sufficiently representative. Whether that is the case depends more on those producers' output as a proportion of total Community production than on the position adopted, with regard to the complaint or the request for a review, by the producers not included in the Community industry pursuant to Article 5(4) of the basic regulation'.

41. Lastly, the General Court mentioned, in paragraph 95 of the judgment under appeal, that the EU institutions cannot be required, in the situation referred to in paragraph 94 of that judgment, to define the Community industry solely by reference to the first option under Article 4(1) of the basic regulation, given that they have a broad discretion in choosing between those alternatives.

42. The General Court concluded from this, in paragraph 96 of the judgment under appeal, that the Council had not erred in law in deciding to include Osram alone in the definition of the Community industry for the purposes of injury.

IV – The appeal

43. The appellants rely on two grounds of appeal.

44. By the first ground of appeal, the appellants submit that the General Court erred in law in finding, on the basis of an *a fortiori* interpretation of Article 9(1) of the basic regulation which is inconsistent with both the wording and the scheme of that provision, that the Commission could continue the procedure not only where the complaint is withdrawn but also where the level of support for the complaint merely falls.

45. By their second ground of appeal, the appellants submit that the General Court erred in law in taking the view that, in determining the injury sustained by the Community industry, the expression 'major proportion of total Community production' was to be understood, for the purposes of Article 5(4) of the basic regulation, as referring to the minimum threshold of 25% of that production, without taking into account the 50% threshold also laid down in that provision.

A – *Philips Lighting's standing to bring proceedings*

1. Arguments of the parties

46. The Council, Osram and the Commission object that the action for annulment was inadmissible on the ground that Philips Lighting is not individually concerned by the contested regulation.

47. In support of that preliminary objection of inadmissibility, the Council — which, without formally raising an objection, had already expressed before the General Court doubts as to Philips Lighting's standing — contends that Philips Lighting cannot rely on the judgment in *Timex* v *Council and Commission*,[15] as it did not support the request for a review of the anti-dumping measures in force, and that it also cannot rely on the case-law devolving from the judgment in *Nachi Europe*,[16] since its sales prices were not used to calculate the dumping margin. Nor, according to the Council, can Philips Lighting rely on the line of authority flowing from the judgment in *Extramet Industrie* v *Council*,[17] in so far as it is not in a situation so special as to differentiate it from all other operators by reason of certain attributes peculiar to it.

48. The appellants, which recall that the General Court decided, for reasons of procedural economy, to proceed directly to examine the merits of the action without first ruling on its admissibility, argue that, in accordance with Articles 173 and 174 of the Rules of Procedure of the Court of Justice, the Council's response may contain only arguments relating to the upholding or the dismissal of the appeal and that, consequently, elements of the response that relate to the admissibility of the action at first instance must be excluded from the Court's examination. They submit, for the sake of completeness, that the contested regulation is of direct and individual concern to them since they are both the main importers of CFL-i in the European Union and major Community manufacturers of those products. They add that that regulation recognises the negative impact of anti-dumping duties on their activities.

15 — 264/82, EU:C:1985:119.
16 — C-239/99, EU:C:2001:101.
17 — C-358/89, EU:C:1991:214.

2. My assessment

49. I propose to begin by revisiting the review which the Court of Justice, in the exercise of its appellate jurisdiction, is able to conduct in relation to the admissibility of an action for annulment, before carrying out a more specific examination of Philips Lighting's standing to bring proceedings by looking first at the determination of the legislative provision applicable *ratione temporis* and then at the question whether Philips Lighting fulfilled the conditions governing standing to bring proceedings for annulment.

a) Review by the Court of Justice of the admissibility of an action for annulment

50. One of the features of the judgment under appeal is that it reverses the normal order of examination, which is to look first at the admissibility of an action and then to examine its merits. Notwithstanding the doubts expressed by the Council with respect to Philips Lighting's standing, the General Court preferred, 'in the interests of procedural economy',[18] to dismiss the action for annulment on its merits without first ruling on its admissibility.

51. The customary practice of the General Court[19] is consistent with a line of authority established by the Court of Justice, primarily in the judgments in *Council* v *Boehringer*[20] and *France* v *Commission*,[21] to which the judgment under appeal refers and which is re-stated in the judgment in *Cofradía de pescadores 'San Pedro' de Bermeo and Others* v *Council*.[22]

52. Let me briefly recall the approaches established by those judgments.

53. In the judgment in *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118), the Court of Justice, hearing an appeal lodged by the Council against a judgment in which the General Court had not examined the preliminary objection of inadmissibility raised before it by the Council in order to oppose an action for the annulment of a directive,[23] held, before dismissing the appeal as inadmissible on the ground that it was not directed against any decision, that '[i]t was for the Court of First Instance to assess, as it [had done], whether in the circumstances of the case the proper administration of justice justified the dismissal of the action on the merits … without ruling on the objection of inadmissibility raised by the Council'.[24]

54. In its judgment in *France* v *Commission* (C-233/02, EU:C:2004:173), the Court of Justice held, in proceedings for the annulment of a decision relating to the conclusion of an agreement on guidelines, that there was no need to rule on the preliminary objection of admissibility predicated on the alleged lack of an actionable measure, since the submissions made by the French Republic fell to be dismissed on the merits.

18 — Paragraph 62 of the judgment under appeal.

19 — See, inter alia, the judgment in *Mebrom* v *Commission* (T-216/05, EU:T:2007:148); the order in *Charron Inox and Almet* v *Commission and Council* (T-445/11 and T-88/12, EU:T:2013:4); the judgments in *Marchiani* v *Parliament* (T-479/13, EU:T:2014:866) and *Club Hotel Loutraki and Others* v *Commission* (T-58/13, EU:T:2015:1); and the order in *Istituto di vigilanza dell'urbe* v *Commission* (T-579/13, EU:T:2015:27).

20 — C-23/00 P, EU:C:2002:118.

21 — C-233/02, EU:C:2004:173.

22 — C-6/06 P, EU:C:2007:702.

23 — As can be seen from paragraph 37 of the judgment in *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118) and from point 28 of the Opinion of Advocate General Ruiz-Jarabo Colomer in *Council* v *Boehringer* (C-23/00 P, EU:C:2001:511), the plea of inadmissibility related to the appellants' alleged lack of standing to bring proceedings under the fourth paragraph of Article 230 EC.

24 — Paragraph 52 of that judgment.

55. Lastly, in its judgment in *Cofradía de pescadores 'San Pedro' de Bermeo and Others* v *Council* (C-6/06 P, EU:C:2007:702), the Court of Justice, re-stating the principle laid down in the judgment in *Council* v *Boehringer* (C-23/00 P, EU:C:2002:118), dismissed the cross-appeal by which the Council sought to have set aside in part the judgment in which the General Court had dismissed an action for a declaration of non-contractual liability without first examining the preliminary objection of inadmissibility raised before it by the Council. [25]

56. In the interests of ensuring that the case-law is consistent, it strikes me as necessary to set against those positions the Court's assertion of the principle that the inadmissibility of an action for annulment on grounds of the applicant's lack of standing constitutes a ground involving a question of public policy which may — and even must — be raised of its own motion by the EU judicature. [26] In the words of its judgment in *Stadtwerke Schwäbisch Hall and Others* v *Commission*, [27] 'the Court, when hearing an appeal under Article 56 of its Statute, is required to rule, if need be of its own motion, on the public policy ground relating to failure to fulfil the condition, laid down in the fourth paragraph of Article 230 EC, that an applicant may not seek the annulment of a decision that is not addressed to him unless he is directly and individually concerned by that decision'. [28] What is more, in other judgments, the Court has expressly categorised a plea in law alleging the inadmissibility of an action brought by a natural or legal person against a decision addressed to another person as a plea alleging an absolute bar to proceeding which it is for the EU judicature to consider at any time, even of its own motion. [29] Pleas in law alleging an absolute bar to proceeding are not 'run-of-the-mill' pleas, inasmuch as they can be placed on the same footing as substantive pleas. As is clear both from Article 150 of the Court's Rules of Procedure and from its case-law, they are governed by special procedural rules characterised, in particular, by the fact that they may be examined at any time during the proceedings, and even raised of the Court's own motion.

57. Those two parallel lines of authority are not suggestive of perfect consistency within a well-constructed judicial system. What justification can there be, after all, for the fact that the EU judicature imposes on itself an obligation to raise of its own motion — including in appeal proceedings — the question whether the action is inadmissible owing to a party's lack of standing to bring proceedings for annulment when, at the same time, it allows itself to refrain from ruling on a plea in law to that effect that is raised before it by one of the parties? Is the obligation — incumbent, in particular, on the court hearing an appeal — to verify as a matter of course possession of the requisite *locus standi* compatible with the discretion to dispense with that verification where the action can be dismissed on the merits?

58. I would level three main criticisms at the case-law authorising the EU judicature to refrain from examining a plea of inadmissibility on grounds of lack of standing where it appears that the action can be dismissed on the merits.

25 — Paragraph 21 of the judgment in *Cofradía de pescadores 'San Pedro' de Bermeo and Others* v *Council* (C-6/06 P, EU:C:2007:702).

26 — See the judgment in *Italy* v *Commission* (C-298/00 P, EU:C:2004:240, paragraph 35), and the order in *Cheminova and Others* v *Commission* (C-60/08 P(R), EU:C:2009:181, paragraph 31).

27 — C-176/06 P, EU:C:2007:730.

28 — Paragraph 18. See also, to that effect, the orders in *Complejo Agrícola* v *Commission* (C-415/08 P, EU:C:2009:574, paragraph 22) and *Calebus* v *Commission* (C-421/08 P, EU:C:2009:575, paragraph 22). From the principle that the condition laid down in the fourth paragraph of Article 230 corresponds to a plea which, if well founded, raises an absolute bar to proceeding and which the European Union judicature 'may' consider at any time, even of its own motion, those two decisions derive the principle that an examination of whether an applicant for annulment has standing to bring proceedings constitutes an 'obligation' incumbent on the Court when exercising its appellate jurisdiction (see paragraph 21 of those two decisions). Apart from the fact that the former principle is wrongly attributed to paragraph 18 of the judgment in *Stadtwerke Schwäbisch Hall and Others* v *Commission* (C-176/06 P, EU:C:2007:730), which does not mention it, paragraphs 21 and 22 of those two decisions, when read together, give rise to some uncertainty as to whether raising the public policy plea alleging lack of standing to bring proceedings constitutes an obligation on the part of the EU judicature or merely an option that is open to it.

29 — See, to that effect, the judgment in *Stichting Woonlinie and Others* v *Commission* (C-133/12 P, EU:C:2014:105, paragraph 32 and the case-law cited).

59. First, that position does not seem to me to be compatible with the recognised fact that a plea of inadmissibility on grounds of lack of standing involves a question of public policy. Where a plea of inadmissibility involves a question of public policy, the EU judicature — although it 'may' give a ruling at any time and may by definition do so *in limine litis* — 'must' none the less give a ruling in its decision. In other words, the discretion available to it is concerned exclusively with the choice of when it intends to fulfil its obligation to verify of its own motion the admissibility of the application.

60. Secondly, I do not believe that case-law to be consistent with the nature of a plea alleging an absolute bar to proceeding, or with the legal rules applicable to such a plea. If the conditions governing the admissibility of an action for annulment brought by a natural or legal person are not met, the Court of Justice, given the limits attaching to its jurisdiction to rule on such actions, may no longer examine the substantive pleas in law put forward in support of the action. To use the terminology employed both in the second and third paragraphs of Article 230 EC and in the second and third paragraphs of Article 263 TFEU, the Court no longer 'has jurisdiction' to hear and determine that action. The inadmissibility of an action for annulment by reason of the applicant's lack of standing to bring proceedings therefore constitutes an obstacle to the examination of the merits of that action.

61. Thirdly, I doubt whether it is entirely consistent with the proper administration of justice or good judicial policy to put off answering key questions which may well arise in other disputes. That practice, the pragmatism of which is difficult to reconcile with the strict application of the rule of law, seems to me to be made all the more questionable by the fact that it is not confined to situations where the action is manifestly unfounded but not so obviously inadmissible. It has, on the contrary, been applied across the board and without restriction, including in cases where the assessment of the merits of the action posed a serious problem.

62. The present appeal provides an opportunity to confirm — or, conversely, to abandon — that case-law, the re-examination of which is not pointless given that the judgments delivered by the Court of Justice in this regard pre-date those which, on the one hand, oblige the EU judicature to rule, if need be of its own motion, on a plea alleging the inadmissibility of an action brought by a natural or legal person against a decision addressed to another and, on the other hand, categorise such a plea as a plea that alleges an 'absolute bar to proceeding'.

63. There are three conceivable approaches.

64. First, although I do not consider there to be any justification for this approach, the possibility cannot be ruled out that the Court of Justice may be minded to confirm its case-law, in which event it would proceed directly to examine the grounds of the appeal without first considering the question of the admissibility of the action for annulment brought by Philips Lighting, on which it would have to adjudicate only if, as I shall be proposing, it decided not to take the approach of dismissing the appeal on the merits.

65. A second approach would be, as I shall recommend, to abandon that case-law or, at the very least, to make it conditional on a finding that the action for annulment is manifestly wholly unfounded, in which event the Court would be required, in the present case, first to examine the admissibility of that action.

66. Lastly, the third approach would be to refrain from applying that case-law but without commenting on its merits, bearing in mind that that case-law merely gives the EU judicature the discretion to dispense with ruling on the admissibility of the action if it intends to dismiss that action: it does not oblige it to do so.

67. For the reasons given above, I would express my preference for the second approach, in which the first step is to consider the admissibility of the action for annulment and, in order to do so, to determine the legislative provisions applicable *ratione temporis*.

b) Determination of the legislative provisions applicable *ratione temporis*

68. Before considering specifically whether Philips Lighting had standing to bring an action for annulment of the contested regulation, a further preliminary question arises, that is to say, whether the fourth paragraph of Article 230 EC or the fourth paragraph of Article 263 TFEU is applicable *ratione temporis*.

69. For the purposes of hearing the present appeal, the practical significance of that question is inversely proportional to its theoretical interest.

70. The answer to that question is, after all, hardly decisive from the point of view of the outcome of the dispute, in so far as I believe, for reasons which I shall explain at length, that the appellants are directly and individually concerned by the contested regulation.

71. On the other hand, that question is definitely of theoretical importance, since the Treaty of Lisbon, far from simply reproducing *verbatim* the conditions governing the admissibility of actions for annulment available to natural or legal persons, elected rather to relax them by adding, in the fourth paragraph of Article 263 TFEU, a final phrase allowing actions for annulment to be brought against regulatory acts which do not entail implementing measures and are of direct concern to an applicant. Consequently, a natural or legal person not entitled to bring proceedings under Article 230 EC may, in theory, be recognised as having standing to bring proceedings on the basis of Article 263 TFEU.

72. Before I state my position on the applicability *ratione temporis* of Article 263 TFEU, it is important first of all to recall how the General Court's case-law on this matter currently stands.

73. The General Court ruled on the question whether the fourth paragraph of Article 263 TFEU applies to pending judicial proceedings on 1 December 2009 in its orders in *Norilsk Nickel Harjavalta and Umicore* v *Commission* [30] and *Etimine and Etiproducts* v *Commission*. [31]

74. In those two decisions, after noting that the Treaty of Lisbon does not lay down any specific transitional provisions, the General Court points out that 'it is settled case-law, first, that in accordance with the maxim *tempus regit actum* …, the question of the admissibility of an application must be resolved on the basis of the rules in force at the date on which it was submitted … and, second, that the conditions of admissibility of an action are judged at the time of bringing the action, that is, the lodging of the application …, a defect in which can be rectified only before the expiry of the period for bringing proceedings'. [32]

75. The General Court goes on to say that the 'contrary view would … lead to the danger of arbitrariness in the administration of justice, since the admissibility of an application would then depend on the — uncertain — date of delivery of the decision of the Court putting an end to the proceedings' [33] and that, even if the fourth paragraph of Article 263 TFEU, in particular the last phrase of the paragraph, could in the circumstances of that case confer on the applicants a *locus standi* which they did not have under the fourth paragraph of Article 230 EC, that standing could not be taken into

30 — T-532/08, EU:T:2010:353.

31 — T-539/08, EU:T:2010:354.

32 — Orders in *Norilsk Nickel Harjavalta and Umicore* v *Commission* (T-532/08, EU:T:2010:353, paragraphs 69 and 70) and *Etimine and Etiproducts* v *Commission* (T-539/08, EU:T:2010:354, paragraphs 75 and 76).

33 — Ibidem (paragraphs 71 and 77 respectively).

account for the purposes of assessing the admissibility of the action in question, since the period for bringing proceedings within the meaning both of the fifth paragraph of Article 230 EC and of the sixth paragraph of Article 263 TFEU had already expired when Article 263 TFEU entered into force on 1 December 2009. [34]

76. Lastly, the General Court points out that '[t]hat conclusion is not affected by the argument that Article 263 TFEU forms part of the procedural rules in respect of which the case-law has held that, unlike substantive rules, they are generally taken to apply to all proceedings pending at the time when they enter into force [since], even if it were considered that jurisdictional questions are within the field of procedural rules …, it is clear that, … for the purposes of determining the applicable provisions by reference to which the admissibility of an action for the annulment of [an EU] act must be assessed, the maxim *tempus regit actum* must be applied'. [35]

77. Should that case-law be confirmed or disapproved?

78. There is perhaps a natural temptation to propose that it be confirmed, since the justifications given by the General Court in support of its position appear, at first sight, to be convincing. It is, after all, logical to take as the point of reference for the purposes of assessing an applicant's standing to bring proceedings before the EU judicature the date on which the action is brought. It is also reasonable to wish to avoid the danger that the examination of actions would not be equally prompt, depending on the expeditiousness of the EU judicature.

79. However, there are at least three arguments to the contrary, which seem to me to carry more weight.

80. The first reason can be found in the traditional rules governing the temporal application of EU law. After all, the analysis to the effect that the maxim *tempus regit actum* should prevail over the immediate application of procedural law is, in my opinion, based on an inflated view of that maxim which I do not consider to be consistent with the principles applicable here.

81. The temporal resolution of conflicts of laws is governed by the traditional distinction between substantive rules and procedural rules.

82. Rules of substantive law are usually construed as being applicable immediately, which means that they are capable of governing situations that 'will arise' and both the 'present' [36] and 'future' [37] effects of situations that 'arose', but did not become fully established, under the old rule. On the other hand, in order to ensure observance of the principles of legal certainty and the protection of legitimate expectations, in accordance with which EU legislation must be clear and foreseeable by individuals, EU legislation must not be applied retroactively, whether or not its effects are favourable to the parties concerned, which means that the new rules cannot be applied to situations 'existing' before the entry into force of those rules, unless it clearly follows from their terms, objectives or general scheme that such effect must be given to them. [38]

34 — Ibidem (paragraphs 72 and 78 respectively).

35 — Ibidem (paragraphs 73 and 79 respectively).

36 — See, to that effect, in relation to the application of the provisions on Union citizenship, the judgments in *D'Hoop* (C-224/98, EU:C:2002:432, paragraph 25); *Lassal* (C-162/09, EU:C:2010:592, paragraph 39); *Runevič-Vardyn and Wardyn* (C-391/09, EU:C:2011:291, paragraph 55); and *Ziolkowski and Szeja* (C-424/10 and C-425/10, EU:C:2011:866, paragraph 58).

37 — See, to that effect, the judgment in *Westzucker* (1/73, EU:C:1973:78), which states that '[a]ccording to a generally accepted principle, the laws amending a legislative provision apply, unless otherwise provided, to the future consequences of situations which arose under the former law' (paragraph 5). To my knowledge, this was the first judgment in which the Court declared immediate effect to be a 'generally recognised principle'. See also, to that effect, the judgments in *Gemeinde Altrip and Others* (C-72/12, EU:C:2013:712, paragraph 22 and the case-law cited) and *Balazs and Casa Județeană de Pensii Cluj* (C-401/13 and C-432/13, EU:C:2015:26, paragraph 30 and the case-law cited).

38 — See inter alia, to that effect, the judgments in *Bureau national interprofessionnel du Cognac* (C-4/10 and C-27/10, EU:C:2011:484, paragraph 26 and the case-law cited); *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 51); and *Kuso* (C-614/11, EU:C:2013:544, paragraph 24 and the case-law cited).

83. Procedural rules are governed by a different regime, characterised by an even more stringent application of the principle of the immediate effect of new rules. Thus, according to settled case-law, procedural rules are 'generally' deemed to apply to all proceedings pending at the time when they enter into force.[39] The Court of Justice has made two important clarifications in this regard. First, it held that jurisdiction is a matter falling within the scope of procedural rules.[40] Next, it stated that the distinction between substantive rules and procedural rules does not apply where procedural rules, being included in EU legislation, form an indivisible whole together with substantive rules and cannot be considered in isolation as regards the time at which they take effect.[41]

84. It is worth noting that the case-law adopts a very broad application of that principle, without drawing any distinction between procedural acts prior or subsequent to the new law or between laws governing the activities of the parties and those, such as laws concerning jurisdiction, governing the activity of the judicature.[42]

85. The provisions of Article 263 TFEU must be regarded as being of a procedural nature, since they determine which persons have standing to bring proceedings for annulment, even though the conditions that they lay down are substantive and not purely formal. The principle of the immediate effect of procedural laws therefore implies that they apply to pending proceedings as soon as they enter into force.

86. Even assuming that the principle of the immediate effect of a new rule is regarded as not going so far as to permit the application of that rule to a procedural act, in this instance an action for annulment, predating the rule's entry into force, it should be noted that the provisions of Article 263 TFEU, as well as having the general appearance of 'procedural' law, in that they are concerned with standing to bring proceedings for annulment, also have the specific appearance of 'jurisdictional' law, since they determine the competence of the European judicature to rule on actions for annulment brought by natural or legal persons.

87. In that regard, as I pointed out earlier, the wording of the second paragraph of Article 263 TFEU, which specifies the circumstances in which the Court of Justice 'has *jurisdiction* in actions'[43] and to which the fourth paragraph of Article 263 TFEU refers, is significant in my view. From that point of view, the maxim *tempus regit actum* cannot justify the non-application of the new law, since, until such time as the dispute has been settled by a judgment, there is no completed procedural act as far as jurisdictional law is concerned, but an ongoing situation which must be governed by the new jurisdictional law. Thus, having acquired, as from 1 December 2009, jurisdiction in actions for annulment brought by natural or legal persons against a regulatory act which is of direct concern to them and does not entail implementing measures, the Court of Justice must be able, as from that date, to rule on such actions, including those which are pending before it. I would add that, even though it relates to a different procedural context, the judgment in Weryński,[44] which applied to a

39 — See the judgments in *Conserchimica* (C-261/96, EU:C:1997:524, paragraph 17); *Beemsterboer Coldstore Services* (C-293/04, EU:C:2006:162, paragraph 19 and the case-law cited); *Dell'Orto* (C-467/05, EU:C:2007:395, paragraph 48); *Commission* v *Italy* (C-334/08, EU:C:2010:414, paragraph 60 and the case-law cited); *Toshiba Corporation and Others* (C-17/10, EU:C:2012:72, paragraph 47 and the case-law cited); *Commission* v *Spain* (C-610/10, EU:C:2012:781, paragraph 45 and the case-law cited); and *Melloni* (C-399/11, EU:C:2013:107, paragraph 32 and the case-law cited).

40 — Judgment in *Dell'Orto* (C-467/05, EU:C:2007:395, paragraph 49).

41 — Judgments in *Meridionale Industria Salumi and Others* (212/80 to 217/80, EU:C:1981:270, paragraph 11) and *Reichelt* (113/81, EU:C:1982:206, paragraph 13). See also the judgment in *Conserchimica* (C-261/96, EU:C:1997:524, paragraph 17) and, on the scope of that exception, the judgment in *Molenbergnatie* (C-201/04, EU:C:2006:136, paragraphs 31 to 34).

42 — As regards the distinction thus drawn by legal commentators, Roubier, P., *Le droit transitoire (conflits des lois dans le temps)*, 2nd ed., Dalloz et Sirey, Paris, 1960, p. 545 et seq.

43 — Emphasis added.

44 — C-283/09, EU:C:2011:85.

request for a preliminary ruling on interpretation made before the Treaty of Lisbon entered into force the new rules rendering inoperative the former limitation of the right of referral, laid down in Article 68(1) EC,[45] is an illustration of the Court's propensity to apply immediately new provisions governing its jurisdiction.

88. There is a second — to my mind, compelling — reason for applying Article 263 TFEU to the current proceedings. The detailed rules governing the temporal application of Article 263 TFEU must be determined in the light of the objective of that provision, which is to contribute to ensuring that individuals have the remedies necessary to guarantee them effective legal protection, while preventing them, as the Court of Justice has stated, from being obliged to infringe the law in order to have access to a court.[46] In so far as recognition of the right of any individual to contest the legality of any act affecting his legal situation forms part of the requirement of effective legal protection, as reaffirmed in Article 47 of the Charter of Fundamental Rights of the European Union, and *ipso facto* constitutes one of the foundations of a European Union based on the values of the rule of law, it is, in my view, the duty of the EU judicature to bring to an immediate end a situation capable of giving rise to a limitation of the fundamental right of access to a legal remedy and, to that end, to apply the new rule to pending proceedings.

89. A third reason may lie in the fact that neither the principle of legal certainty nor the principle of the protection of legitimate expectations precludes the application of Article 263 TFEU to proceedings pending at the time of the entry into force of the new rule. It should be noted in this regard that the application to pending proceedings of the new provision, which is intended to fill a gap in the EU system of judicial protection, is not at odds with legal certainty. The action, provided for in Articles 263 TFEU and 264 TFEU, for the annulment of acts of the European Union is an objective remedy designed primarily to restore legality. The immediate application to pending proceedings of a rule relaxing the conditions governing the admissibility of actions for annulment does not favour the individual rights of one party to the detriment of the other, as the retroactive application of a provision of substantive law might. Nor does it affect the legitimate expectations of individuals, but, on the contrary, strengthens the protection of such expectations by making it easier for individuals to gain access to the EU judicature.

90. I would add that the fact that the Court's narrow construction of the concept of 'regulatory act'[47] — in particular, the condition requiring that such an act should not entail implementing measures[48] — has limited the scope for relaxing the conditions governing direct access to the EU judicature is not an argument militating in favour of the opposite position, since there is no reason why the loss of the material substance of that provision should bring with it a loss of temporal substance, too.

91. It is for those reasons that I propose that the Court rule that Article 263 TFEU is applicable to the action for annulment, the admissibility of which must therefore be examined in the light of that provision.

c) Philips Lighting's standing to bring proceedings

92. The fourth paragraph of Article 263 TFEU provides for two situations in which a natural or legal person may institute proceedings against a decision addressed to another person. On the one hand, such proceedings may be instituted if the act is of direct and individual concern to the applicant. On the other hand, that person may institute proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to him.

45 — Paragraph 28.

46 — See the judgment in *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852, paragraph 27).

47 — See the judgment in *Inuit Tapiriit Kanatami and Others* v *Parliament and Council* (C-583/11 P, EU:C:2013:625).

48 — See the judgment in *Telefónica* v *Commission* (C-274/12 P, EU:C:2013:852).

93. The admissibility of the action should be examined, first of all, by reference to the first situation. Since the condition relating to direct concern is undisputed, it is appropriate to turn immediately to ascertaining whether the condition relating to individual concern is fulfilled in the case of Philips Lighting.

94. It follows from settled case-law, devolving from the judgment in *Plaumann* v *Commission*,[49] that persons other than those to whom a decision is addressed may claim to be individually concerned by it only if the decision affects them by reason of certain attributes peculiar to them or by reason of a factual situation which differentiates them from all other persons and thereby distinguishes them individually in the same way as the addressee.[50]

95. In the case, more specifically, of decisions concerning anti-dumping measures, the Court of Justice has repeatedly had occasion to hold that regulations imposing an anti-dumping duty, although of a legislative nature, in so far as they are applicable to all the economic operators concerned, may also be of an individual nature, inasmuch as they may be of direct and individual concern to some of those operators,[51] who therefore have standing to bring proceedings for annulment. In thus endorsing the theory regarding the 'hybrid' nature of such acts, the case-law has generally proved to be relatively in favour of recognising the standing of the operators concerned to bring proceedings.

96. That trend is evident, to varying degrees, in the case of all the operators concerned, be they exporter-producers, importers, certain suppliers or Community producers.

97. First, taking into account the fact that anti-dumping duties are imposed on the basis of findings made in the course of investigations into the production prices and export prices of individual undertakings, the Court has taken the view that regulations imposing an anti-dumping duty are capable of being of direct and individual concern to 'exporters and producers' which are charged with practising dumping on the basis of information originating from their business activities and which are thus able to establish that they were identified in the measures adopted by the Commission or the Council, or were concerned by the preliminary investigations.[52]

98. Secondly, the Court has also held that 'importers' associated with exporters in third countries on whose products anti-dumping duties have been imposed are individually concerned by findings as to the existence of dumping, where the export price[53] or the anti-dumping duty itself[54] has been calculated on the basis of those importers' resale prices for the goods in question on the EU market. On the other hand, standing to bring proceedings was refused in the case of an independent importer established in the European Union which was not referred to in the measures adopted by the Commission or the Council and was concerned by the regulation imposing anti-dumping duties only in so far as it objectively fell within the scope of that regulation.[55] An exception to that exception was created by the judgment in *Extramet Industrie* v *Council*,[56] which conferred standing to bring proceedings on an independent importer which had established the existence of a set of factors constituting a situation peculiar to it and differentiating it, as regards the measure in question, from all other economic operators.[57]

49 — 25/62, EU:C:1963:17.

50 — Page 223. See, most recently, the order in *Banco Bilbao Vizcaya Argentaria and Telefónica* v *Commission* (C-587/13 P and C-588/13 P, EU:C:2015:18, paragraph 41 and the case-law cited).

51 — See the order in *Gesamtverband der deutschen Textil- und Modeindustrie and Others* v *Council and Others* (C-3/11 P(I), EU:C:2011:665, paragraph 13 and the case-law cited) and the judgment in *Valimar* (C-374/12, EU:C:2014:2231, paragraph 30 and the case-law cited).

52 — See the judgment in *Valimar* (C-374/12, EU:C:2014:2231, paragraph 30 and the case-law cited).

53 — Ibidem (point 32).

54 — See the judgment in *Neotype Techmashexport* v *Commission and Council* (C-305/86 and C-160/87, EU:C:1990:295, paragraphs 19 and 20).

55 — See in that regard the criticisms made by Van Ginderachter, E., 'Recevabilité des recours en matière de dumping', *Cahiers de droit européen*, 1987, Nos 1 and 2, p. 623.

56 — C-358/89, EU:C:1991:214.

57 — Paragraph 17.

99. Thirdly, case-law has recognised as having standing to bring proceedings economic operators — such as an original equipment manufacturer supplying products manufactured by a producer under its own trade mark — which, being limited in number and identified by the institutions, exhibit in their commercial relations with the producer of the products concerned special characteristics which have been taken into account in the construction of normal value and in the calculation of the weighted dumping margin on the basis of which the anti-dumping duty was fixed. [58]

100. Fourthly, the EU judicature held that a 'Community producer' had standing to bring proceedings on the ground that the regulation imposing an anti-dumping duty was based on the individual situation of that producer, which was the leading manufacturer of the product concerned in the European Union. In arriving at that finding, the Court of Justice held that the complaint which had led to the opening of the investigation procedure owed its origin to the complaints made by that producer; that the latter's views had been heard during that procedure, the conduct of which had been largely determined by those observations; and that the anti-dumping duty had been fixed in the light of the effect of the dumping on the producer. [59]

101. To use terminology borrowed from criminal law, it could be said that the case-law has finally conferred standing to bring proceedings not only on the perpetrators of dumping practices and some of their accomplices but also on their victims, but in variable circumstances, which make it difficult to determine the criteria employed. With the exception of importers and certain suppliers, in respect of which a — questionable [60] — criterion involving the consideration of their economic data in the determination of the factors to be used to calculate the anti-dumping duty has been developed, the main criterion is based on the applicant's participation in the process for the measure's adoption.

102. In my view, the application of that criterion leads it to be recognised, in the present case, that the contested regulation adversely affects Philips Lighting by reason of certain attributes peculiar to it. Additionally, Philips Lighting may rely on a factual situation which differentiates it from all other persons and thereby distinguishes it individually in the same way as an addressee.

103. First, the contested regulation is not only of concern to Philips Lighting in its substantive capacity as a Community producer which has been the victim of dumping practices, falling objectively within the scope of that regulation. It is also of concern to it by dint of a particular attribute of a procedural nature, since it is common ground that reference is made to Philips Lighting — identified as a 'Community manufacturer' — in recitals 13(g), 47, 48, 49, 98 and 99 to the contested regulation and that that producer cooperated in the investigation. What is more, in the examination carried out during the investigation under Article 5(4) of the basic regulation, Philips Lighting was mentioned in its capacity as an 'opponent' of the request for a review. It can therefore rely, not only on its participation in the procedure prior to the adoption of the anti-dumping measures, but also on the fact that its status as an opponent of the request for a review was taken into account in determining the degree of support for that request. Let us suppose that, from the outset, the request was supported only by a percentage of Community producers lower than the 50% threshold required under Article 5(4) of the basic regulation and that the Commission none the less decided to initiate an investigation on the basis of that complaint, despite not having evidence sufficient to permit it, in accordance with Article 5(6) of that regulation, to initiate an investigation of its own motion. Could Community producers which cooperated in the investigation and indicated their opposition be denied the right to raise a complaint as to the infringement of EU law on the pretext that they are not individually concerned by the regulation adopted upon completion of that irregularly conducted procedure? In my view, the specific status thus accorded to Philips Lighting in the procedure distinguished it individually in the same way as an addressee.

58 — Judgment in *Neotype Techmashexport* v *Commission and Council* (C-305/86 and C-160/87, EU:C:1990:295).

59 — Judgment in *Timex* v *Council and Commission* (264/82, EU:C:1985:119, paragraphs 14 and 15).

60 — See, in particular, the criticisms directed against that criterion by Van Ginderachter, E., op. cit.

104. Secondly, the contested regulation takes into account the particular factual situation that differentiates Philips Lighting from the other economic operators concerned. Apart from the fact that its specific economic situation was the subject of an examination the detailed results of which are set out in the annex to the contested regulation, the Council — analysing the interest of the Community manufacturers other than Osram in the continued imposition of anti-dumping measures — stated in recital 98 to the contested regulation that, given the import activity of Community manufacturers, the existence of duties had had a negative impact on their overall activity and that, aside from the expenses emanating from anti-dumping duties linked to importation, the measures had prevented them from optimising their production mix, sales portfolio and, as a corollary, their profitability. Investment, production, research and development, and other strategic decisions had also been affected as a result. The Council went on to conclude in recital 99 to the contested regulation that, in the light of the sourcing strategy adopted by Philips Lighting, re-imposition of the measures was not in the interest of that manufacturer.

105. The view must therefore be taken that the action is admissible in so far as it was brought by Philips Lighting, since Philips Lighting was identified, in its twofold capacity as Community producer and importer, in the measures adopted by the Council and the Commission in connection with the anti-dumping duties and since it was concerned by the preparatory investigations and referred to as an 'opponent' in the contested regulation.

106. It also seems fitting, to my mind, that Community producers in the same circumstances as Philips Lighting should be able to challenge, in particular, the fact that their situation was not taken into account in determining the injury to the Community industry within the meaning of Article 4(1) of the basic regulation.

107. In keeping with my view that Philips Lighting is directly and individually concerned by the contested regulation, I believe that there is no need to examine the admissibility of the action for annulment in the light of the second situation contemplated in the fourth paragraph of Article 263 TFEU, under which a natural or legal person may institute proceedings against a regulatory act not entailing implementing measures if that act is of direct concern to him.

B – *The merits of the appeal*

1. First ground of appeal: misinterpretation of Article 9(1) of the basic regulation

a) Arguments of the parties

108. The appellants submit, in essence, that the General Court relied on an erroneous interpretation of Article 9(1) of the basic regulation in accepting that the Commission could continue the investigation in a situation where the complaint had not been withdrawn, but support for that complaint had fallen.

109. They argue that that extensive interpretation cannot validly be based on the judgment in *Interpipe Niko Tube and Interpipe NTRP* v *Council*,[61] to which the General Court refers in paragraph 84 of the judgment under appeal, in view of the differences between the circumstances of the present case and those of the case which gave rise to that judgment, and given that that interpretation has no basis in the wording or the scheme of Article 9(1) of the basic regulation and is not supported by the practice employed by the EU institutions over the last 25 years.

61 — T-249/06, EU:T:2009:62.

110. Recalling that the request for the review procedure to be launched had initially been supported by Osram and by GE Hungary (which represented more than 50% of the total Community production of CFL-i), before GE Hungary informed the Commission, once the investigation was under way, that it opposed the existing anti-dumping measures, the Council, supported by Osram and the Commission, contends that, if the basic regulation contains clear provisions with respect only to the requirements governing standing to bring proceedings at the time when the investigation is initiated, it is because that is the only stage at which standing to bring proceedings plays a role, whereas the degree of support during the course of the investigation is a different matter that must be viewed in its proper context, that is to say, amongst the information which the Community industry has to notify to the Commission in order to enable it, inter alia, to adjudicate on any injury sustained.

111. In the Council's view, the *a fortiori* reasoning applied by the General Court, in addition to being coherent, logical and consistent with customary methods of interpretation, is borne out by the previous case-law devolving both from the judgment in *Interpipe Niko Tube and Interpipe NTRP* v *Council* (T-249/06, EU:T:2009:62) and from the judgment in *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (T-172/09, EU:T:2012:532), according to which the requirements laid down in Article 5(4) of the basic regulation in relation to standing to bring proceedings must be satisfied only at the time when an investigation is initiated, but not necessarily during that investigation. According to the Council, the appellants are confusing the question of the concept of the Community industry for the purposes of verifying standing to bring proceedings with the question of the definition of the Community industry for the purposes of determining injury.

112. The Council adds that, assuming it to be established that it has been the past practice of the EU institutions, which enjoy a broad discretion in deciding whether a procedure should be closed following the withdrawal of a complaint, more frequently to terminate an investigation after such a withdrawal than to decide to continue it, it cannot be concluded from this that they should also have terminated the investigation that led to the adoption of the contested regulation on the ground that the Community industry's support for the investigation had weakened.

b) My analysis

113. The first ground of appeal raises the question of the relevance of the *a fortiori* reasoning followed by the General Court on the basis of Article 9(1) of the basic regulation in finding, in paragraphs 85 and 86 of the judgment under appeal, that, if, in accordance with that provision, the Commission is not under an obligation to terminate the investigation or review procedure where a complaint is withdrawn or a review requested, that must apply *a fortiori* where there is merely a drop in the level of support for one or the other procedure.

114. A number of arguments prompt me to propose that the Court of Justice follow the approach adopted by the General Court.

115. The first argument is textual. First, it is clear from the very wording of Article 5(4) of the basic regulation that the requirement relating to the representativeness of the complaint to be filed by or on behalf of the Community industry is a condition attaching only to the 'initiation of the investigation', not to the 'continuation of the procedure' once it has been initiated. Secondly, as the General Court rightly pointed out in paragraph 139 of the judgment in *Interpipe Niko Tube and Interpipe NTRP* v *Council* (T-249/06, EU:T:2009:62), paragraph 42 of the judgment in *Gem-Year and Jinn-Well Auto-Parts (Zhejiang)* v *Council* (T-172/09, EU:T:2012:532) and paragraph 84 of the judgment under appeal, the basic regulation does not place any obligation on the Commission to terminate an anti-dumping proceeding in progress where the level of support for the complaint falls below the minimum threshold of 25% of Community production. Nor is there anything in the basic regulation to compel the Commission to terminate the proceeding where the level of support for the complaint falls below the threshold of 50% of the portion of Community production which has

expressed an opinion on the complaint. The argument that the level of representativeness required under Article 5(4) of the basic regulation should be maintained throughout the investigation — not to say throughout the anti-dumping proceeding — is thus not substantiated by the text of the regulation, which, on the contrary, clearly does not impose such a requirement until the time when the complaint is filed and only in connection with the initiation of the investigation.

116. The second argument is based on a contextual and purposive interpretation of Article 9(1) of the basic regulation. That provision, which confers on the EU institutions discretion to continue the procedure where the complaint is withdrawn after the investigation has been initiated,[62] must, as the Council and the Commission rightly argue, be read in conjunction with Article 5(6) of that regulation, which gives the Commission a power of initiative enabling it, in special circumstances, to initiate an investigation of its own motion if it has sufficient evidence of dumping and injury, and a causal link between the two. In a similar vein, the first subparagraph of Article 11(2) of the basic regulation authorises the Commission to conduct an expiry review on its own initiative. Those procedural provisions, which confer on the Commission, at the upstream stage prior to any finding as to the existence of dumping and injury, a measure of discretion in deciding whether to initiate or to continue an initial investigation or review, irrespective of the conduct or inaction of the Community industry, are supplemented by substantive provisions which confer on the EU institutions, at the downstream stage subsequent to a finding of dumping and injury to the Community industry, further discretion in the adoption of anti-dumping measures. Thus, in accordance with Article 21(1) of the basic regulation, the taking into account of 'all the various interests taken as a whole', including those of users and consumers, allows the EU institutions not to adopt anti-dumping measures even where the existence of dumping and resulting injury to the Community industry has been established. In short, as the Court of Justice pointed out in its judgment in *Fediol* v *Commission* (191/82, EU:C:1983:259), the Commission has a 'very wide discretion' to decide, by reference to the interests of the Community, any measures needed to deal with the situation which it has established.[63]

117. Those various procedural and substantive rules reflect the notion that anti-dumping action is intended to protect not only private interests — in the present case, the category-specific interests represented by the manufacturers of the product concerned — but also the general interest of the European Union. Although an investigation is normally triggered by a complaint lodged by the Community industry, the 'right to lodge a complaint'[64] conferred on complainants does not mean that they are also entitled to terminate the investigation by withdrawing their complaint or their support for it. Although the taking of anti-dumping action comes with procedural guarantees, that does not make the anti-dumping procedure the 'perquisite' of Community producers, or a number of them, who can terminate it whenever they see fit.

118. A third, practical, argument militates, in my view, in favour of the approach adopted by the General Court. During the anti-dumping procedure, the positions of the complainants and that of the Community producers who have declared their support for or opposition to the complaint may change on a number of occasions, at different times and in opposite directions. A Community producer which supported the complaint may withdraw its support and remain neutral or become an opponent, while another producer which opposed the complaint may decide to support it, without those changes of position necessarily being related in any way to the injury sustained.[65]

119. Taken together, those arguments prompt me to propose that the first ground of appeal, which I do not consider to be well founded, should be rejected.

62 — In accordance with Article 5(8) of the basic regulation, a complaint withdrawn before the investigation is initiated is deemed not to have been lodged.

63 — Paragraph 26 of that judgment.

64 — Paragraph 11 of that judgment.

65 — See Didier, P., 'Le code anti-dumping du cycle de l'Uruguay: impact dans la communauté', *Cahiers de droit européen*, 1994, Nos 3 and 4, p. 251, who points out that support for or opposition to a complaint may be due to a variety of reasons and that, for example, many national producers may support a complaint as long as their support 'does not involve any financial or intellectual obligation' (p. 291).

2. Second ground of appeal: misinterpretation of Articles 4(1) and 5(4) of the basic regulation

a) Arguments of the parties

120. The appellants submit, in essence, that the General Court misinterpreted Articles 4(1) and 5(4) of the basic regulation when defining the Community industry, in so far as it did not take into account the second cumulative criterion for determining the 'major proportion', which requires that the Community production in support of the request must account for at least 50% of the producers which have adopted a position on that request. Noting that defining the Community industry is one of the essential steps in assessing injury, the appellants argue that the approach adopted by the General Court is contrary both to the wording of Article 5(4) of the basic regulation and to the practice hitherto followed by the EU institutions. According to the appellants, the Court should therefore set aside the judgment under appeal and give final judgment in the matter, annulling the contested regulation.

121. The Council, Osram and the Commission contend that the appellants are confusing two distinct issues: (i) standing to bring proceedings at the time when the complaint or request for review is lodged and (ii) the determination of injury in the course of the procedure. According to those parties, the 50% threshold laid down in Article 5(4) of the basic regulation applies only in relation to standing to bring proceedings at the time when the investigation is initiated. In the view of the Council and the Commission, the General Court rightly drew that distinction in paragraph 93 of the judgment under appeal, in accordance with its case-law and the practice of the EU institutions, and correctly inferred from it that, in order to determine the major proportion of the Community industry for the purposes of assessing injury, account is to be taken only of the 25% threshold, which relates to total Community production, and not of the 50% threshold, which corresponds to a different proportion, that of the Community producers which have expressed an opinion on the complaint.

b) My analysis

122. Under Article 1(1) of the basic regulation, an anti-dumping duty may be applied to a dumped product only if its release for free circulation in the European Union causes injury, the term 'injury' being understood, in accordance with Article 3(1) of that regulation, as material injury to the Community industry, threat of material injury to the Community industry or material retardation of the establishment of such an industry.

123. Moreover, in accordance with Article 4(1) of the basic regulation, the term 'Community industry' refers, in particular for the purposes of determining the existence of injury, to the Community producers as a whole of the like products or those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4) of that regulation, of the total Community production of those products. Thus, while providing that, in principle, the Community industry is to include all producers of the like products, the basic regulation, taking into account the difficulties connected with identifying all producers, not least in the case of a highly fragmented industry composed of a very large number of small producers, also makes it possible to take into account only some producers, where these constitute a 'major proportion' of Community production.

124. It follows that there are two co-existent options for identifying the Community production by reference to which injury will be determined, but the basic regulation does not establish any order of precedence in that regard.

125. 'Major proportion' therefore constitutes a key concept of anti-dumping legislation. After all, given that the basic regulation allows dumping to be penalised only if it causes injury, the fact that it is able to take as its point of reference a 'major proportion' none the less facilitates the Commission's task of establishing the existence of injury by allowing it to base its analysis on the situation of only a few Community producers.

126. Article 4(1) of the basic regulation does not define the concept of 'major proportion of total Community production' other than by reference to Article 5(4) of that regulation. However, the implications of that reference are, to my mind, unclear.

127. While the EU legislature appears to have sought, by that reference, to create a link between, on the one hand, the threshold for the complaint's representativeness for the purposes of the initiation of an anti-dumping investigation and, on the other, the determination of the relevant national production for the purposes of establishing the existence of injury, the fact remains that Article 5(4) of the basic regulation does not serve to define the concept of 'major proportion', which, moreover, is not even mentioned there.

128. Moreover, Article 5(4) of the basic regulation establishes a presumption as to the representativeness of the complaint through a reference to two criteria. While the 25% percentage is calculated on the basis of total production of the like product, the 50% percentage is calculated on the basis of the production only of those producers which have expressed an opinion, favourable or unfavourable, on the complaint. It is clear from the wording of Article 4(1) of the basic regulation, however, that the major proportion must be determined solely on the basis of 'total Community production' of the like product, with no account being taken of production from that part of the Community industry which has expressed its support for, or opposition to, the complaint.

129. In short, the fact that Article 5(4) of the basic regulation contains no definition of 'major proportion' and the fact that that provision refers to two representativeness criteria, whereas Article 4(1) of that regulation provides for only one, divest the interpretation of 'major proportion within the meaning of Article 5(4)' of any obvious meaning, possibly of any meaning at all.

130. Since a literal interpretation of Articles 4(1) and 5(4) of the basic regulation is not capable of providing a clear answer to the question raised, those provisions should be interpreted by reference to the objectives which they pursue and in the light of the scheme and general logic of the basic regulation, and consistently with the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (GATT).[66]

131. First, although the basic regulation contains only one definition of the Community industry, the fact remains that Articles 4(1) and 5(4) of the basic regulation are two mutually independent provisions which relate to two different stages of the anti-dumping procedure and pursue different purposes. As the Council and the Commission rightly argue, whereas Article 5(4) of that regulation is concerned, at the time when the investigation is initiated, with determining the threshold for the complaint's representativeness with a view to ensuring that it is supported by a sufficiently large number of Community producers, Article 4(1) of that regulation, read in conjunction with Article 3(1) thereof, is concerned, during the investigation, with determining the injury caused to the Community industry by the dumping practices. Articles 3(1) and 4(1) of the basic regulation serve to meet a

66 — OJ 1994 L 336, p. 103; 'the Anti-Dumping Agreement'. This agreement is set out in Annex 1A to the Agreement establishing the World Trade Organisation (WTO), signed in Marrakesh on 15 April 1994 and approved by Council Decision 94/800/EC of 22 December 1994 concerning the conclusion on behalf of the European Community, as regards matters within its competence, of the agreements reached in the Uruguay Round multilateral negotiations (1986-1994) (OJ 1994 L 336, p. 1).

different objective, which is to enable the EU institutions to analyse the injury despite the difficulty, not to say the impossibility, of gathering objective evaluation evidence for all Community producers, in particular where the market for the product in question is highly fragmented and composed of many producers.

132. Secondly, it should be noted that, although, in accordance with settled case-law, the Agreement establishing the WTO and the agreements set out in Annexes 1, 2 and 3 to that agreement are not in principle among the rules in the light of which the Court of Justice is to review the legality of measures adopted by the EU institutions,[67] the fact remains, in accordance with equally settled case-law, that the primacy of international agreements concluded by the European Union over instruments of secondary law means that those instruments must as far as possible be interpreted in a manner that is consistent with those agreements,[68] in particular where such instruments are specifically intended to give effect to an international agreement concluded by the European Union.[69] Accordingly, irrespective of whether the circumstances of the case correspond to one of the two situations described by the Court in its judgments in *Fediol* v *Commission* (70/87, EU:C:1989:254) and *Nakajima* v *Council* (C-69/89, EU:C:1991:186), in which it falls to the EU judicature to review the legality of EU measures in the light of the WTO rules, the principle of consistent interpretation that is inherent in the primacy of international agreements concluded by the European Union over instruments of secondary law requires that the interpretation of the Anti-Dumping Agreement be taken into account in the interpretation of the corresponding provisions of the basic regulation. It follows that Article 4(1) of that regulation, which, as I have just shown, is, on account of its ambiguity, open to more than one interpretation, must be construed, as far as possible, in such a way as to be consistent with the comparable provisions of Article 4.1 of the Anti-Dumping Agreement, which also refers to the concept of 'major proportion' in order to define, for the purposes of that agreement, the term 'domestic industry'.

133. In that regard, the WTO Panel Report of 22 April 2003, entitled 'Argentina — Definitive Anti-Dumping Duties on Poultry from Brazil',[70] and the WTO Appellate Body Report of 15 July 2011, entitled 'European Communities — Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China',[71] provide useful guidance on the interpretation of the concept of 'major proportion'.

134. In its report of 22 April 2003, the WTO Panel found that the term 'major proportion' should, for the purposes of defining the domestic industry, be understood as an 'important, serious or significant' proportion of total domestic production and that Article 4.1 of the Anti-Dumping Agreement did not require the domestic industry to consist of national producers constituting more than 50% of total domestic production.[72] In the case submitted to it, the WTO Panel therefore accepted the definition of the domestic industry as being composed of national producers accounting for only 46% of total domestic production.[73]

67 — Judgment in *LVP* (C-306/13, EU:C:2014:2465, paragraph 44 and the case-law cited).

68 — See the judgments in *Z* (C-363/12, EU:C:2014:159, paragraph 72 and the case-law cited) and *Glatzel* (C-356/12, EU:C:2014:350, paragraph 70 and the case-law cited).

69 — See the judgment in *Petrotub and Republica* v *Council* (C-76/00 P, EU:C:2003:4, paragraph 57 and the case-law cited).

70 — WT/DS241/R.

71 — WT/DS397/AB/R.

72 — WT/DS241/R (paragraph 7.341).

73 — Ibidem (paragraph 7.344).

135. In its report of 15 July 2011, the WTO Appellate Body, after finding that Article 4.1 of the Anti-Dumping Agreement did not stipulate a specific proportion for evaluating whether a certain percentage constituted 'a major proportion',[74] stated that, given the context in which it arises, that term is to be interpreted as indicating a 'relatively high' proportion of the total domestic production, which will 'standardly serve as a substantial reflection of the total domestic production'.[75]

136. Then, emphasising the importance of an accurate determination of injury, the WTO Appellate Body stated that, although recourse to the concept of 'major proportion' made it possible, particularly in the case of a market fragmented among many producers, to overcome the practical obstacles to obtaining information on production as a whole by accepting, where necessary, a lower proportion than is normally permissible on a less fragmented market, it was none the less important to ensure that the definition of the domestic industry 'is capable of providing ample data that ensure an accurate injury analysis' and does not therefore give rise to a material risk of biased economic data and distortion in determining the existence of injury.[76]

137. Lastly, examining the European Union's argument to the effect that, for the purposes of defining the major proportion within the meaning of Article 4.1 of the Anti-Dumping Agreement, account should be taken of the thresholds specified in Article 5.4 of that agreement and that it was therefore reasonable to take the view that producers representing 25% or more of domestic production could legitimately represent a major proportion of total production, the WTO Appellate Body found that there was 'no textual basis for such a proposition' and that, even though the European Union stated that the discussions on major proportion and representativeness had been conducted in tandem during the negotiations, that did nothing to alter the fact that no agreement had been reached in setting a specific proportion for determining what, in the abstract, constitutes a 'major proportion'. In its view, Articles 4.1 and 5.4 of the Anti-Dumping Agreement concern two different aspects of the anti-dumping procedure, since the former defines the domestic industry relevant to the determination of injury, while the latter, irrespective of how the domestic industry is to be defined, sets a minimum threshold for the determination of support for a request to initiate an investigation.[77]

138. In short, although it had taken into account the fragmented nature of the market at issue, the WTO Appellate Body formed the view in that dispute that the 27% threshold adopted by the Commission '[a]s a result of the application of a [25%] benchmark wholly unrelated to the proper interpretation of the term "a major proportion"' was too low a percentage to represent such a proportion.[78]

139. It follows from the above analysis that a single interpretation of the concept of major proportion is now possible. This consists in taking the view that that concept must be understood as meaning a proportion of Community production that is sufficiently significant to constitute, to some extent, a relatively faithful reflection of that production. In other words, the textual link between Articles 4(1) and 9(4) of the basic regulation, which, moreover, the Commission described at the hearing as 'unfortunate', is contrary both to the spirit and to the logic and objectives of the EU anti-dumping legislation, as interpreted in the light of the Anti-Dumping Agreement, and must in consequence be regarded as being of no prescriptive significance.

74 — WT/DS397/AB/R (paragraph 411).

75 — Ibidem (paragraph 412).

76 — Ibidem (paragraphs 413 to 416).

77 — Ibidem (paragraphs 417 and 418).

78 — Ibidem (paragraph 425).

140. To accept that, as the General Court held, the major proportion may be equal to only a quarter of total Community production would be to pave the way for a veritable deflection of the requirements of the anti-dumping legislation by permitting the adoption of measures which benefited only a minority of the Community industry, despite the fact that the other three-quarters of the industry did not sustain any injury.

141. It is important to point out, however, that, by their ground of appeal, the appellants are not submitting that the General Court applied the 25% threshold. They take issue with the General Court only for not having applied that threshold cumulatively with the 50% threshold laid down in Article 5(4) of the basic regulation.

142. To my mind, the proposition that the reference made by Article 4(1) of the basic regulation to Article 5(4) of that regulation constitutes an unconditional requirement that the two thresholds specified in Article 5(4) of that regulation be applied cumulatively for the purposes of determining the representativeness of the complaint is based on an erroneous reading of Article 4(1) of the regulation, which specifies that the major proportion must be determined by reference to 'total Community production' and not to those national producers which have expressed an opinion on the complaint.

143. I therefore take the view that the second ground of appeal, which is exclusively concerned with the contention that the judgment under appeal did not cumulatively apply the two thresholds laid down in Article 5(4) of the basic regulation, is unfounded.

144. The appeal can therefore be dismissed without the need for any further examination of whether the EU institutions made a manifest error of assessment in finding that the analysis of the continuation or recurrence of injury could be carried out on the basis of data from a single producer accounting for 48% of total Community production.

145. I would merely observe that, given the very specific configuration of the market in question, which is shared between four Community producers whose business includes not only production in the European Union but also importation, the fact that the EU institutions took into account the injury caused to the producer with the highest output in the European Union and the lowest imports, as a percentage of its sales, does not strike me as contrary to the logic of the anti-dumping legislation.

146. It is for those reasons that I believe that the second ground of appeal must be rejected.

V – Conclusion

147. In the light of the foregoing considerations, I propose that the Court should:

(1) Dismiss the appeal;

(2) Order Philips Lighting Poland SA and Philips Lighting BV to pay the costs.