ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
24 February 1995 *

In Case T-2/95 R,

Industrie des poudres sphériques, a company incorporated under French law, established in Annemasse (France), represented by Chantal Momège, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Alex Schmitt, 62 Avenue Guillaume,

applicant,

v

Council of the European Union, represented by Ramon Torrent and Jorge Monteiro, acting as Agents, assisted by Philip Bentley, Barrister, of Lincoln's Inn, with an address for service in Luxembourg at the office of Bruno Eynard, Manager of the Legal Affairs Department of the European Investment Bank,

defendant,

APPLICATION for suspension of the operation, with regard to the applicant, of Council Regulation (EC) No 2557/94 of 19 October 1994 imposing a definitive

* Language of the case: French.

anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia (OJ 1994 L 270, p. 27),

THE PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Facts

1 On 18 September 1989, the Council adopted Regulation (EEC) No 2808/89 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and the Soviet Union and definitively collecting the provisional anti-dumping duty imposed on such imports (OJ 1989 L 271, p. 1). That regulation provided for anti-dumping duty of 21.8% and 22% respectively to be imposed on imports of calcium metal originating in the People's Republic of China and the Soviet Union.

2 Regulation No 2808/89 was the subject of an action for annulment and an application for interim measures brought by the applicant, which was trading at the time under the name of 'Extramet Industrie SA'. The application for interim measures was dismissed by order of the President of the Court of Justice of 14 February 1990

in Case C-358/89 R *Extramet Industrie* v *Council* [1990] ECR I-431 (summary publication only), on the ground that the applicant had failed to establish the imminence of the alleged danger that it might not survive the imposition of the anti-dumping duty.

3 The action for annulment brought by Extramet Industrie was declared admissible by judgment of the Court of Justice of 16 May 1991 in Case C-358/89 *Extramet Industrie* v *Council* [1991] ECR 2501. By judgment of 11 June 1992, the Court annulled Regulation No 2809/89 (*Extramet Industrie* v *Council* [1992] ECR I-3813). The Court of Justice held that the Community institutions had not considered whether Péchiney Électrométallurgie SA (hereinafter 'Péchiney'), the only Community producer of calcium metal, had itself contributed, by its refusal to supply, to the injury suffered, or established that the injury found to exist had not been caused by factors other than dumping, such as those alleged to exist by the applicant.

4 Following the receipt of further information from Péchiney, the Commission resumed its investigation and, on 21 April 1994, adopted Regulation (EC) No 892/94 imposing a provisional anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia (OJ 1994 L 104, p. 5). The amount of duty imposed was ECU 2 074 per tonne in the case of calcium metal originating in the People's Republic of China and ECU 2 120 per tonne in the case of calcium metal originating in Russia. On 19 November 1994, on a proposal from the Commission, the Council adopted Regulation (EC) No 2557/94 imposing a definitive anti-dumping duty on imports of calcium metal originating in the People's Republic of China and Russia (OJ 1994 L 270, p. 27, hereinafter 'the contested regulation'). The amount of the duty was maintained at the level fixed by Regulation No 892/94.

5 It appears from the preamble to the contested regulation that the applicant's activity consists *inter alia* in granulating calcium metal. Owing to the special features of its manufacturing process, which has certain requirements related to the level of oxygen in the calcium metal used, it experiences technical difficulties in using the product manufactured by Péchiney in the form in which it is currently available. However, still according to the preamble to the contested regulation, in view of the

efforts and investments made by the said Community producer, that circumstance does not support the conclusion that the producer itself is responsible for the injury which it has suffered, as the applicant claimed. Lastly, the preamble to the contested regulation states that the Commission is to review the regulation 'after six months have elapsed from its coming into force, provided that competition conditions in the sector concerned so require. Otherwise the review should be initiated after one year.'

6 The applicant lodged a complaint with the Commission on 12 July 1994 on the ground that Péchiney's refusal to supply it with a product satisfying its needs amounted to an abuse of a dominant position within the meaning of Article 86 of the EC Treaty.

Procedure

7 By application received at the Court Registry on 9 January 1995, the applicant brought an action under Article 173 of the EC Treaty for the annulment of the contested regulation and, in the alternative, for a declaration that the contested regulation cannot be relied on against it.

8 By separate document received at the Court Registry on the same date, the applicant lodged this application under Article 185 of the EC Treaty for suspension of the operation of the contested regulation in relation to the applicant.

9 The Council submitted its observations on the instant application for interim measures on 18 January 1995. The parties' oral arguments were heard on 30 January 1995. At the hearing, the President of the Court asked them to commence negotiations with a view to their reaching an agreement within five days in order to bring the dispute to an end. When that period expired, the parties made it known that their negotiations had not led to such an agreement. In accordance with the

time-limits prescribed by the President of the Court, the Council submitted its observations on 1 February 1995 on the documents produced to the Court by the applicant at the hearing; the applicant's replies to those observations were received at the Court on 1 and 3 February 1995.

10 By applications received at the Court Registry on 1 and 13 February 1995 respectively, Péchiney and the Commission sought leave to intervene in the present interlocutory proceedings in support of the form of order sought by the Council.

Law

The application for suspension of the operation of the contested regulation

11 Under the combined provisions of Articles 185 and 186 of the EC Treaty and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21) and Council Decision 94/149/ECSC, EC of 7 March 1994 (OJ 1994 L 66, p. 29), the Court may, if it considers that circumstances so require, order that operation of the contested act be suspended or prescribe any necessary interim measures.

12 Article 104(2) of the Rules of Procedure of the Court of First Instance provides that applications for the adoption of the interim measures referred to in Articles 185 and 186 of the Treaty must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the interim measures applied for. The measures applied for must be provisional in nature, in the sense that they must not prejudge the decision on the substance (see the orders of the

President of the Court in Case T-295/94 R *Buchmann* v *Commission* [1994] ECR II-1265, paragraph 9, and in Case T-301/94 R *Laakmann Karton* v *Commission* [1994] ECR II-1279, paragraph 10).

Arguments of the parties

13 In order to make out a prima facie case for its claims, the applicant refers to the seven pleas raised in support of its main application. Those pleas allege: infringement of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter referred to as 'the basic regulation') together with the principle of legal certainty, inasmuch as the Commission 'resumed the investigation' following the annulment of Regulation No 2808/89 by judgment of 11 June 1992 in *Extramet Industrie* v *Council*, and infringement of Articles 7 and 8 of the basic regulation together with infringement of the principle *audi alteram partem*; infringement of Article 4(4) and Article 2(12) of the basic regulation, together with a manifest error of assessment in so far as the Commission considered that the product imported from the People's Republic of China and Russia and that manufactured in the Community were like products; infringement of Article 4 of the basic regulation together with a manifest error of assessment in so far as the Council came to the conclusion that the Community industry suffered material injury; infringement of Article 12 of the basic regulation together with a manifest error of assessment in so far as the Council concluded that it was appropriate in the Community interest to take definitive measures; infringement of Article 190 of the Treaty inasmuch as the Council failed to fulfil its obligation to state reasons with regard to the applicant's complaint to the Commission alleging abuse of a dominant position; and misuse of power in so far as the Commission colluded in the utilization of an anti-dumping procedure for anti-competitive purposes.

14 With regard to the question of urgency, the applicant, which claims that the calcium metal sector accounts for a major part of its total business, avers that it is in danger of suffering serious and irreparable harm as a result of the imposition of the anti-dumping duty fixed by the contested regulation. In that connection, it asserts that by the time that the Court delivers judgment on the substance, payment of the duty will have eliminated it from the market.

15 According to the applicant, the duty imposed amounts to almost 70% of the price of the product whereas, if it had to use the calcium metal produced by the Community manufacturer, its costs would rise by 77%. Moreover, to date Péchiney has been unable to supply it with a product satisfying its requirements, despite the means available to Péchiney, but has, on the contrary, sought to exclude it from the market. As a result, the applicant had no source of supply other than the Russian and Chinese producers. In that connection, the applicant points out that there are only five producers of calcium metal in the world, of which only one — Péchiney — is in the Community. It adds that, after examining the nature of the products of two companies based in the United States of America and Canada respectively, it concluded that the first of those companies could satisfy only one-sixth of its needs at a delivery time of six months and that the second was unable to supply it in view of its present strategy.

16 The applicant further alleges that since the provisional anti-dumping duty was imposed by Regulation No 892/94 it has lost four of its main European customers, namely 76% of its European market, to Péchiney, its main competitor for processed calcium metal, which has strengthened Péchiney's dominant position on all the markets for calcium metal. This means that, in order to forestall its disappearance from those markets, the applicant has to promote the exportation of its products to countries outside Europe. However, in time, those outlets will also be taken away from it, since, thanks to its dominant position, Péchiney is in a position to develop an aggressive strategy in those countries.

17 The applicant further considers that the review clause contained in the preamble to the contested regulation does not eliminate the danger posed to it by the application of that measure. On the one hand, the clause is worded in such a way as to leave it entirely to the Commission's discretion as to whether the review procedure is initiated. On the other hand, as the applicant has already sustained the losses in terms of market share described above, the conditions of competition had already been fundamentally changed to Péchiney's advantage at the time when that clause was inserted.

18 Lastly, the applicant maintains that the balance of the interests at stake tilts in favour of the grant of suspension. In this connection, it argues that Péchiney is not

adversely affected in any way as a result of the applicant's imports of calcium metal originating in the People's Republic of China and Russia, since to date Péchiney has not succeeded in supplying it with a like product. Even if it were to be taken that Péchiney was genuinely suffering injury within the meaning of the basic regulation, it would relate to less than 30% of the imports of Russian and Chinese calcium metal into the Community, since the applicant alone is responsible for between 62% and 97% of aggregate imports from those countries. Moreover, Péchiney's activity in the sector concerned accounts for only 0.05% of the activity of the group of which it is a member company.

19 To begin with, the Council expresses doubts as to the admissibility of the main application. In its view, to hold such an application admissible would detract from the coherence of the Community legal system. If the application to have the contested regulation annulled only as far as the applicant is concerned were to be declared admissible, the other importers could possibly circumvent the duty by purchasing calcium metal imported by the applicant. If, in contrast, the application to have the regulation as a whole annulled were to be declared admissible, that might lead — wrongly — to the annulment of a generally applicable measure at the request of an individual which is concerned only in its objective capacity as an importer.

20 In answer to the pleas raised by the applicant, the Council observes *in limine* that the applicant merely refers in a general way to the pleas raised in its application in the main proceedings and does not specify which factors are capable of justifying *prima facie* the grant of the measure sought. As regards the applicant's first plea, the Council considers that since the judgment of 11 June 1992 in *Extramet Industrie* v *Council* annulled Regulation No 2808/89 as a measure bringing the investigation to an end, the investigation cannot be regarded as closed. Moreover, following the delivery of judgment, the Commission received from the Community producer in question evidence of dumping and injury, which placed it under a duty to resume the investigation. As for the second plea, the Council denies the applicant's claim that it was not given an opportunity to defend its interests. In reply to the third, fourth and fifth pleas, the Council asserts that the facts alleged by the applicant are not sufficient for any errors which may have been committed to be regarded as manifest. As for the sixth plea, by which the applicant complains that the Council failed to fulfil its obligation to state reasons with regard to its

complaint that there was an abuse of a dominant position, the Council considers that questions relating to such an abuse fall within the purview of the Commission. As for the seventh plea, alleging misuse of power, the Council points out that no evidence has been adduced in support of the applicant's contentions.

21 As for the question of urgency, the Council considers that the applicant has not backed up its allegations that it is impossible for it to obtain supplies from the two companies based respectively in the United States of America and Canada and that it is precluded from increasing its exports to non-European countries. In the Council's view, the alleged loss of customers and of market shares allegedly picked up by the Community producer has not been proved either. Moreover, even assuming that they were proven, those factors would be the inherent consequences of the imposition of anti-dumping duty, like the fact that such duty results in an increase in the production costs of the producer concerned. It claims that that analysis is not called in question by the applicant's contentions as to the alleged refusal of the Community producer to supply it, which the Council moreover rejected in the preamble to the contested regulation. In order to establish the urgency of its application, it is not enough for the applicant to rely on such effects; it has to prove that it suffered injury peculiar to itself. The applicant, however, has not adduced any evidence to that effect. Lastly, the Council points out that in any event it is the Commission which is competent to adopt sanctions as a result of any abuse of a dominant position on the part of Péchiney and to adopt any interim measures with regard to it.

22 As to whether the balance of the interests at stake tilts in favour of the grant of suspensory measures, the Council considers that the applicant has not proved that this is the case. In that regard, the Council reiterates the findings made in the contested regulation with regard to the injury allegedly suffered by the Community producer and the Community interest in adopting anti-dumping measures. Moreover, the small percentage accounted for, according to the applicant, by Péchiney's production of calcium metal as a proportion of the aggregate activity of the group to which it belongs is irrelevant, since the anti-dumping rules are designed to protect the various sectors of production.

23 The Council adds that, if the Court hearing the application for interim measures were to take the view, contrary to that taken by the Council, that interim measures should be adopted, those measures should be subject to two essential considerations. In the first place, there should be a mechanism designed to prevent the applicant's reselling the goods imported from China and Russia without processing and, secondly, there should be a bank guarantee securing the payment of the anti-dumping duties in the event of the main application being dismissed, since such a guarantee is essential in order to balance the respective interests of the applicant and the Community producer.

Findings of the Court hearing the application for interim measures

24 As regards the admissibility of the main application, it should be noted that it cannot be regarded as being prima facie manifestly inadmissible. In its judgment of 16 May 1991 in *Extramet Industrie* v *Council*, cited above, the Court held that the applicant's action for the annulment of Regulation No 2808/89 was admissible. In that judgment, the Court acknowledged that, although regulations imposing anti-dumping duties are indeed of a legislative character, they may none the less be of individual concern to certain traders in specific circumstances. Moreover, it took the view that the applicant was individually concerned by the said regulation on account of certain factors constituting a peculiar situation which distinguished it, as regards that regulation, from any other trader. Those factors, which are summarized in paragraph 17 of the judgment in *Extramet Industrie* v *Council*, cited above, have not, prima facie, undergone any material change since then.

25 As to whether the main application is prima facie well founded, it should be observed that, as the Council has pointed out, in order to establish that it has a prima facie case for its claims, the applicant has merely set out the pleas raised in its main application. Whilst the Court hearing an application for interim measures may not consider in detail all the pleas and arguments contained in the main application, it must nevertheless take into consideration the arguments which the applicant has put forward in its application for interim measures and in oral argument in order to check whether there are any factors likely to cast doubt on the

conclusions reached by the Community authority (see the order of the President of the Court of First Instance in Case T-29/92 R *SPO and Others* v *Commission* [1992] ECR II-2161, paragraph 34).

26 In its application for interim measures and at the hearing, the applicant took issue with the conclusions reached by the Commission and the Council with regard to injury within the meaning of Article 4 of the basic regulation and its causes. According to the applicant, since Péchiney was not in a position to supply it with a product meeting its requirements, it was wrong to consider that that company had suffered injury. It argues that, in any event, the magnitude of the injury was overestimated. In addition, the applicant put particular stress on its claim that Péchiney did not take the necessary steps in order to supply it, but endeavoured instead to exclude it from the market. That argument, which corresponds to the first two limbs of the fourth plea advanced in support of the main application, is a serious one and cannot therefore be regarded as being prima facie without any foundation. Moreover, in response to that argument, the Council merely repeated the findings contained in the contested regulation and, at the hearing, simply raised in the abstract the possibility of there being technical shortcomings attributable to the applicant which prevented it from utilizing the product manufactured by Péchiney.

27 In any event, the in-depth factual and legal examination which that argument of the applicant merits — as do the other pleas and arguments contained in the main application — is beyond the scope of these proceedings relating to an application for interim measures.

28 Consequently, it is necessary to consider the urgency of the relief sought, which, as has been consistently held, must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party seeking such relief (see the order of 14 February 1990 in *Extramet Industrie* v *Council*, cited above (summary publication only), paragraph 17). As the Court has consistently held, damage of a purely financial nature cannot in principle be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation (see the order of the President of the Court of First Instance in Case T-185/94 R *Geotronics* v *Commission* [1994]

ECR II-519, paragraph 22). Accordingly, in order to establish urgency in the case of an application for suspension of the operation of an anti-dumping regulation, it is not sufficient to rely on the effects inherent in the imposition of the duty in question, namely a rise in the price of the product affected by the duty and a corresponding decrease in the share of the Community market. Indeed, the very purpose of an anti-dumping duty is to offset the dumping margin found to exist by increasing the price of the product in question (order of the President of the Court of Justice in Case C-6/94 R *Descom* v *Council* [1994] ECR I-867, paragraph 16).

29 In that connection, it should be held that, having regard to the criteria set out above, the information provided by the applicant does not at this stage warrant the grant of the suspensory measure sought.

30 As regards the risk alleged by the applicant of its being eliminated from the market before the Court rules in the main proceedings, the applicant admitted at the hearing that this was a mere possibility. In that regard, it is important to note that the applicant also acknowledged that only part of its production was affected by the anti-dumping duty imposed by the contested regulation, since the remainder was imported under the inward processing system and was hence exempt from anti-dumping duty.

31 As far as the alleged loss of customers and market shares resulting from the imposition of the anti-dumping duty is concerned, the applicant claims that such injury is due to the increased price which the imposition of that duty compels it to charge. In that regard, it explained at the hearing that its customers were willing — up to a point — to pay a higher price for the product manufactured by it than the price charged by Péchiney for its competing product, on account of the higher quality of the former. However, since the prices that it maintains it is obliged to charge as

a result of the anti-dumping duty exceed that limit, its customers prefer to obtain their supplies from Péchiney.

32 However, as the Council rightly points out, that argument is prima facie evidence that the alleged injury in terms of loss of customers and market shares is not irreparable. As regards, in the first place, the period up to the possible abolition of the anti-dumping duty, if the application in the main proceedings is successful, the alleged injury would be purely pecuniary and inherent in the imposition of the duty and would consequently be reparable in principle, since a prima facie case has not been made out that the applicant is in danger of disappearing from the market (see paragraph 30 above). Secondly, as regards the period following the possible annulment of the contested regulation, there is nothing in principle to prevent the applicant from reducing its selling prices commensurately with the fall in the prices of the imported product following the abolition of the anti-dumping duty so as to regain the customers and market shares lost in the meantime. The documents produced and the argument before the Court hearing the application for interim relief have not disclosed any factor suggesting that it would be impossible to restore along those lines the situation as it was prior to the imposition of the anti-dumping duties.

33 It follows from those considerations that at this stage a risk of serious and irreparable injury has not been made out and that consequently the urgency of the relief sought has not been established.

34 However, it must be conceded that any subsequent change in the economic data, in particular any deterioration in the applicant's situation, might jeopardize its survival before a decision is given in the main proceedings. In this regard, it should be borne in mind that such a change can be taken into account, either by the Commission when it carries out the review provided for in the preamble to the

contested regulation, or by the Court hearing an application for interim relief brought on the basis of Article 108 of the Rules of Procedure of the Court of First Instance.

35 Furthermore, even on the assumption that the urgency of the relief sought could be regarded as established at this stage, the Court hearing an application for interim relief could grant the suspension applied for only subject to the provision of security by the applicant in the amount due from it under the contested regulation, since the Court's assessment of the legality of that regulation cannot be sufficiently certain (see the order of the President of the Court of Justice in Case 113/77 R and Case 113/77 R-Int *NTN TOYO Bearing Co* v *Council* [1977] ECR 1721, paragraph 9). However, at the hearing the applicant stated that if it had to provide such security, it would have to include in its prices amounts corresponding to the anti-dumping duties, since it would have to take account of the possibility of their being collected retrospectively. It follows that the only suspensory measure which the Court hearing an application for interim relief might take in these circumstances is, by the applicant's own account, of no interest to it and cannot therefore be contemplated.

36 In addition and in any event, the obligation for the applicant to take into consideration the possibility of the accrued anti-dumping duty being collected retrospectively does not depend on whether or not the Court hearing an application for interim relief orders appropriate security to be given as a condition for granting suspension of the operation of the contested regulation, but is connected with the necessarily provisional nature of the measures which the Court may order, which precludes any 'definitive suspension' of the duties, since such measures may not prejudge the decision on the substance. It follows that such measures cannot remedy the pecuniary injury which the need to take that eventuality into account entails for the applicant. In its document of 1 February 1995, the applicant argued moreover that the only solution capable of remedying the injury suffered by it would be to amend the contested regulation, so that the latter could be declared inapplicable to it. In that connection, it is sufficient to observe that any amendment

of the contested regulation is a matter for the Council, the institution which adopted it. Consequently, the Court hearing an application for interim relief may not grant such a request.

37 It follows from the foregoing considerations that the application for suspension of the operation of the contested regulation must be dismissed.

The applications for leave to intervene

38 Having regard to the foregoing, there is no need to rule on the applications made by the Commission and Péchiney for leave to intervene in support of the form of order sought by the Council, which should be granted solely on the basis of the arguments of the main parties.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. The application for the adoption of interim measures is dismissed.

2. It is unnecessary to rule on the applications for leave to intervene.

3. The costs are reserved.

Luxembourg, 24 February 1995.

H. Jung — J. L. Cruz Vilaça

Registrar — President