Reports of Cases

JUDGMENT OF THE COURT (Third Chamber)

2 February 2012 *

(Appeal — Dumping — Regulation (EC) No 1472/2006 — Imports of certain footwear with uppers of leather originating in China and Vietnam — Regulation (EC) No 384/96 — Articles 2(7), 9(5) and 17(3) — Market economy treatment — Individual treatment — Sampling)

In Case C-249/10 P,

APPEAL under Article 56 of the Statute of the Court of Justice of the European Union, brought on 18 May 2010,

Brosmann Footwear (HK) Ltd, established in Kowloon (China),

Seasonable Footwear (Zhongshan) Ltd, established in Zhongshan (China),

Lung Pao Footwear (Guangzhou) Ltd, established in Guangzhou (China),

Risen Footwear (HK) Co. Ltd, established in Kowloon,

represented by L. Ruessmann, A. Willems, S. De Knop and C. Dackö, avocats,

appellants,

the other parties to the proceedings being:

Council of the European Union, represented by J.-P. Hix and R. Szostak, acting as Agents, and by G. Berrisch, Rechtsanwalt, and N. Chesaites, Barrister,

defendant at first instance,

European Commission, represented by T. Scharf and H. van Vliet, acting as Agents,

Confédération européenne de l'industrie de la chaussure (CEC),

interveners at first instance,

THE COURT (Third Chamber),

composed of K. Lenaerts, President of the Chamber, J. Malenovský, R. Silva de Lapuerta, G. Arestis (Rapporteur) and D. Šváby, Judges,

Advocate General: P. Mengozzi,

* Language of the case: English.

Registrar: C. Strömholm, Administrator,

having regard to the written procedure and further to the hearing on 25 May 2011,

after hearing the Opinion of the Advocate General at the sitting on 6 September 2011,

gives the following

Judgment

1 By their appeal, Brosmann Footwear (HK) Ltd ('Brosmann'), Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd ('Lung Pao') and Risen Footwear (HK) Co. Ltd claim that the Court should set aside the judgment of the General Court of the European Union of 4 March 2010 in Case T-401/06 *Brosmann Footwear (HK) and Others* v *Council* [2010] ECR II-671, ('the judgment under appeal'), by which that court dismissed their action for the partial annulment of Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam (OJ 2006 L 275, p. 1, 'the contested regulation').

Legal framework

2 The provisions governing the application of anti-dumping measures by the European Union ('EU') are set out in Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12, 'the basic regulation').

3 As regards the conditions for the grant of market economy treatment ('MET'), Article 2(7) of the basic regulation provides:

'7.

(a) In the case of imports from non-market economy countries …, normal value shall be determined on the basis of the price or constructed value in a market economy third country, or the price from such a third country to other countries, including the Community, or where those are not possible, on any other reasonable basis, including the price actually paid or payable in the Community for the like product, duly adjusted if necessary to include a reasonable profit margin.

An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection. Account shall also be taken of time-limits; where appropriate, a market economy third country which is subject to the same investigation shall be used.

The parties to the investigation shall be informed shortly after its initiation of the market economy third country envisaged and shall be given 10 days to comment.

(b) In anti-dumping investigations concerning imports from … the People's Republic of China, normal value will be determined in accordance with paragraphs 1 to 6, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation … that

market economy conditions prevail for this producer or producers in respect of the manufacture and sale of the like product concerned. When this is not the case, the rules set out under subparagraph (a) shall apply.

(c) A claim under subparagraph (b) must be made in writing and contain sufficient evidence that the producer operates under market economy conditions, that is if:

— decisions of firms regarding prices, costs and inputs, including for instance raw materials, cost of technology and labour, output, sales and investment, are made in response to market signals reflecting supply and demand, and without significant State interference in this regard, and costs of major inputs substantially reflect market values,

— firms have one clear set of basic accounting records which are independently audited in line with international accounting standards and are applied for all purposes,

— the production costs and financial situation of firms are not subject to significant distortions carried over from the former non-market economy system, in particular in relation to depreciation of assets, other write-offs, barter trade and payment via compensation of debts,

— the firms concerned are subject to bankruptcy and property laws which guarantee legal certainty and stability for the operation of firms, and

— exchange rate conversions are carried out at the market rate.

A determination whether the producer meets the abovementioned criteria shall be made within three months of the initiation of the investigation, after specific consultation of the Advisory Committee and after the Community industry has been given an opportunity to comment. This determination shall remain in force throughout the investigation.'

4 Article 3 of the basic regulation, entitled 'Determination of injury', provides in paragraphs 1, 2 and 7 thereof as follows:

'1. Pursuant to this Regulation, the term "injury" shall, unless otherwise specified, 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 and shall be interpreted in accordance with the provisions of this Article.

2. A determination of injury shall be based on positive evidence and shall involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the Community market for like products; and (b) the consequent impact of those imports on the Community industry.

…

7. Known factors other than the dumped imports which at the same time are injuring the Community industry shall also be examined to ensure that injury caused by these other factors is not attributed to the dumped imports under paragraph 6. Factors which may be considered in this respect include the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, restrictive trade practices of, and competition between, third country and Community producers, developments in technology and the export performance and productivity of the Community industry.'

5 As regards the conditions for the initiation of an anti-dumping investigation, Article 5(2) to (4) of the basic regulation provides:

'2. A complaint under paragraph 1 shall include evidence of dumping, injury and a causal link between the allegedly dumped imports and the alleged injury …

...

3. The Commission shall, as far as possible, examine the accuracy and adequacy of the evidence provided in the complaint to determine whether there is sufficient evidence to justify the initiation of an investigation.

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.'

6 Under Article 9(5) and (6) of the basic regulation:

'5. An anti-dumping duty shall be imposed in the appropriate amounts in each case, on a non-discriminatory basis on imports of a product from all sources found to be dumped and causing injury, except as to imports from those sources from which undertakings under the terms of this Regulation have been accepted. The Regulation imposing the duty shall specify the duty for each supplier or, if that is impracticable, and in general where Article 2(7)(a) applies, the supplying country concerned.

Where Article 2(7)(a) applies, an individual duty shall, however, be specified for the exporters which can demonstrate, on the basis of properly substantiated claims that:

(a) in the case of wholly or partly foreign owned firms or joint ventures, exporters are free to repatriate capital and profits;

(b) export prices and quantities, and conditions and terms of sale are freely determined;

(c) the majority of the shares belong to private persons. State officials appearing on the board of Directors or holding key management positions shall either be in minority or it must be demonstrated that the company is nonetheless sufficiently independent from State interference;

(d) exchange rate conversions are carried out at the market rate; and

(e) State interference is not such as to permit circumvention of measures if individual exporters are given different rates of duty.

6. When the Commission has limited its examination in accordance with Article 17, any anti-dumping duty applied to imports from exporters or producers which have made themselves known in accordance with Article 17 but were not included in the examination shall not exceed the weighted

average margin of dumping established for the parties in the sample … Individual duties shall be applied to imports from any exporter or producer which is granted individual treatment, as provided for in Article 17.'

7 As regards the sampling technique, Article 17(1) and (3) of the basic regulation provides:

'1. In cases where the number of complainants, exporters or importers, types of product or transactions is large, the investigation may be limited to a reasonable number of parties, products or transactions by using samples which are statistically valid on the basis of information available at the time of the selection, or to the largest representative volume of production, sales or exports which can reasonably be investigated within the time available.

…

3. In cases where the examination has been limited in accordance with this Article, an individual margin of dumping shall, nevertheless, be calculated for any exporter or producer not initially selected who submits the necessary information within the time-limits provided for in this Regulation, except where the number of exporters or producers is so large that individual examinations would be unduly burdensome and would prevent completion of the investigation in good time.'

8 Article 18(3) and (4) of the basic regulation is worded as follows:

'3. Where the information submitted by an interested party is not ideal in all respects it should nevertheless not be disregarded, provided that any deficiencies are not such as to cause undue difficulty in arriving at a reasonably accurate finding and that the information is appropriately submitted in good time and is verifiable, and that the party has acted to the best of its ability.

4. If evidence or information is not accepted, the supplying party shall be informed forthwith of the reasons therefor and shall be granted an opportunity to provide further explanations within the time-limit specified. If the explanations are considered unsatisfactory, the reasons for rejection of such evidence or information shall be disclosed and given in published findings.'

Background to the dispute

9 The facts of the dispute were set out as follows by the General Court in paragraphs 10 to 42 of the judgment under appeal:

'10 The applicants [Brosmann, Seasonable Footwear (Zhongshan) Ltd, Lung Pao and Risen Footwear (HK) Co. Ltd] are footwear-producing and exporting companies established in China.

11 Imports of footwear from China falling within certain categories of the combined nomenclature were subject to a quantitative quota regime which lapsed on 1 January 2005.

12 Following a complaint lodged on 30 May 2005 by the Confédération européenne de l'industrie de la chaussure ("CEC"), the Commission of the European Communities (now the European Commission) initiated an anti-dumping proceeding concerning imports of certain footwear with uppers of leather originating in China and Vietnam. The notice of initiation of that proceeding was published in the *Official Journal of the European Union* of 7 July 2005 (OJ 2005 C 166, p. 14) ("the notice of initiation").

13 In view of the large number of parties involved, it was envisaged, at point 5.1(a) of the notice of initiation, to apply sampling, in accordance with Article 17 of the basic regulation.

14 The applicants contacted the Commission and on 25 and 26 July 2005 provided it with the information required by points 5.1(a)(i) and 5.1(e) of the notice of initiation in order to form part of the sample of exporting producers which the Commission proposed to establish pursuant to Article 17 of the basic regulation and in order to be granted MET or, failing that, to be given individual treatment ("IT").

15 On 23 March 2006, the Commission adopted Regulation (EC) No 553/2006 imposing a provisional anti-dumping duty on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam (OJ 2006 L 98, p. 3) ("the provisional regulation").

16 According to recital 9 to the provisional regulation, the investigation of dumping and injury covered the period from 1 April 2004 to 31 March 2005 ("the investigation period"). The examination of trends relevant for the assessment of injury covered the period from 1 January 2001 to 31 March 2005 ("the period considered").

17 In light of the need to establish a normal value for the products of the Chinese and Vietnamese exporting producers which could not be granted MET, a verification to establish normal value on the basis of data from an analogue country, in this case the Federative Republic of Brazil, took place at the premises of three Brazilian companies (recital 8 to the provisional regulation).

18 As regards the product concerned, it follows from recitals 10, 11, 40 and 41 to the provisional regulation that that regulation covered essentially sandals, boots, urban footwear and city shoes, all manufactured with uppers of leather or composition leather. It follows, moreover, from recitals 12 to 31 to the provisional regulation that the Commission excluded Special Technology Athletic Footwear ("STAF") from the definition of the product concerned and that it included children's footwear. According to recital 38 to the provisional regulation, all remaining types of footwear with uppers of leather, although they cover a wide range of styles and types, have essentially the same basic characteristics, and their uses and consumer perception remain the same. Thus, all those various styles and types are, according to recital 39 to that regulation, in direct competition and to a very large extent interchangeable.

19 The Commission therefore concluded, at recital 52 to the provisional regulation, that all types of footwear with uppers of leather or composition leather produced and sold in the countries concerned and in Brazil and those produced and sold by the Community industry were alike to those exported from the countries concerned to the Community.

20 In ascertaining whether there had been dumping, the Commission applied sampling. Of the Chinese exporting producers which came forward in order to be included in the sample, 154 exported to the Community during the investigation period, according to recital 55 to the provisional regulation. According to the same recital, those companies were initially considered to be cooperating companies and were taken into account in the selection of the sample.

21 It follows from recital 57 to the provisional regulation that the Commission finally selected a sample consisting of 13 Chinese exporting producers representing more than 20% of the Chinese export volume to the Community. According to recital 59 to that regulation, the criteria taken into account in the selection of the sample were, first, the size of the exporting producer in terms of export sales to the Community and, second, the size of the exporting producer in terms of domestic sales. With respect to the latter criterion, the Commission stated at recital 60 to the provisional regulation that domestic sales figures would make the sample more representative by providing information on prices and costs associated with producing and selling the product concerned on the domestic markets. According to recital 61 to the provisional regulation, the Chinese companies selected for the sample represented 25% of export quantities to the

Community and 42% of Chinese domestic market sales by producers which had cooperated in the investigation. According to the same recital, the exclusion of STAF from the definition of the product concerned did not significantly influence the representativeness of the sample.

22 According to recital 62 to the provisional regulation, exporting producers which were not finally retained in the sample were informed that any anti-dumping duty on their exports would be calculated in accordance with the provisions of Article 9(6) of the basic regulation. As regards the requests presented by those exporting producers which sought an individual dumping margin pursuant to Article 9(6) and Article 17(3) of the basic regulation, the Commission considered, at recital 64 to the basic regulation, that individual examination of those exporting producers would be unduly burdensome and prevent it from completing the investigation in good time. In those circumstances, the dumping margin of those producers was determined on the basis of the weighted average of the dumping margins of the companies in the sample (recitals 135 and 143 to the provisional regulation).

23 One of the 13 companies initially included in the sample did not respond to the anti-dumping questionnaire which the Commission sent it (recital 63 to the provisional regulation).

24 As regards the definition of the Community industry, the Commission observed, at recital 150 to the provisional regulation, that the complainants accounted for 42% of the total Community production of the product concerned. According to recitals 65 and 151 to the provisional regulation, the Commission selected a sample of 10 Community producers on the basis of their production volume and location. The producers in the sample represented approximately 10% of the production of the complainants. Thus, the 814 Community producers on whose behalf the complaint was lodged were deemed to constitute the Community industry within the meaning of Article 5(4) of the basic regulation (recital 152 to the provisional regulation).

25 As regards the identities of the Community producers taking part in the sample, the Commission observed that certain Community producers supply customers in the Community that also source their products in China and Vietnam and thus benefit directly from the imports in question. Those producers are therefore in "a sensitive position", since some of their customers may not be satisfied with their having lodged or supported a complaint against alleged injurious dumping. Those producers therefore considered that there was "a risk of retaliation" by some of their customers, including the possible termination of their business relationship. The Commission therefore granted the request for confidential treatment of the identities of the companies selected to participate in the sample (recital 8 to the provisional regulation).

26 As regards the level which the provisional anti-dumping measures ought to reach in order to eliminate injury, the Commission stated, at recital 284 to the provisional regulation, that a profit margin of 2% of turnover could be expected for the Community industry in the absence of injurious dumping. That profit margin, according to the same recital, corresponds to the highest level of profit achieved by the Community industry during the period under examination and namely during 2002, when the market shares from the countries concerned were relatively limited by comparison with the level attained during the investigation period.

27 By letters of 7 and 12 April 2006, the Commission sent the applicants, pursuant to Article 14(2) and Article 20(1) of the basic regulation, respectively, a copy of the provisional regulation and a document containing information on the details underlying the essential facts and considerations on the basis of which the anti-dumping duties were imposed ("the general disclosure document"). The Commission invited the applicants to submit any comments which they might have on those documents by 8 May 2006.

28 By letters of 8 May 2006, two of the applicants, Brosmann … and Lung Pao … sent the Commission their comments on the provisional regulation and the general disclosure document.

29 On 2 June 2006, a meeting took place between Lung Pao and the Commission at the Commission's headquarters.

30 By fax of 8 July 2006, the Commission sent the applicants, pursuant to Article 20(2) to (4) of the basic regulation, a final disclosure document setting out the essential facts and considerations forming the basis of the proposal to impose definitive anti-dumping duties. The Commission invited the applicants to submit their comments on the final disclosure document by 17 July 2006.

31 By letter of 28 July 2006, the Commission sent the applicants an additional final disclosure document.

32 By letters of 17 July and 2 August 2006, three of the applicants, Brosmann, Seasonable Footwear (Zhongshan) [Ltd and Lung Pao,] and Novi Footwear (Far East) Pte Ltd sent the Commission their comments on the final disclosure document and the additional final disclosure document. By letter of 7 August 2006, the other applicant, Risen Footwear (HK) Co. [Ltd] sent the Commission its comments on the additional final disclosure document.

33 On 5 October 2006, the Council of the European Union adopted [the contested regulation]. By [that] regulation, the Council imposed a definitive anti-dumping duty on imports of footwear with uppers of leather or composition leather, excluding sports footwear, STAF, slippers and other indoor footwear and footwear with a protective toecap, originating in China and falling within a number of combined nomenclature codes (Article 1 of the contested regulation). The rate of the definitive anti-dumping duty applicable, before duty, to the net free-at-Community-frontier price was established, for footwear produced by the applicants, at 16.5%. Pursuant to Article 3, the contested regulation was to remain in force for a period of two years.

34 As regards the product concerned, the Council confirmed the Commission's assessment (see paragraph 18 above), according to which STAF should be excluded from the definition of the product concerned, whereas children's footwear should be included (recitals 19 and 25 to the contested regulation). On the other hand, the Council rejected the requests to exclude from the definition of the product concerned six types of footwear, including patented technology footwear. With respect to that category of footwear, the Council observed that patented technology does not by itself substantially change the characteristics of being footwear for ordinary usage. Accordingly, that footwear remains in competition with the Community production of the product concerned (recital 37 to the contested regulation).

35 As regards the representativeness of the sample of the Chinese producers, the Council stated, at recital 44 to the contested regulation, that the undertakings taking part accounted for more than 12% of exports to the Community by the cooperating producers. Since Article 17 of the basic regulation lays down no threshold with respect to the level of representativeness, the sample taken is representative for the purposes of that provision.

36 The Council also stated, at recital 46 to the contested regulation, that the methodology applied was intended to ensure the highest possible representativeness of the samples and to include within the largest representative volume of exports that could reasonably be investigated some companies with representative domestic sales.

37 As regards the sample of Community producers, the Council, at recitals 53 to 59 to the contested regulation, rejected all the complaints questioning the representativeness of that sample and, accordingly, confirmed the findings of the Commission in the provisional regulation (see paragraph 24 above).

38 The Council dealt with the questions connected with the claims of a number of companies to be granted MET, on which the Commission had not ruled, at recitals 60 to 65 to the contested regulation.

39 According to those recitals, the fact that the Commission did not respond individually to each MET claim submitted to it does not constitute a breach of the basic regulation. It is, on the contrary, consistent with Article 17 of that regulation. The sampling methodology provided for in that article also applies where a high number of companies concerned request MET or IT. In the present case, the exceptionally high number of claims by the companies concerned left the administration with no alternative other than to examine only those from the companies which were part of the sample in order to balance necessities resulting from an as individualised as possible case assessment within the margin of mandatory deadlines. That entailed the application to all non-sampled companies of the weighted average margin resulting from the undertakings in the sample. It follows that the complaints formulated during the administrative procedure, according to which the dumping calculation is not representative, must also be rejected.

40 Those considerations also apply to claims for IT.

41 As regards the definition of the Community industry, the Council emphasised, at recital 157 to the contested regulation, that none of the complainants had been found not to cooperate with the investigation. Full injury questionnaires were sent only to the sampled Community producers, which followed from the very nature of sampling (recital 158 to the contested regulation).

42 As for the level at which the definitive anti-dumping duties would have to be set in order to eliminate injury, the Council referred at recital 292 to the contested regulation to evidence provided by the Community industry after the imposition of the provisional duties, which showed that the profit margin of 2% fixed by the provisional regulation (see paragraph 26 above) must be reconsidered. On that basis, the Council increased that margin to 6% of the turnover of the Community industry, noting that it had in fact achieved that margin for footwear not subject to materially injurious dumping.'

The proceedings before the General Court and the judgment under appeal

10 By application lodged at the General Court Registry on 28 December 2006, the applicants brought before it an action for the annulment of the contested regulation. By document lodged at that registry on 26 March 2007, the Commission sought leave to intervene in the case in support of the form of order sought by the Council. By document lodged at the General Court Registry on 5 April 2007, CEC also sought leave to intervene in the case in support of the form of order sought by the Council. By order of 2 August 2007, the President of the Second Chamber of the General Court granted the applications to intervene lodged by the Commission and CEC.

11 In support of their action, the applicants raised eight pleas in law, alleging, respectively:

— breach of Article 2(7)(b) and Article 9(5) of the basic regulation and breach of the principles of equal treatment and protection of legitimate expectations;

— breach of Article 2(7)(c) and Article 18 of the basic regulation and breach of the rights of the defence;

— manifest error of assessment and breach of Article 5(4) of the basic regulation;

— manifest error of assessment and breach of Article 1(4) and Articles 2 and 3 of the basic regulation;

— manifest error of assessment and breach of Article 17 of the basic regulation and of Article 253 EC;

— manifest error of assessment and breach of Article 3(2) of the basic regulation and of Article 253 EC;

— manifest error of assessment and breach of Article 3(2) of the basic regulation;

— manifest error of assessment and breach of Article 9(4) of the basic regulation.

12 In rejecting the first two pleas in law in the action, the General Court held, in paragraphs 77 and 78 of the judgment under appeal, that, where sampling is used, the basic regulation does not give traders who are not included in the sample an unconditional right to the calculation of an individual dumping margin. In the view of the General Court, the acceptance of such a claim depends on the Commission's decision as to the application of Article 17(3) of the basic regulation. The General Court considered that, as the grant of MET or IT serves, pursuant to Article 2(7)(b) of the basic regulation, only to establish the method for calculating normal value with a view to the calculation of individual dumping margins, the Commission was not required to examine MET/IT claims from traders who are not included in the sample, where it has concluded, in applying Article 17(3) of the basic regulation, that the calculation of such margins would be unduly burdensome and would prevent it from completing the investigation in good time. The General Court inferred from this, in paragraph 92 of the judgment under appeal, that, as the Commission had not erred in not examining the applicants' MET/IT claims, the applicants could not rely on the expiry of the three-month period laid down in Article 2(7)(c) of the basic regulation, since that period related to cases in which the Commission was required to examine those claims.

13 As regards the third plea in the action, the General Court rejected that plea holding, in paragraph 112 of the judgment under appeal, that the statement by Community producers that they supported the complaint was sufficient to prove that there was support for the complaint in terms of Article 5(4) of the basic regulation. In addition, the General Court held, in paragraphs 114 and 118 of the judgment under appeal, that there is nothing to prevent the Commission from taking account, in the investigation, of information which is by its very nature gathered before the initiation of that investigation and that, in the present case, the contested regulation was adopted within the 15-month period provided for by the basic regulation.

14 As regards the fourth plea in law, alleging a manifest error of assessment and breach of Article 1(4) and Articles 2 and 3 of the basic regulation, the General Court rejected that plea on the ground that the institutions had correctly defined the product concerned in the provisional regulation and in the contested regulation. The General Court also rejected, in paragraph 156 of the judgment under appeal, the fifth plea in law relied on by the applicants in support of their action, by which they claimed in essence that the sample of exporting producers selected under Article 17 of the basic regulation was unrepresentative and disputed the reasoning of the contested regulation in that regard.

15 As regards the sixth plea in law, the General Court held, in particular in paragraph 164 of the judgment under appeal, that the Commission had the necessary information to select the sample of Community producers on the basis of those criteria which, in the Commission's opinion, were the most relevant. As the applicants did not dispute the relevance of those criteria, the General Court held that their arguments as regards the selection of the sample had to be rejected. It also held, in paragraph 173 of the judgment under appeal, that the applicants' claims relating to the allegedly distorted data provided by two Italian companies could be considered to be relevant only if those data were capable of calling in question the factors taken into account by the Council to determine that there was injury.

16 As regards the seventh plea in law, alleging a manifest error of assessment in relation to the poor export performance of the Community industry, the General Court held, in paragraph 192 of the judgment under appeal, that that the Council had been right to find, at recital 224 to the contested regulation, that the vast majority of the Community production was intended to be sold on the Community market and therefore that export performance could not have caused significant injury to the Community industry. The General Court also held, in paragraph 196 of the judgment under appeal, that the effects of imports from other non-member countries were not capable of calling in question the causal link between the dumped imports and the injury suffered by the Community industry. In addition, the General Court held, in paragraph 199 of the judgment under appeal, that where the institutions find that imports of a product which has until then been subject to quantitative restrictions increase after those restrictions have lapsed, they may take that increase into account for the purposes of their assessment of the injury suffered by the Community industry. The General Court thus concluded, in paragraph 200 of that judgment, that the institutions had taken into account a number of factors, concerning injury and the causal link, which related not only to the last quarter of the investigation period, but also to the period under consideration.

17 Lastly, the General Court also rejected the eighth plea in law relied on by the applicants in support of their action — whereby they had claimed that the Council's assessment, in the contested regulation, of the level which the definitive anti-dumping measures had to attain in order to eliminate injury was manifestly erroneous — holding, in paragraph 208 of the judgment under appeal, that the Council had not made a manifest error of assessment by taking into account the profit margin that the Community industry had attained for footwear other than that covered by the investigation because that other footwear is sufficiently similar to the product concerned.

The forms of order sought by the parties

18 By their appeal, the appellants claim that the Court should:

— set aside the judgment under appeal, in so far as the General Court did not annul the contested regulation and in so far as it ordered them to pay the costs of the proceedings before the General Court;

— annul the contested regulation;

— order the Council to pay the costs of the appeal and of the proceedings before the General Court.

19 The Council contends that the Court should:

— dismiss the appeal;

— in the alternative, refer the case back to the General Court;

— in the further alternative, dismiss the appeal and, in any event, order the appellants to pay the costs of the appeal.

20 The Commission contends that the Court should dismiss the appeal and order the appellants to pay the costs incurred by the Commission.

The appeal

21 In support of their appeal the appellants rely on nine grounds, alleging (i) an error of law concerning the application of Articles 2(7) and 9(5) of the basic regulation, (ii) an error of law concerning the application of Article 2(7)(c) of the basic regulation and a failure to provide reasons with regard to the three-month time-limit as applied to the MET/IT claims of the Chinese producers included in the sample, (iii) an error of law concerning the application of that Article 2(7)(c) in relation to that time-limit as applied to the appellants' MET/IT claims, (iv) distortion of the evidence, a failure to provide reasons and an error in law concerning the application of Articles 3(2), (5) and (6), 4(1) and 5(4) of that regulation and (v) an error of law concerning the application of Article 6(1) of the basic regulation. The four remaining grounds relied on in support of the appeal relate to the General Court's findings concerning the injury to the Community producers and allege (i) an error of law with regard to the application of Article 3 of the basic regulation and distortion of the evidence, (ii) an error of law concerning the duty of the investigating authority to examine carefully and impartially all relevant aspects, (iii) infringement of Article 253 EC and (iv) an error of law concerning the application of Article 3(7) of the basic regulation.

The grounds of appeal alleging errors of law in the application of Articles 2(7) and 9(5) of the basic regulation

22 It is appropriate to examine the first three grounds of appeal together in so far as they concern the alleged errors in the contested regulation in relation to the appellants' MET/IT claims.

Arguments of the parties

23 By their first ground of appeal, the appellants submit that the General Court erred in law concerning the application of Articles 2(7)(c) and 9(5) of the basic regulation, by holding that the institutions were not required to examine or in any manner take account of the appellants' MET/IT claims. The appellants submit that if the Chinese exporting producers were able to show that they meet the conditions laid down by those provisions, they should have been treated as though they were established in a country different from that of producers that do not meet those conditions, that is, a non-market economy country. By definition, Article 2(7)(c) and Article 9(5) may be applied only on an individual basis, as they require a characterisation of the economic conditions under which each individual company operates. The appellants state that the General Court erred in law when it reduced their MET/IT claim to a claim for an individual margin of dumping within the meaning of Article 17 of the basic regulation. In any event, they requested recognition of the fact that they operate in 'market economy China', and that they should therefore be granted the weighted average duty rate applicable to producers operating under those conditions. In addition, in the appellants' view, the General Court also erred in law in finding that the institutions could validly argue that the number of MET/IT claims was so large that examining them would have prevented them from completing the investigation in good time.

24 As regards the second ground of appeal, the appellants state that the General Court erred in law by not examining their allegation that the institutions infringed Article 2(7)(c) of the basic regulation by failing to make a determination as to whether to grant MET/IT to the Chinese producers included in the sample within three months of the initiation of the investigation. By failing to give any reasons for not doing so, the General Court infringed its obligation to state reasons.

25 By their third ground of appeal, the appellants submit that the General Court erred in law in finding that they could not rely on Article 2(7)(c) of the basic regulation in relation to their own MET claims on the ground that the three-month period 'relates to cases in which the Commission is required to examine' the MET/IT claims.

26 In the Council's view, the first ground of appeal is a repetition of the plea put forward at first instance, which was rejected by the General Court. The Council contends that it is common ground that non-sampled exporters who do not make a successful MET claim under Article 17(3) of the basic regulation cannot obtain an individual dumping margin, whether or not they are established in a market-economy country. Consequently, in the case of a country which does not have a market economy, MET/IT serves to enable the companies which are in the sample, or those who make a successful request under Article 17(3), to obtain an individual dumping margin. In any event, the appellants did not claim the right to an individual dumping margin or an individual duty rate at first instance and, therefore, their arguments are irrelevant.

27 The Commission contends that the appellants' argument is essentially that the examination of MET/IT claims of operators who are not in the sample may be useful even if those operators are not granted an individual dumping margin. They state that such an examination could be useful if, as a result, the operators concerned were able to obtain the (weighted average) duty applicable to operators from the sample with MET or IT. However, the General Court considered that that was not feasible in this case, which has not been contested by the appellants. In the Commission's view, the appellants do not put forward any line of reasoning capable of justifying an obligation on the institutions to assess each MET/IT claim — even where they decide to apply sampling — which could have been misapplied by the General Court.

28 As regards the second ground of appeal, the Council and the Commission submit, principally, that the ground is inadmissible because it constitutes a new plea in law relied on for the first time at the appeal stage.

29 As regards the third ground of appeal, the Council considers that the three-month time-limit at issue applies expressly to 'a determination whether the producer meets the [MET] criteria'. Where no such determination is made, the three-month time-limit does not apply. In the Commission's view, the institutions were not required to consider the appellants' MET/IT claims, for the reasons set out in response to the first ground of appeal. The third ground of appeal is therefore unfounded.

Findings of the Court

30 It should be noted, first of all, that Article 2(7)(a) of the basic regulation provides that in the case of imports from non-market economy countries, in derogation from the rules set out in paragraphs 1 to 6 of that provision, normal value must, as a rule, be determined on the basis of the price or constructed value in a market economy third country.

31 However, under Article 2(7)(b), in anti-dumping investigations concerning imports from, inter alia, China, normal value is to be determined in accordance with Article 2(1) to (6) of the basic regulation, if it is shown, on the basis of properly substantiated claims by one or more producers subject to the investigation and in accordance with the criteria and procedures set out in Article 2(7)(c), that market economy conditions prevail for that producer or producers in respect of the manufacture and sale of the like product concerned.

32 It is necessary to point out that the burden of proof lies with the producer wishing to claim MET under Article 2(7)(b) of the basic regulation. To that end, the first subparagraph of Article 2(7)(c) provides that the claim submitted by such a producer must contain sufficient evidence, as laid down in that provision, that the producer operates under market economy conditions. Accordingly, there is no obligation on the EU institutions to prove that the producer does not satisfy the conditions laid down for the recognition of such status. On the contrary, it is for the EU institutions to assess whether the evidence supplied by the producer concerned is sufficient to show that the criteria laid

down in the first subparagraph of Article 2(7)(c) of the basic regulation are fulfilled in order to grant it MET and it is for the EU judicature to examine whether that assessment is vitiated by a manifest error.

33 As is apparent from paragraph 14 of the judgment under appeal, the appellants communicated to the Commission the information required by points 5.1(a)(i) and 5.1(e) of the notice of initiation in order to be granted MET or, failing that, to be given IT. The EU institutions did not examine each individual claim.

34 It is apparent from recital 61 to the contested regulation that the institutions in question considered, referring to Article 17 of the basic regulation, that exporters are, by the nature of the sampling exercise, denied individual assessment. It was also stated in that recital that the number of requests for MET and IT was so substantial that an individual examination of the requests — as sometimes done in other cases — was administratively impossible. The EU institutions considered that it was reasonable, accordingly, to apply equally to all non-sampled companies the weighted average margin resulting from all the companies in the sample.

35 In paragraphs 72 to 80 of the judgment under appeal, the General Court rejected the appellants' argument that the basic regulation obliged the Commission to examine individual MET/IT claims from a trader from a non-market economy country. The General Court therefore held, in paragraph 78 of the judgment under appeal, that the Commission was not required to examine MET/IT claims from traders who are not included in the sample, where it has concluded, in applying Article 17(3) of the basic regulation, that the calculation of individual dumping margins would be unduly burdensome and would prevent it from completing the investigation in good time.

36 However, the General Court erred in law in so far as it held that the Commission was not required to examine MET claims under Article 2(7)(b) and (c) of the basic regulation from non-sampled traders.

37 To that effect, it must be noted, first, that Article 2(7) of the basic regulation is one of the provisions of that regulation concerned solely with the determination of normal value, whereas Article 17 of that regulation — on sampling — is one of the provisions relating, inter alia, to the methods available for determining the dumping margin. Thus, the provisions differ in content and purpose.

38 Second, the obligation on the Commission to adjudicate upon a claim from a trader wishing to claim MET is clear from the very wording of Article 2(7)(b) of the basic regulation. That provision lays down the obligation to determine the normal value in accordance with Article 2(1) to (6), if it is shown, on the basis of properly substantiated claims by one or more producers, that market economy conditions prevail for those producers. Such an obligation concerning the recognition of the economic conditions under which each producer operates, in respect of the manufacture and sale of the like product concerned, is not affected by the manner in which the dumping margin is to be calculated.

39 Third, under the second subparagraph of Article 2(7)(c) of the basic regulation, a determination whether the producer meets the criteria referred to in the first subparagraph of that provision in order to claim MET is to be made within three months of the initiation of the investigation.

40 Consequently, the first three grounds of appeal relied on by the appellants in support of their appeal must be upheld, inasmuch as they are based upon an infringement of Article 2(7) of the basic regulation. Therefore, the judgment under appeal must be set aside without the need to examine the other grounds of appeal.

The action at first instance

41 Under Article 61 of the Statute of the Court of Justice of the European Union, if the appeal is well founded, the Court is to quash the decision of the General Court. It may then itself give final judgment in the matter, where the state of the proceedings so permits. Such is the position in the present case.

42 It follows, first of all, from paragraphs 36 to 40 above that the Commission ought to have examined the substantiated claims submitted to it by the appellants pursuant to Article 2(7)(b) and (c) of the basic regulation for the purpose of claiming MET in the context of the anti-dumping proceeding the subject of the contested regulation. It must next be found that it cannot be ruled out that such an examination would have led to a definitive anti-dumping duty being imposed on the appellants other than the 16.5% duty applicable to them pursuant to Article 1(3) of the contested regulation. It is apparent from that provision that a definitive anti-dumping duty of 9.7% was imposed on the only Chinese trader in the sample which obtained MET. As is apparent from paragraph 38 above, had the Commission found that the market economy conditions prevailed also for the appellants, they ought, when the calculation of an individual dumping margin was not possible, also to have benefited from the same rate.

43 In those circumstances, the contested regulation must be annulled in so far as it relates to the appellants.

Costs

44 Under the first paragraph of Article 122 of its rules of procedure, where the appeal is well founded and the Court itself gives final judgment in the case, the Court is to make a decision as to costs. Article 69 of those rules, applicable to appeal proceedings by virtue of Article 118 thereof, provides in paragraph 2 that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. The first subparagraph of Article 69(4) of those rules provides that institutions which intervene in the proceedings are to bear their own costs and the third subparagraph of Article 69(4) provides that the Court may order an intervener other than those expressly mentioned in the preceding subparagraphs to bear his own costs.

45 Since the appeal brought by the appellants has been allowed and the contested regulation annulled in so far as it relates to them, the Council must be ordered to pay the costs incurred by the appellants, both at first instance and in connection with the present proceedings, as asked for in their pleadings. In addition, the Commission and CEC must also be ordered to bear their own costs, both at first instance and in connection with the present proceedings.

On those grounds, the Court (Third Chamber) hereby:

1. **Sets aside the judgment of the General Court of the European Union of 4 March 2010 in Case T-401/06 *Brosmann Footwear (HK) and Others* v *Council;***

2. **Annuls Council Regulation (EC) No 1472/2006 of 5 October 2006 imposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam in so far as it relates to Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co. Ltd;**

3. Orders the Council of the European Union to pay the costs incurred by Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd and Risen Footwear (HK) Co. Ltd both at first instance and in connection with the present proceedings;

4. Orders the European Commission and the Confédération européenne de l'industrie de la chaussure (CEC) to bear their own costs, both at first instance and in connection with the present proceedings.

[Signatures]