DECISIONS

COUNCIL IMPLEMENTING DECISION

of 18 March 2014

rejecting the proposal for an Implementing Regulation reimposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and produced by Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd, Risen Footwear (HK) Co. Ltd and Zhejiang Aokang Shoes Co. Ltd

(2014/149/EU)

THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union,

Having regard to Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community [1], and in particular Article 9 thereof,

Having regard to the proposal submitted by the European Commission, after consulting the Advisory Committee,

Whereas:

(1) On 5 October 2006 the Council adopted Regulation (EC) No 1472/2006 [2] ('the contested Regulation'), which imposed a definitive anti-dumping duty and collected definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and Vietnam. Following an expiry review, the measures were extended by Council Implementing Regulation (EU) No 1294/2009 [3]. The measures expired on 31 March 2011.

(2) Certain exporting producers brought actions before the General Court for annulment of the contested Regulation. The General Court dismissed these actions [4]. However, on appeal, the Court of Justice ('the Court'), in its judgments of 2 February 2012 in Case C-249/10 P, *Brosmann et al.* v *Council*, and of 15 November 2012 in Case C-247/10 P, *Zhejiang Aokang Shoes* v *Council* (the 'judgments'), set aside the judgments of the General Court and annulled Regulation (EC) No 1472/2006 in so far as it related to the appellants. In particular, the Court found that the Commission ought to have examined the claims submitted by the appellants for the purpose of claiming Market Economy Treatment ('MET') in accordance with Article 2(7)(b) and (c) of Regulation (EC) No 1225/2009 and that it could not be ruled out that such examination would have led to a lower anti-dumping duty for the appellants.

(3) By means of a notice published in the *Official Journal of the European Union* [5], the Commission informed the exporting producers concerned by the judgments that it had decided to resume the procedure for replacing the annulled parts of the contested Regulation and to examine whether market economy conditions prevailed for these producers during the relevant period.

[1] OJ L 343, 22.12.2009, p. 51.

[2] OJ L 275, 6.10.2006, p. 1. On 23 March 2006, the Commission had already 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 L 98, 6.4.2006, p. 3). Subsequently to the adoption of the contested Regulation, the measures were extended to imports consigned from the Macao Special Administrative Region by Council Regulation (EC) No 388/2008 of 29 April 2008 extending the definitive anti-dumping measures imposed by Regulation (EC) No 1472/2006 on imports of certain footwear with uppers of leather originating in the People's Republic of China to imports of the same product consigned from the Macao SAR, whether declared as originating in the Macao SAR or not (OJ L 117, 1.5.2008, p. 1).

[3] Council Implementing Regulation (EU) No 1294/2009 of 22 December 2009 imposing a definitive anti-dumping duty on imports of certain footwear with uppers of leather originating in Vietnam and originating in the People's Republic of China, as extended to imports of certain footwear with uppers of leather consigned from the Macao SAR, whether declared as originating in the Macao SAR or not, following an expiry review pursuant to Article 11(2) of Council Regulation (EC) No 384/96 (OJ L 352, 30.12.2009, p. 1).

[4] Judgments of 4.3.2012 in Case T-401/06, *Brosmann Footwear (HK) and others* v *Council* ([2010] ECR II-671) and in Joined Cases T-407/06 and T-408/06, *Zhejiang Aokang Shoes and Wenzhou Taima Shoes* v *Council* ([2010] ECR II-747).

[5] OJ C 295, 11.10.2013, p. 6.

(4) On 19 February 2014, the Commission adopted the proposal for a Council Implementing Regulation reimposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and produced by Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd, Risen Footwear (HK) Co. Ltd and Zhejiang Aokang Shoes Co. Ltd ('the proposal'). The proposal states that the examination of the MET claims showed that market economy conditions did not prevail during the relevant period for the exporting producers concerned by the judgments, that MET must therefore be denied from these exporting producers and that the anti-dumping duty originally imposed by the contested Regulation should consequently be reinstated. To this effect, the proposal would reinstate a definitive anti-dumping duty for the exporting producers concerned by the judgments for the period of application of the contested Regulation.

(5) Article 1(4) of the proposal reads as follows: 'The provisions in force concerning customs duties shall apply, with the exception of Article 221 of the Council Regulation (EEC) No 2913/1992 of 12 October 1992 establishing the Community Customs Code [1]. Communication to the debtor of the amount of duty may take place more than three years after the customs debt was incurred, but no later than two years after the entry into force of this Regulation.'.

Article 221(3) of Regulation (EEC) No 2913/1992 ('Customs Code') time-bars the communication of the reimposed anti-dumping duty to the debtor for any imports which took place over three years ago, provided that the period was not suspended pending an appeal under Article 243 of the Customs Code. Article 1(4) of the contested Regulation provided that, unless otherwise specified, the provisions in force concerning customs duties applied, and it did not contain any derogation from Article 221(3) of the Customs Code. To the extent that the original communication of the debt to the debtor was withdrawn following the judgments, the operators could legitimately expect that, once the three-year period prescribed by Article 221(3) of the Customs Code had expired, any reimposition of the debt was time-barred and, consequently, the debt was 'extinguished' [2]. Once the debt was extinguished pursuant to Article 221(3), its retroactive reimposition would therefore infringe the legitimate expectations of the operators concerned.

In conclusion, the assessment of the Council is that a retroactive application of the derogation from Article 221(3) of the Customs Code is not possible in this case, as it would infringe the legitimate expectations of the operators concerned.

(6) Without the retroactive derogation from Article 221(3), the reimposition of duties would have a very limited financial effect in practice, since the original measures expired on 31 March 2011.

(7) Furthermore, the complainants did not provide elements demonstrating that the adoption of the proposed measure would have an impact on them.

(8) The Court has annulled the contested Regulation in its entirety, in so far as it relates to the appellants. As a consequence, the effect of the judgments with respect to the measure annulled is not dependent on an additional act to be adopted by the Institutions. The Council therefore concludes that Article 266 of the Treaty on the Functioning of the European Union does not oblige the Institutions to reimpose the duties in the present case,

HAS ADOPTED THIS DECISION:

Article 1

The proposal for a Council Implementing Regulation reimposing a definitive anti-dumping duty and collecting definitely the provisional duty imposed on imports of certain footwear with uppers of leather originating in the People's Republic of China and produced by Brosmann Footwear (HK) Ltd, Seasonable Footwear (Zhongshan) Ltd, Lung Pao Footwear (Guangzhou) Ltd, Risen Footwear (HK) Co. Ltd and Zhejiang Aokang Shoes Co. Ltd is rejected and the proceedings with regard to these producers are terminated.

Article 2

This Decision shall enter into force on the day following that of its publication in the *Official Journal of the European Union*.

Done at Brussels, 18 March 2014.

For the Council
The President
E. VENIZELOS

[1] OJ L 302, 19.10.1992, p. 1.
[2] Cf. judgment of the Court of Justice of 23.2.2006 in Case C-201/04, Molenbergnatie ([2006] ECR I-2049), paragraph 41; judgment of 28.1.2010 in Case C-264/08, Direct Parcel Distribution Belgium ([2010] ECR I-731), paragraph 43.