JUDGMENT OF THE COURT OF FIRST INSTANCE (Fourth Chamber)

26 January 2006 *

In Case T-364/03,

Medici Grimm KG, established in Rodgau Hainhausen (Germany), represented by R. MacLean, Solicitor, and E. Gybels, lawyer, with an address for service in Luxembourg,

applicant,

v

Council of the European Union, represented by M. Bishop, acting as Agent, assisted by G. Berrisch, lawyer,

defendant,

supported by

Commission of the European Communities, represented by N. Khan and T. Scharf, acting as Agents, with an address for service in Luxembourg,

intervener,

* Language of the case: English.

ACTION under Article 235 EC and the second paragraph of Article 288 EC for damage allegedly suffered by the applicant as a result of the absence of retroactive effect of Council Regulation (EC) No 2380/98 of 3 November 1998, amending Regulation (EC) No 1567/97 imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China (OJ 1998 L 296, p. 1), partly annulled by the judgment of the Court of First Instance of 29 June 2000 in Case T-7/99 *Medici Grimm* v *Council* [2000] ECR II-2671,

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

composed of H. Legal, President, P. Mengozzi and I. Wiszniewska-Białecka, Judges,

Registrar: K. Andová, Administrator,

having regard to the written procedure and further to the hearing on 14 September 2005,

gives the following

Judgment

Legal context

1 Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), as amended by Council Regulation (EC) No 2331/96 of 2 December 1996 (OJ 1996 L 317, p. 1) and by Council Regulation (EC) No 905/98 of 27 April

1998 (OJ 1998 L 128, p. 18) ('the Basic Regulation'), lays down the legal framework applicable in the Community to dumping at the material date in the present case, namely 6 November 1998, the date of the entry into force of Council Regulation (EC) No 2380/98 of 3 November 1998, amending Regulation (EC) No 1567/97 imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China (OJ 1998 L 296, p. 1).

2 Article 1(1) of the Basic Regulation provides as follows:

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

3 Article 11(3) of the Basic Regulation provides as follows:

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

An interim review shall be initiated where the request contains sufficient evidence that the continued imposition of the measure is no longer necessary to offset dumping and/or that the injury would be unlikely to continue or recur if the

measure were removed or varied, or that the existing measure is not, or is no longer, sufficient to counteract the dumping which is causing injury.

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

4 Article 11(5) reads as follows:

'The relevant provisions of this Regulation with regard to procedures and the conduct of investigations, excluding those relating to time-limits, shall apply to any review carried out pursuant to paragraphs 2, 3 and 4. Any such review shall be carried out expeditiously and shall normally be concluded within 12 months of the date of initiation of the review.'

5 Article 11(6) reads as follows:

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

6 Article 11(8) provides as follows:

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

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

...'

Background to the dispute

7 The present action has arisen in the course of a dispute between the applicant and the Commission and the Council following the entry into force of Regulation No 2380/98.

8 In 1996 the Commission initiated an anti-dumping proceeding concerning imports of handbags from the People's Republic of China (OJ 1996 C 132, p. 4). Neither the

applicant, which imported leather handbags produced by Lucci Creation Ltd, a company located in Hong Kong with factories in China and producing leather handbags made exclusively for the applicant in the Community, nor Lucci Creation participated in the Commission's investigation.

9 By Regulation (EC) No 209/97 of 3 February 1997 imposing a provisional anti-dumping duty on imports of certain handbags originating in the People's Republic of China (OJ 1997 L 33, p. 11), which entered into force on 4 February 1997, provisional anti-dumping duties at a maximum rate of 39.2% were imposed by the Commission on these imports.

10 By Council Regulation (EC) No 1567/97 of 1 August 1997 imposing a definitive anti-dumping duty on imports of leather handbags originating in the People's Republic of China and terminating the proceeding concerning imports of plastic and textile handbags originating in the People's Republic of China (OJ 1997 L 208, p. 31), which entered into force on 3 August 1997, definitive anti-dumping duties of a maximum of 38% were imposed by the Council on imports of leather handbags originating in the People's Republic of China. As Lucci Creation had not participated in the proceedings, it was not given individual treatment, and the applicant's imports of its products into the Community were therefore subjected to the residual duty of 38%. The applicant did not challenge Regulation No 1567/97.

11 On 13 September 1997, six weeks after the publication of Regulation No 1567/97, after a large number of producers and exporters in the People's Republic of China had contacted the Commission in order to request individual treatment, at a time when the Commission was no longer in a position to consider such requests as they had been submitted after the period prescribed in the original investigation, the Commission published a notice requesting producers and exporters to submit

evidence warranting the initiation of an interim review of the anti-dumping measures imposed by Regulation No 1567/97 (OJ 1997 C 278, p. 4). Lucci Creation, as an exporter and producer, responded to this notice and lodged the information requested by the Commission.

12 On 13 December 1997 the Commission published a notice (OJ 1997 C 378, p. 8) formally initiating an interim review of the anti-dumping measures imposed by Regulation No 1567/97, although (i) the time-limit laid down by Article 11(3) of the Basic Regulation of one year from the imposition of the definitive measure, consisting in the present case in the adoption of Regulation No 1567/97 dated 1 August 1997, after which importers or exporters may submit to the Commission a request, supported by sufficient evidence, for an interim review, had not expired and (ii) no change in circumstances could have provided a reason for the Commission's initiating the review (Case T-7/99 *Medici Grimm* v *Council* [2000] ECR II-2671, 'the *Medici Grimm I* judgment', paragraph 83). However, the Commission stated in its notice that the scope of the review was limited to the issue of the individual treatment of producers and exporters. The investigation period used was the same as that covered by the original investigation leading to the adoption of Regulation No 1567/97, namely 1 April 1995 to 31 March 1996 ('the investigation period').

13 While this new investigation proceeded, imports of handbags that had not received individual treatment under Regulation No 1567/97 continued to be subject to the residual anti-dumping duty of 38%.

14 In the course of that investigation, the applicant made a series of written representations to the Commission arguing that the regulation to be adopted on the completion of that investigation should be made retroactive, mainly because the factual information used in the course of that investigation related to the same period as that covered by the original investigation leading to the adoption of Regulation No 1567/97. For the same reason, the applicant also asked the Commission on several occasions for a refund of the anti-dumping duties paid by it

since 3 August 1997, the date of the entry into force of Regulation No 1567/97. The applicant also explained that it had not initiated the refund procedure pursuant to Article 11(8) of the Basic Regulation because it expected that the new measures would apply retroactively.

15 Nevertheless, on 17 August 1998 the applicant, pursuant to Article 11(8) of the Basic Regulation, submitted a first application to the German customs authorities for a refund of DEM 1 046 675.81, being the total anti-dumping duties paid by the applicant up to that date.

16 By way of a preliminary reply, the Commission informed the applicant by letter of 14 September 1998 that 15 payments, representing a total of DEM 406 755.77, seemed to have been made before the six-month period preceding the date on which that first refund application was lodged and could not therefore be taken into account pursuant to Article 11(8) of the Basic Regulation.

17 In the final disclosure document of 27 August 1998 the Commission confirmed that the applicant and Lucci Creation were subject to anti-dumping duty at a rate of 0% and refused the applicant's request regarding retroactive application of the revised rate of duty.

18 On 3 November 1998 the Council adopted Regulation No 2380/98, from which it is apparent that no dumping was found in relation to imports of Lucci Creation products by the applicant during the investigation period and that therefore Lucci Creation qualified for individual anti-dumping duty of 0%. However, the Council rejected the request for retroactive effect on the grounds, first, that measures

adopted following review investigations have prospective effect only and, second, that 'this would result, for those exporters which receive as a result of the present investigation a lower duty rate than the residual duty, in an unwarranted bonus for their non-cooperation in the initial investigation'.

19 On 3 December 1998 the applicant made a second refund application to the German customs authorities for the sum of DEM 409 777.34. This claim was in respect of the anti-dumping duties that had been paid between 18 August and 6 November 1998.

20 On 12 January 1999 the applicant commenced the proceedings before the Court of First Instance in the case giving rise to the *Medici Grimm I* judgment.

21 On 24 January 2000 the Commission adopted a decision concerning the two applications for the refund of anti-dumping duties which had been submitted by the applicant by that date. This decision granted the two applications for the refund of duties totalling DEM 1 049 697.38 and rejected the applications relating to a total of DEM 406 755.77 on the ground that those duties had been paid on transactions effected in the period prior to the six-month period preceding the application for refund.

22 On or around 30 March 2000 the applicant received a reimbursement of anti-dumping duties from the German customs authorities for the sum of DEM 682 385.46. This payment was for the amount authorised under the Commission's decision of 24 January 2000, less sums retained by the German customs authorities following an audit of the applicant's import records.

23 On or around 2 June 2000 a further sum of DEM 229 502.16 was repaid by the German customs authorities in respect of the anti-dumping duties reassessed for the period from 17 February to 5 November 1998. This refund was however provisional, being conditional on implementation of the procedure for review of the Commission's decision of 24 January 2000, laid down in paragraph 4 thereof. On 6 June 2000 the applicant therefore submitted a third application for repayment of that sum.

24 On 29 June 2000 the Court of First Instance delivered judgment in the *Medici Grimm I* case. The Court annulled Article 2 of Regulation No 2380/98 in so far as the Council had not abided by all the consequences of the review findings relating to the applicant's imports of Lucci Creation's products.

25 After finding that there was no change in circumstances which could have provided a reason for the Commission's initiating the review, the Court noted that the Commission had decided to use the same investigation period as that which had formed the basis for the imposition of definitive duties by Regulation No 1567/97. The Court concluded that the Council had not reviewed the measures in force but had in fact reopened the original procedure. Accordingly, the institutions could not raise the scheme and purposes of the review procedure as obstacles to the applicant's claim for retroactive application of the individual rate of 0% granted to it by Regulation No 2380/98.

26 Accordingly, the Court held that, since the Community institutions had found, in the context of a review investigation, that one of the factors was missing on the basis of which definitive anti-dumping duties had been imposed, it was no longer possible to consider that the conditions laid down in Article 1 of the Basic Regulation were satisfied at the time when Regulation No 1567/97 was adopted and that the trade-protection measures against Lucci Creation imports to the Community were necessary. As the institutions found that Lucci Creation had not engaged in dumping during the investigation period, they were required to give that finding retroactive effect.

27 Therefore the Court partly annulled Regulation No 2380/98 in so far as the Council failed to give retroactive effect therein to the amendment of the rate of anti-dumping duty imposed on the applicant's imports of Lucci Creation's products. However, the Court maintained that regulation in force until the competent institutions adopted the measures necessary to comply with the judgment.

28 No appeal was brought against that judgment.

29 On 22 January 2001, following the submission by the Commission of a proposal for a regulation amending Regulation No 1567/97, the Council adopted Regulation (EC) No 133/2001 amending Regulation (EC) No 1567/97 as regards the date of application of certain anti-dumping measures applicable to imports of leather handbags originating in the People's Republic of China (OJ 2001 L 23, p. 9) in order to comply with the *Medici Grimm I* judgment.

30 Article 1 of Regulation No 133/2001 adds the following subparagraph to Article 3 of Regulation No 1567/97:

'As far as leather handbags produced by Lucci Creation Ltd and imported by Medici Grimm KG ... are concerned, the rate of duty of 0.0% shall be applicable as from 3 August 1997.'

31 This regulation came into effect on 26 January 2001.

32 On or around 9 February 2001, following the adoption of Regulation No 133/2001, the German customs authorities made two further repayments of DEM 16 068.60 and DEM 120 369.64 in respect of the payments withheld as a result of the reassessment of the anti-dumping duties owed by the applicant for the period prior to 17 February 1998.

33 On or around 19 February 2001 the German customs authorities made a final repayment of DEM 425 115.90.

Procedure and forms of order sought by the parties

34 The applicant brought the present action by document lodged at the Registry of the Court of First Instance on 31 October 2003.

35 By document lodged at the Court Registry on 16 February 2004, the Commission sought leave to intervene in the present proceedings in support of the Council. By order of 6 May 2004, the President of the Fourth Chamber of the Court granted leave to intervene.

36 By letter of 18 June 2004 the Commission informed the Court that it would not submit a statement in intervention, but that it would intervene in the oral procedure.

37 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Fourth Chamber) decided to open the oral procedure.

38 The parties presented oral argument and their replies to the Court's oral questions at the hearing on 14 September 2005.

39 The applicant claims that the Court should:

— declare the action admissible;

— find that, pursuant to the second paragraph of Article 288 EC, the Council is liable for the damage caused to the applicant and order the Council to pay the applicant damages in the total amount of EUR 168 315 or whatever amount the Court considers appropriate;

— order the Council to pay the costs.

40 The Council contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

41 The Commission contends that the Court should dismiss the application.

Admissibility

Arguments of the parties

42 Without formally raising a plea of inadmissibility by separate document under Article 114 of the Rules of Procedure of the Court of First Instance, the Council none the less submits that the application is inadmissible, since it does not meet the requirements of the first paragraph of Article 21 of the Statute of the Court of Justice and of Article 44(1)(c) of the Rules of Procedure, for two reasons.

43 First, the applicant does not sufficiently identify the relevant Community act or the conduct that allegedly caused the damage, referring in turn to Regulation No 2380/98, an omission on the part of the Council, the Council's 'illegal actions when adopting' Regulation No 2380/98, or the 'retention' of anti-dumping duties. The applicant did not in any event state, for each act, why it constitutes a sufficiently serious breach of a rule of law intended to protect the applicant and why it caused it damage.

44 Second, the applicant does not give sufficient details of the rule(s) of Community law alleged to have been infringed by the Council. The applicant bases its claim both on Articles 1 and 15, Article 11(3), and Articles 7(1) and 9(4) (of the Basic Regulation) and, generally, on 'the protection granted under the Basic Regulation'. There again, the applicant does not explain in what way the Council is alleged to have breached each of those provisions nor in what way the provision was intended to protect the applicant's interests.

45 The applicant argues that its action is admissible. First, it was the adoption of Regulation No 2380/98, and more specifically the Council's refusal to give proper effect to the findings of the review investigation, that caused the damage. Second,

the rule of Community law which was infringed is adequately identified. It is Article 1(1) of the Basic Regulation, since the other provisions of the Basic Regulation cited in the application (Articles 7(1), 9(4) and 11(5)) are mentioned only because, according to the applicant, they underpin the fundamental principle of Article 1(1) of the Basic Regulation.

46 The applicant adds that the plea of inadmissibility raised by the Council must be rejected on the basis of Article 46(1)(c) of the Rules of Procedure as the Council has not sought any form of order relating to the inadmissibility of the action; the Council disputes this, claiming that its head of claim for the dismissal of the action is sufficient.

Findings of the Court

47 As a preliminary point, it must be observed that this action has been formally brought against the Council and not against the Community. However, it is settled case-law that the fact of bringing, against the institution itself, an action seeking, on the basis of the second paragraph of Article 288 EC, to establish the non-contractual liability of the Community on account of damage allegedly caused by an institution of the Community cannot render the application inadmissible. Such an application must be deemed to be directed against the Community represented by that institution (Case 353/88 *Briantex and Di Domenico* v *EEC and Commission* [1989] ECR 3623, paragraph 7, and Case T-209/00 *Lamberts* v *Ombudsman* [2002] ECR II-2203, paragraph 48).

48 As regards the admissibility of the plea of inadmissibility raised by the Council, although Article 46(1)(c) of the Rules of Procedure provides that the defence must state the form of order sought by the defendant, that article does not distinguish

between the form of order sought concerning the admissibility of the action and the form of order sought concerning the merits of the action. Nor does that article require the defendant to state in the form of order sought, in addition to the arguments set out in the main part of its defence, why the Court should grant or dismiss the action.

49 In the present case, the Council expressly stated in the main part of its defence that it takes the view that the action should be dismissed as inadmissible and, in the form of order sought in that defence, that it was asking the Court to dismiss the application. Accordingly, the applicant's argument relating to the plea of inadmissibility raised by the Council must be rejected (see, to that effect, Case T-145/98 *ADT Projekt* v *Commission* [2000] ECR II-387, paragraphs 67 and 69). In any event, the plea of inadmissibility raised by the Council is a matter of public policy and may be raised by the Court of its own motion.

50 Consequently, the plea of inadmissibility raised by the Council must be examined.

51 Under the first paragraph of Article 21 of the Statute of the Court of Justice, which applies to the Court of First Instance by virtue of the first paragraph of Article 53 of that statute, and Article 44(1)(c) and (d) of the Rules of Procedure of the Court of First Instance, every application must contain the subject-matter of the dispute, the form of order sought and a brief statement of the pleas in law on which it is based. That statement must be sufficiently clear and precise to enable the defendant to prepare its defence and the Court to rule on the application. In order to guarantee legal certainty and sound administration of justice it is necessary, in order for an action to be admissible, that the basic legal and factual particulars relied on be indicated, at least in summary form, coherently and intelligibly in the application itself (Case T-195/95 *Guérin automobiles* v *Commission* [1997] ECR II-679, paragraph 20, and Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 64).

52 In order to satisfy those requirements, an application seeking compensation for damage allegedly caused by a Community institution must state the evidence from which the conduct which the applicant alleges against the institution can be identified, the reasons for which the applicant considers there is a causal link between the conduct and the damage it claims to have suffered, and the nature and extent of that damage (Case T-64/89 *Automec* v *Commission* [1990] ECR II-367, paragraph 73, and *Chiquita Brands and Others* v *Commission*, paragraph 65).

53 In the present case, only the identification of the conduct alleged against the Council is at issue.

54 As regards the measure of the Council which caused the damage, it is apparent from the file, and in particular from the information given in the application and in the reply, that it is the adoption of Regulation No 2380/98 which is concerned and, more specifically, the refusal of the Council to abide, in that regulation, by all the findings of the investigation giving rise to its adoption. Consequently, the Court must reject the plea of inadmissibility raised by the Council alleging that the act which caused the damage was not identified.

55 As regards identification of the rule of law which has been infringed, it is true that the application refers not only to Article 1(1) of the Basic Regulation, but also to Articles 7(1), 9(4) and 11(5) thereof, stating that 'these provisions are intended to safeguard, or protect, individuals from the arbitrary and wrongful imposition of anti-dumping duties when the essential three criteria are not satisfied'. However, the applicant explained in its reply that it was pleading infringement only of Article 1(1) of the Basic Regulation, and that the other provisions of that regulation cited in the application were referred to only to illustrate the fundamental principle laid down by that article. In view of this and given, first, that the infringement of Article 1(1) of the Basic Regulation was pleaded by the applicant in its application and, second, that it is accepted that an applicant may specify its claim in the reply (see, to that effect, Case 25/62 *Plaumann* v *Commission* [1963] ECR 95, 108), the Court must also reject the plea of inadmissibility raised by the Council alleging that the rule of law purportedly infringed by the Council has not been identified.

56 Furthermore, the file shows that the Council was in a position to present its defence both as regards the unlawful conduct alleged against it and as regards the rule of law allegedly infringed.

57 It follows from the foregoing that the action is admissible.

Substance

58 First of all, the Court observes that this is an action for compensation for damage, based on Article 235 EC and the second paragraph of Article 288 EC.

59 In the case of non-contractual liability of the Community within the meaning of the second paragraph of Article 288 EC, it is settled case-law that, for the Community to incur that liability, a series of conditions must be met, namely the conduct of which the institutions are accused must have been unlawful, the damage must be real and a causal connection must exist between that conduct and the damage in question (Case 26/81 *Oleifici Mediterranei* v *EEC* [1982] ECR 3057, paragraph 16, and Case T-283/02 *EnBW Kernkraft* v *Commission* [2005] ECR II-913, paragraph 84).

60 If any one of those conditions is not satisfied, the action must be dismissed in its entirety and it is unnecessary to consider the other conditions for the non-contractual liability in question (*EnBW Kernkraft* v *Commission*, paragraph 85).

61 It is common ground in the present case that the unlawfulness of the conduct alleged against the Council by the applicant, namely the adoption of Regulation No 2380/98 without giving retroactive effect to the amendment of the rate of anti-dumping duty imposed on the applicant's imports of Lucci Creation's products, was established by the *Medici Grimm I* judgment and that, according to paragraph 87 of that judgment, the infringement of Article 1(1) of the Basic Regulation has also been established.

62 However, that is not sufficient to justify the conclusion that the first condition for the Community's non-contractual liability, relating to the unlawfulness of the conduct alleged against the institution in question, has been satisfied. As regards that condition, the case-law requires a sufficiently serious breach to be established of a rule of law intended to confer rights on individuals (Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraph 42).

63 Since the two conditions, relating to the nature of the rule of law relied on and the seriousness of the breach of that rule, are cumulative, it is appropriate, in the present case, first to examine whether the conduct of the Council constitutes a sufficiently serious breach of Article 1(1) of the Basic Regulation.

Arguments of the parties

64 The applicant submits that the test for finding that a breach of Community law is sufficiently serious is whether the Community institution manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced, or no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

65 In the present case, the Council had no alternative but to abide by the consequences of its findings and give retroactive effect to the measures taken, and had no discretion. The Court of First Instance has already ruled on this question at paragraphs 85 and 86 of the *Medici Grimm I* judgment. Thus, that judgment establishes that the Council had no discretion in deciding whether to abide by all the consequences of the review and, consequently, the mere infringement of Community law is sufficient to establish the existence of a sufficiently serious breach.

66 Three additional factors show that the Council had little or no discretion when it adopted Regulation No 2380/98. First, that regulation had limited application and scope. Second, the review which was carried out involved no choice of economic policy on the part of the institutions and therefore little or no discretion other than examining the export prices of the Chinese producers participating in the investigation. On the contrary, the retention of the review period initially used for the adoption of Regulation No 1567/97 made the exercise akin to an administrative procedure by excluding the normal policy choices entailed in a normal review procedure. Third, Regulation No 2380/98 did no more than draw the appropriate conclusions from the analysis of the information given to the Commission by the applicant and Lucci Creation in the course of the investigation.

67 The applicant adds as a secondary point that in any event the Council manifestly and gravely disregarded the limits on its discretion. The failure of the Council to respect the protection afforded by the Basic Regulation is manifest because the Council failed to take into account the consequences of the review findings in purporting to conclude a review investigation based on Article 11(3) of the Basic Regulation in order to avoid the consequences of that review when in fact the procedure which was followed was a reopening of the original investigation.

68 The breach of the protection afforded by the Basic Regulation is aggravated by three factors. First, the applicant drew the Council's attention to the fact that the refusal to

give retroactive effect to the findings of Regulation No 2380/98 was inconsistent with the general scheme of the Basic Regulation. Second, for the applicant, the consequences of refusal were foreseeable and were nevertheless disregarded by the Council as unimportant. Third, the decision to use the original investigation period should have alerted the Council to the fact that the procedure was unusual and it ought to have been obvious to it that Regulation No 2380/98 would be adopted to address a particular set of circumstances that could, conceivably, have special consequences.

69 Furthermore, the reasons given by the Council for its refusal to act in accordance with the review findings amount to an abuse of power.

70 In any event, in the light of the facts of this case, the conduct of the Council constitutes a sufficiently serious breach of Community law, since the Council knew that data relating to an original investigation period had never before been used to carry out a review investigation, retroactive anti-dumping measures having already been adopted in the past and the difficulties faced by the Council being irrelevant for the purposes of assessing the legality of its acts.

71 The Council replies that, were the Court to find that the Council acted in breach of a rule of law intended for the protection of the applicant, that breach would not be sufficiently serious. The question whether a breach of Community law is sufficiently serious or not must be assessed by reference to the complexity of the situations to be regulated, difficulties in the application or interpretation of the legislation and, more particularly, the margin of discretion available to the author of the act in question. Furthermore, the decisive test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and

gravely disregarded the limits of its discretion. Where that institution has only a considerably reduced discretion, or no discretion at all, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach.

72 In the present case, the Council considers that it had a discretion with respect to the question of whether to give retroactive effect to Regulation No 2380/98.

73 The Council emphasises, first, that its position on whether or not to apply Regulation No 2380/98 retroactively was taken as the culmination of a process which began with the initiation of a review investigation at the behest of the Member States and, second, that, as a result of the adoption of that regulation, the applicant was better off than if that investigation had not been initiated. The initiation of the review investigation was thus a purely discretionary act which enabled the applicant to obtain relief which legally it could not have claimed if that investigation had not been initiated. The fact that the institutions failed to provide further relief to the applicant cannot be considered a sufficiently serious breach giving rise to the Community's non-contractual liability under the second paragraph of Article 288 EC.

74 As a secondary point, the Council puts forward three additional arguments. First, the decision as to whether Regulation No 2380/98 should apply retroactively involved an element of discretion, namely to determine whether the circumstances of the review investigation allowed or justified an exception to the general rule that measures adopted pursuant to review investigations have only prospective effect. Second, the Council did not wilfully disregard the findings of the review investigation. The Council considered whether it was possible to give retroactive effect to Regulation No 2380/98, given that reusing original data in connection with a review was unprecedented and that it was clear that the findings did not relate to a later period. However, it concluded that this was not possible in the light of the

provisions applying to reviews and in the absence of any similar precedent. The Council could not have foreseen that the Court would disagree with it. Since the case was exceptional, the risk of error was greater. Furthermore, by refusing to give retroactive effect, it was merely endeavouring to apply the Basic Regulation in a non-discriminatory manner to a situation in respect of which that regulation had not provided for a solution; to apply a rule of law by analogy would be very difficult. Third, the fact that the applicant drew the institutions' attention to the consequences of not giving retroactive effect to Regulation No 2380/98 is irrelevant, in particular as the institutions did not ignore this reminder, but merely came to a different conclusion.

75 Likewise the Council did not misuse its powers. The request for retroactive application was rejected due to the prospective nature of measures adopted pursuant to review investigations, and Regulation No 2380/98 was not adopted with the sole or main purpose of achieving ends other than those stated.

76 In the present case, the Council's conduct therefore amounts merely to 'an erroneous but excusable approach to an unresolved legal question', which does not trigger the non-contractual liability of the Community within the meaning of the second paragraph of Article 288 EC.

77 At the hearing, the Commission claimed that in this case the Council, by adopting Regulation No 2380/98, was simply and of its own initiative compensating for an excessively rigid and strict application of Regulation No 1567/97, in order to assist parties such as the applicant. Since the Basic Regulation does not contain any provision on the reopening of the procedure, a review investigation was initiated under Article 11(3) of that regulation. Furthermore, case-law accords the institutions wide discretion in terms of determining the investigation period. Therefore the institutions merely thought that they were reviewing the measures in force. It was only the *Medici Grimm I* judgment which made it clear that the provisions of the Basic Regulation relating to reviews were not applicable in this case. Since new and exceptional circumstances were involved, it cannot be inferred

that, by acting in that manner, the Council manifestly or gravely exceeded the limits on its discretion. In the present case, there is not therefore a sufficiently serious breach of Community law giving rise to the Community's non-contractual liability.

Findings of the Court

78 The unlawful conduct alleged in the present case arises, in essence, from the fact that, in Regulation No 2380/98, the Council failed to give retroactive effect to the amendment of the rate of anti-dumping duty imposed on the applicant's imports of Lucci Creation's products and thus did not abide by all the consequences of the review findings relating to those imports.

79 According to settled case-law, and as the applicant points out, the test for finding that a breach of Community law is sufficiently serious is whether the Community institution concerned manifestly and gravely disregarded the limits on its discretion. Where that institution has only a considerably reduced, or no, discretion, the mere infringement of Community law may be sufficient to establish the existence of a sufficiently serious breach (*Bergaderm and Goupil* v *Commission*, paragraphs 41 to 44, and *EnBW Kernkraft* v *Commission*, paragraph 87). In particular, the finding of an irregularity which in comparable circumstances would not have been committed by a normally prudent and diligent administration permits the conclusion that the conduct of the institution constituted an illegality of such a kind as to give rise to the liability of the Community under Article 288 EC (Joined Cases T-198/95, T-171/96, T-230/97, T-174/98 and T-225/99 *Comafrica and Dole Fresh Fruit Europe* v *Commission* [2001] ECR II-1975, paragraph 134).

80 In this respect, the Community rules on the non-contractual liability of the Community also take account of the complexity of the situations to be regulated, and the difficulties in the application or interpretation of the legislation (Joined Cases C-46/93 and C-48/93 *Brasserie du Pêcheur and Factortame* [1996] ECR I-1029, paragraph 43, and Case C-312/00 P *Commission* v *Camar and Tico* [2002] ECR I-11355, paragraph 52).

81 Furthermore, the protection of the rights which individuals derive from Community law cannot vary depending on whether a national authority or a Community authority is responsible for the damage (*Bergaderm and Goupil* v *Commission*, paragraph 41). It must therefore be recognised that, as with proceedings relating to the liability of Member States for infringement of Community law, in order to determine whether an infringement of Community law committed by a Community institution constitutes a sufficiently serious breach, the Community Court hearing a claim for compensation must take account of all the factors which characterise the situation put before it, and those factors include, in particular, the clarity and precision of the rule infringed, and whether any error of law was inexcusable or intentional (see, by analogy, Case C-424/97 *Haim* [2000] ECR I-5123, paragraph 43, and Case C-63/01 *Evans* [2003] ECR I-14447, paragraph 86).

82 As a first step, it must be ascertained whether in this case the Council had a discretion when adopting Regulation No 2380/98 as regards the issue of whether the amendment of the rate of anti-dumping duty imposed on the applicant's imports of Lucci Creation's products had retroactive effect.

83 The Court of First Instance held, in paragraph 87 of the *Medici Grimm I* judgment, that, since the Community institutions found in the review investigation that one of the factors on the basis of which the definitive anti-dumping duties had been imposed was missing, it was no longer possible to consider that the conditions laid down in Article 1 of the Basic Regulation were satisfied at the time when Regulation No 1567/97 was adopted and that the trade-protection measures against Lucci Creation exports to the Community were necessary. That being so, the institutions

were bound to abide by all the consequences flowing from their choice of the investigation period used and, since they had found that Lucci Creation had not engaged in dumping during that period, they were obliged to give retroactive effect to the consequences flowing from that finding.

84 It follows that, since the Council had found that Lucci Creation had not engaged in any dumping during the investigation period, it was not entitled to impose an anti-dumping duty on imports of those products by the applicant. As a matter of law, it therefore had no discretion and was bound to give retroactive effect to the amendment of the rate of such a duty.

85 The Council's arguments to the contrary, relating to the prospective nature of the measures adopted as a result of review investigations, cannot be accepted. The Court held in the *Medici Grimm I* judgment that, since the investigation period used for the review preceding the adoption of Regulation No 2380/98 was the same as that covered by the original investigation leading to the adoption of Regulation No 1567/97, it was not a review procedure but a reopening of the original investigation.

86 Furthermore, the fact that the initiation of the investigation which led to the adoption of Regulation No 2380/98 could have been a political gesture, amounting to an exercise of discretion by the Council — were that fact established — is irrelevant, since that exercise of discretion could not have had any effect on the Council's obligations under the Basic Regulation.

87 However, the Council's lack of discretion as regards the retroactive effect of Regulation No 2380/98 is not sufficient to justify the conclusion that in the present case there was a sufficiently serious breach of Article 1(1) of the Basic Regulation

such as to give rise to the liability of the Community. It is also necessary, as a second step, to take account of the complexity of the situation to be regulated, the difficulties in the application or interpretation of the legislation, the clarity and precision of the rule infringed, and whether the error of law made was inexcusable or intentional.

88 In the present case, the Council claims, in essence, that it made an excusable error, the circumstances of the case being unprecedented, and that it acted in good faith when it chose not to give retroactive effect to Regulation No 2380/98.

89 In that respect, it should be pointed out, first, that it follows both from Regulation No 2380/98 and from the entire procedure prior to its adoption, that the institutions took the view that they had initiated a review investigation, as opposed to reopening the original procedure. It was only after the *Medici Grimm I* judgment that the legal situation was clarified and that the procedure followed by the institutions was reclassified.

90 Second, it is apparent from the principles applicable to reviews, and in particular from Article 11(6) of the Basic Regulation, that measures adopted as a result of review investigations are of a prospective nature, since any retroactive effect of certain review regulations is allowed only under certain limited conditions which are not satisfied here. Moreover, there was no similar precedent.

91 Third, the second paragraph of recital 19 in the preamble to Regulation No 2380/98 clearly demonstrates that the Council did not ignore the arguments submitted by the applicant prior to the adoption of Regulation No 2380/98 as regards its retroactive effect, but that, after considering them, it reached a different conclusion.

92 Fourth, even if the adoption of Regulation No 2380/98 did not involve, in itself, a choice of economic policy, it none the less raised a difficult legal question, without any precedent in case-law, which was resolved only when the Court of First Instance, giving judgment in *Medici Grimm I*, ruled on the lawfulness of that regulation.

93 Fifth, it has not been established that the Council misused its powers. According to the case-law, an act of a Community institution is vitiated by such unlawfulness only if it was adopted with the exclusive or main purpose of achieving an end other than that stated (Case C-285/94 *Italy* v *Commission* [1997] ECR I-3519, paragraph 52, and Case T-52/99 *T. Port* v *Commission* [2001] ECR II-981, paragraph 53) and a finding of misuse of powers may be made only on the basis of objective, relevant and consistent evidence (Joined Cases T-551/93, T-231/94 to T-234/94 *Industrias Pesqueras Campos and Others* v *Commission* [1996] ECR II-247, paragraph 168, and *T. Port* v *Commission*, paragraph 53).

94 In the present case, the applicant has not established at all that the Council refused to give retroactive effect to Regulation No 2380/98 with the exclusive or main purpose of achieving an end other than that stated.

95 On the contrary, the Council refused to give retroactive effect to Regulation No 2380/98 not with the exclusive or main purpose of ensuring that importers who did not participate in the original investigation would be sanctioned and deprived of entitlement to the refund of their anti-dumping duties, but because, in the factual and legal context such as it could reasonably have been perceived at the time, the Council considered that it was a review investigation which had in fact been carried out and that the measures to be taken as a result of that investigation could only have prospective effect. The justification for having recourse to the original investigation period for reasons of expedition, in recital 8 in the preamble to Regulation No 2380/98, and the classification of this recourse as 'exceptional' moreover demonstrate that the institutions believed that they were carrying out a review.

96 Moreover, the reasoning put forward by the Council to justify the refusal to give retroactive effect to Regulation No 2380/98, noted in paragraph 18 above, is not relevant for the purposes of analysing whether there might have been a misuse of powers. Even if that reasoning is undeniably awkward, it is only secondary in relation to the — in itself sufficient — main line of reasoning put forward, according to which review procedures, in the context of which the Council considered that it was acting, are inherently prospective in nature.

97 Therefore, contrary to what the applicant submits, it cannot be held, in view of the circumstances and in the absence of any evidence to the contrary, that the Council misused its powers or intentionally infringed Article 1(1) of the Basic Regulation.

98 In those circumstances, it is not apparent that the Council infringed Article 1(1) of the Basic Regulation in a sufficiently serious manner to give rise to the non-contractual liability of the Community. The applicant's arguments must therefore be rejected, without there being any need to consider whether that provision is intended to confer rights on individuals.

99 Since the condition which gives rise to the non-contractual liability of the Community has not therefore been satisfied in the present case, the action must be dismissed and it is unnecessary to consider the other conditions for non-contractual liability.

Costs

100 Article 87(2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, it must be ordered to pay the costs in accordance with the form of order sought by the defendant.

101 The Commission, as intervener, is to bear its own costs under Article 87(4) of the Rules of Procedure, according to which institutions which intervened in the proceedings are to bear their own costs.

On those grounds,

THE COURT OF FIRST INSTANCE (Fourth Chamber)

hereby:

1. Dismisses the action;

2. Orders the applicant to bear, in addition to its own costs, the costs incurred by the Council;

3. Orders the Commission to bear its own costs.

Legal Mengozzi Wiszniewska-Białecka

Delivered in open court in Luxembourg on 26 January 2006.

E. Coulon H. Legal

Registrar President