JUDGMENT OF THE GENERAL COURT (Sixth Chamber)

13 September 2010 *

In Case T-314/06,

Whirlpool Europe Srl, established in Comerio (Italy), represented by M. Bronckers and F. Louis, lawyers,

applicant,

supported by

Italian Republic, represented by G. Albenzio, lawyer,

and by

European Committee of Domestic Equipment Manufacturers (CECED), established in Brussels (Belgium), represented by Y. Desmedt and A. Verheyden, lawyers,

interveners,

* Language of the case: English.

Council of the European Union, represented by J.-P. Hix, acting as Agent, and G. Berrisch, lawyer,

defendant,

supported by

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

and by

LG Electronics, Inc., established in Seoul (South Korea), represented initially by L. Ruessmann and P. Hecker, and subsequently by L. Ruessmann and A. Willems, lawyers,

interveners,

APPLICATION for the annulment in part of Council Regulation (EC) No 1289/2006 of 25 August 2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain side-by-side refrigerators originating in the Republic of Korea (OJ 2006 L 236, p. 11),

THE GENERAL COURT (Sixth Chamber),

composed of A.W.H. Meij (Rapporteur), President, V. Vadapalas and L. Truchot, Judges,

Registrar: C. Kantza, Administrator,

having regard to the written procedure and further to the hearing on 11 November 2009,

gives the following

Judgment

Legal context

1 The basic anti-dumping legislation is constituted by 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 ('the basic regulation') (replaced by Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, corrigendum OJ 2010 L 7, p. 22)).

2 Article 1(1) and (4) of the basic regulation (now Article 1(1) and (4) of Regulation No 1225/2009) state:

'1. An anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury.

...

4. For the purpose of this Regulation, the term "like product" shall be interpreted to mean a product which is identical, that is to say, alike in all respects, to the product under consideration, or in the absence of such a product, another product which although not alike in all respects has characteristics closely resembling those of the product under consideration.'

3 Article 15 of the basic regulation (now Article 15 of Regulation No 1225/2009) provides:

'1. Any consultations provided for in this Regulation shall take place within an Advisory Committee, which shall consist of representatives of each Member State, with a representative of the Commission as chairman. Consultations shall be held immediately at the request of a Member State or on the initiative of the Commission and in any event within a period of time which allows the time-limits set by this Regulation to be adhered to.

2. The Committee shall meet when convened by its chairman. He shall provide the Member States, as promptly as possible, but no later than 10 working days before the meeting, with all relevant information.

3. Where necessary, consultation may be in writing only; in that event, the Commission shall notify the Member States and shall specify a period within which they shall be entitled to express their opinions or to request an oral consultation which the chairman shall arrange, provided that such oral consultation can be held within a period of time which allows the time-limits set by this Regulation to be adhered to.

4. Consultation shall cover, in particular:

…

(d) the measures which, in the circumstances, are appropriate to prevent or remedy the injury caused by dumping and the ways and means of putting such measures into effect.'

4 The deadline of 10 working days which Article 15(2) of the basic regulation (now Article 15(2) of Regulation No 1225/2009) grants the chairman of the Advisory Committee to provide the Member States with all relevant information was introduced into the basic regulation by Council Regulation (EC) No 461/2004 of 8 March 2004 (OJ 2004 L 77, p. 12), recital 17 in the preamble to which states the following:

'Information provided to Member States in the Advisory Committee is often of a highly technical nature and involves an elaborate economic and legal analysis. In order to provide Member States with sufficient time to consider this information, it should be sent at the latest 10 days before the date of a meeting set by the chairman of the Advisory Committee.'

5 Article 20 of the basic regulation (now Article 20 of Regulation No 1225/2009) states:

'1. The complainants, importers and exporters and their representative associations, and representatives of the exporting country, may request disclosure of the details underlying the essential facts and considerations on the basis of which provisional

measures have been imposed. Requests for such disclosure shall be made in writing immediately following the imposition of provisional measures, and the disclosure shall be made in writing as soon as possible thereafter.

2. The parties mentioned in paragraph 1 may request final disclosure of the essential facts and considerations on the basis of which it is intended to recommend the imposition of definitive measures, or the termination of an investigation or proceedings without the imposition of measures, particular attention being paid to the disclosure of any facts or considerations which are different from those used for any provisional measures.

…

4. Final disclosure shall be given in writing. It shall be made, due regard being had to the protection of confidential information, as soon as possible and, normally, not later than one month prior to a definitive decision or the submission by the Commission of any proposal for final action pursuant to Article 9. Where the Commission is not in a position to disclose certain facts or considerations at that time, these shall be disclosed as soon as possible thereafter. Disclosure shall not prejudice any subsequent decision which may be taken by the Commission or the Council but where such decision is based on any different facts and considerations, these shall be disclosed as soon as possible.

5. Representations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter.'

Background to the dispute

1. *The market concerned by the investigation*

6 The market for combined refrigerator-freezers, which was the subject of the investigation following which the contested anti-dumping measures were adopted, is made up of three segments:

— the bottom-mount segment, in with the freezer compartment is below the refrigerator compartment;

— the top-mount segment, in which the freezer compartment is above the refrigerator compartment;

— the side-by-side segment, in which the two swing doors open to a freezer compartment and a refrigerator compartment side-by-side.

7 Recently a new type of three-door combined refrigerator-freezer came onto the market, with the freezer compartment below the refrigerator compartment all in one piece. The freezer compartment is fitted with one door, whereas two side-by-side swing doors open to the refrigerator compartment.

2. *The initial stage of the investigation procedure*

8 On 18 April 2005 the applicant, Whirlpool Europe Srl, lodged a complaint with the Commission of the European Communities on the basis of the basic regulation against imports of certain refrigerators originating in South Korea.

9 On 2 June 2005 the Commission published the notice of initiation of an anti-dumping proceeding concerning imports of certain side-by-side refrigerators originating in the Republic of Korea (OJ 2005 C 135, p. 4). According to that notice, the product allegedly being dumped was combined refrigerator-freezers of a capacity exceeding 400 litres, fitted with at least two separate external doors placed side-by-side.

10 The Commission sent questionnaires to all the parties known to be concerned by the investigation.

11 A Korean company, LG Electronics, Inc. ('LG'), claimed that all large refrigerators should have been included in the definition of the product being investigated, in so far as they all serve the same purpose, namely the conservation of food and beverages, and most of them have both a refrigerator compartment and a freezer compartment.

12 LG also submitted that the definition of the product concerned in the notice of initiation was erroneous. It stated that in the industry side-by-side refrigerators are understood to be refrigerators with a refrigerator compartment and a freezer compartment situated side-by-side, with a separate external door for each compartment. In its view, if the definition of the product concerned in the notice of initiation were maintained, certain bottom-mount freezers, namely combined refrigerator-freezers with two doors on the refrigerator compartment above and one door on the freezer

compartment below, would be included in the investigation, whereas comparable models with one door on each compartment would be excluded. LG therefore requested that all combined refrigerator-freezers with three or more doors be excluded from the procedure or that the scope of the procedure be broadened to include all combined refrigerator-freezers.

13 In short, LG submitted that it was not the external characteristics of the models, notably the doors, which are relevant, but their inner configuration. In particular, LG considered that the alignment of the refrigerator and freezer compartments was the essential basic distinguishing characteristic of a side-by-side refrigerator.

14 On 14 November 2005 the applicant provided the Commission with analyses which appeared in consumer publications that supported the inclusion of three-door refrigerators in the definition of the product concerned.

15 On 17 November 2005 LG's arguments concerning the definition of the product concerned were made known to the applicant during a meeting with the Commission. It responded to those arguments by letter of 13 December 2005. By letters of 17 and 25 January 2006, LG made further submissions to which the applicant replied on 31 January 2006. On 2 February 2006 the applicant was heard again by the Commission. On 6, 7 and 15 February 2006 LG made further submissions to the Commission on the definition of the product concerned.

3. *The provisional regulation*

16 On 28 February 2006 the Commission adopted Regulation (EC) No 355/2006 imposing a provisional anti-dumping duty on imports of certain side-by-side refrigerators originating in the Republic of Korea (OJ 2006 L 59, p. 12) ('the provisional regulation').

17 In the provisional regulation, the Commission rejected LG's argument relating to the common purpose of all large refrigerators on the ground that the side-by-side refrigerator market 'clearly is a separate and distinct market segment'. The particular physical characteristics of side-by-side refrigerators, in particular the two large doors placed side-by-side, give them their 'own specific place' on the market for combined refrigerator-freezers.

18 The Commission also rejected LG's claim that all combined refrigerator-freezers with three doors or more should be excluded from the procedure, on the ground that the investigation had led to the finding that there was no 'commonly used definition' of side-by-side refrigerators. The three-door combined models referred to by LG can, by contrast, be found on the market alongside all other models of side-by-side refrigerators.

19 The Commission provisionally concluded from this that, although there are differences in volume, optional features and materials used, all types of side-by-side refrigerators, including three-door combined models with bottom-mount freezers, shared the same basic physical and technical characteristics and were basically used for the same purposes.

20 Therefore, the Commission found that side-by-side refrigerators produced and sold in the European Union by the Community industry, on the one hand, and those produced and sold in South Korea, on the other, had essentially the same physical and technical characteristics and the same basic uses and, therefore, provisionally considered them to be alike for the purposes of Article 1(4) of the basic regulation.

21 Consequently, Article 1 of the provisional regulation states:

'A provisional anti-dumping duty is hereby imposed on [imports of] side-by-side refrigerators, i.e. combined refrigerator-freezers of a capacity exceeding 400 litres, with at least two separate external doors fitted side-by-side, falling within CN code ex 8418 10 20 (TARIC code 8418 10 20 91) and originating in the Republic of Korea.'

4. *The subsequent stage of the investigation procedure*

22 After receiving the Commission's communication of its provisional conclusions, the applicant and LG made further submissions on the definition of the product concerned. LG also sent the Commission an expert's report on a project for classification of refrigerators. In an exchange of letters, the applicant and LG explained their positions on the definition of the product concerned at greater length.

5. *The definitive disclosure document*

23 On 30 June 2006 the Commission drew up the definitive disclosure document. In that document the Commission noted that it was the standing practice of the European Union institutions when defining the product concerned to consider primarily the basic physical and technical characteristics of that product, and that models classified in different product segments were usually considered to form one single product unless 'clear dividing lines' existed between the various segments.

24 The Commission considered that the investigation had established that the traditional division into three segments of the market for large-volume combined refrigerator-freezers was undisputed and familiar to all the operators in the sector, with the result that it was not necessary to include in the definition of the product concerned all combined refrigerator-freezers, as requested by LG.

25 The Commission then stated that neither the physical characteristics (two doors side-by-side and the width of the unit) nor the considerations relating to marketing and consumer perception justified the exclusion of the three-door model from the definition of the product concerned. The Commission thus concluded that it was necessary to include the 'three-door side-by-side model' in that definition.

6. *The revised definitive disclosure document*

26 The interested parties were given until 11 July 2006 to submit their comments on the definitive disclosure document.

27 On 5 and 6 July 2006 the chairman of the Advisory Committee sent the Member States the documents concerning the definitive measures which the Commission was intending to propose.

28 On 11 July 2006 the applicant and LG submitted their comments on the definitive disclosure document. The applicant confirmed its agreement with the definition of the product concerned determined by the Commission, whereas LG once again challenged the Commission's reasoning and conclusions in that regard.

29 By letter of 14 July 2006, the Commission informed the Member States that it had changed its position regarding the definition of the product concerned, from which it henceforth excluded three-door refrigerators.

30 By letter of 17 July 2006 sent to the European Commissioner for Trade, the applicant disputed that change in position, which it had learned of informally.

31 By letter of 19 July 2006, the Commission sent the revised definitive disclosure document to the applicant, informing it of that change. In that document the Commission stated:

'Additional evidence supporting a definition of the segment of side-by-side refrigerators on the basis of the inner configuration of the compartments and not on the basis of the position of the doors was submitted by the abovementioned exporter. After definitive disclosure, in the light of further evidence provided by the same exporter, the positions expressed by some leading research institutes and classification bodies, most of which classify side-by-side refrigerators on the basis of the inner configuration and not on the basis of the position of the doors, were further assessed. This led to the conclusion that, from the point of view of physical characteristics, the three-door model cannot be considered as part of the side-by-side segment … As to consumer perception, both the claimant and the Community industry submitted consumer surveys supporting their respective views and contradicting each other. In this respect, therefore, no clear conclusion could be drawn in one direction or the other.

It stems from the above that the three-door model should be regarded as belonging to the segment of the bottom-mount refrigerators and not to the segment of the side-by-side refrigerators. …

As a consequence, it was deemed appropriate to revise the product scope definition as determined in the provisional regulation. Therefore, the product concerned is definitively defined as combined refrigerator-freezers with a capacity exceeding 400 litres and with the freezer and refrigerator compartments placed side-by-side, originating in the Republic of Korea, currently classifiable within CN code ex 8418 10 20.'

32 The applicant and the other interested parties were given until 10.00 on 31 July 2006 to submit their observations.

33 On 19 and 20 July 2006 the Advisory Committee convened and examined the definitive measures which the Commission intended to propose to the Council of the European Union, including the new definition of the product concerned from which three-door combined refrigerator-freezers were excluded.

34 By letters of 28 July 2006, the applicant and the European Committee of Domestic Equipment Manufacturers (CECED) criticised the change made to the definition of the product concerned in the revised definitive disclosure document.

35 On 31 July 2006 the Commission submitted to the Council the proposal for a regulation, COM(2006) 436 final, imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain side-by-side refrigerators originating in the Republic of Korea.

36 By letter of 9 August 2006, the Commission replied to the applicant's comments of 28 July 2006.

7. *The contested regulation*

37 On 25 August 2006 the Council adopted Regulation (EC) No 1289/2006 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of certain side-by-side refrigerators originating in the Republic of Korea (OJ 2006 L 236, p. 11) ('the contested regulation').

38 Article 1 of the contested regulation states:

'A definitive anti-dumping duty is hereby imposed on [imports of] side-by-side refrigerators, i.e. combined refrigerator-freezers of a capacity exceeding 400 litres, with the freezer and refrigerator compartments placed side-by-side, falling within CN code ex 8418 10 20 (TARIC code 8418 10 20 91) and originating in the Republic of Korea.'

Procedure and forms of order sought by the parties

39 By application lodged at the Registry of the Court on 17 November 2006, the applicant brought the present action.

40 The notice of the bringing of the action was published in the *Official Journal of the European Union* of 30 December 2006 (OJ 2006 C 326, p. 67).

41 By documents lodged at the Registry of the Court on 11 January and 14 February 2007 respectively, the Commission and LG applied to intervene in the present proceedings in support of the form of order sought by the Council.

42 By documents lodged at the Registry of the Court on 9 February 2007, CECED and Electrolux applied to intervene in the present proceedings in support of the form of order sought by the applicant.

43 By order of 26 February 2007, the President of the Third Chamber of the Court granted the Commission leave to intervene.

44 By order of 10 May 2007, the President of the Third Chamber of the Court granted CECED and LG leave to intervene.

45 By a document lodged at the Registry of the Court on 22 June 2007, the Italian Republic applied to intervene in the present proceedings in support of the form of order sought by the applicant.

46 By order of 4 September 2007, the President of the Third Chamber of the Court granted the Italian Republic leave to intervene.

47 The composition of the Chambers of the Court having been modified, the Judge-Rapporteur was assigned to the Sixth Chamber, to which this case was therefore assigned.

48 By order of 10 January 2008, the Court (Sixth Chamber) rejected Electrolux's application to intervene.

49 By order of 8 October 2009, the President of the Sixth Chamber granted the applicant's request for confidential treatment of some of its documents vis-à-vis CECED and LG, with the exception of one of the documents concerned, in respect of which the request for confidential treatment vis-à-vis LG was rejected. The full version of that document was thus served on LG.

50 Acting upon a report of the Judge-Rapporteur, the Court (Sixth Chamber) decided to open the oral procedure and, by way of measures of organisation of procedure, invited the parties to reply in writing to certain questions. The parties complied with that request within the time-limit prescribed.

51 The parties presented oral argument and replied to the questions put by the Court at the hearing on 11 November 2009.

52 The applicant, supported by the Italian Republic and CECED, claims that the Court should:

— annul the contested regulation in so far as the Council's definition of the product concerned and the like product does not include all large-volume combined refrigerator-freezers with at least two external doors placed side-by-side;

— order the Council to pay the costs.

53 The Council, supported by the Commission and LG, contends that the Court should:

— dismiss the action as inadmissible or unfounded;

— order the applicant to pay the costs.

54 Since Judge Tchipev was prevented from sitting after the closure of the oral procedure, the case was reassigned to Judge Meij, President of the Sixth Chamber, as Judge-Rapporteur, and Judge Vadapalas was designated, in accordance with Article 32(3) of the Rules of Procedure of the General Court, to complete the Chamber.

55 By order of 5 July 2010, the Court (Sixth Chamber), in its new composition, reopened the oral procedure and the parties were informed that they would be heard at a new hearing on 8 September 2010.

56 By letters of 9, 12, 14, 15 and 16 July 2010, the applicant, the Council, the Commission, CECED, LG and the Italian Republic informed the Court that they did not wish to be heard again.

57 Consequently, the President of the Sixth Chamber decided to close the oral procedure.

Law

1. *Alleged infringement of Article 116(6) of the Rules of Procedure*

58 At the hearing, the Council pointed out that the Italian Republic was not entitled to submit observations on the substance of the dispute in its application to intervene. Such observations could have been submitted only during the oral procedure.

59 The Court observes that, under Article 116(6) of the Rules of Procedure, an intervener, such as the Italian Republic, which makes an application to intervene after the expiry of the period of six weeks, laid down in Article 115(1) of the Rules of Procedure, from the date of publication in the Official Journal of the notice of initiation of proceedings is entitled only to participate in the oral procedure, to receive a copy of the Report for the Hearing and to submit its observations on the basis of that report at the hearing (Case C-113/07 P *Selex Sistemi Integrati* v *Commission* [2009] ECR I-2207, paragraph 36).

60 However, it should be noted that, as the Italian Republic stated at the hearing, the observations which it submitted in its application to intervene amounted to nothing more than a statement of the grounds which it raised in support of that application and that they therefore did not relate to the substance of the action.

61 It must therefore be concluded that the requirements of Article 116(6) of the Rules of Procedure were not infringed.

2. *The claim for annulment*

Admissibility

Arguments of the parties

62 The Council submits that the present action is inadmissible since the applicant is seeking the annulment in part of the contested regulation only in so far as the Council's definition of the product concerned and the like product does not include all large-volume combined refrigerator-freezers with at least two external doors placed side-by-side. In that regard, the Council relies on the case-law according to which the partial annulment of an act of the European Union is possible only in so far as the elements whose annulment is sought may be severed from the remainder of the act.

63 The Council also challenges the introduction by the applicant in the reply of a request for the annulment of the contested regulation or of Article 1 thereof as well as an order that the contested regulation remain in force until the European Union institutions have taken the necessary measures to comply with a judgment of the Court annulling the regulation. In the view of the Council, that request effectively changes the subject-matter of the dispute during the proceedings. Consequently, if the Court were to annul the contested regulation in its entirety or Article 1 thereof, it would be ruling *ultra petita*.

64 Finally, the Council points out that the Court cannot correct a mistake on the part of the European Union institutions by invalidating the 'last-minute exclusion' of three-door refrigerators from the scope of the anti-dumping measures at issue.

65 The applicant disputes the arguments raised by the Council in support of the inadmissibility of the action.

Findings of the Court

66 The Court takes the view that, given the circumstances in the present case, it is not necessary to rule on the arguments raised by the Council in support of the inadmissibility of the present action, since the applicant's claim for annulment must in any event be dismissed on the substance (see, to that effect, Case C-233/02 *France* v *Commission* [2004] ECR I-2759, paragraph 26).

Substance

67 The applicant raises four pleas in law in support of its claim for annulment. First, it submits that the Council and the Commission failed to respect its rights of defence in relation to the 'last-minute exclusion' of three-door refrigerators from the definition of the product concerned. Second, the institutions failed to consult the Member States in the Advisory Committee on that exclusion 'in good time', contrary to

Article 15(2) of the basic regulation. Third, sufficient reasons were not given in the contested regulation in relation to the exclusion in dispute. Fourth and finally, the institutions erred in law in choosing the method used to define the product concerned.

The first plea: infringement of the applicant's rights of defence in relation to the exclusion of three-door refrigerators from the definition of the product concerned

— Arguments of the parties

68 First, the applicant submits that the Commission drew up the revised definitive disclosure document on 19 July 2006 and that it was required, pursuant to Article 20(5) of the basic regulation (now Article 20(5) of Regulation No 1225/2009), to give the interested parties concerned at least 10 days to make their representations. Yet the Commission submitted the proposal for definitive measures to the Council on 31 July 2006, that is 'a few hours' after the expiry of the time-limit given to those parties to make their representations (see paragraph 32 above).

69 The applicant points out that a change in the definition of the like product concerns a 'fundamental element' of the anti-dumping procedure and that it is highly unusual at an advanced stage of the procedure. The applicant thus sent the Commission 30 pages of representations, along with 13 new annexes, to which no reference was made in the contested regulation. In fact, that regulation merely reiterated the findings which had

already been made in the revised definitive disclosure document which was sent on 19 July 2006.

70 The applicant also notes that the fact that the Commission waited until 9 August 2006 to reply to its representations, and did so in some detail, shows that they were meaningful and required substantial analysis; something that did not happen prior to the Commission changing its final proposal and sending it to the Council on 31 July 2006. In those circumstances, the fact that the Commission did not allow itself enough time to examine the applicant's representations rendered the latter's rights of defence redundant.

71 In that regard, the applicant also observes that the time-limit prescribed in Article 20(5) of the basic regulation is not merely a formality to be observed, but seeks to ensure the interested parties' right to make themselves heard effectively.

72 Second, the applicant submits in the reply that, with the exception of two letters and a note from the United States administration which the Council attached to the defence to demonstrate the lobbying to which the definition of the product concerned had been subject up until the last minute, none of the documents and telephone conversations which influenced the final conclusions reached by the Commission was attached to the non-confidential version of its file and thus made known to the interested parties. The Council thereby infringed the applicant's rights of defence. The Council also infringed the principles of procedural fairness and equality of arms as it did not disclose all documents pertaining to lobbying activities directed at the Commission.

73 The Council disputes the merits of this plea and the admissibility of the arguments raised by the applicant at the reply stage.

— Findings of the Court

74 Respect for the rights of the defence is a fundamental principle of European Union law, in accordance with which the undertakings affected by an investigation which terminates in the adoption of an anti-dumping regulation must be placed in such a position during the administrative procedure that they can effectively make known their views on the correctness and relevance of the facts and circumstances alleged (see Case T-35/01 *Shanghai Teraoka Electronic* v *Council* [2004] ECR II-3663, paragraphs 288 and 289 and the case-law cited).

75 That requirement is implemented in Article 20(4) of the basic regulation (now Article 20(4) of Regulation No 1225/2009), which provides that final disclosure is to be given in writing. Pursuant to that provision, where the decision which is finally adopted is based on any different facts and considerations from those in the final disclosure, 'these shall be disclosed as soon as possible'. Article 20(5) of the basic regulation states that '[r]epresentations made after final disclosure is given shall be taken into consideration only if received within a period to be set by the Commission in each case, which shall be at least 10 days, due consideration being given to the urgency of the matter'.

76 In the present case, it is not disputed that the Commission sent the applicant the revised definitive disclosure document on 19 July 2006 and gave it until 31 July 2006 to make its representations. It is also common ground that, on 28 July 2006, the

applicant made its representations on the revised definitive disclosure document and that, on 31 July 2006, that is 12 days after the revised definitive disclosure document was sent to the applicant, the Commission submitted to the Council its proposal for the definitive regulation. Consequently, the Commission was in possession of the applicant's representations before the 10-day deadline laid down in Article 20(5) of the basic regulation had expired, and waited for that deadline to expire before sending its proposal for a definitive regulation to the Council.

77 In addition, the fact that a draft proposal for a definitive regulation submitted to the Council is distributed within the Commission in accordance with a written procedure in order to gain the approval of the members of the institution does not call into question the possibility for the applicant to make itself heard effectively, since the Commission may, if necessary, stop the written procedure or amend its draft proposal in response to the representations made by the interested parties.

78 Therefore, it must be concluded that the Commission did not infringe Article 20(5) of the basic regulation. For that reason, no infringement of the applicant's rights of defence can be found.

79 That conclusion cannot be called into question by the applicant's argument that its rights of defence and its right to be informed were infringed in that it was not provided with certain letters and notes relating to telephone conversations, contrary to Article 20 of the basic regulation.

80 The applicant infers the existence of additional documents, with which it was not provided, from the existence of documents produced by the Council during the procedure before the Court, namely two letters sent by the United States authorities to the Commission and an internal e-mail of the Commission detailing a telephone conservation with the United States authorities.

81 However, the applicant merely assumes, without further evidence, that additional documents exist which influenced the Commission's final conclusions.

82 The applicant thus cannot claim in support of its plea that it was not provided with such documents.

83 In the light of all the above, the first plea must be rejected.

The second plea: the Member States in the Advisory Committee were not consulted 'in good time' on the exclusion of three-door refrigerators from the definition of the product concerned

— Arguments of the parties

84 The applicant submits that, pursuant to the second sentence of Article 15(2) of the basic regulation (now the second sentence of Article 15(2) of Regulation No 1225/2009), the chairman of the Advisory Committee has to provide the Member States, as promptly as possible, but no later than 10 working days before the meeting of that committee, with all relevant information.

85 In the applicant's submission, that provision was infringed in the present case, since the Advisory Committee was not able to give its opinion with full knowledge of the facts as its members had not been provided with all the relevant information 10 working days before its meeting on 19 and 20 July 2006. They were not informed until 14 July 2006 of the Commission's decision to exclude three-door refrigerators from the definition of the product concerned.

86 That procedural period of notice of 10 working days was included in the basic regulation to ensure that the rights of the interested parties and legal certainty are respected. The obligation to consult effectively the Member States in the Advisory Committee constitutes an essential procedural requirement in that it may have repercussions on the content of the measure which is finally adopted. The consultation of the Member States in the Advisory Committee could lead the Commission to change its position.

87 The applicant adds that the Commission's reversal of position in respect of the definition of the product concerned opened an 'entirely new debate' for which the members of the Advisory Committee needed time to prepare.

88 The Council disputes the merits of the applicant's arguments.

— Findings of the Court

89 The documents before the Court show that, at its meeting on 19 and 20 July 2006, the Advisory Committee decided on the Commission's proposal for definitive measures on the basis of information which the Member States only received in full on 14 July 2006.

90 Consequently, contrary to the requirements of Article 15(2) of the basic regulation, the Member States did not receive, 10 working days prior to the meeting of the Advisory Committee, all the information relevant to giving their views on the Commission's decision to exclude three-door refrigerators from the definition of the product concerned.

91 However, that failure to respect the period prescribed in Article 15(2) of the basic regulation cannot, in itself, constitute an infringement of an essential procedural requirement which is liable to render unlawful the procedure for consulting the Member States in the Advisory Committee and, consequently, the definition of the product concerned adopted in the contested regulation.

92 According to recital 17 in the preamble to Regulation No 461/2004, which amended the basic regulation in that regard, information provided to Member States in the Advisory Committee 'should' be sent at the latest 10 days before the date of a meeting set by the chairman of the Advisory Committee '[i]n order to provide Member States with sufficient time to consider this information'.

93 It can be inferred from the wording of that recital and, in particular, from the use of the conditional ('should') that failure to observe the period of notice at issue does not render the procedure for consulting the Member States in the Advisory Committee null and void; rather, the requirements of Article 15(2) of the basic regulation may be satisfied where the Member States are actually given enough time to examine the information which they are provided with by the chairman of the Advisory Committee (see, by analogy, Case T-317/02 *FICF and Others* v *Commission* [2004] ECR II-4325, paragraph 188 and the case-law cited).

94 The applicant has not established that the Member States lacked the time necessary to be able to take proper note of the information relating to the new definition of the product concerned adopted by the Commission and that the Advisory Committee was thus not able to give its opinion in full knowledge of the facts.

95 On the contrary, it is apparent from the file that the question of the definition of the product concerned had been discussed in detail by the representatives of the Member States at the various meetings of the Advisory Committee held during the investigation and that that definition had been addressed, inter alia, in the documents relating to the definitive measures which the Commission sent to the Member States on 5 July 2006.

96 It must thus be concluded that the failure to comply with the period prescribed in Article 15(2) of the basic regulation could not have had an impact on the outcome of the consultation procedure or, consequently, on the definition of the product concerned finally adopted in the contested regulation (see, to that effect, Case T-69/89 *RTE* v *Commission* [1991] ECR II-485, paragraph 27, and Case T-290/94 *Kaysersberg* v *Commission* [1997] ECR II-2137, paragraph 88).

97 Consequently, the Italian Republic argued in vain at the hearing that the failure to comply with the period of notice at issue had deprived the members of the Advisory Committee of the opportunity to challenge effectively the change in the definition of the product concerned.

98 In that regard, it should also be noted that the Council pointed out, without being challenged, that although certain Member States had requested and obtained, at that meeting, an additional period of notice expiring on 27 July 2006 to submit in writing their opinions on the Commission's proposal for definitive measures, none of them had stated, however, that that period was insufficient or requested another additional period to submit their views.

99 In those circumstances, the second plea must be rejected.

The third plea: lack of reasoning in the contested regulation in relation to the definition of the product concerned

— Arguments of the parties

100 The applicant submits that the reasoning in the contested regulation in relation to the definition of the product concerned which was finally adopted does not enable it to understand or challenge the validity of the final conclusions drawn on that matter by the Council and the Commission and does not enable the Court to exercise its power of review in that regard.

101 In the light of the fundamental nature and lateness of the Commission's reversal of its position in respect of its definition of the product concerned, the statement of reasons in the contested regulation is not sufficient for an understanding of the reasoning process followed in response to the detailed arguments and the evidence furnished in relation to that issue for over a year.

102 Instead of merely stating their new definition of the product concerned, basing that definition on the facts and material elements used beforehand, the institutions should have explained why the criterion based on the inner configuration of large combined refrigerator-freezers, based exclusively on their physical characteristics, was to replace the criterion based on their external characteristics, namely the presence of at least two separate swing doors fitted side-by-side, which until that point had been thought appropriate in respect of both the physical characteristics of the appliances and consumer perception.

103 The institutions could not summarily dismiss the latter parameter when the interested parties and the Commission had debated it keenly and it had been regarded as the main reason behind the initial definition of the product concerned. Sufficient reasons were not given for the finding that consumer perception was no longer decisive. Where, as in the present case, the European Union institutions reject consumer surveys on the grounds that they contradict each other, they are required to explain why such contradictions are particularly troublesome to them.

104 The recitals in the preamble to the contested regulation state that the European Union institutions were led to exclude the three-door model from the definition of the product concerned after having examined in more detail the positions expressed by some research institutes and classification bodies, in the light of the additional evidence which LG furnished after receipt of the definitive disclosure document.

105 First, LG did not furnish any additional evidence, but merely repeated the assertion that the inner configuration of the product was more important than its external physical characteristics and forwarded a letter dated 10 July 2006 from an institute reiterating an opinion which it had submitted to the Commission in April 2006, accusing the latter of not having followed that opinion in its definitive disclosure document.

106 Second, the Council and the Commission failed to explain why the positions expressed by some research institutes and classification bodies, most of which classify side-by-side combined refrigerators on the basis of the inner configuration and not on the basis of the position of the doors, had led them to the conclusion that, from the point of view of physical characteristics, the three-door model could not be regarded as part of the side-by-side segment. They also did not verify the authority of those purportedly 'leading' establishments.

107 Moreover, the Council and the Commission should have explained why certain evidence in the file since October 2005 had not been regarded as persuasive for the purposes of the investigation and why they had also not taken account of other evidence, such as publications of independent consumer organisations, some of which concerned three-door combined models explicitly.

108 The applicant adds that the institutions' practice is not to create divisions in the product scope unless there are 'clear dividing lines' between segments. In the present case, there are no 'clear dividing lines' between the two-door and the three-door side-by-side combined refrigerator-freezers. The institutions did not explain why, in the absence of 'clear dividing lines', they felt compelled to make their own division.

109 Finally, the applicant supposes that the 'abrupt' about-face on the part of the institutions was caused by 'last-minute lobbying', which does not however appear in the statement of reasons for the contested regulation.

110 The Council disputes the merits of the applicant's arguments.

— Findings of the Court

111 The statement of reasons for an act of the European Union institutions must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in such a way as to enable the persons concerned to ascertain the reasons for the adopted measure and defend their rights and to enable the Court

to exercise its power of review (Joined Cases T-134/03 and T-135/03 *Common Market Fertilizers* v *Commission* [2005] ECR II-3923, paragraph 156).

112 The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations (Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

113 The question whether the statement of reasons is sufficient must be assessed in the light not only of its wording but also of its context and all the legal rules governing the matter in question (Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86, and *Kaysersberg* v *Commission*, paragraph 150).

114 Provided that a regulation imposing definitive anti-dumping duties, as in the present case, falls within the general scheme of a series of measures, it cannot be required that its statement of reasons specify the often very numerous and complex matters of fact and law dealt with in the regulation or that the institutions adopt a position on all the arguments relied on by the parties concerned. On the contrary, it is sufficient for the institution which adopted the measure to set out the facts and the legal considerations having decisive importance in the scheme of the contested regulation.

115 It is true that the statement of reasons for a regulation imposing anti-dumping duties must be assessed by taking account, inter alia, of the information which has been communicated by the European Union institutions to the interested parties and the submissions made by those parties during the investigation procedure. However, the institutions are not required to give specific reasons for a decision not to take account of the various arguments raised by the interested parties. It is sufficient that the

regulation contain clear justification for the main points of their analysis, provided that that justification is capable of casting light on the reasons why they rejected the relevant arguments raised by the parties during the administrative procedure.

116 Moreover, a regulation imposing anti-dumping duties following an investigation procedure has to be reasoned only as regards all the elements of fact and of law that are relevant for the purposes of the findings made in it. The statement of reasons for such a measure does not seek to explain the development of the position of the institutions during the administrative procedure and is thus not aimed at justifying the differences between the solution adopted in the final measure and the provisional position set out in the documents sent to the interested parties during that procedure to enable them to submit their observations. That obligation thus also does not require the institutions to explain why a position which they envisaged at a certain stage of the administrative procedure turned out to be unfounded.

117 In the present case, as is apparent from recitals 10 and 11 in the preamble to the contested regulation, the definition of the product concerned is based on the twofold premiss that the market for large combined refrigerator-freezers is traditionally divided into three segments (see paragraph 6 above), and that there exists 'a clear dividing line' between those three segments.

118 In order to determine whether large three-door combined refrigerator-freezers fall within the bottom-mount segment or the side-by-side segment, in recital 13 in the preamble to the contested regulation the Commission first defined the product concerned on the basis of its external characteristics, namely the presence of at least two separate swing doors placed side-by-side, basing its definition both on the physical characteristics of the product and on consumer perception, whereas the applicant defined and presented the three-door model as a side-by-side refrigerator.

119 That recital states that, at that preliminary stage of the investigation, the Commission did not consider, in the absence of conclusive evidence and a commonly used definition of side-by-side combined refrigerator-freezers, that the different alignment of the refrigerator and freezer compartments in the side-by-side model and in the three-door model constituted a decisive distinguishing criterion making it possible to exclude the three-door model from the definition of the product concerned.

120 As is apparent from recital 14 in the preamble to the contested regulation, the Commission considered however that it should in the course of its investigation make a more detailed assessment of the positions expressed by some leading research institutes and classification bodies, most of which classify side-by-side combined refrigerator-freezers on the basis of the inner configuration and not the position of their doors.

121 It is stated in that recital that the Commission was thus led to revise the definition of the product concerned adopted in the provisional regulation and to exclude definitively, on the basis of its physical characteristics, the three-door model from the side-by-side segment, as is apparent from recital 15 in the preamble to the contested regulation.

122 In that regard, it is stated in recital 14 in the preamble to the contested regulation that the Commission dismissed the consumer perception criterion as unable to support a clear conclusion in one direction or the other as to whether to include three-door refrigerators in the definition of the product concerned, in the light of the contradictory results of the consumer surveys which the applicant and the Community industry had submitted in support of their respective points of view.

123 In those circumstances, as stated in recital 15 in the preamble to the contested regulation, the institutions considered that the three-door model belonged to the bottom-mount segment and not to the side-by-side segment.

124 It must thus be concluded that the institutions gave sufficient reasoning for their decision to exclude three-door combined refrigerator-freezers from the definition of the product concerned by stating that the consumer surveys contradicted each other, since it is apparent from that finding that, as a result of such a contradiction, no indisputable conclusion could be drawn from those surveys in relation to the consumer perception criterion.

125 Having noted that it was impossible to decide on the basis of the consumer perception criterion, the institutions based their decision on the positions expressed by the leading research institutes and classification bodies, the majority of which classify side-by-side combined refrigerator-freezers on the basis of their inner configuration and not the position of the doors.

126 Such a reference constitutes sufficient reasoning for the definition of the product concerned adopted in the contested regulation.

127 The applicant thus wrongly accuses the institutions of having failed to explain why, in the absence of a 'clear dividing line' between two-door and three-door side-by-side combined refrigerator-freezers, they felt it necessary to make their own distinction; in stating that the main characteristic of side-by-side combined refrigerator-freezers resides in the layout of the compartments, the institutions thereby even established that criterion as a dividing line between side-by-side combined refrigerator-freezers and three-door combined refrigerator-freezers, without there being any need for further explanation in that regard.

128 In addition, it should be noted that the infringement of the duty to state reasons constitutes a plea of infringement of an essential procedural requirement, which, as such, is different from a plea that the grounds of the decision are inaccurate, the latter plea being a matter to be reviewed by the Court when it examines the substance of that decision (*Commission* v *Sytraval and Brink's France*, paragraph 67; see also, to that effect, Case T-48/04 *Qualcomm* v *Commission* [2009] ECR II-2029, paragraph 179).

129 In order to comply with the duty to give reasons, it was thus sufficient for the institutions to set out, as they did, the reasons for having finally decided to exclude three-door combined refrigerator-freezers from the definition of the product concerned, contrary to what they had decided in an initial definition, the provisional nature of which was indeed noted expressly in recital 17 in the preamble to the provisional regulation, without being required to address all the factual and legal elements dealt with during the administrative procedure in order to justify that exclusion.

130 In those circumstances, it must be concluded that the statement of reasons for the contested regulation in relation to the definition of the product concerned enabled the applicant, which moreover was closely involved in the administrative procedure and consequently familiar with the problem of the definition of the product concerned, to understand and dispute the merits of the solution which was finally adopted, and the Court to exercise its power of review in that regard, as is indeed apparent from the examination of the fourth plea.

131 Consequently, the applicant's argument that the change in the definition of the product concerned was brought about by 'last-minute lobbying' which is not mentioned in the grounds of the contested regulation cannot, in any event, be usefully relied on, since it is apparent from all the above that the contested regulation sets out, to the required legal standard, the elements of fact and of law that are relevant for the purposes of the findings made in it.

132 In the light of all the above, the third plea must be rejected.

The fourth plea: error of law in choosing the method used to define the product concerned

— Arguments of the parties

133 The applicant claims that the method used to define the scope of the product concerned is contrary to Article 1(1) and (4) of the basic regulation in so far as the Council did not take account of consumer perception.

134 The applicant submits that the differences in the physical characteristics of the refrigerators at issue are so minimal that they do not affect the end use of those products. Physical differences can justify making a distinction between products only when they matter to consumers. Thus, given that the differences in the physical characteristics of the refrigerators do not influence their end use, the institutions could not ignore their limited impact on consumer perception. Consequently, the Council erred in dismissing the evidence relating to consumer perception in the present case.

135 In that regard, the applicant submits that, in Regulation (EEC) No 1418/88 of 17 May 1988 imposing a provisional anti-dumping duty on imports of serial-impact dot-matrix printers originating in Japan (OJ 1988 L 130, p. 12), the Commission itself considered that minor differences which do not concern the basic physical and technical characteristics of the products should make it possible to rule out the similarity of the products only where those differences have the effect that the application, use or consumer perception of the products in question are fundamentally different (recital 12 in the preamble to Regulation No 1418/88). In so far as the European Union institutions considered that the evidence relating to consumer perception was not conclusive, they should have adopted a broader definition of the product concerned, which includes three-door refrigerators.

136 The applicant states that it does not dispute the Council's factual assessment for the purpose of the definition of the product concerned, and merely pleads an error of law relating to the method used in defining the product concerned.

137 The Council disputes the merits of this plea.

— Findings of the Court

138 It must be pointed out, first of all, that the purpose of the definition of the product concerned in an anti-dumping investigation is to aid in drawing up the list of the products which will, if necessary, be subject to the imposition of anti-dumping duties. For the purposes of that process, the European Union institutions may take account of a number of factors, such as, inter alia, the physical, technical and chemical

characteristics of the products, their use, interchangeability, consumer perception, distribution channels, manufacturing process, costs of production and quality.

139 In the present case, as is apparent from the examination of the third plea, the Council stated, in recital 13 in the preamble to the contested regulation, that, from the time when the Commission initiated the procedure, the examination of the product concerned was carried out in the light of both the physical and technical characteristics and the consumer perception of the products at issue. In recital 14 in the preamble to the contested regulation, after having examined the evidence and the positions expressed by some leading research institutes and classification bodies, which support a definition of the side-by-side refrigerator segment based on the inner configuration of the compartments and not on the positioning of the doors, the Council came to the conclusion that, from the point of view of physical characteristics, the three-door model could not be regarded as part of the side-by-side segment. Next, having examined consumer perception, the Council considered that the items of evidence furnished in that regard by the applicant and by the Community industry 'contradict[ed] each other', with the result that they did not enable any clear conclusion to be drawn in relation to the definition of the product concerned.

140 The Court thus finds, contrary to the applicant's claims, that the Council examined the evidence relating to consumer perception, but came to the conclusion that that evidence was contradictory and, consequently, that it was not conclusive for the purposes of the definition of the product concerned. The applicant's argument that the Council overlooked consumer perception must therefore be rejected as having no factual basis.

141 As regards the applicant's claim that physical differences can justify making a distinction between products only when they matter to consumers, that claim has no basis either in the basic regulation or in the case-law. As is apparent from paragraph 138 above, the European Union institutions may take account of a number of factors when defining the product concerned, among which the physical, technical and chemical

characteristics of the products are naturally important, but without necessarily having priority. In any event, it cannot be considered that the differences in the physical or technical characteristics are relevant only when they are reflected in consumer perception.

142 Next, as regards the applicant's claim that the differences in the physical and technical characteristics of refrigerators are minor or subtle, suffice it to note that that factual assessment does not appear in the contested regulation. On the contrary, it is apparent from recitals 14 and 15 in the preamble to the regulation that, in the assessment of the physical characteristics of the refrigerators, the Council attached more importance to their inner configuration than to the position of the doors, and then considered that the differences it found were justification for not regarding the three-door model as part of the side-by-side segment. The applicant explicitly did not challenge the Council's factual assessment.

143 Therefore, the premiss which is the basis of the applicant's arguments that the physical and technical characteristics of the products examined display only minor differences rests on a mere assertion which is not supported by any evidence as to its correctness.

144 On that ground, it is also necessary to reject the claim that, since the evidence concerning consumer perception had not been regarded as conclusive, the definition of the product concerned should have included three-door refrigerators.

145 In the light of all the above, the fourth plea must be rejected.

146 It follows that the action must be dismissed in its entirety.

Costs

147 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings.

148 As the applicant has been unsuccessful, it must be ordered to pay, in addition to its own costs, those incurred by the Council and LG, in accordance with the form of order they sought.

149 CECED will bear its own costs.

150 In addition, under the first subparagraph of Article 87(4) of the Rules of Procedure, Member States and institutions which have intervened in the proceedings are to bear their own costs.

151 The Italian Republic and the Commission will thus bear their own costs.

On those grounds,

THE GENERAL COURT (Sixth Chamber)

hereby:

1. Dismisses the action;

2. Orders Whirlpool Europe Srl to bear its own costs and to pay those incurred by the Council of the European Union and LG Electronics, Inc.;

3. Orders the Italian Republic, the European Commission and the European Committee of Domestic Equipment Manufacturers (CECED) to bear their own costs.

Meij Vadapalas Truchot

Delivered in open court in Luxembourg on 13 September 2010.

[Signatures]

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