JUDGMENT OF THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

29 June 2000 *

In Case T-7/99,

Medici Grimm KG, established in Rodgau Hainhausen, Germany, represented by R. MacLean, Solicitor, assisted by P. McGarry, Barrister, with an address for service in Luxembourg at the Chambers of Arendt and Medernach, 8-10 Rue Mathias Hardt,

applicant,

v

Council of the European Union, represented by S. Marquardt, of its Legal Service, acting as Agent, assisted by G.M. Berrisch, Rechtsanwalt, Hamburg, and member of the Brussels Bar, with an address for service in Luxembourg at the office of A. Morbilli, Director of Legal Affairs at the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by V. Kreuschitz, Legal Adviser, and N. Khan, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for partial annulment of Council Regulation (EC) No 2380/98 of 3 November 1998 amending Council Regulation (EC) No 1567/97 imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China (OJ 1998 L 296, p. 1),

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fourth Chamber, Extended Composition),

composed of: V. Tiili, President, P. Lindh, R.M. Moura Ramos, J.D. Cooke and P. Mengozzi, Judges,

Registrar: B. Pastor, Principal Administrator,

having regard to the written procedure and further to the hearing on 8 December 1999,

gives the following

Judgment

Relevant law

1 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, hereinafter 'the basic regulation'), as amended by Council Regulation (EC) No 2331/96 of 2 December 1996 (OJ 1996 L 317, p. 1) and Council Regulation (EC) No 905/98 of 27 April 1998 (OJ 1998 L 128, p. 18), sets out the legal framework applicable in the Community in the field of anti-dumping at the material time in this case.

2 Article 11(3) of the basic regulation provides:

'The need for the continued imposition of measures may also be reviewed, where warranted, on the initiative of the Commission or at the request of a Member State or, provided that a reasonable period of time of at least one year has elapsed since the imposition of the definitive measure, upon a request by any exporter or importer or by the Community producers which contains sufficient evidence substantiating the need for such an interim review.

An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset

dumping and/or that the injury would be unlikely to continue or recur if the measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.

In carrying out investigations pursuant to this paragraph, the Commission may, *inter alia*, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established under Article 3. In these respects, account shall be taken in the final determination of all relevant and duly documented evidence.'

3 Article 11(6) provides:

'Reviews pursuant to this Article shall be initiated by the Commission after consultation of the Advisory Committee. Where warranted by reviews, measures shall be repealed or maintained pursuant to paragraph 2, or repealed, maintained or amended pursuant to paragraphs 3 and 4, by the Community institution responsible for their introduction...'

4 Article 11(8) provides:

'Notwithstanding paragraph 2, an importer may request reimbursement of duties collected where it is shown that the dumping margin, on the basis of which duties were paid, has been eliminated, or reduced to a level which is below the level of the duty in force.

In requesting a refund of anti-dumping duties, the importer shall submit an application to the Commission. The application shall be submitted via the Member State of the territory in which the products were released for free circulation, within six months of the date on which the amount of the definitive duties to be levied was duly determined by the competent authorities or of the date on which a decision was made definitively to collect the amounts secured by way of provisional duty. Member States shall forward the request to the Commission forthwith.'

Facts giving rise to the dispute

5 The applicant, Medici Grimm KG (hereinafter 'Medici'), is a company incorporated under German law. In 1993, it entered into an agreement with Lucci Creation Ltd (hereinafter 'Lucci Creation'), a company based in Hong Kong with facilities in China for the manufacture of leather handbags. The handbags are manufactured using leather and other materials supplied by the applicant.

6 Following a complaint filed by the European Committee for Leather Goods Industries (CEDIM), on 4 May 1996 the Commission published a notice of initiation of an anti-dumping investigation into imports of handbags from the People's Republic of China (OJ 1996 C 132, p. 4).

7 The applicant and Lucci Creation were aware of the initiation of the original investigation but did not participate in it.

8 On 4 February 1997 the Commission imposed provisional anti-dumping duties of a maximum of 39.2% on such imports (Commission Regulation (EC) No 209/97 of 3 February 1997, OJ 1997 L 33, p. 11).

9 On 3 August 1997 the Council imposed definitive anti-dumping duties of a maximum of 38% on imports of leather handbags from China (Council Regulation (EC) No 1567/97 of 1 August 1997 imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China and terminating the proceeding concerning imports of plastic and textile handbags originating in the People's Republic of China (OJ 1997 L 208, p. 31, hereinafter 'the original regulation'). As Lucci Creation had not participated in the proceeding, it did not receive individual treatment and the imports of its products into the Community by the applicant were thus made subject to a residual duty of 38% under Article 9(5), in conjunction with Article 18, of the basic regulation. The applicant did not challenge the original regulation.

10 On 13 September 1997, six weeks after publication of the original regulation, the Commission published a notice inviting exporting producers to submit evidence warranting the initiation of an interim review of the anti-dumping measures applicable to imports of leather handbags originating in the People's Republic of China (OJ 1997 C 278, p. 4). That notice provided as follows:

'During the investigation leading to the adoption of the measures concerned, only two exporters, representing a small share of total exports, made sufficiently substantiated requests for individual treatment for these requests to be granted. At the end of this investigation, however, a large number of exporting producers in the People's Republic of China contacted the Commission applying for individual treatment. Although these applications could not be considered, since they were made well beyond the time-limit for their submission, they were made by exporters possibly responsible for a material proportion of imports into the Community of leather handbags originating in the People's Republic of China.

In view of the above circumstances, the Commission invites the exporting producers concerned to submit the information listed below... which will be used by the Commission to consider whether there is sufficient evidence warranting,

exceptionally, an early interim review of the measures in force with regard to the issue of individual treatment.'

11 Lucci Creation, as an exporting producer, responded to the notice by providing the information requested by the Commission. On 13 December 1997 the Commission published a notice (OJ 1997 C 378, p. 8) formally initiating an interim review of the anti-dumping measures imposed by the original regulation, stating that the scope of the review was limited to the issue of the individual treatment of exporting producers.

12 The Commission sent out questionnaires asking for information on the same investigation period as that to which the original investigation related, namely 1 April 1995 to 31 March 1996 (hereinafter 'the investigation period').

13 On 15 February 1998 the applicant and Lucci Creation jointly filed the questionnaire for exporting producers with the Commission. The applicant completed Annex I to the questionnaire as an associated importer. The two companies then cooperated in the Commission's on-the-spot investigation at their respective premises in Hong Kong and Rogdau in Germany. The export prices for establishing the individual dumping margin were calculated on the basis of the applicant's sales to independent customers in the Community.

14 During the review investigation the applicant had to pay anti-dumping duties at the rate of 38% of the value of the imports of Lucci Creation's products.

15 By letter of 18 June 1998 from its legal representative, the applicant asked the Commission for a refund of the anti-dumping duties paid by the applicant since

3 August 1997. It suggested that it would be possible to achieve that by giving retroactive effect to the regulation which was to be adopted upon completion of the interim review. In a further letter dated 1 July 1998 the applicant explained the reasons for which it had not used the refund procedure. It stated, *inter alia*, that:

'These [refund] applications were not made because Medici had developed a legitimate expectation that, because the Commission was using the... investigation period in the present review, the application of the new measures would be backdated.'

16 At the formal hearing requested by the applicant, which took place on 16 July 1998 at the Commission's offices, the applicant's legal representative asked the Commission's representatives to clarify the Commission's position on the retroactive application of the rates of duty adopted following the review findings. The Commission's representatives replied that the issue had not yet been resolved and that a final decision had not yet been taken.

17 On 17 August 1998 the applicant made a formal application to the German customs authorities for a refund of DEM 1 046 675, being the total amount of anti-dumping duties paid by the applicant up to that date. By way of preliminary reply, the Commission informed the applicant by letter of 14 September 1998 that 15 payments, representing a total of DEM 406 755.77, seemed to have been made before the six-month period preceding the date on which the refund application was lodged and could not therefore be taken into account for the purposes of Article 11(8) of the basic regulation.

18 In the final disclosure document of 27 August 1998 the Commission confirmed that the applicant and its associated exporter were subject to anti-dumping duty

at a rate of 0% and to an undercutting margin of 0%. It also refused the applicant's request regarding retroactive application of the revised rates of duty.

19 In that final disclosure document, the applicant and Lucci Creation were treated as associated companies because they jointly control a third company, Medici Germany (Asia) Ltd. However, in a letter of 11 September 1998, the applicant disputed that link and said that the relationship between itself and Lucci Creation was a compensatory arrangement under Article 2(9) of the basic regulation. By letter of 15 December 1998 the Commission replied:

'It is our understanding that Lucci Creation and Medici are related parties in the sense of the AD Basic Regulation, as both companies jointly control a third party, Medici Germany (Asia) Ltd.

As far as the establishment of the export price is concerned, you state that Medici Germany (Asia) Ltd. was only incorporated after the investigation period, and that therefore the basis for the construction of the export price is not, strictly speaking, the relationship, but rather the existence of a compensatory arrangement between Lucci Creation and Medici. However, as you acknowledge this issue does not put into question the application of Article 2(9) of the Basic Regulation for the establishment of the export price.'

20 On 3 November 1998 the Council adopted Regulation (EC) No 2380/98 amending the original regulation (OJ 1998 L 296, p. 1), which closed the review procedure (hereinafter 'the contested regulation'). That regulation stated that no dumping had been found as regards transactions between the applicant and Lucci Creation during the investigation period and that the latter company was accordingly entitled to an individual dumping margin of 0%. The application for retroactive effect was dismissed for two reasons: first, because the measures adopted further to review investigations were prospective and, secondly, because

'this would result, for those exporters which receive as a result of the present investigation a lower duty rate than the residual duty, in an unwarranted bonus for their non-cooperation in the initial investigation.'

21 On 8 January 1999 the applicant made a second refund application in an amount of DEM 409 777.34 to the German customs authorities. The Commission has not yet taken a decision on the applicant's refund applications. However, in a letter of 12 November 1999, it sent the applicant its officials' final findings which favoured refunding the amounts in respect of which application had been made within the period prescribed in Article 11(8) of the basic regulation.

Procedure and forms of order sought

22 By application lodged at the Registry of the Court on 12 January 1999, the applicant brought this action.

23 By application lodged at the Registry of the Court on 6 May 1999, the Commission sought leave to intervene in the proceedings in support of the Council. The President of the Fourth Chamber (Extended Composition) granted leave to intervene by order of 11 June 1999. The Commission informed the Court by letter of 16 August 1999 that it did not consider it necessary that it support the Council in writing and that it would make its submissions at the hearing only.

24 Upon reading the report of the Judge-Rapporteur, the Court (Fourth Chamber, Extended Composition) decided to open the oral procedure. By way of measures of organisation of procedure, it asked the applicant to produce certain documents and the Council to reply in writing to a question.

25 The parties presented oral argument and replied to the questions put by the Court at the hearing on 8 December 1999.

26 The applicant claims that the Court should:

— annul the contested regulation in so far as the Council failed to grant the applicant retroactive reimbursement of the anti-dumping duties paid by it prior to the adoption thereof;

— order the Council to pay the costs.

27 The Council, supported by the Commission, contends that the Court should:

— declare the application inadmissible;

— in the alternative, dismiss the application;

— order the applicant to pay the costs.

Admissibility

28 The Council contends that the action is inadmissible on four grounds. It claims that the application does not sufficiently specify the relief sought, that the action constitutes an abuse of process, that the applicant has no legal interest in bringing the proceedings, and that the applicant is not individually concerned by the contested regulation.

29 At the hearing, the Commission concurred with the Council's arguments.

The plea that the application does not sufficiently specify the relief sought

Arguments of the parties

30 The Council contends that the action is inadmissible because the applicant has not identified the provision of the contested regulation which it seeks to have annulled.

31 The Commission adds that, by this action, the applicant is in fact seeking the annulment of the grounds of the contested regulation, not of the operative part of

that regulation, which is in any event favourable to it. The action challenges only the 19th recital in which the Council sets out the grounds on which it refuses to allow the provisions of the contested regulation to take effect retroactively. However, the Court has already held that, whatever the grounds on which an act is based, only the operative part can form the subject-matter for an action for annulment (Case T-138/89 *NBV and NVB* v *Commission* [1992] ECR II-2181, paragraphs 30 to 35).

32 The applicant claims that the statement of the relief which it seeks is specific enough for the Court to be able to identify the provisions which the applicant wishes to have annulled. It has not singled out any specific provision because it falls within the Court's powers to determine, in the interests of legal certainty, the extent to which the regulation ought to be annulled in order to be cured of its defects.

Findings of the Court

33 The application states that the action has as its object 'the partial annulment under Article 173 of the EC Treaty of [the contested regulation] in so far as the Council refused to grant retroactive reimbursement of anti-dumping duties paid by [Medici] prior to the adoption of [that regulation]'.

34 Although the applicant has not identified the provision of the contested regulation to which its action is directed, it is clear from those words, and from all the arguments set out in support of the application, that the action is for the annulment of that regulation in so far as the Council failed to give retroactive effect to the review finding that the applicant did not engage in dumping during the investigation period.

35 That being so, the statement of the relief sought by the applicant is sufficiently precise for the Court to be able to identify the provision of the contested regulation to which this action is directed (see, to that effect, Case C-388/93 *PIA HIFI* v *Commission* [1994] ECR I-387, paragraphs 9 to 11).

36 Furthermore, unlike the position in the case which gave rise to the judgment in *NBV and NVB* v *Commission*, the aspects which the applicant challenges, namely the effects *ratione temporis* of the contested regulation, are to be found in the operative part. More specifically, they are to be found in Article 2, which provides that the amendments in Article 1 are to be applicable from the day following publication of the contested regulation in the *Official Journal of the European Communities*. That being so, the Commission cannot rely on the judgment in the *NBV* case as authority for its submission that the action is inadmissible.

37 It follows that the plea must be dismissed.

The alleged abuse of process

Arguments of the parties

38 The Council, supported by the Commission, contends that the true objective of the application is to obtain reimbursement of the anti-dumping duties paid by the applicant under the original regulation. That being the case, the proper procedure to follow would have been to submit an application for a refund under Article 11(8) of the basic regulation.

39 Where such an administrative procedure exists, and the time-limit for submitting an application under that procedure has not been complied with, an action for annulment brought after expiry of that time-limit with the object of obtaining satisfaction of the same claim constitutes an abuse of process and must therefore be declared inadmissible.

40 Those arguments are based, *inter alia*, on the case-law relating to the relationship between actions for annulment and actions for damages. Whilst it is true that the judgment of the Court of Justice in Case 9/75 *Meyer-Burckhardt* v *Commission* [1975] ECR 1171, paragraphs 10 to 13, and the judgment of the Court of First Instance in Case T-27/90 *Latham* v *Commission* [1991] ECR II-35, paragraph 38, make it clear that the independence of the two types of action follows from their different nature and different objectives, those judgments also establish that, where an action for damages pursues the same objective as an action for annulment and seeks to circumvent the consequences of having failed to bring such an action within the prescribed time-limit, the action for damages is inadmissible.

41 The applicant contests the arguments put forward by the Council and the Commission.

Findings of the Court

42 It is to be noted first that in this action the applicant is requesting the Court to assess the legality of the contested regulation which brought the review procedure provided for in Article 11(3) of the basic regulation to a close, whereas, in its refund applications, it is asking the Commission, on the basis of Article 11(8) of the basic regulation, to exempt it from application of the original regulation.

43 Consequently, even on the assumption that this action and the refund applications have the same financial outcome, the two procedures are

none the less different in nature and relate to different acts of the institutions.

44 As regards the case-law cited by the Council on the relation between actions for annulment and actions for damages, which allows for an exception to the principle of the autonomy of remedies, it must be pointed out, as was done by the Court of Justice in its judgment of 14 September 1999 in Case C-310/97 P *Commission* v *AssiDomän Kraft Products and Others* [1999] ECR I-5363, paragraph 61, that that exception 'is based in particular on the consideration that the purpose of having time-limits for bringing legal proceedings is to ensure legal certainty by preventing Community measures which produce legal effects from being called in question indefinitely as well as on the requirements of good administration of justice and procedural economy'.

45 That exception therefore presupposes that the applicant has already had an opportunity to submit for review by the Community judicature the act or conduct of the administration which is effectively the subject of the second claim. It does not apply, therefore, where the two actions arise as a result of different acts or conduct on the part of the administration, even if the financial outcome of the two actions is the same for the applicant (see *Latham* v *Commission*, paragraph 38).

46 In those circumstances, the objection relied upon by the Council cannot constitute grounds for declaring inadmissible an action such as the present one, in which the applicant is submitting an act of the institutions for review by the Community judicature for the first time.

47 Furthermore, the present action for annulment has the further purpose of submitting for consideration by the Community judicature the question whether there is a duty to apply retroactively rates of duty adopted following a review based on the same reference period as that used for the original investigation, where the Council finds that the applicant did not engage in dumping.

48 It follows that this action does not constitute an abuse of process and that the plea must accordingly be dismissed.

The applicant's legal interest in bringing the proceedings

Arguments of the parties

49 The Council submits first of all that the applicant has no interest in obtaining the annulment of the contested regulation since that regulation does not adversely affect it. The operative part of the contested regulation improves the applicant's situation by applying to it an individual rate of duty of 0%. If the contested regulation were annulled, imports of leather handbags manufactured by Lucci Creation would once again be subject to anti-dumping duty at the rate of 38%.

50 Secondly, the applicant has no legal interest in challenging the contested regulation since the basic regulation provides for a special form of remedy in order to attain the objectives it claims to be pursuing. If a person attempts to procure a particular decision for which Community law provides a specific administrative procedure before the Commission, then so long as that procedure is not concluded, as in this case, he has no legal interest in applying for the same relief by means of an action before the Community Courts.

51 It also follows from the general principle of the institutional balance between the Court of Justice, as an institution, and the other institutions that it is not the task of the Community judicature to intervene in pending administrative procedures. The Council bases its argument on an analogy with the principle of the exhaustion of administrative procedures expressly laid down in the second

paragraph of Articles 175 of the EC Treaty (now the second paragraph of Article 232 EC), the second paragraph of Article 169 of the EC Treaty (now Article 226 EC) and Articles 90 and 91 of the Staff Regulations of Officials of the European Communities.

52 The Council points out that the refund procedures initiated by the Commission further to the applicant's requests are still pending. If the Commission were to decide those requests in favour of the applicant, this action would become devoid of purpose. If it were to decide against the applicant, the applicant could always bring an action for annulment against that decision. The applicant therefore enjoys full legal protection, which renders this action superfluous.

53 The applicant disputes the contention that it has no legal interest in challenging the contested regulation. It further submits that it is not necessary in order for the present action, which is based on Article 173 of the EC Treaty (now, after amendment, Article 230 EC), to be admissible, that it should first have exhausted all other remedies. Finally, the present action does not relate to the refund application but to the review procedure.

Findings of the Court

54 Although the contested regulation reduces the rate of duty imposed on the applicant's imports to 0%, that amendment only applies for the future. Furthermore, it is common ground that the contested regulation impliedly refuses the applicant's request for the rates of duty laid down in the course of the review procedure to be applied retroactively (see paragraph 20 above).

55 In those circumstances, the applicant has a legal interest in the annulment of the contested regulation in that the Council did not grant its request for retroactive application of the provisions amending the rate of duty chargeable on its imports. The fact that the contested regulation is favourable to the applicant overall in no way diminishes its interest in the annulment of the part of the regulation unfavourable to it, namely the provision relating to the entry into force of the amended duties as they apply to it (see Case 264/82 *Timex* v *Council and Commission* [1985] ECR 849).

56 Since the present action has an objective which goes beyond reimbursement of duties already paid by the applicant (see paragraph 47 above), the applicant's interest in taking these proceedings is not to be confused with the objectives pursued by the refund applications. That being so, the judicial protection which the present cause of action confers on the applicant would not be afforded by a right to challenge a decision by the Commission in relation to the refund applications.

57 Similarly, the argument based on the application, by analogy, of the principle of the exhaustion of the pre-litigation procedure laid down in relation to other remedies must also be dismissed. Article 173 of the Treaty does not lay down such a requirement. Furthermore, the admissibility of an action for annulment can only be determined by reference to the objectives of Article 173 and the principle of the legal protection of individuals (Case T-288/97 *Regione Autonoma Friuli Venezia Giulia* v *Commission* [1999] ECR II-1871, paragraph 47).

58 It follows that the plea must be dismissed.

The applicant is not individually concerned by the contested regulation

Arguments of the parties

59 The Council submits that the applicant is not individually concerned by the contested regulation. First of all, it was not treated as a related importer in the review investigation. Although the applicant and Lucci Creation were initially considered to be related companies by the Commission because they jointly control a third company, Medici Germany (Asia) Ltd, the applicant itself denied the existence of such a link between the two companies in its letter of 11 September 1998.

60 The Council does not deny that the dumping margin was established on the basis of constructed export prices based on the applicant's sales to independent customers. However, the data provided by the applicant formed the basis only for the findings resulting in the determination of an individual duty of 0% for handbags manufactured by Lucci Creation and were not taken into account for the determination of the effects *ratione temporis* of the contested regulation, which are challenged in the present action.

61 The Council further contends that the mere fact that the applicant participated in the administrative procedure does not mean that the applicant is individually concerned by the contested regulation.

62 The applicant claims that it is individually concerned by the contested regulation.

Findings of the Court

63 It must be observed at the outset that, as the Commission indicated in its letter of 15 September 1998, the dispute concerning the nature of the relationship between the two companies, which goes to the question whether they are, *stricto sensu*, related companies or whether they entered into a compensatory arrangement, is not relevant to the application of Article 2(9) of the basic regulation. The Commission may construct the export price in either case.

64 In this case, it is clear from the 15th recital in the preamble to the contested regulation and from the final disclosure letter of 27 August 1998 that the Commission used the applicant's resale prices to calculate Lucci Creation's export prices and, consequently, the rate of duty to be imposed on imports of Lucci Creation's products.

65 In such circumstances, the case-law recognises that there is *locus standi* to bring an action for annulment against a regulation imposing anti-dumping duties on importers where their resale prices were used in order to construct export prices (see, *inter alia*, Case 205/87 *Nuova Ceam* v *Commission* [1987] ECR 4427, paragraph 13 and Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others* v *Commission and Council* [1990] ECR I-719, paragraphs 12 and 15).

66 It follows that the applicant is individually concerned by the contested regulation.

67 Next, the Council is wrong in contending that the applicant is individually concerned only by Article 1, amending the rates of duty established by the original regulation, and that the non-retroactivity of that amendment as a result of Article 2, which provides that the contested regulation is to enter into force on the day following its publication in the Official Journal, affects all importers.

68 The effects of the contested regulation on the applicant constitute the result of the combined application of those two provisions, with the result that the applicant cannot be concerned by one of them without being concerned by the other.

69 It follows from all the foregoing considerations that the pleas raised in support of the objection of inadmissibility must be dismissed in their entirety.

Substance

70 The applicant relies on three pleas in law in support of its action. The first alleges infringement of the rules of the Treaty, breach of fundamental principles and infringement of the basic regulation and of the relevant provisions of the World Trade Organisation agreement on the implementation of Article VI of the General

Agreement on Tariffs and Trade 1994 (hereinafter 'the WTO anti-dumping agreement'). The second alleges breach of the principle of the protection of legitimate expectations. The third alleges breach of the principle of proportionality.

The first plea: infringement of the rules of the Treaty, breach of fundamental principles and infringement of the basic regulation and of the relevant provisions of the WTO anti-dumping agreement

Arguments of the parties

71 The applicant claims that Articles 7(1) and 9(4) of the basic regulation embody a fundamental principle of Community anti-dumping law, namely that provisional or definitive anti-dumping duties may be imposed only if three conditions are concurrently satisfied: the existence of dumping, injury to the Community industry and a causal link between the dumping and the injury.

72 According to the applicant, the same principle underlies Articles 7(1) and 9 of the WTO anti-dumping agreement with which the institutions are required to comply (Case C-69/89 *Nakajima* v *Council* [1991] ECR I-2069, paragraph 29).

73 The applicant points out that the investigation in this case led to the finding that it and Lucci Creation had not engaged in dumping during the investigation

period. Furthermore, there was no reason to suppose that the companies engaged in dumping practices at any other time. Consequently, the requisite conditions were not satisfied at the time when the definitive anti-dumping duties were imposed by the original regulation. That finding should have led the Council to grant reimbursement of the duties already paid by the applicant.

74 As regards the Council's argument to the effect that to apply retroactively a regulation closing a review investigation is incompatible with the principles of legal certainty and of the protection of legitimate expectations, the applicant submits that retroactivity can be applied selectively, so as not to infringe those fundamental principles if such application were to favour certain exporters.

75 The Council contends, first of all, that neither the basic regulation nor the WTO anti-dumping agreement contain any express provision requiring it to apply retroactively a regulation closing a review investigation. The inference to be drawn from the concept which underlies Article 11(3) of the basic regulation is that such a regulation is to have effect only for the future. Similarly, in this case, the objective of the review investigation was not to confer a retroactive benefit on those exporters who had not cooperated in the original investigation.

76 Secondly, the Council states that the original regulation was valid because the Council acted in full compliance with the requirements of the basic regulation and the WTO anti-dumping agreement. The findings of the review investigation cannot invalidate the findings of the original investigation and the fact that they both relate to the same investigation period makes no difference. It is clearly wrong to conclude from the fact that findings made in an anti-dumping or review regulation are based on facts in the past that the regulation must necessarily have retroactive effect.

77 Thirdly, the Council maintains that the only exceptional circumstance in the review in this case was the exceptionally favourable conduct of the institutions in initiating an early review. However, this does not make the review different from any other review carried out under Article 11(3) of the basic regulation and cannot therefore justify departing from the wording of that provision by allowing retroactive effect.

78 Fourthly, for the Council to confer retroactive effect on a regulation closing a review investigation would put exporters cooperating in the review only on the same footing as exporters who cooperated in the original investigation from the outset and that could undermine the whole system of anti-dumping investigations under the basic regulation. The Council points out in this connection that the notice of initiation of the investigation was published in the Official Journal as required by Article 5(9) of the basic regulation and contends that the applicant cannot therefore claim that it was not notified of the procedure.

79 Fifthly, the retroactive application of a review regulation may lead to results incompatible with the principles of legal certainty and the protection of legitimate expectations. According to current case-law, a Community measure may have retroactive effect only if the legitimate expectations of all affected parties are duly respected. As the contested regulation provides for an individual duty higher than 38% for two exporters, retroactive application of the regulation would have resulted in importers who had imported handbags from those exporters having to pay the difference between that rate of 38% and their individual duties.

80 Sixthly, as regards the applicant's arguments on the selective application of retroactive effect, the Council contends that the specific rule in Article 10(3) of the basic regulation cannot be applied to regulations terminating review investigations, in particular because it follows from the nature of a review under

Article 11(3) of the basic regulation that regulations of that kind have effects only for the future. The implicit effect of the applicant's argument is to transform the system of the basic regulation into one where definitive anti-dumping duties would not be definitive but contingent on a later review.

Findings of the Court

81 The scope of Article 11(3) of the basic regulation must first be determined, and in particular that of the subparagraph providing that, during a review investigation, 'the Commission may, *inter alia*, consider whether the circumstances with regard to dumping and injury have changed significantly, or whether existing measures are achieving the intended results in removing the injury previously established...'.

82 As the Court of Justice observed in Case 312/84 *Continentale Produkten Gesellschaft* v *Commission* [1987] ECR 841, paragraph 11, the review procedure applies 'if there is a change in the circumstances on the basis of which the values applied in the regulation imposing the anti-dumping duties were established'. The purpose of the review procedure is therefore to adapt the duties imposed to take account of an evolution in the factors which gave rise to them and the procedure therefore presupposes that those factors have altered.

83 It is common ground that in this case there was no change in circumstances which could have provided a reason for the Commission's initiating the review investigation. As is clear from the first paragraph of the notice of 13 September 1997, on the one hand, and the third recital in the preamble to the contested regulation, on the other, the purpose of that procedure was merely to enable those companies which did not participate in the original procedure to obtain individual treatment on the basis of their export prices.

84 To that end, the Commission, out of a concern to save resources and expedite the procedure, decided to use the investigation period which had formed the basis for the imposition of the definitive duties. In that connection, the Commission and the Council informed the Court at the hearing that that choice had no precedent in the Commission's practice in the field of reviews.

85 Since it was not the purpose of the review to adapt the anti-dumping duties imposed to changes in circumstances, and since the review also entailed re-examination of the factors which had given rise to those duties, the Court finds that the Council did not, contrary to its contention, review the measures in force but in fact reopened the original procedure.

86 Accordingly, since the institutions themselves departed from the framework prescribed in the basic regulation for the review procedures, they cannot raise the scheme and purpose of that procedure as obstacles to the applicant's claim.

87 Furthermore, where, in an investigation such as that carried out in this case (see paragraphs 83 to 85 above), the institutions find that one of the factors on the basis of which the definitive anti-dumping duties were imposed is missing it is no longer possible to consider that the conditions laid down in Article 1 of the basic regulation were satisfied at the time when the original regulation was adopted and that the trade-protection measures against Lucci Creation exports to the Community were therefore necessary. That being so, the institutions are bound to abide by all the consequences flowing from their choice of investigation period for the review in question and, since they found that Lucci Creation had not engaged in dumping during that period, they must give that finding retroactive effect.

88 As to the Council's argument that retroactive application of the contested regulation would constitute an unjustified reward for the applicant's failure to cooperate in the initial investigation, it must be observed that the purpose of the power given to the Commission under Article 18 in conjunction with Article 9(5) of the basic regulation, to fix anti-dumping duties on the basis of the available information in the event of failure to cooperate in the investigation, is to enable such duties to be imposed in a non-discriminatory manner on all imports of goods from a particular country. It is no part of that purpose to penalise traders for their failure to participate in an anti-dumping investigation.

89 Furthermore, to accept the Council's position, even though the Court has held in this case that the Council was bound to abide by all the consequences flowing from the review findings, would result in the unjust enrichment of the Community at the applicant's expense.

90 As regards the difficulties raised by the Council in relation to the possibility of applying the contested regulation retroactively, it must be borne in mind that it is settled case-law that although, as a general rule, the principle of legal certainty precludes a Community act from taking effect as from a date prior to its publication, the position may exceptionally be otherwise where the purpose to be attained so requires and the legitimate expectations of the persons concerned are properly respected (see, *inter alia*, Case C-368/89 *Crispoltoni* [1991] ECR I-3695, paragraph 17 and the cases therein cited).

91 Consequently, the retroactive application of acts of the institutions is permissible if it is capable of placing the person concerned in a more favourable legal

situation and provided that his legitimate expectations are properly respected (see, to that effect, Case C-310/95 *Road Air* [1997] ECR I-2229, paragraph 47).

92 In this case there is no legal principle which would have prevented the Council from limiting retroactive application of the contested regulation exclusively to exporters who benefited from an amendment to their advantage of the rate of duty applicable to their products. For the others, the contested regulation could only alter their legal situation for the future, in application of the principles of legal certainty and the protection of legitimate expectations.

93 It follows from all the foregoing considerations that the first plea in law must be upheld, and the contested regulation annulled in so far as the Council failed to give retroactive effect to the amendment of the rate of anti-dumping duty imposed on the applicant's imports of Lucci Creation's products, and that it is not necessary to examine the other pleas in law raised by the applicant.

94 However, the purpose of the action is not to secure the removal of the provision amending the rate of duty applicable to those imports, but to have the provision limiting the temporal effects of that amendment annulled. It is therefore appropriate to maintain the contested regulation as it stands until the competent institutions have adopted the measures necessary to comply with this judgment pursuant to the second paragraph of Article 174 of the EC Treaty (now the second paragraph of Article 231 EC) (see *Timex* v *Council and Commission*, cited above, paragraph 32).

Costs

95 Under Article 87(2) of the Rules of Procedure of the Court of First Instance, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the Council has been unsuccessful, it must be ordered to bear its own costs and pay those of the applicant.

96 The Commission, as intervener, shall bear its own costs in accordance with Article 87(4) of the Rules of Procedure which provides that the institutions which intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE
(Fourth Chamber, Extended Composition)

hereby:

1. **Annuls Article 2 of Council Regulation No 2380/98 of 3 November 1998 amending Council Regulation (EC) No 1567/97 imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China in so far as the Council did not abide by all the consequences of the review findings relating to the applicant's imports of Lucci Creation's products;**

2. **Orders that the amendment of the rates of duty shall remain in force until the competent institutions have adopted the measures necessary to comply with this judgment;**

3. **Orders the Council to bear its own costs and pay those of the applicant;**

4. **Orders the Commission to bear its own costs.**

Tiili Lindh Moura Ramos

Cooke Mengozzi

Delivered in open court in Luxembourg on 29 June 2000.

H. Jung V. Tiili

Registrar President