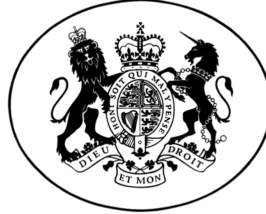
[2012] UKFTT 766 (TC)



TC02421

Appeal numbers: LON/2007/7058, LON/2007/7081, LON/2007/7082

CUSTOM DUTY – anti-dumping duty - whether regulation EC 1470/2001 invalidated by manifest errors of assessment – held no - whether question should be referred to CJEU – held no – appeals dismissed

FIRST-TIER TRIBUNAL
TAX CHAMBER

TARGETTI (UK) LIMITED **Appellant**

- and -

THE COMMISSIONERS FOR HER MAJESTY'S REVENUE & CUSTOMS **Respondents**

TRIBUNAL: JUDGE GREG SINFIELD

Sitting in public at 45 Bedford Square, London on 16 - 19 July 2012

Timothy Lyons QC, counsel, instructed by Avv. Dr Maurizio Gambardella for the Appellant

Kieron Beal QC, counsel, instructed by the General Counsel and Solicitor for HM Revenue and Customs, for the Respondents

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DECISION

Introduction

1. Targetti (UK) Limited ("Targetti") appeals against three decisions of the Respondents ("HMRC") on reviews under section 16 Finance Act 1994. The review decisions confirmed a Post-clearance Demand for duty and VAT and refused two claims for repayment of duty and VAT. In all three cases, the duty and VAT related to compact fluorescent lamps with integrated electronic components ("CFL-i") imported by Targetti.

2. The disputed duty was chargeable pursuant to Council Regulation (EC) No 1470/2001 of 16 July 2001 ("the Definitive ADD Regulation") imposing a definitive anti-dumping duty on imports of CFL-i originating in the People's Republic of China ("PRC"). There is no challenge to the customs duty classification of the CFL-i or their origin in the PRC. Targetti appeals against the decisions confirming that duty is payable and refusing the repayment claims solely on the ground that the Definitive ADD Regulation is invalid.

3. Mr Timothy Lyons QC, who appeared for Targetti, submitted that the Definitive ADD Regulation is rendered invalid in its entirety by a number of manifest errors and procedural irregularities. Targetti alleged manifest errors in relation to the Community interest, the existence of dumping, the assessment of material injury to the Community interest and in relation to the causation of injury by dumping. Targetti also claimed that the Regulation fails to state adequately the reasons on which it is based contrary to Article 253 of the EC Treaty and breaches general principles of EU law, namely the principles of legal certainty and duty of "good", "sound" or "proper" administration". Mr Kieron Beal QC, who appeared for HMRC, submitted that the matters raised by Targetti do not cast any doubt on the validity of the Definitive ADD Regulation so no reference to the CJEU is necessary. In addition, HMRC contended that the reference is not admissible as Targetti would have had standing to challenge the Definitive ADD Regulation in a direct action before the CJEU but failed to do so.

4. The Tribunal (or any other national court) cannot declare Community legislation invalid. If the Tribunal considers that one or more of the arguments in relation to the validity of the Definitive ADD Regulation are reasonably arguable or not unfounded then it must stay the proceedings and make a reference to the Court of Justice of the European Union ("CJEU") for a preliminary ruling on the Regulation's validity (see Case C-344/04 *The Queen on the application of International Air Transport Association and European Low Fares Airline Association v Department for Transport* [2006] ECR I-403 at [29] and [30] "*IATA and ELFAA*").

5. For the reasons set out below, I have concluded that none of Targetti's submissions that the Definitive ADD Regulation is invalid are reasonably arguable and, therefore, the Tribunal should not make a reference to the CJEU for a preliminary ruling.

Facts

6. There was a statement of agreed facts. Witness statements were produced by Dr Maurizio Gambardella, Dr Tommaso Nannelli, Mr Gherardo Nardi Dei and Mr Cliff Stevenson on behalf of Targetti and by Ms Jan Pond on behalf of HMRC. The witness statements were admitted as evidence in chief. The witnesses for Targetti all gave oral evidence and were cross-examined. On the basis of the evidence, I find the material facts concerning the background to the dispute to be as set out below. Evidence in relation to the alleged manifest errors in the Definitive ADD Regulation was principally provided by Mr Stevenson and Mr Nardi Dei and I consider that evidence in the context of the alleged errors below. The bundle of documents included correspondence and various documents that had been provided by the European Commission ("the Commission") to Targetti following a request for sincere co-operation by the Tribunal in 2009.

7. In 2000, the European Lighting Companies Federation, representing Community producers of CFL-i, lodged a complaint with the Commission alleging dumping of CFL-i by exporters in the PRC. The Commission initiated an anti-dumping investigation shortly thereafter.

8. Mr Nardi Dei, formerly the director of research and development at Targetti Sankey SpA which is the parent company of Targetti, described the construction of the CFL-i. The CFL-i consist of a plastic socket with a screw-fitting onto which are glued cleaned glass tubes. The plastic socket contains an electronic circuit and electrolytic capacitor. The glass tubes contain mercury, gas, fluorescent white powder and two filaments connected to the electronic circuit. The electronic circuit transmits an electric pulse through the filaments into the gas. The subsequent chemical reaction produces ultraviolet light, which stimulates the white fluorescent powder to emit visible light. Mr. Nardi Dei's evidence was that there were various differences between CFL-i manufactured in the EU and those made in the PRC. The differences included differences in component quality, materials, appearance and assembly. Mr Nardi Dei said that the differences would have an effect on the performance and reliability of the products.

9. By Council Regulation (EC) No 255/2001 of 7 February 2001 ("the Provisional ADD Regulation"), the Commission imposed provisional anti-dumping duties on exports of CFL-i from the PRC with particular rates for a number of specified PRC manufacturers, as well as a country-wide rate of 74.4% for all the other PRC manufacturers. The recitals to the Provisional ADD Regulation set out the background to the investigation, the steps taken in the course of the investigation and the Commission's findings. I comment on the specific recitals, where relevant, when considering the submissions below. The Provisional ADD Regulation came into force on 9 February 2001 and was stated to apply for a period of six months.

10. The Definitive ADD Regulation confirmed the Provisional ADD Regulation, subject to some further findings and revisions of calculations, and imposed the definitive anti-dumping duty on imports of CFL-i originating in the PRC with effect from 20 July 2001. The Regulation provided for particular rates in relation to

specified manufacturers and a country-wide rate of 66.1% for all other manufacturers. Targetti paid the country-wide rate on its imports of CFL-I which are the subject of this appeal.

11. Targetti was incorporated in the UK on 4 December 2001. At all relevant times, Targetti's principal activity has been the provision of interior and exterior architectural lighting. At the time of the importations in question, its principal place of business was in London E1.

12. By Council Regulation (EC) No 866/2005 of 6 June 2005, the Council extended the anti-dumping measures imposed by the Definitive ADD Regulation so that they covered imports of CFL-i consigned from the Socialist Republic of Vietnam, the Islamic Republic of Pakistan and the Republic of the Philippines.

13. By Council Regulation (EC) No 1322/2006 of 1 September 2006, the Council amended the anti-dumping measures in force so that direct current voltage lamps (known as DC-CFL-i) were excluded from the scope of the measures which thereafter encompassed only CFL-i which were capable of functioning on an alternating current (known as AC-CFL-i).

14. This appeal relates to two importations of CFL-i which Targetti acquired from Hangzhou Duralamp Electronics Co Limited in the PRC in 2007. Targetti imported the CFL-i into the UK for sale on the UK market. There is no dispute that these products were liable on importation to the anti-dumping duty imposed by the Definitive ADD Regulation.

15. The first of the two importations with which this appeal is concerned was of 5,000 CFL-i in 50 cartons. It took place in March 2007. The price was US $11,300, including freight charges. The goods were shipped by air from Shanghai to Gatwick airport. The terms of sale were that the goods were delivered duty and VAT unpaid. The goods were entered for free circulation on 19 March 2007.

16. Initially, Targetti paid duty of £171.54 and VAT of £1,218.41 in respect of the CFL-i. This was the duty and tax appropriate to a commodity classification under CN code 85 3929 9290. It is not disputed that the correct classification should have been CN code 85 3931 9095 which carried liability to the anti-dumping duty.

17. On 22 March 2007, Targetti's agent, Davies Turner Air Cargo Limited, made a voluntary declaration on behalf of Targetti that too little duty had been paid.

18. On 17 April 2007, HMRC issued a post-clearance demand note C18 seeking an additional sum of £4,934.61 which was sent to Targetti by letter the following day. The sum of £4,934.61 consists of anti-dumping duty of £4,199.66 and additional VAT of £734.95. The anti-dumping duty was charged at a rate of 66.1%. This was the country-wide duty rate contained in Article 1(2) of the Definitive ADD Regulation. On 23 April, the amount of £4,934.61 was paid by being debited from the deferment account of Davies Turner Air Cargo Limited.

19. The second of the two importations with which this appeal is concerned was of 200 CFL-i in four cartons. It took place in April 2007. The price was US $1,570, including freight charges. The goods were shipped by air from Shanghai to Gatwick airport. The terms of sale were that the goods were delivered duty and VAT unpaid. The goods were entered for free circulation on 27 April. Duty of £550.90 and VAT of £254.16 was paid in respect of the CFL-i which were classified under CN code 85 3931 9095. The anti-dumping duty was charged at the country-wide rate of 66.1%.

20. By a letter dated 23 May 2007, Targetti sought a formal departmental review of the decision to issue the post-clearance demand note C18 of 17 April in relation to the first importation.

21. By a form C285 dated 8 June 2007, Targetti claimed repayments of duty and VAT in relation to the first and second importations. Targetti claimed a repayment of £4,934.59, being duty of £4,199.65 and VAT of £734.94, in relation to the first importation and of £622.24, being £529.57 anti-dumping duty and £92.67 VAT, in relation to the second importation.

22. In a letter dated 9 July 2007, Ms Jan Pond, the HMRC reviewing officer, confirmed the decision to issue the C18 of 17 April 2007. Targetti appealed against the review decision. By letter dated 11 July, HMRC rejected the claims for repayment of duty and VAT in relation to the first and second importations made by Targetti in June.

23. In a letter dated 22 August 2007, Targetti sought a formal departmental review of the decision contained in the letter dated 11 July refusing the repayment of duty and VAT in relation to the first and second importations.

24. In a letter dated 27 September 2007, Ms Jan Pond upheld the decision to reject Targetti's claim for repayment of duty and VAT in relation to the first and second importations. Targetti appealed against the review decision.

25. By Council Regulation (EC) No 1205/2007 of 15 October 2007, a definitive anti-dumping duty was imposed, following an expiry review, on imports of CFL-i of the description contained in Article 1 of the regulation and originating in the PRC. The country-wide rate of duty was 66.1%. By virtue of Article 1(3), the duty was extended to Vietnam, Pakistan and the Philippines. The Regulation entered into force on 17 October 2007 for a period of one year. The period has now expired and there is no longer any anti-dumping duty imposed on CFL-i originating in the PRC.

Admissibility of the reference

26. HMRC contended that, even if Targetti's arguments on invalidity are reasonably arguable, the Tribunal should not make a reference in this case because it is not admissible. I accept that the Tribunal should not make a reference if I consider that the CJEU will rule that the reference is inadmissible.

27. HMRC submitted that if a person could have brought a direct action to challenge a regulation and failed to do so then a collateral action to challenge the

regulation will be inadmissible. It is clear from Case C-239/99 *Nachi Europe GmbH v Hauptzollamt Krefeld* [2001] ECR I-1197 at [29] – [40] that if an importer of products subject to anti-dumping duty undoubtedly had a right to challenge the imposition of the duty but failed to do within the two month time limit in Article 263 of the Treaty on the Functioning of the European Union ("TFEU") then the importer cannot subsequently plead the invalidity of that anti-dumping duty before a national court and any reference would be inadmissible.

28. HMRC accepted that, as Targetti was not incorporated until after the expiry of the time limit for challenging the Definitive ADD Regulation, it could not have challenged the regulation at the time of its introduction. Nevertheless, HMRC contended that Targetti could have challenged the Definitive ADD Regulation by challenging the subsequent amending regulations in 2005, 2006 and 2007. HMRC relied on Case C-299/05 *Commission v Parliament and Council* [2007] ECR I-8695 in which the CJEU stated at [30] that "where a provision in a regulation is amended, a fresh right of action arises, not only against that provision alone, but also against all the provisions which, even if not amended, form a whole with it". HMRC submitted that Targetti could have challenged the amending regulations because Targetti is associated with Hangzhou Duralamp, one of the Chinese exporters affected by the regulation (see Case 277/85 *Canon Inc v Council* [1988] ECR 5731 at [8] and *Nachi Europe* at [38] and [39]). HMRC submitted that the amending regulations were free-standing measures susceptible to challenge by Targetti. HMRC pointed out that Hangzhou Duralamp has challenged the 2007 amending regulation and the hearing before the General Court of the European Union (formerly the Court of First Instance and together referred to as "the GCEU") was due to take place in September. HMRC also invited the Tribunal to infer from the circumstances of the importation that the dispute had been artificially generated by Targetti in order to challenge the Definitive ADD Regulation.

29. Targetti's position was that the amending regulations are not of direct and individual concern to Targetti and so it would not have standing under Article 263 TFEU to challenge the amending regulations. The anti-dumping duty was not a matter of direct and individual concern to Targetti in the sense explained by the CJEU in Case C-263/02 P *Commission v Jégo-Quéré & Cie SA* [2004] ECR I-3425 at [45] where the CJEU observed that:

> "… natural or legal persons cannot be individually concerned by ... a measure unless they are affected by it by reason of certain attributes peculiar to them, or by reason of a factual situation which differentiates them from all other persons and distinguishes them individually in the same way as an addressee."

30. Even if it could be argued that the regulations were of direct and individual concern to it, Targetti submitted that the position is not beyond doubt relying on Case C-550/09 *E and F* [2010] ECR I-6213 at [44] – [50] and Case C-494/09 *Bolton Alimentari SpA v Agenzia delle Dogane* [2011] ECR I-647 at [22] – [23] in which the CJEU said that, in this context, the admissibility of a direct action must be beyond any doubt before holding that a reference was not admissible.

31. Targetti does not deny that it was associated with Hangzhou Duralamp but says that the company was a joint venture with Chinese investors and, accordingly, it was not related for these purposes. Targetti submitted that the ECJ in *Canon* was dealing with subsidiaries. The evidence of Dr Maurizio Gambardella was that Targetti did not control Hangzhou Duralamp. Hangzhou Duralamp was founded on 31 December 2002 as a joint venture company between Duralamp International SA, a Luxembourg company, and some Chinese investors and the majority of the board was Chinese.

32. Targetti referred to Joined Cases 239/82 and 275/82 *Allied Corporation v Commission* [1984] ECR 1005 in which the CJEU held at [12] that "measures imposing anti-dumping duties are liable to be of direct and individual concern to those producers and exporters who are able to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations". The CJEU went onto to hold that the position was different for an importer established in one of the Member States that was not referred to in any of the measures and the fact that the importer acted as importing agent for the producer and exporter did not alter that conclusion. The CJEU held, at [15], that the importer could bring an action in a national court and put forward its argument against the validity of the regulations.

33. Having considered the submissions by both parties, it seems to me that it is not possible to say that it is beyond doubt that Targetti had a right to challenge the amending regulations by direct action. It is not disputed that the regulations were not addressed to Targetti. The *Allied Corporation* case shows that simply being an importer will not give a person sufficient interest to challenge regulations imposing anti-dumping duties. I accept that where an importer is related to or associated with an exporter who is affected by the measure then the importer can bring an action. In my view, it has not been established in this case that Targetti was a related or associated importer in relation to Hangzhou Duralamp. Article 4(2) of Council regulation (EC) No 384/96 on protection against dumped imports ("the Basic Regulation") provides that two persons are considered to be related where one controls the other or both are controlled by or control a third person. In this case, the evidence shows that Targetti and Hangzhou Duralamp were engaged in a joint venture but does not, in my view, establish the necessary control. The involvement of Chinese investors, who form a majority of the board, in particular appeared to establish that the two companies operated with a degree of independence that shows they were not related in the way described in Article 4(2) of the Basic Regulation. Further, I am not satisfied that the dispute which led to this appeal has been artificially generated in such a way as to make a reference an abuse. It seems to me that the facts described above give rise to a genuine dispute. I have not seen any evidence to support HMRC's assertion that the facts giving rise to the appeal have been artificially created or to justify accepting HMRC's invitation to infer that the dispute is not real. In conclusion, I consider that it is not beyond doubt that a reference in this case would be ruled to be inadmissible by the CJEU and, accordingly, I will make a reference if I am satisfied that it is right to do so.

Test for whether to refer question on validity of a regulation to the CJEU

34. Targetti contended that the Tribunal must refer a question to the CJEU if the arguments that the Definitive ADD Regulation is invalid are not "unfounded" (see *IATA and ELFAA* at [29] and [30]). HMRC submitted that the burden of proof is on Targetti to satisfy the Tribunal that its arguments that the Definitive ADD Regulation is invalid are well-founded. In *R (Telefonica O2 Europe Plc) v Secretary for State for Business Enterprise and Regulatory Reform* [2007] EWHC 3018 (Admin), Mitting J expressed the test at [4] as whether the challenge to validity was "reasonably arguable or, put negatively, not unfounded". In my view, Mitting J's formulation of the test shows that it is not necessary to distinguish between "well-founded" and "founded" when evaluating the strength of the arguments in favour of invalidity. I consider that the Tribunal should make a reference if I am satisfied that Targetti's submissions that the Definitive ADD Regulation is invalid are reasonably arguable.

Introduction to challenges to validity

35. The legal framework within which anti-dumping duties may be imposed in the EU is set out in the Basic Regulation. Article 1(1) of the Basic Regulation provides that an anti-dumping duty may be applied to any dumped product whose release for free circulation in the Community causes injury. A product is to be considered as being dumped if its export price to the Community is less than a comparable price for the like product in the ordinary course of trade, as established for the exporting country (see Article 1(2)). Like product is defined by Article 1(4) as 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.

36. The Basic Regulation sets out four main criteria that must be satisfied for anti-dumping duty to be imposed. There must have been:

(1) dumping (Articles 1(2) and 2);

(2) material injury to the Community industry or the threat of such material injury (Articles 3 and 4)

(3) caused by the dumping (Article 3(6)); and

(4) duty must not be imposed where, on the basis of information submitted, it is clearly not in the Community interest to do so (Article 21).

37. Further, the level of duty imposed must not exceed the margin of dumping established and should be less than that if duty at a lower level would be adequate to remove injury to the Community industry ("the lesser duty rule" - see the final sentence of Article 9(4) of the Basic Regulation).

38. Targetti contended that serious errors were made in relation to each of the criteria set out above and, consequently, the Definitive ADD Regulation is invalid. Targetti alleges that there are manifest errors of appraisal in relation to

(1) the Community interest;

(2) the assessment of dumping; and

(3) the assessment of injury and the causation of injury.

39. In addition, Targetti submitted that, contrary to the requirement in Article 253 of the EC Treaty, the Definitive ADD Regulation does not contain an adequate statement of the reasons on which it is based. Targetti also alleged that the general principle of EU law of good administration was breached in relation to the Definitive ADD Regulation.

40. I consider below each of the alleged errors in the order in which Mr Lyons dealt with them at the hearing rather than the order in which they appeared in his skeleton argument. Both parties referred to Case T-158/010 *The Dow Chemical Company v Council* [2012] ECR II-0000 as describing the principles to be applied by the GCEU and the CJEU in cases such as this. In the *Dow Chemical* case, the GCEU observed at [21]:

> "At the outset, it must first be noted that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the institutions of the European Union enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40, and Case C-373/08 *Hoesch Metals and Alloys* [2010] ECR I-951, paragraph 61). In that respect it must be held that the examination of the likelihood of a continuation or recurrence of dumping and of injury involves the assessment of complex economic matters and that the judicial review of such an appraisal must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there have been manifest errors in the assessment of those facts or a misuse of powers (see, to that effect, Case T-188/99 *Euroalliages* v *Commission* [2001] ECR II-1757, paragraphs 45 and 46)."

The *Euroalliages* case also shows, at [90] – [94], that the applicants must provide specific evidence to prove that there has been a manifest error and mere suspicion is not enough.

41. The comments of the GCEU in *Dow Chemical* indicate that the court (and, therefore, this Tribunal) is concerned with whether there are manifest errors in the assessment of the facts relevant to the imposition of anti-dumping duty. The GCEU's comments in *Euroalliages* show that Targetti bears the burden of proof and must establish that the Community institutions have made manifest errors in the assessment of the facts relevant to the imposition of anti-dumping duty. I consider that a distinction should be drawn between an error and a manifest error in the assessment of the facts. A manifest error is one that is obvious and clear cut. The nature of the Tribunal's task in this case is not to second guess EU institutions' appraisal but is limited to verifying whether there have been obvious and clear cut errors in the

assessment of the facts on which the decision to impose the anti-dumping duty on CFL-i from the PRC was based.

Error in relation to Community interest

42. Targetti submitted that, even where dumping and injury have been established, the Community interest must clearly call for intervention before anti-dumping duty can be imposed. This seems to me to be plainly correct. Article 9(4) of the Basic Regulation provides:

> "Where the facts as finally established show that there is dumping and injury caused thereby, and the Community interest calls for intervention in accordance with Article 21, a definitive anti-dumping duty shall be imposed by the Council …"

43. Article 21 of the Basic Regulation sets out how the authorities shall determine whether the Community interest calls for intervention. Article 21(1) states that the determination must be based on an appreciation of all the various interests taken as a whole. Article 21(1) also states that:

> "Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information, submitted, can clearly conclude that it is not in the Community interest to apply such measures."

44. Targetti submitted that the EU institutions have failed to demonstrate that the Community interest called for intervention in this case. Targetti points to recital 46 of the Definitive ADD Regulation which says:

> "… the findings set out in recitals 100 to 118 of the provisional Regulation are confirmed, i.e. there are no compelling reasons on the grounds of Community interest against the imposition of anti-dumping duties."

45. Targetti's submission on this point was that the recital shows that there was no positive call for intervention because if there had been then it would have been stated. The facts as to whether or not the Community interest "called for" intervention were not assessed, either adequately or at all. Targetti submitted that it is not for the Tribunal to substitute its view or try to second guess what the decision would have been if it had been taken on a proper basis. Targetti contended that the only issue for the Tribunal is whether the Commission asked the right question, namely did the Community interest call for intervention.

46. HMRC contended that whether the Community interest called for intervention is a matter for the discretion of the EU institutions. The EU institutions clearly considered that the Community interest called for intervention because they introduced the Provisional ADD Regulation and the Definitive ADD Regulation. The reasons of Community interest which justified intervention were set out in recitals 102 to 105 of the Provisional ADD Regulation.

47. Recitals 100 to 118 of the Provisional ADD Regulation deal with the subject of Community interest. Recital 118 concludes with similar words to those in recital 46 of the Definitive ADD Regulation, namely

> "… it is provisionally concluded that there are no compelling reasons against the imposition of anti-dumping duties."

I do not regard those words as showing that the EU institutions had failed to consider whether the Community interest called for intervention. Those words and, therefore, the words of recital 46 of the Definitive ADD Regulation reflect the wording of Article 21 of the Basic Regulation. Further, recital 118 should be read in the context of the preceding recitals in the Provisional ADD Regulation.

48. In my view, recitals 100 to 117 of the Provisional ADD Regulation show that the Community institutions considered whether the Community interest called for intervention to counter the material injury caused by dumping. Recital 116 states that the Community interest analysis focused on the economic impact on the economic operators concerned ie the Community industry, importers and traders. Recitals 103 to 105 state that the Community industry suffered material injury caused by dumping which would be mitigated by the imposition of anti-dumping duties. Recital 105 specifically states that a failure to take measures would frustrate the Community industry's efforts to regain market share and to reach a satisfactory margin of profitability as well as jeopardising necessary new investment. Recitals 106 to 109 deal with the impact of measures on importers and traders. Recital 109 concludes that anti-dumping measures will not have such a negative impact on importers as a whole so as to outweigh the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition.

49. In conclusion on this point, I consider that the recitals to Provisional ADD Regulation, which are incorporated by reference in the Definitive ADD Regulation, show that the EU institutions carried out an assessment of the Community interest and concluded that the facts established showed that it clearly called for intervention. In reaching this conclusion, I am not substituting my own view of Community interest or second guessing what the decision should have been. My view, having considered the relevant recitals, is that they do not disclose any obvious error in the assessment of the facts in relation to the Community interest. It follows that I reject Targetti's submission that the EU institutions have failed to demonstrate that the Community interest called for intervention in relation to the Definitive ADD Regulation.

Manifest errors in appraisal and assessment in relation to dumping

50. Articles 1 and 2 of the Basic Regulation provide that, in order to determine whether or not dumping has occurred in relation to a product, it is necessary to establish the price of the product, in the ordinary course of trade, in the exporting country ("the normal value") and then compare it with the export price. If the normal value exceeds the export price then dumping has occurred and the amount of the excess is the dumping margin. Article 2(10) of the Basic Regulation requires a "fair comparison" between the export price and the normal value. In this case, the normal

value was not determined by using the price of sales of CFL-i for the domestic market in the PRC because normal market economy conditions did not exist for CFL-i products in the PRC at the time. Instead, the normal value was established by using information obtained from Mexico, a so-called “analogue” country.

5 *Order of adjustments for physical differences*

51. It is necessary to make certain adjustments to the price of the analogue products which are used to establish the normal value in order to make a fair comparison with the export price of the goods. Targetti criticised the order in which the various adjustments were applied. Mr Stevenson’s evidence was that the Commission made
10 an error in calculating the adjustments for wattage, lifetime and cover to ensure that the Mexican normal values were comparable with the prices of exports from the PRC. The alleged error was that the Commission applied the adjustments for different characteristics sequentially rather than adding the different percentage adjustments together and then making a single adjustment. To give a simple example, if the
15 adjustment for voltage was a 10% reduction in price and the adjustment for lifetime was a 15% reduction in price then Targetti considered that the total adjustment to the price of the Mexican product should have been 25%. Mr Stevenson’s evidence was that the Commission applied the second adjustment to an adjusted figure ie 10% was applied to 100 and 15% was applied to 90. Targetti contended that the error inflated
20 the dumping margin in relation to Firefly Lighting Corporation Ltd ("Firefly"), one of the co-operating exporting producers in the PRC, and that inflated calculation was used to set the country-wide dumping margin that was payable by Targetti.

52. Mr Stevenson did not say that the methodology of sequential or layered adjustments was flawed. In reply to a question from Mr Beal, Mr Stevenson said that
25 if the Commission had said that they would use layered adjustments then he would have no criticism of the methodology per se. The criticism was that Mr Stevenson did not know what methodology had been used ie whether they made a single adjustment or sequential adjustments.

53. Recital 40 of the Provisional ADD Regulation confirmed that adjustments were
30 made to the normal value in order to take account of differences in voltage, lifetime, wattage and type of cover. I do not accept the submission by Targetti that the use of a sequential or layered calculation was wrong, even if it inflated the dumping margin. The submission depends on accepting that the methodology that produces the lowest margin must be the correct one. Mr Stevenson did not say that the methodology
35 actually chosen was flawed. His complaint was that he did not know what methodology had been used. It seems to me that the choice of one permissible methodology over another is clearly a matter within the discretion of the EU institutions. I do not consider that the fact that the precise methodology used was not stated in the recitals to the Provisional ADD Regulation was a manifest error.

40 *Voltage adjustment*

54. Targetti contended that no adjustment for voltage was made to the normal value of the Mexican products in respect of export prices of Firefly and Zhijang Sunlight

Group Co Ltd ("Sunlight"), another exporting producer, and this had the effect of inflating the dumping margin. Mr Stevenson's evidence was that the Commission stated that an adjustment of 19.03% had been applied to take account of voltage but he could not find that it had actually been made. HMRC say that Targetti is simply wrong on this point as an adjustment was made for voltage across the board and was shown in a provisional disclosure document, as referred to by Mr Stevenson.

55. As stated above, recital 40 of the Provisional ADD Regulation confirmed that adjustments were made to the normal value in order to take account of differences in voltage. The provisional disclosure spreadsheet showed that an across the board adjustment of 19.03% was applied. Mr Stevenson's criticism was that he had not seen evidence that the adjustment was applied. He said that he would expect to see it in a work sheet but it was not there. I do not accept that the failure to include the adjustment in the worksheets included in the provisional or general disclosure amounts to a manifest error. The evidence is that a single adjustment for voltage was made to prices for all Mexican products. In the absence of any evidence that the adjustment was not made (and there is none), the statements in the recital and spreadsheet referred to above that it was made must be accepted. It follows that there is no manifest error in relation to the voltage adjustment.

Basis of dumping margin for non-co-operators and co-operators

56. The final dumping margin that was used to set the country-wide dumping margin that was payable by Targetti was a weighted average of the dumping margins for co-operating and non-co-operating companies. Mr Stevenson said when giving evidence that his criticism was that he could not find the statistical basis for the figure of 66.3% used for non-co-operating companies. Targetti contended that the absence of any statistical basis for the dumping margin for non-co-operating companies is a manifest error.

57. As HMRC submitted, the basis for the dumping margin calculation was set out in recitals 45 and 46 to the Provisional ADD Regulation and, in revised form, in recitals 19 to 21 to the Definitive ADD Regulation. In my view, the basis of the calculation does not disclose any obvious error in assessment of the facts on which the margin was based. HMRC acknowledged that the underlying data, on which the margin was calculated, had not been disclosed. I do not accept that the failure to disclose the data is itself a manifest error in the calculation of the margin. I deal with this further when I consider Targetti's criticism that the Regulations fail to state the reasons on which they are based.

58. Mr Stevenson criticised the way the calculation had been carried out. Mr Stevenson had found from examination of the worksheets containing the dumping calculation for Firefly that "model zeroing" had been included through automatic coding in the spreadsheet. Zeroing is the practice of changing negative dumping margins to zero and was found to be contrary to the Basic Regulation in Case C-351/04 *Ikea Wholesale Ltd v HMC&E* [2007] ECR I-7723 at [56] and [57]. Zeroing was also used in other calculations concerning Sunlight. Mr Stevenson found that the use of zeroing in the dumping calculation had no effect on the dumping margin

because, after rounding to one decimal place, the result was the same with and without zeroing. HMRC accepted Mr Stevenson's evidence that zeroing was used in the calculation for Firefly. HMRC submitted that, as Mr Stevenson had found that the practice of zeroing had no impact in this case, there was no basis for a reference on this point. HMRC referred to Case C-348/11 *Thomson Sales Europe SA v Administration des douanes* [2012] ECR I-0000, only available in French, where at [59] to [64] the CJEU held that, in the absence of any evidence that the practice of zeroing had influenced the actual calculation of the anti-dumping duty imposed, the zeroing did not render the regulations invalid.

59. I consider that the use of zeroing is a manifest error but, as the use of zeroing had no effect on the calculation of the dumping margins then, following *Thomson Sales Europe*, it does not render the Definitive ADD Regulation invalid. My conclusion is that the Tribunal should not refer a question to the CJEU on this point.

Choice of Mexico as analogue country

60. Targetti objects to the choice of Mexico as an analogue country. In addition and even if Mexico was an appropriate analogue, Targetti alleges that a fair comparison was not made between the export price and the normal value of the CFL-i because necessary adjustments to take account of the difference between the Chinese and Mexican products were not made. Targetti submitted that incorrect or inadequate adjustments meant that the extent of the dumping and the dumping margin could not be accurately determined.

61. Targetti contended that Mexico should not have been chosen as the analogue country because the sole producer of comparable products (Philips Mexicana SA de CV) was associated with one of the complainants (Philips Lighting BV). Article 2(7) of the Basic Regulation provides:

> "An appropriate market economy third country shall be selected in a not unreasonable manner, due account being taken of any reliable information made available at the time of selection."

Targetti submitted that the selection of Mexico was carried out in an unreasonable manner and the decision was flawed.

62. Targetti referred to the comments of the CJEU in Case C-338/10 *Grünwald Logistik Service GmbH (GLS)* [2012] ECR I-0000 at [22] and Case C-16/90 *Nölle* [1991] ECR I-5163 at [12] and [13] as showing that the choice of an appropriate analogue country is important and it is essential that all information is considered before intervening on the market. Targetti submitted that the EU institutions were wrong to rely on evidence from one related party in an analogue country and more could and should have been done. In *Grünwald*, the CJEU noted, at [31], in relation to Article 2(7) that:

> " "... that provision's objective of seeking to find an analogue country where the price for a like product is formed in circumstances which are as similar as possible to those in the country of export would be jeopardised

> if the concept of 'reliable information made available', within the meaning of Article 2(7)(a) of the basic regulation, were restricted to information provided by the complainant in its complaint or to the information supplied subsequently by the parties concerned in the context of the investigation. "

In the present case, the information was provided by a party, Philips Mexicana, related to one of the complainants, Philips Lighting. Recital 31 of the Provisional ADD Regulation states that "this relationship does not, per se, render the information provided by the Mexican producer unreliable".

63. Targetti also relied on the fact that recital 29 of the Provisional ADD Regulation referred to an objection to the choice of Mexico because of the different voltages of Mexican and Chinese products. Targetti contended that this showed that other differences were not considered when they should have been and this shows that the decision to choose Mexico was flawed. Targetti's position was that Korea should have been chosen as the analogue country and, in support of this, Targetti pointed out that Korea was used as the analogue in Council Regulation (EC) No 1205/2007, following an expiry review

64. HMRC referred to a decision of the GCEU in Case T-255/01 *Changzhou Hailong Electronics & Light Fixtures Co. Ltd v Council and Commission* [2003] ECR II-4741 in relation to the Definitive ADD Regulation. In that case, the GCEU rejected a challenge to the use of Mexico as an analogue country on the ground that the use of Philips Mexicana data was clearly inappropriate and unreasonable. The GCEU held at [59] that:

> "The competent institutions may choose not to apply the general rule set out in Article 2(7)(a) of the basic regulation for the determination of the normal value of products originating in non-market economy countries, using a different reasonable basis, only where it is impossible to apply that general rule. The Court of First Instance considers that such impossibility arises only where the data required in order to determine normal value are not available or are not reliable. That it happens to be necessary to adjust those data in order to adapt them as closely as possible to the conditions which would obtain for Chinese producers if the PRC were a market-economy country does not demonstrate that it was either impossible or even inappropriate to use the data concerning Philips Mexicana."

65. HMRC accepted that Philips Mexicana was related to Philips Lighting but state that Philips Lighting withdrew as a complainant and there was no evidence that the data from Philips Mexicana was unreliable.

66. HMRC contended that the choice of Korea as the analogue in Council Regulation (EC) No 1205/2007 did not mean that the choice of Mexico in the Definitive ADD Regulation was flawed. HMRC pointed out that the co-operation of Philips Mexicana could not be obtained at the time of the later regulation and

manufacture of the relevant product in Mexico had ceased (see recital 28 to Regulation 1205/2007).

67. I do not accept Targetti's submission that the choice of Mexico as an analogue country was a manifest error. The use of the data from Philips Mexicana was not inappropriate as the *Changzhou Hailong* case demonstrates. I accept HMRC's submissions that the choice of Korea as the analogue in Council Regulation (EC) No 1205/2007 does not cast any doubt on the choice of Mexico as the analogue in the Definitive ADD Regulation. The passage of time between the two investigations and the different circumstances in which the investigations took place mean that it is not possible to draw any conclusion from the fact that different countries were chosen as analogues.

Errors in appraisal and assessment in relation to injury

68. Article 3(1) of the Basic Regulation provides that 'injury' means material injury to the Community industry or the threat of such injury. In determining whether there is such injury, Article 3.2 requires

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

69. Targetti submitted that that there were a number of manifest errors in relation to injury. The errors include a failure to identify correctly the Community industry, an absence of positive evidence of injury and a failure to conduct an objective examination of the volume, effect and impact of dumping. One of the errors was a failure to recognise that there was another cause of injury to the Community industry apart from the imports from the PRC, namely imports of CFL-i from Hungary and Poland.

Failure to identify Community industry

70. Article 4(1) of the Basic Regulation defines Community industry and provides:

> "… the term 'Community industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4), of the total Community production of those products, except that:
>
> > (a) when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'Community industry' may be interpreted as referring to the rest of the producers."

The effect of article 4(1)(a) is that the EU institutions are given a discretion to exclude any producer importing the allegedly dumped product (CFL-i in this case) from Community industry.

71. Recital 8 of the Provisional ADD Regulation identifies three Community producers who had made complaints and replied to the Commission's questionnaires. One of those was Philips Lighting BV which, during the investigation period, informed the Commission that it no longer wished to be treated as a member of the group of complainants (see recital 49 to the Provisional ADD Regulation). Recital 50 stated that the two remaining co-operating Community producers accounted for more than 85% of the Community production of CFL-i during the investigation period. Recital 51 states that, on average, 14.6 % of the total sales of CFL-i by the two producers originated in the PRC. Although not stated in the recitals, a letter dated 28 July 2010 from the Commission revealed that the figure of 14.6% referred to volume not value of sales. The same letter also disclosed that, for one of the two producers, sales of CFL-i imported from the PRC constituted between 50% and 60% of its sales whereas the other producer imported only between 0.5% and 5% of its total sales from the PRC. The latter producer accounted for between 75% and 85% of total Community sales whereas the producer whose imports amounted to between 50% and 60% of its total volume of sales accounted for between 15% and 25% of total Community sales.

72. Article 5(4) of the Basic Regulation provides that an investigation shall not be initiated unless it has been determined that the complaint has been made by or on behalf of the Community industry. The article goes on to provide that a complaint is considered to have been made by or on behalf of the Community industry "if it is supported by those Community producers whose collective output constitutes more than 50 % of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint".

73. In this case¸ the producer whose imports from the PRC represented between 0.5% and 5% of its sales accounted for more than 50% of total Community sales of CFL-i. It is clear, therefore, that the complaint could have been considered as made by or on behalf of the Community industry, as required by Article 5(4), on the basis of that one Community producer. However, Article 4 provides that Community industry refers to Community producers as a whole but gives the Community authorities a discretion to exclude producers who are themselves importers of the allegedly dumped product. The Commission did not exclude either of the Community producers who were also importers of CFL-i from the PRC and gave its reasons in Recital 51 of the Provisional ADD which stated that:

> "However, despite these sales of imported CFL-i, the primary activity of these companies remained in the Community. Furthermore, the sales are explained by the need for the complainants to complete their product range so as to be able to satisfy demand, as well as by the attempt to defend themselves against low priced imports due to dumping. Consequently, the described trading activity of these producers did not affect their status as Community producers."

That reasoning was repeated in recital 26 of the Definitive ADD Regulation.

74. Targetti made various criticisms of the inclusion of the two companies in the Community industry. Mr Stevenson's evidence was that, given that one of the producers imported more than 50% of its sales of CFL-i from the PRC, the figure of 14.6% of total sales was distortive. Targetti submitted that, in deciding whether or not to include the two Community producers in the Community industry, each producer should have been considered individually (see Case C-156/87 *Gestetner Holdings v Commission* [1990] ECR I-781, at [43]. Targetti submitted that, had each producer been considered individually, the producer whose imports from the PRC accounted for more than 50% of its sales should have been excluded from the Community industry and its inclusion was a manifest error. Mr Stevenson's evidence was that exclusion of the producer that imported more than 50% of its sales from the PRC could result in significant changes to the assessment of the injury to the Community industry and the calculation of the injury margin.

75. The first criticism is that the two importers should, on the authority of *Gestetner* have been assessed separately. In my view, Targetti has not established that the two producers were not assessed separately. It is clear that they were described together in the recitals but that seems to me to follow from the terms of Article 4 and does not indicate that they were not assessed separately. Targetti has not, in my view, established that there was any error of assessment.

76. Further, I consider that the fact that the Commission did not exercise its discretion to exclude one of the two complaining producers from the Community industry in this case cannot be described as a manifest error. It is clear from the recitals to the Provisional and the Definitive ADD Regulations referred to above that the Commission considered the position of the producers and made a decision not to exclude one or both of them from the Community industry. The reasons given in the recitals appear on their face to provide a justification for that decision. This conclusion is consistent with that of the CJEU in Case C-260/85 *Tokyo Electric Company v. Council* [1988] ECR I-5855, at [47] where it said that:

> "In that connection, it is apparent from the contentions of the institutions, which have not been seriously challenged by TEC, that only a few models, all of them at the lower end of the range, were imported by Community manufacturers to fill gaps which at that time existed in their range of products and that the total volume of such imports was always relatively low. In those circumstances, the Community manufacturers' imports must be regarded as not having contributed to the injury to the Community industry and there is therefore no reason to exclude such manufacturers from the determination of injury."

In the absence of something more, my view is that the decision to include both producers in the Community industry cannot be described as a manifest error.

77. Targetti contended that there was more in that there was no positive evidence to support the statements in recital 26 of the Definitive ADD Regulation that the trading

activities of the two producers in question were held not to have affected their status as Community producers because their primary activity remained in the Community and the imports were to complete their product ranges or were defensive. HMRC contended that there was positive evidence in the form of the complaint and complainants' questionnaires and correspondence. In particular, a letter dated 8 September 2000 from a complainant to the Commission set out the basis of the defensive imports, namely by purchasing products from the PRC in the hope of maintaining some market share at reasonable price levels. A further letter dated 15 April 2001 confirmed that the statements, in recitals 51, 96 and 97 to the Provisional ADD Regulation, that the imports were defensive were correct. In any event, recital 97 to the Provisional ADD Regulation shows that imports of CFL-i from the PRC by the Community producers were relatively small at only 4% of the total volume of imports of the product concerned from the PRC. The recital records that the Commission concluded that the low volume of such imports was unlikely to have caused the injury and, in any event, was not such as to break the causal link between dumping and injury.

78. In conclusion, I consider that, despite the fact that they were also importers of CFL-i from the PRC, the inclusion of both of the complaining Community producers in the Community industry was not a manifest error in this case.

Failure to make necessary or adequate adjustments for product differences in the assessment of injury

79. The injury margin is the measure of the level of anti-dumping duty which is necessary to eliminate the injury to the EU producers (ie the difference between the price of CFL-i imported from the PRC and the non-injurious price of like products). The price undercutting calculation is the difference between the price of CFL-i imported from the PRC and the price of CFL-i produced in the EU. Article 2(10)(a) of the Basic Regulation states that:

> "An adjustment shall be made for differences in the physical characteristics of the product concerned. The amount of the adjustment shall correspond to a reasonable estimate of the market value of the difference."

80. Targetti contended that there was a failure to make adequate adjustments for product differences in calculating the injury margin and that constituted a manifest error. In his evidence, Mr Nardi Dei said that, in addition to differences of wattage, lifetime and cover, the products were quite different in terms of quality of components and manufacture which affected performance, lifespan and reliability of the CFL-i. Targetti contended that there was no mention of any adjustments in relation to the assessment of the injury margin in the recitals to the Provisional ADD Regulation or the Definitive ADD Regulation. Mr Stevenson said that he could not find any evidence that the adjustments had been taken into account in calculating the injury margin.

81. In relation to the price undercutting calculation, Mr Stevenson also said that he could not find any evidence that the adjustments had been taken into account in the calculations. Targetti acknowledged that recital 60 to the Provisional ADD Regulation states that adjustments were made for lifetime, wattage and cover but submitted that there was no indication that any adjustments to take account of the differences identified by Mr Nardi Dei had been made. Targetti submitted that the failure to make such adjustments constitutes a manifest error.

82. I agree that a failure to make adjustments for differences in the physical characteristics of the products would be a manifest error. It seems to me, however, that the recitals to the Provisional ADD Regulation contain clear evidence that some adjustments were made to take account of the differences between products. Recital 60 of the Provisional ADD Regulation is headed "Undercutting" and states as follows:

> "The Commission has examined whether the exporting producers of the country concerned undercut the prices of the Community industry during the IP. For this purpose, the exporting producers' prices have been duly adjusted to a cif level, whereas the Community producers' prices have been adjusted to an ex-works level. For the analysis of the price undercutting, the exported CFL-i as well as those manufactured in the Community by the Community industry, were grouped according to the lifetime, wattage and the type of cover of the lamp. Within each group, the weighted average ex-works prices charged by the Community producers were compared, at the same level of trade, to the weighted average export prices. Adjustments for differences in physical characteristics were made where appropriate."

83. Recital 121 of the Provisional ADD Regulation refers to the calculation of the injury margin on the basis of comparisons per product type. Recital 123 is also concerned with the calculation of the injury margin and states:

> "As for the calculation of the undercutting margins, this comparison was carried out by appropriate groups of types."

84. It seems clear from recitals 60, 121 and 123 of the Provisional ADD Regulation that products were grouped according to lifetime, wattage and the type of cover and that adjustments for differences in physical characteristics were made in relation to the undercutting and injury margins. It follows that Targetti's complaint, relying on the evidence of Mr Nardi Dei, is that the adjustments were inadequate and further adjustments should have been made for other differences in physical characteristics between the products.

85. Article 2(10)(a) of the Basic Regulation requires an adjustment that is no more precise than “a reasonable estimate of the market value of the difference” between the products. It is for Targetti to show that the required adjustments were either not made or, if made, were inadequate. There is no evidence that any adjustments were made to take account of the specific differences identified by Mr Nardi Dei in his evidence but, in my view, that is not enough to demonstrate a manifest error. Targetti must

demonstrate that the adjustments were not adequately made and, in addition, that the inadequacy made a material difference to the amount of the adjustment.

86. HMRC contended that the differences identified by Dr Nardi Dei had actually been taken into account in the adjustments that were made eg the lower quality of the components or manufacture was reflected in reduced lifetime of the product. Although this is possible, there was no evidence that showed that, for example, quality of manufacture had been a factor in adjusting for differences in lifetime of products and, accordingly, I do not accept that this occurred.

87. The burden of proving that the adjustments were not adequate rests on Targetti. In my view, Targetti has not established that the adjustments were inadequate for the purpose of ensuring that like products were compared with like. Mr Nardi Dei's evidence showed that there are a number of features that might distinguish the CFL-i produced in the PRC from those produced in Mexico. The evidence did not establish that the adjustments that were made produced an unreasonable estimate of the market value of the differences between the products as required by Article 2(10)(a) of the Basic Regulation. My conclusion is that Targetti has not established that there was a failure to make the necessary adjustments for the different characteristics of the products in order to calculate the injury margin and the price undercutting margin. Accordingly, I do not accept that there was any manifest error in relation to the adjustment for differences in the physical characteristics of the product.

Failure to consider substitutability of products

88. Targetti submitted that the issue of whether the CFL-i imported from the PRC were substitutable for the CFL-i produced in the EU is material to the issue of causation of injury. Targetti contended that there was no investigation of substitutability and, without it, there could not have been any finding that injury had been caused by the imports from the PRC which is a requirement of Article 3(6) of the Basic Regulation. Targetti submitted that the recitals contained no reference to substitutability and proceeded on the basis that CFL-i from the PRC were substitutable for CFL-i manufactured in the EU without any adequate evidential basis for so doing. The evidence of Mr Stevenson was that the CFL-i from the PRC did not compete in the same market. Mr Stevenson referred to substitutability as a subset of the concept of like product in Article 1(4) of the Basic Regulation ie a product that has characteristics closely resembling those of the product under consideration. Targetti submitted in closing that the concept of substitutability was not found in the Basic Regulation but was necessary to establish causation of injury.

89. Targetti referred to Commission Regulation (EU) No 402/2012 imposing a provisional anti-dumping duty on imports of aluminium radiators originating in the PRC as an example of an investigation in relation to dumping which specifically considered substitutability. I do not consider that Regulation 402/2012 is analogous to the situation under consideration in this case. The reference to substitutability in recital 18 of Regulation No 402/2012 was in the context of a complaint by one of the PRC producers that there were two production processes used to manufacture the radiators. The producer submitted that one of the methods was uncommon in the EU

and the PRC and, for that reason, should not be subject to the anti-dumping duty. The Commission rejected the argument because radiators produced by both methods had the same basic physical and technical characteristics as well as uses and so were highly substitutable. In Regulation No 402/2012, substitutability was considered in the context of the identification of two types of product that the Commission proposed should both be subject to the same anti-dumping duty. In my view, Regulation No 402/2012 does not provide any authority for the proposition that a failure to consider specifically whether the products produced in the PRC are substitutable for products produced in the EU is a manifest error.

90. My view is that there is no requirement that allegedly dumped products must be substitutable in order for injury to be established. The test to be applied is whether the product is a like product as defined by Article 1(4) of the Basic Regulation, that is to say a product that is 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. Recitals 12 and 13 to the Provisional ADD Regulation state that the Commission found, after considering representations by exporting producers, that the CFL-i produced in the EU and the CFL-i from the PRC had the same basic physical and technical characteristics and so were alike within the meaning of Article 1(4) of the Basic Regulation. Recitals 8 and 9 to the Definitive ADD Regulation confirmed that the CFL-i made in the PRC were comparable with those made in the EU and that comparisons made for the purpose of calculating injury and undercutting margins were based on CFL-i with comparable lifetimes. I consider that the recitals show that the Commission applied the correct test, namely whether the products were alike rather than any stricter test of substitutability. Further, I consider that the representations of exporting producers and the use of CFL-i from the EU and the PRC with similar lifetimes for the purposes of comparison provided an adequate evidential basis for the conclusion that the PRC and EU products were alike.

Incorrect attribution of all injury to imports from PRC

91. Article 3(7) of the Basic Regulation requires the EU institutions to take account of any factors other than dumped imports to ensure that injury caused by these other factors is not attributed to the dumped imports which cause injury to the Community industry. The requirement for the authorities to consider whether the injury on which they intend to base their conclusions derives from dumped imports rather than from any other factors which must be disregarded was confirmed by the GCEU in Case T-107/04 *Aluminium Silicon Mill Products GmbH v Council* [2007] ECR II-669 at [72] as follows:

> "… in determining injury, the Council and the Commission are under an obligation to consider whether the injury on which they intend to base their conclusions actually derives from dumped imports and must disregard any injury deriving from other factors, particularly from the conduct of Community producers themselves."

92. Targetti submitted that the Commission wrongly concluded that all the injury to the Community industry was caused by the products imported from the PRC. There is no statement to that effect in the Provisional ADD Regulation or the Definitive ADD Regulation but Targetti contended that it was the consequence of the failure to distinguish between imports from Hungary and Poland (which were at the material time outside the EU) and imports from the PRC. Targetti submitted that such failure meant that the authorities attributed all the injury to products from the PRC because they could not disregard the injury caused by imports from Hungary and Poland. Targetti pointed to recital 35 of the Definitive ADD Regulation as clearly showing the attribution of all injury to the importers from the PRC.

93. I do not accept Targetti's submission that the EU institutions disregarded the impact of the imports from Hungary and Poland or that they should have done more by way of analysis. Recital 87 of the Provisional ADD Regulation, under the heading "Effect of other factors", shows that the authorities considered the level of imports from Hungary and Poland. Recital 89 states that an exporting producer claimed that one cause of the material injury suffered by the Community industry was imports from Hungary and Poland. The authorities' provisional conclusion in recital 91 was that these imports did not break the causal link between dumping and injury.

94. I also reject Targetti's contention that the authorities concluded that all the injury to the Community industry was caused by the products imported from the PRC. Recital 35 of the Definitive ADD Regulation does not say that the dumped imports caused all the injury. Recital 35 simply states

> "In the absence of any new evidence, the findings on causation set out in recitals 84 to 99 of the provisional Regulation are confirmed, ie, that the dumped imports caused the material injury suffered by the Community industry."

That indicates only that the dumped imports from the PRC caused the material injury to the Community industry which is not the same as saying that all injury arises from imports from the PRC. Targetti did not adduce any evidence that the imports from Hungary and Poland caused injury which broke the causal link between the dumping and the material injury. My conclusion is that Targetti has not established that there was any manifest error in the attribution of material injury to the imports from the PRC.

95. As I do not accept the basis of Targetti's submission that the EU institutions erred in attributing all injury to imports from the PRC, it is not strictly necessary to consider the five specific criticisms made by Targetti but, in case I am wrong in my approach, I consider them briefly below:

> (1) Analysis of the trends of volume of imports
>
> Mr Stevenson's evidence was that the increase in imports from Hungary and Poland was underestimated and that the loss of Community market share that could not be attributed to imports from the PRC and from Hungary and Poland was just over 15% which was never analysed.

Recital 87 of the Provisional ADD Regulation states that CFL-i were imported from other third countries although only at de minimis levels from each country. Even if the increase in imports from other countries was underestimated, that does not demonstrate that there was dumping of the imports from Hungary and Poland or that those imports caused material injury such as to break the link between the dumped imports from the PRC and the injury to the Community industry. The fact that that part of the loss of Community market share due to imports from countries other than Hungary, Poland and the PRC was not analysed does not appear to me to undermine the EU institutions' analysis or demonstrate a manifest error.

(2) Movement of production from the Community to Hungary and Poland

Targetti submitted that the attribution of all injury to imports from the PRC was plainly incorrect in view of the relocation of production of CFL-i from the EU to Hungary and Poland as referred to in recitals 87 and 88 of the Provisional ADD Regulation. In my view, the recitals show that the EU institutions took account of the movement of production by two Community producers to Hungary and Poland. In the case of one of the two producers, recital 88 states that the move was a reaction to the aggressive pricing of products from the PRC. Recital 7 of the Definitive ADD Regulation stated that there was no evidence of injurious dumping by Hungary and Poland and Targetti did not produce any evidence that the imports from Hungary and Poland were dumped. In view of the fact that the authorities took account of the movement of Community production to Hungary and Poland and the lack of any evidence of dumping by the two producers, I do not regard this criticism as showing that there has been any manifest error.

(3) Price analysis and adjustments

Targetti submitted that there should have been adjustments to the prices of CFL-i imported from Hungary and Poland in order to assess whether they caused material injury. In particular, Targetti contended that, by ignoring the need for adjustments for physical characteristics, the EU institutions did not take account of factors which would decrease the price of products from Poland. Lower prices might indicate dumping of CFL-i from Poland. The authorities concluded in recital 90 of the Provisional ADD Regulation that the prices of imports from Hungary and Poland were higher than the prices of the products from the PRC. Targetti contended that it was not clear that the prices would be higher once the adjustments had been made but did not produce evidence that adjustments would have any material impact on the prices. I accept that adjustments to the prices of CFL-i imported from Hungary and Poland would be necessary to determine whether there was material injury to the Community industry in the event that there was found to be dumping. I do not accept that, in the absence of dumping, it is necessary to make adjustments to the price of imports from Hungary and Poland in order to establish the injury attributable to imports from the PRC. If the price of the imports from Hungary and Poland is

higher than that of the imports from the PRC then it would follow that the former have no impact on the injury caused by the latter. I do not consider that the lack of adjustments to the prices of imports from Hungary and Poland constitutes a manifest error.

5 (4) The direction of causality

Mr Stevenson's evidence was that prices of CFL-i from Poland fell one year ahead of the prices of CFL-i from the PRC and the imports from Poland increased while those from the PRC fell. Targetti submitted that the movement in prices was not taken into account. Mr Stevenson's 10 evidence, which I accept, shows that a reduction in prices can make products, in this case from Poland, more competitive in relation to products from the PRC. It does not show that the imports from the PRC did not cause material injury to the Community industry or that the imports from Poland did cause such injury. I do not consider that the fact that the 15 reduction in prices was not specifically considered by the EU institutions was a manifest error.

(5) Issues over use of data

Mr Stevenson said in his evidence that unidentified sources of data were used to analyse matters such as the volume of imports from Hungary and 20 Poland or, if the data was given (as in recital 90 of the Provisional ADD Regulation) it was unclear and no explanations were given. HMRC submitted that the reason why the figures in relation to imports from Hungary and Poland were not given was in order to preserve confidentiality. I consider that the criticisms of Mr Stevenson are not well 25 founded. As well as the confidentiality point made by HMRC, the fact that data sources are not identified in the recitals does not seem to me to indicate a lack of transparency. More detail about the data was made available to the complainants and affected parties. The recitals are not the place for detailed discussions of data and the absence of detail does not 30 seem to me to indicate a manifest error.

Use of different methodologies in calculating dumping and injury margins

96. Mr Stevenson noted that the Commission used different product groupings for the purposes of calculating the dumping margin and the injury margin. The comparison of the two margins is important. Anti-dumping duty must not exceed the 35 dumping margin but should be less than that margin if a lower rate of duty would be enough to remove the injury to Community industry ("the lesser duty rule" – see article 9(4) Basic Regulation). Targetti submitted that, in order to apply the lesser duty rule, it is important to be able to compare the two margins. Targetti contended that a proper comparison was not possible because the dumping margin and the injury 40 margin were calculated using different product groupings for the different types of CFL-i.

97. HMRC accepted that there were differences in the two calculations because they used different Product Control Number ("PCN") codes. PCN codes were assigned according to the different characteristics of the products. HMRC submitted that the

PCN codes used for the injury margin contained a refinement which was appropriate for the broader range of products being compared than the range of Mexican products being considered for the dumping calculation. HMRC referred to Cases C-191/09 P and C-200/09 P *Council and Commission v Interpipe Niko Tube and Interpipe NTRP* [2012] ECR I-0000 at [51] where the CJEU held that:

> "… it should be noted, first of all, that different rules apply for the determination of normal value and export price and therefore the sales, general and administrative expenses need not necessarily be treated in the same way in both cases. However, any differences between the two values may be taken into account under the adjustments provided for in Article 2(10) of the basic regulation."

98. In my view, Targetti has not demonstrated that that the use of the different PCN codes to calculate the dumping margin and the injury margin invalidated the comparison or make the proper application of the lesser duty rule more difficult or impossible. The *Interpipe* case shows that different rules apply to the dumping calculation and the injury calculation. In the circumstances, I do not consider that the use of different product groupings in calculating dumping and injury margins was a manifest error.

Failure to state reasons contrary to Article 253 EC Treaty

99. Article 253 of the EC Treaty (now Article 296 of the TFEU) states:

> "Regulations, directives and decisions adopted jointly by the European Parliament and the Council, and such acts adopted by the Council or the Commission, shall state the reasons on which they are based and shall refer to any proposals or opinions which were required to be obtained pursuant to this Treaty."

100. Targetti contended that the need to state reasons is of particular importance in this case. It referred to the observations of the General Court in Case T-122/09 *Zhejiang Xinshiji Foods v Commission* [2011] ECR I-22 at [75] where it said:

> "...where the institutions enjoy a wide power of appraisal, as is clearly the case when a choice is to be made between a number of methods for calculating the injury margin in anti-dumping matters, respect for the safeguards guaranteed by the Community legal order in administrative procedures is of even greater fundamental importance."

101. HMRC submitted that the duty to state reasons did not require the statement of evidence and methodologies. As authority for this proposition, HMRC referred to the passage from the judgment of the CJEU in Case C-241/95 *The Queen v Intervention Board for Agricultural Produce, ex parte Accrington Beef Co. Ltd and Others* [1996] ECR I-6699 at [39]:

> "The Court has consistently held that the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact or of law dealt with in the regulations, provided that the latter fall within the general scheme of the body of measures of which they form part, and that in order to satisfy the requirements of Article 190 of the Treaty it is sufficient that the statement of reasons is appropriate to the nature of the measure in question. The reasoning of the institution which adopted the measure must be stated clearly and unequivocally, so as to inform persons concerned of the justification for the measure adopted and to enable the Court to exercise its powers of review"

102. Targetti acknowledged that the reasons do not have to be exhaustive but submitted that they must provide sufficient explanation to enable judicial oversight. Targetti relies on the following passage from the judgment of the CJEU in *Petrotub* at [81]:

> "...it is settled case-law that the statement of reasons required by Article 190 of the Treaty must be appropriate to the act at issue and must disclose in a clear and unequivocal fashion the reasoning followed by the institution which adopted the measure in question in such a way as to enable the persons concerned to ascertain the reasons for the measure and to enable the competent Community court to exercise its power of review."

103. Targetti contended that the stated reasons in the Provisional ADD Regulation and the Definitive ADD Regulation do not clearly and unequivocally state the reasoning of the EU institutions and so do not allow the GCEU and the CJEU to review the Regulation effectively. Targetti considered that the reasons stated are inadequate in 19 respects set out in its skeleton argument. All of Targetti's criticisms relate to the alleged manifest errors referred to above. My comments on the individual criticisms are as follows:

> (1) Targetti submitted that there is no indication of the manner in which multiple adjustments were made. This is the alleged error dealt with in [51]-[53] above. The complaint seems to me to be that the methodology for calculating the dumping margin was not described in the recitals. In my view, the methodology is a step in the process of determining the dumping margin. I consider that it is too remote to qualify as a reason on which the ADD Regulations were based. It follows that the failure to include an explanation of the manner in which the adjustments were made does not constitute a failure to state reasons.
>
> (2) Targetti stated that statement of reasons is inaccurate to the extent that it indicates that adjustments have been made for voltage when they have not been made. This is the error dealt with in [54]-[55] above. I have found that the evidence showed that a single adjustment for voltage was made to prices for all Mexican products and there was no evidence that the adjustment was not made. It follows that this criticism must be rejected.

(3) In relation to the alleged error that the dumping margin for non-co-operators and co-operators was flawed (dealt with in [55]-[59] above), Targetti submitted that there was no indication of the basis for the choice of 66.3% as the rate for the dumping margin for non-co-operating companies. This is really a complaint that the calculations are not set out. As in the case of the first criticism, I consider that the method of calculating the margin is not a reason on which the ADD Regulations were based so its absence is not a failure to state reasons.

(4) The next criticism also related to the alleged error that the dumping margin for non-co-operators and co-operators was flawed. Targetti states that there is no explanation for the use of "zeroing" or the reasoning in relation to it which is dealt with at [58]-[59] above. Again, it seems to me that the criticism is that a method used to calculate the margin was not set out and, as before, I do not regard the method as a reason or the fact that it is not stated as a failure to state reasons.

(5) Targetti submitted that there is no indication of why the Commission used a particular figure in the calculation of the level of cooperation or the source of the figure. This point was abandoned as a manifest error at the hearing as Targetti accepted that the reason for the differences between its figures and those of the Commission was due to the fact that the Commission had been "annualising" the numbers. Targetti maintained that the fact that the recitals do not refer to figures being annualised is a failure to state reasons. As I have already stated, the method by which a figure is calculated is not, in my view, a reason and the failure to set out the method in the recitals is not a failure to state reasons.

(6) Targetti contended that the justification of the use of Mexico as an analogue country is inadequate. This is the error dealt with in [60]-[67] above. I have found that the choice of Mexico over Korea was justified. It seems to me that the explanation of that choice found in recitals 12, 29 and 30 of the Provisional ADD Regulation and recital 12 of the Definitive ADD Regulation adequately explained the choice of Mexico. I do not consider that there has been any failure to state reasons.

(7) In relation to the same alleged error, Targetti pointed out that the statement in recital 31 to the Provisional ADD Regulation that the sales referred to were made "in the ordinary course of trade" was very similar to the statement criticised by the CJEU in *Petrotub*. Recital 31 refers to the fact that the cooperating Mexican producer, Philips Mexicana, was related to one of the complainants, Philips Lighting, and continues:

> "It was found that the Mexican producer sold substantial quantities of the product concerned on the domestic market and that these sales were made in the ordinary course of trade. It was carefully checked whether the relationship in question had any distorting impact on costs of production and, consequently, on profitability of the Mexican producer concerned. No indication was found that this was the case."

In *Petrotub*, the recital merely asserted that "… during the course of the investigation, it was found that sales made using compensation were indeed made in the ordinary course of trade" essentially just repeating the words of the third subparagraph of Article 2(1) of the Basic Regulation. The CJEU in *Petrotub* held, at [86]-[87], that

> "… by merely stating, in the contested regulation, that it had been found that sales made using compensation were indeed made in the ordinary course of trade, the Council did not satisfy the requirements of the obligation to state reasons.
>
> Such a peremptory statement, which amounts to no more than a reference to the provisions of Community law, does not contain any explanatory element of such a kind as to enlighten the parties concerned and the Community judicature as to the reasons which led the Council to consider that the prices charged in connection with those sales made using compensation had not been affected by the relationship."

In the case of recital 31 of the Provisional ADD Regulation, the statement goes further than a mere reference to the Basic Regulation. It sets out that the effects of the relationship were carefully checked and no indication was found that it distorted the costs or profitability of Philips Mexicana. The recital does not set out the evidence that was reviewed but that is not what the CJEU in *Petrotub* held was required. The CJEU held that there must be some explanatory element to enlighten the parties and the courts as to the reasons for the conclusion. In this case, the reason for the conclusion is explained as, after careful checking, nothing was found that indicated that the relationship had any distorting impact. Targetti has not provided any evidence that the data from Philips Mexicana was unreliable. In the circumstances, I consider that recital 31 contains an adequate statement of reasons.

(8) Targetti submitted that there is no indication in recital 26 to the Definitive ADD Regulation or elsewhere whether the figure of 14.6% relates to volume or value and no statement in the recitals of the range of the figures of which 14.6% is an average. This is part of the error dealt with in [70]-[78] above. Recital 51 of the Provisional ADD Regulation states that, on average, 14.6 % of the total sales of CFL-i by the two producers originated in the PRC. It is true that the recital does not specify whether the percentage relates to volume or value and there is no information about the data supporting the calculation of the average. As I have set out above, the statement of reasons must reflect the reasoning, in this case to justify why certain Community producers were not excluded. The reasons are not the same as the data on which such reasons were based. I accept that it would have been helpful if the recital had made clear that the figure of 14.6% referred to volume but the omission of that information, while it may be a reason for a request for further information, as happened in this case, does not constitute a failure to state reasons.

(9) In relation to the same alleged error (failure to identify Community industry), Targetti contended that there is no statement in the recitals that the company with between 0.5% and 5% of sales originating in the PRC represented between 75% and 85% of total Community sales and the company with between 50% and 60% of sales originating in the PRC represented between 15% and 25% of total Community sales. Targetti maintains that such information was material and should have been mentioned. I agree that the information is relevant to the assessment of whether the producers should be included in the Community industry but I do not accept that it was necessary to set out the additional information identified by Targetti in the recitals. That information is not, in my view, a reason. The information in recitals 50 and 51 to the Provisional ADD Regulation provides reasons and the failure to set out the additional information is not a failure to state reasons.

(10) In relation to the same error, Targetti stated that there is no "positive evidence" to support the assertions that the two complainants imported products from the PRC in order to complete their product range and/or defend themselves against low-priced imports. The assertions are part of the reasoning for including the two complainants in the Community industry but Targetti's criticism relates to evidence not reasons. I have rejected the criticism of the lack of evidence in [77] above. I further reject the criticism that, in not referring to the evidence in the recitals, there was a failure to state reasons for the reasons already given.

(11) Targetti contended that there is a failure to record adequately or at all the adjustments which were made, if any, in calculating the injury margin. At [82]-[87] above, I rejected this criticism and found that recitals 60, 121 and 123 contain clear statements that adjustments were made and the nature of those adjustments. Targetti's criticism is really that the recitals do not contain sufficient detail. Even if that were correct, it would not amount, in my view, to a failure to state reasons.

(12) Targetti stated that the recitals contain no reasoning justifying the implicit assumption of substitutability of PRC and EU products. This refers to the error dealt with in [88]-[90] above. As I state above, Article 1(4) of the Basic Regulation requires the allegedly dumped products to be like products which does not mean that they must be substitutable. I have already concluded that the recitals show that the Commission applied the correct test of whether the products were alike rather than any stricter test of substitutability and that there was an adequate evidential basis for the conclusion that the PRC and EU products were alike. I do not, therefore, accept that there was a failure to state reasons in relation to this point.

(13) Targetti submitted that the recitals do not contain any adequate justification or explanation of why all injury was incorrectly attributed to imports from the PRC and why a loss 13.3% of Community market share by Community producers was ignored. This refers to the alleged error dealt with at [91]-[95] above. For the reasons given at [93]-[94], I have already rejected Targetti's contention that the Commission concluded that

all the injury to the Community industry was caused by the products imported from the PRC and that the Commission ignored the impact of imports from Hungary and Poland by reference to, among other things, recital 87 to the Provisional ADD Regulation and recital 35 to the Definitive ADD Regulation. It follows that, in my view, the recitals do deal adequately with the attribution of injury.

(14) In relation to the same error, Targetti submitted that there is no adequate justification for the assumption that prices of imports from Hungary and Poland were higher than the prices of imports from the PRC so that no adjustments needed to be made on account of physical differences between the products. For the reasons given in relation to the immediately preceding criticism, I do not accept that there was a failure to state reasons in relation to this point.

(15) In relation to the same error, Targetti states that there is no, or no adequate, explanation of the reasoning relating to the impact of imports from Hungary and/or Poland and no indication of the volume of the imports or the sources of data used. I deal with these criticisms at [93] and [95] above in the context of the alleged error. As I have rejected the criticisms in that context, it follows that I must reject the contention that there was a failure to state reasons.

(16) In relation to the same error, Targetti contended that there is no indication what the figures of 56% and 79% relating to imports from Poland and Hungary in recital 90 to the Provisional ADD Regulation mean. I have rejected this criticism at [95] above. For the reasons given above, I do not consider that there is any lack of transparency about the figures and my view is that recitals are not the place for detailed discussions of data. I do not accept that there was a failure to state reasons.

(17) Also in relation to the same error, Targetti criticised the absence of any explanation of the disparity in the amounts of product concerned within the relevant CN code imported into the EU from the PRC and from Hungary and Poland. Targetti did not explain and I cannot understand how the reason for the disparity can be regarded as a reason for the anti-dumping measures. It seems to me that the amounts of product being imported are reasons for the measures but the reason for the disparity is irrelevant if material injury has been established.

(18) In relation to the alleged error that different methodologies were used in calculating the dumping and injury margins, Targetti contended that no justification or explanation was given for the use of different product groupings in calculating dumping and injury margins or why they did not distort the application of the lesser duty rule. At [97]-[98] above, I have concluded that that the use of different product groupings in calculating dumping and injury margins was not a manifest error. It follows that I do not accept that the absence of any explanation for the use

of different product groupings in calculating dumping and injury margins was a failure to state reasons.

(19) Finally, Targetti criticised the lack of any reasons explaining why the Community interest called for intervention as required by the Basic Regulation. This is the alleged error dealt with at [42]-[49] above. At [49], I concluded that recitals 100-118 of the Provisional ADD Regulation show that the EU institutions had carried out an assessment of the Community interest and, on the facts, established that it clearly called for intervention. It follows that, in my view, the recitals clearly explained why the Community interest called for intervention. I do not accept that there was any failure to state reasons.

Breach of principles of EU law

104. Targetti contended that the Community institutions acted in breach of the principles of legal certainty and the duty of good, sound or proper administration.

105. Targetti referred to the use of the criterion of whether or not there were compelling reasons on grounds of Community interest against the imposition of anti-dumping duty (discussed at [42] – [49] above). Targetti contended that the use of that test was contrary to the principle of legal certainty because it was not found in the Basic Regulation and so was inherently uncertain in scope and unpredictable in application. Essentially, Targetti's point is that the Community institutions did not apply the correct test for determining whether the Community interest called for intervention and that was contrary to legal certainty. I have already found, at [49] above, that the recitals to the Provisional ADD Regulation, which are incorporated by reference in the Definitive ADD Regulation, show that the EU institutions carried out an assessment of the Community interest and that the facts established showed that it clearly called for intervention. It follows that, in my opinion, the correct test was used and there is no question of any breach of the principle of legal certainty.

106. Targetti also alleged that the conduct of the Community institutions was influenced by unpublished documents which meant that the institutions had failed to disclose the criteria governing the investigation into the alleged dumping. Targetti submitted that this was a breach of the principles of legal certainty and the duty of proper administration. Targetti made an application under Regulation (EC) No 1049/2001 regarding public access to European Parliament, Council and Commission documents for access to internal guidelines in 2007. That application was initially refused by the Commission in a letter dated 10 July 2007. The application was partially granted subsequently on review. Article 4 of the 2001 Regulation provides that documents need not be disclosed if such disclosure would seriously undermine the institution's decision-making process, unless there is an overriding public interest in disclosure. In a letter dated 29 October 2007, the Commission justified its refusal to disclose all the documents requested on the grounds that it would undermine the Commission's decision making and investigation process. The letter stated that Targetti could bring proceedings before the GCEU or could make a complaint to the European Ombudsman. It seems to me that the Commission are entitled to refuse to make certain documents publicly available and, where it does so, the appropriate way

to challenge such refusal is by one of the methods set out in the Commission's letter of 29 October 2007. In fact, as Dr Gambardella stated in evidence, Targetti began proceedings before the European Ombudsman. Those proceedings are ongoing. I do not consider that it is appropriate for this Tribunal to provide an alternative method of challenging a decision of the Commission not to disclose documents (and a back-door method of challenging the Definitive ADD Regulation) by making a reference to the CJEU.

107. Targetti's contention that the Community institutions acted in breach of the duty of good, sound or proper administration relies on the commission of manifest errors which I have already dealt with above. Targetti also relies on the Commission's failure to obtain information from a Korean company to enable Korea to be used as an analogue country. I do not accept that this demonstrates that the Community institutions acted in breach of the duty of good, sound or proper administration. Recital 28 to the Provisional ADD Regulation states that only one producer in Korea initially agreed to cooperate with the Commission but then failed to provide the necessary information requested by the Commission. In reality, Targetti's complaint is that the Commission did not try hard enough to obtain information from Korea when the only company that responded stopped co-operating. That appears to me to fall well short of establishing a lack of good, sound or proper administration.

Summary of conclusions

108. To summarise, I have reached the following conclusions:

(1) it is not beyond doubt that a reference in this case would be ruled to be inadmissible by the CJEU;

(2) the Tribunal should make a reference if it is satisfied that Targetti's submissions on invalidity are not unfounded but are reasonably arguable;

(3) the EU institutions have not failed to demonstrate that the Community interest called for intervention in relation to the Definitive ADD Regulation;

(4) the fact that the methodology used sequential or layered adjustments rather than a single adjustment to calculate the dumping margin is not a manifest error;

(5) there is no evidence that no adjustment for voltage was made and, accordingly, no manifest error in relation to the voltage adjustment;

(6) the use of "model zeroing" in the worksheets for the dumping margin had no impact on the calculation and thus did not render the Definitive ADD Regulation Tribunal invalid so the Tribunal should not refer a question on the use of zeroing to the CJEU;

(7) there was no manifest error in the identification of the Community industry;

(8) there was no failure to make the necessary adjustments for the different characteristics of the products in order to calculate the injury margin and the price undercutting margin;

(9) the Commission applied the correct test of whether the products were alike rather than any stricter test of substitutability in considering the issue of injury;

(10) there was no manifest error in the attribution of material injury to the imports from the PRC;

(11) the use of the different PCN codes to calculate the dumping margin and the injury margin did not invalidate the comparison or make it more difficult or impossible to apply the lesser duty rule and so it was not a manifest error;

(12) there was no failure to state reasons; and

(13) the Community institutions did not act in breach of the principles of legal certainty and the duty of good, sound or proper administration

Decision

109. I have concluded that, for the reasons set out above, none of the challenges to the validity of the Definitive ADD Regulation has been substantiated. It follows that I do not consider that it is necessary to make any reference to the CJEU for a preliminary ruling on the validity of the Definitive ADD Regulation. My decision is that Targetti's appeal must be dismissed.

Rights of appeal

110. This document contains full findings of fact and reasons for the decision. Any party dissatisfied with the Tribunal's decision has a right to apply for permission to appeal against it pursuant to Rule 39 of the Tribunal Procedure (First-tier Tribunal) (Tax Chamber) Rules 2009. The application must be received by this Tribunal not later than 56 days after this decision is sent to that party. The parties are referred to "Guidance to accompany a Decision from the First-tier Tribunal (Tax Chamber)" which accompanies and forms part of this Decision Notice.

GREG SINFIELD
TRIBUNAL JUDGE

RELEASE DATE: 21 December 2012