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

30 November 2000 *

In Case T-5/97,

**Industrie des Poudres Sphériques,** established in Annemasse (France), represented by C. Momège, of the Paris Bar, with an address for service in Luxembourg at the Chambers of A. May, 398 Route d'Esch,

applicant,

v

**Commission of the European Communities,** represented by F. Mascardi, of its Legal Service, acting as Agent, assisted by A. Carnelutti, of the Paris Bar, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: French.

supported by

**Péchiney Électrométallurgie,** established in Courbevoie (France), represented by J.-P. Gunther and O. Prost, of the Paris Bar, with an address for service in Luxembourg at the Chambers of De Bandt, Van Hecke, Lagae and Loesch, 4 Rue Carlo Hemmer,

intervener,

APPLICATION for annulment of the Commission decision of 7 November 1996, rejecting the applicant's request for a finding that an infringement of Article 86 of the EC Treaty (now Article 82 EC) had allegedly been committed by Péchiney Electrométallurgie (Case No IV/35.151/E-I IPS/Péchiney Électrométallurgie),

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

composed of: R. García-Valdecasas, President, P. Lindh, J.D. Cooke, M. Vilaras and N. Forwood, Judges,

Registrar: G. Herzig, Administrator,

having regard to the written procedure and further to the hearing on 6 April 2000,

gives the following

## Judgment

### Facts

*A. The product in question*

1 Primary calcium metal is a chemical element, produced either from calcium oxide (lime) or from calcium chloride, in splintered form, chunks or chips.

2 It is produced in five countries, France (by Péchiney Électrométallurgie, hereinafter 'PEM'), China, Russia, Canada (by 'Timminco') and the United States of America (by 'Minteq'). Producers use two different production processes: the electrolytic process and the aluminothermic process.

3 The electrolytic process, used in China and Russia, consists of two stages: electrolysis of the calcium chloride, during which the calcium is deposited on a copper cathode, giving an alloy of copper and calcium, and distillation of the copper-calcium alloy, which allows the two metals to be separated. That process makes it possible to produce a very pure form of primary calcium metal but entails a heavy consumption of electricity.

4 The aluminothermic process consists of a single stage of reduction of calcium oxide with aluminium, with condensation of calcium vapour. This process, which is comparatively flexible in operation, is used by all the Western producers because of its lower investment and operating costs.

5 Various kinds of primary calcium metal are available on the market, depending on the process used to obtain it or on the applications envisaged. The quality of those products depends essentially on the degree of purity of the calcium, which may be improved by one or more distillation stages.

6 One variety is 'standard' or 'commercial' quality primary calcium metal, depending on the terminology used by the applicant or the Commission respectively. It is obtained by an aluminothermic process. The calcium content of that variety is of between 97% and 98.8%, depending on the manufacturer, and the oxygen content is far greater than that of the primary calcium metal produced by the Chinese and Russian producers. 'CaRK', marketed by PEM, is of this first variety.

7 A second variety of primary calcium metal, also obtained by the aluminothermic process, includes several types of nuclear primary calcium metal obtained by distillation of the standard primary calcium metal. This variety, which includes 'CaN' and 'CaNN', marketed by PEM, is extremely pure (99.3% calcium). However, almost none of the purchasers of primary calcium metal require such a level of purity and so sales of that variety do not exceed a few tonnes per annum. The price of this variety of primary calcium metal is more than twice that of the standard quality product on account of the costs of distillation.

8 A third variety of primary calcium metal consists of the Chinese and Russian primary calcium metals, also known as electrolytic calcium metals. The electrolytic process makes it possible to obtain a minimum calcium content of between 98.5% and 99.7%. The prices charged before the imposition of anti-dumping duties on calcium metal originating in China and Russia were close to that of the quality-standard products, with which they are in competition.

9 Broken calcium metal is a derivative of primary calcium metal. Two processes may be used in order to obtain broken calcium metal. The first process, used by PEM and the other undertakings operating in the broken calcium metal market, relies on the mechanical cold pulverisation of primary calcium metal to produce granulated calcium metal. The second process, used only by Industrie des Poudres Sphériques (hereinafter 'IPS'), relies on atomisation in order to obtain spherical balls (or granules). That technique involves smelting of the primary calcium metal in a furnace followed by atomisation of the liquid metal in a granulation tower, all under pressure of an inert gas (argon). The requirements of the atomisation process mean that IPS must use very pure primary calcium metal.

*B. The undertakings concerned*

10 The applicant company, IPS, formerly Extramet Industrie ('Extramet'), is an undertaking based in Annemasse (France). It was set up in 1982, following the discovery in 1980 of a process for manufacturing broken calcium metal and markets the product thus obtained.

11 PEM, formerly Société Électrométallurgique du Planet and a subsidiary of Bozel Électrométallurgique, has belonged to the Péchiney group since 1985 and is the sole Community producer of primary calcium metal. It also markets broken calcium metal.

*C. Case C-358/89 Extramet Industrie* v *Council*

12 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).

13 On 27 November 1989 the applicant, whose company name was then Extramet, brought an action for annulment of that regulation.

14 By judgment of 11 June 1992 (Case C-358/89 *Extramet Industrie* v *Council* [1992] ECR I-3813, hereinafter '*Extramet II*') the Court annulled Regulation No 2808/89 on the grounds that the Community institutions had not actually considered whether PEM, the Community producer which had suffered an injury within the meaning of Article 4(1) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1), had by its own refusal to sell to IPS itself contributed to the injury suffered, and had not established that the injury on which they based their conclusions did not derive from the factors mentioned by the applicant, so that those institutions had therefore not followed the proper procedure in determining the injury.

*D. Case T-2/95 Industrie des Poudres Sphériques* v *Council*

15 On 1 July 1992, following the *Extramet II* judgment, PEM sent the Commission a note arguing that the investigation should be reopened and a technical memorandum on the assessment of the injury to the Community industry.

16 On 19 October 1994 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).

17 On 9 January 1995, the applicant brought an action for annulment before the Court of First Instance against that regulation.

18 By judgment of 15 October 1998 in Case T-2/95 *Industrie des Poudres Sphériques* v *Council* [1998] ECR II-3939 the Court dismissed the application.

19 On 16 December 1998, IPS appealed the judgment in *Industrie des Poudres Sphériques* v *Council*, cited above. By judgment of 3 October 2000 in Case C-458/98 P *Industrie des Poudres Sphériques* v *Council* [2000] ECR I-8147, the Court of Justice dismissed that appeal.

*E. Relations between IPS and PEM*

20 IPS is the only undertaking which produces broken calcium metal by atomisation, which forces it to use, as raw material, a very pure form of primary calcium metal with a low oxygen content. Since 1991 it has been turning to PEM in order to obtain a product of those characteristics but of standard quality (that is to say, non-distilled). PEM was not able to provide such a product until 1995, following research, technical updating of its factory and numerous trial consignments. However, IPS rejected that product because it was too expensive.

*F. Administrative procedure before the Commission*

21 By document registered on 20 July 1994, the applicant lodged a complaint with the Commission Directorate-General responsible for competition, DG IV, seeking a declaration that PEM had abused its dominant position. In its complaint IPS claimed, first, that PEM had used the anti-dumping proceeding which led to the adoption of Regulation No 2557/94 ('the anti-dumping proceeding') in order to strengthen its dominant position on the calcium metal market and thus cut off IPS's sources of primary calcium metal originating in China and Russia. Second, IPS claimed that PEM had sought to prevent or delay supplies of primary calcium metal to IPS in order to eliminate it from the broken calcium metal market.

22 By letter of 21 July 1994, PEM offered to supply the applicant with nuclear primary calcium metal, its CaNN calcium, at the rate of 100 to 150 tonnes per annum for five years. The price offered was FRF 33 per kilogram, applicable from September to December 1994, after which a clause would enter into force requiring a six-monthly review of changes in the average sale-price for its standard calcium metal.

23 That offer gave rise to much correspondence between PEM and IPS, in which the applicant pointed out that what it sought was standard calcium metal rather than nuclear calcium metal, but finally accepted to test, at its own expense, a consignment of distilled primary calcium metal to see whether that made it possible to improve PEM's standard calcium metal. On 28 February 1995, PEM delivered to IPS a consignment of 5 tonnes of distilled primary calcium metal. Testing took place between 28 February and 3 March 1995 monitored by two independent experts: Mr Laurent, an expert appointed by IPS, and Professor Winand, an expert appointed by PEM. The tests established that the distilled calcium metal consignment tested satisfied the requirements of the process used by IPS.

24 At the request of the applicant, Mr Laurent drew up, on 19 May 1995, on the basis of the documents exchanged between the two undertakings, a report intended to show that PEM had wilfully complicated and delayed the preparation of calcium metal suited to IPS's techniques. On 18 December 1995, Professor Winand wrote a report which questions the conclusions drawn in Mr Laurent's report.

25 On 21 June 1995, on the day after a meeting organised by DG IV to discuss the complaint lodged by IPS, PEM offered to provide IPS with a low-oxygen primary calcium metal tested by the experts ('CaBO' according to PEM's nomenclature), at a rate of 120 to 150 tonnes per annum. The price proposed was first of all FRF 40 and then FRF 37 per kilogram. PEM justified that price by the additional cost in meeting IPS's specific requirements. IPS none the less refused such an offer because the price was too high.

26 On 20 and 21 November 1995, the Commission conducted an investigation pursuant to Article 14(2) of Regulation No 17: First Regulation implementing Articles 85 and 86 of the Treaty (OJ, English Special Edition 1959-1962, p. 87) at the premises of PEM. On 27 November 1995, a second investigation was conducted by the Commission at the applicant's premises. The Commission also requested information from Western producers as well as from the main European importers and processors of primary calcium metal, on the basis of Article 11 of Regulation No 17. DG IV, with the parties' consent, also examined all the documents submitted by them in the context of the anti-dumping procedure.

27 By letter of 18 March 1996, the Commission indicated to IPS, in accordance with Article 6 of Regulation No 99/63/EEC of the Commission of 25 July 1963 on the hearings provided for in Article 19(1) and (2) of Council Regulation No 17 (OJ, English Special Edition 1959-1962, p. 87), the reasons for which it intended to reject its complaint. On 12 March 1996, and again on 15 April 1996, the applicant submitted its comments on the procedure and on the communication under Article 6 of the abovementioned regulation. In those two letters, the applicant alleged the existence of an abusive and predatory pricing policy on the part of PEM.

28 After examining the non-confidential documents in the file, IPS also requested, in its letter of 15 April 1996, to be allowed access to certain documents which had not been sent to it. That request was rejected by the relevant director in DG IV, in a letter of 7 June 1996, on the ground that those documents were confidential.

29 By decision of 7 November 1996, the Commission concluded that it could not accord a favourable outcome to the complaint lodged by IPS and rejected it ('the decision').

30 In that decision, the Commission examines the three aspects of its inquiry into PEM, namely: misuse of the anti-dumping procedure; the deployment of delaying tactics with the aim of preventing or delaying supplies to IPS; and abusive pricing *vis-à-vis* the latter. The Commission dismisses any allegation that the anti-dumping procedure was misused, stating that resort to the anti-dumping procedure does not in itself constitute an infringement of Article 86 of the EC Treaty (now Article 82 EC) and that, in any event, the Commission checked all the data submitted by the parties in the context of that procedure. So far as concerns the alleged delaying tactics, the Commission considers that PEM made great efforts to meet IPS's requirements. Finally, as to any predatory or abusive pricing policy, the Commission points out that IPS did not adduce any evidence to show the existence of such practices and that the inquiries conducted by the Commission have not made it possible to find that competition law has been infringed.

## Procedure before the Court and forms of order sought by the parties

31 By application lodged at the Registry of the Court of First Instance on 13 January 1997, the applicant brought the present action.

32 By order of 23 July 1997, the President of the Fifth Chamber, Extended Composition, of the Court of First Instance granted PEM leave to intervene in support of the form of order sought by the Commission. That order also granted an initial request for confidential treatment, submitted by IPS, *vis-à-vis* the intervener, of certain information contained in the application, in the reply and in the annexes thereto.

33 By order of 12 November 1997 the President of the Fifth Chamber, Extended Composition, of the Court granted a further request for confidential treatment submitted by IPS *vis-à-vis* the intervener of certain data set out in an annex appended to the Commission's rejoinder.

34 On 16 December 1997 PEM submitted its statement in intervention. On 27 February 1998, the applicant submitted observations on that statement in intervention.

35 Upon hearing the report of the Judge-Rapporteur, the Court (Fifth Chamber, Extended Composition) decided, first, by way of measures of organisation of procedure under Article 64 of the Rules of Procedure of the Court of First Instance, to put a question to the parties to be answered during the hearing and, second, to open the oral procedure.

36 The parties presented oral argument and answered the question put to them by the Court at the hearing on 6 April 2000. At the hearing, the applicant gave its consent for the data in the confidential version of the Report for the Hearing to be included in the judgment for publication.

37 The applicant claims that the Court should:

— annul the Commission's decision of 7 November 1996;

— order the Commission to pay the costs.

38 The Commission contends that the Court should:

— dismiss the action as unfounded;

— order the applicant to pay the costs.

39 The intervener, PEM, contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

## Substance

40 The applicant puts forward four pleas in law. The first plea in law, alleging a manifest error of assessment amounting to an infringement of Article 86 of the Treaty and infringement of Article 190 of the EC Treaty (now Article 253 EC), concerns the Commission's disregard of the link between PEM's delaying tactics and the use of the anti-dumping procedure. The second plea in law, alleging a manifest error of assessment amounting to an infringement of Article 86 of the EC Treaty, criticises the Commission for refusing to find that PEM had employed delaying tactics. The third plea in law, alleging infringement of Article 86 of the Treaty, points to several errors of fact and assessment said to be contained in the Commission's reasoning. The fourth plea in law, alleging breach of essential procedural requirements, criticises the Commission for not forwarding to the applicant certain items from the file.

41 The second plea in law is preliminary to the first and will therefore be examined first. Furthermore, the third plea in law raises essentially the same legal arguments as the second plea in law. It is appropriate, therefore, to examine those two pleas together.

*The second and third pleas in law alleging errors of fact, manifest errors of assessment and infringement of Article 86 of the EC Treaty inasmuch as the Commission refused to find that PEM had employed delaying tactics*

42 The applicant subdivides the second plea in law into two parts and the third plea in law into four. The fourth part of the third plea in law challenges the Commission's claim that IPS was not obliged to seek supplies from PEM when there were alternative sources. In the first part of the second plea and in the first three parts of the third plea in law, the applicant submits, essentially, that the Commission committed errors of fact and manifest errors of assessment

amounting to an infringement of Article 86 of the Treaty by finding that PEM did actually attempt to supply IPS with primary calcium metal. The second part of the second plea alleges that PEM's offer of 21 June 1995 of distilled calcium metal constituted an abuse of a dominant position.

1. *Whether the Commission committed a manifest error of assessment in taking the view that there were alternative sources of supply (fourth part of the third plea)*

Arguments of the parties

43 The applicant claims that the Commission committed a manifest error of assessment by stating, in its decision, that IPS had available to it alternative sources of supply other than PEM, even excluding Chinese and Russian producers.

44 The applicant submits, first, that North American producers have never been a significant presence on the European market, despite the imposition, in 1989 and 1994, of anti-dumping duties against imports originating in China and Russia. Second, it claims to have found difficulties in obtaining supplies from such producers.

45 Thus, the Canadian producer Timminco, after delivering 47 tonnes in 1994, suspended deliveries in 1995, despite repeated requests from IPS to continue deliveries. Furthermore, an order for 10 tonnes of primary calcium metal ordered by IPS on 14 May 1997 from Timminco only succeeded in obtaining 4.5 tonnes on 18 June 1997. There is no indication of how long the United States producer

Minteq took to respond to a request from IPS in October 1994 to make it an offer to deliver 150 tonnes. On the other hand, although an initial order for two tonnes was placed on 8 December 1994, it was not delivered until four months later, after repeated postponements.

46 The Commission explains that the offers made by North American producers and the statistics concerning imports of primary calcium metal into the Community point to a significant increase in imports originating in North America. The Commission submits that importation by the applicant from Russia and China did not cease as a result of the imposition of anti-dumping duties.

47 The applicant responds by saying that it did not place the least tonnage of Chinese or Russian calcium metal in circulation in the Community in 1996.

48 The intervener states that IPS has a large number of alternative sources available. Data from Eurostat reveals, first, that Chinese and Russian producers are capable of supplying IPS with primary calcium metal and, secondly, that importation from Canadian and United States producers into the Community had greatly increased.

49 With regard to the Eurostat data put forward by the intervener, the applicant states that PEM of its own accord added to the Russian and Chinese imports the calcium metal covered by inward processing arrangements. Calcium metal which is temporarily imported into the Community with a view to re-exportation does not constitute a source of supply. As regards imports originating in the United States, the applicant states that they concern, in essence, importations of cored wire which falls under the same customs heading as calcium. The applicant observes that Canadian importations, for their part, remain marginal.

Findings of the Court

50 As regards North American imports, it should be noted that, even though the Canadian producer Timminco experienced certain difficulties in supplying IPS, the Eurostat statistics show that imports originating in Canada were 49 tonnes in 1993, 131 tonnes in 1994, 75.9 tonnes in 1995, 65.6 tonnes in 1996 and over 111 tonnes for the first half of 1997, which are substantial quantities.

51 So far as concerns the United States producer, Minteq, it should be observed that it did in fact offer to deliver 150 tonnes in response to IPS's request while indicating that it awaited instructions from IPS (see the letter of November 1994, annex 65 to the application). IPS did not reply until a month later with an order for 8.2 tonnes, rather than the 2 tonnes that it claims, which Minteq delivered late. None the less, a further delivery was made in October 1995, about which IPS had no complaints. Moreover, Minteq's reply to requests from the Commission for information shows the willingness and ability of that company to supply the European market.

52 As regards the Russian and Chinese producers, it should be recalled that it was held in Case T-2/95 *Industrie des Poudres Sphériques* v *Council*, cited above (paragraph 304), that the imposition of a specific duty, as opposed to fixing the duty by reference to a threshold import price, makes it possible to minimise the risk of duties being evaded by manipulations of prices, since the amount of duty levied is not reduced if exporters reduce their prices. That method of proceeding enables a minimum price to be guaranteed for calcium in the Community, while allowing imports at fair prices, that is, prices which enable a Community producer to realise an adequate profit margin.

53 In those circumstances, the imposition of a specific duty did not in itself have the effect of preventing imports from China and Russia (Case T-2/95 *Industrie des Poudres Sphériques* v *Council*, cited above, paragraph 305).

54 That conclusion is confirmed by the tables of imports of calcium metal drawn up by IPS, which show that following the imposition of definitive duties IPS continued to obtain supplies from Russian and Chinese producers. Thus 202 tonnes were imported by IPS and placed in free circulation in 1994 and 160 tonnes in 1995.

55 In that connection, the applicant merely states out that it did not place any tonnage whatever of Chinese or Russian calcium metal in circulation in the Community in 1996.

56 However, according to the data provided by the applicant, 155 tonnes of calcium metal from Russia and China, that is 17.5% of European consumption, were imported in 1996 and placed in free circulation. Thus, even though IPS, the main Community importer, ceased importing in 1996, there was still quite substantial importation from those countries in that year. It follows that it was just as possible for IPS to obtain supplies from Russian and Chinese suppliers as it was for other producers.

57 It must therefore be held that IPS had available to it alternative sources of supply other than PEM.

58 It follows that the Commission has not committed a manifest error of assessment in taking the view that there were alternative sources of supply other than PEM.

59 Accordingly, the fourth part of the third plea in law must be rejected.

*2. Whether the Commission committed errors of fact, manifest errors of assessment and infringed Article 86 of the Treaty by finding that PEM did actually attempt to supply IPS with calcium metal (first part of the second plea in law and in the first three parts of the third plea)*

60 In its complaint, IPS claims that PEM sought to prevent or delay supplies of primary calcium metal to IPS in order to eliminate it from the broken calcium metal market.

61 Since it did not have available standard primary calcium metal with a low oxygen content as required by IPS, PEM carried out tests, research, changes in its factory and numerous deliveries in order to be able to supply IPS with a product which satisfied its technical requirements. However, according to IPS, the alleged technical efforts undertaken by PEM with a view to improving its product were in practice a series of delaying tactics aimed at needlessly complicating the search for a solution to the problem.

62 In its decision, the Commission explains that, given, first, that PEM had, in the past, been criticised by the French Competition Council for practices which appear, at first sight, to bear a certain resemblance to the alleged practices which are at the heart of IPS's complaint and, second, that PEM is the sole European primary calcium metal producer, it decided to undertake a thorough investigation into the relations between the parties since 1991.

63 In its analysis of those relations, the Commission finds that IPS is PEM's only customer to ask for primary calcium metal with a specific oxygen content and

that IPS refused to accept, for the sole reason that the price was too high, an offer by PEM to supply calcium which a series of trials in which both parties had been represented had shown to be compatible with the IPS installations.

64 The Commission claims, first, that, 'in so far as a strategy of manœuvres aimed at complicating relations at technical level between the two undertakings may be considered "abuse of a dominant position", as IPS claims, no such strategy has been shown to exist' and, second, that 'IPS has not proved the existence of any other practice of its competitor which is capable of being caught by Article 86 of the Treaty'.

65 The applicant submits that, in its analysis, the Commission committed errors of fact and manifest errors of assessment which led it to infringe Article 86 of the Treaty.

66 It submits that the Commission cannot refrain, as it claims to be able to do in the decision, from assessing the technical effectiveness or soundness of the measures taken by PEM in order to comply with IPS's expectations in order to determine whether such measures were effective or were aimed at delaying indefinitely the finalisation of a product satisfactory to IPS. The Commission's analysis is based only on the enumeration of those various measures without questioning their rationale.

67 Thus, according to the applicant, the Commission committed errors of fact and manifest errors of assessment which led it to infringe Article 86 of the Treaty in respect of the following matters: (a) PEM's difficulty in resolving the problem posed by the manufacture of a product suited to IPS's needs, a problem resolved by the other producers; (b) the requirements of specifications particular to IPS; (c)

the absence of any indication by the other producers of the oxygen content of their calcium metal; (d) the exchange of correspondence between PEM and IPS as evidence of the efforts made by PEM; (e) how the problem of lime contamination was dealt with; (f) the difficulty of arriving at a reliable method of analysis; (g) the effectiveness of PEM's changes; and (h) the fact that the expert's reports confirmed that PEM had employed delaying tactics.

68 The Court must therefore verify whether the Commission committed such errors of fact and assessment leading to an infringement of Article 86 of the Treaty.

(a) PEM's difficulty in resolving the problem posed by the manufacture of a product suited to IPS's needs, a problem resolved by the other producers

Arguments of the parties

69 The applicant claims that PEM had at its disposal sufficient resources to resolve the problem of producing primary calcium metal with a low oxygen content. In that regard, other producers in possession of less efficient plants, such as Timminco which had old furnaces, or the Russian producers, were able to resolve the problem quickly.

70 The Commission contests the relevance of such a comparison, made by IPS, between PEM and the other producers inasmuch as such a comparison was based on disparate circumstances.

Findings of the Court

71 It must first be observed that PEM's capability to manufacture the calcium metal required by IPS cannot be compared to that of the Russian and Chinese producers who manufacture calcium by electrolysis, a process which produces a very pure form of calcium. That process involves very high costs for Western producers who are unable to bear them.

72 Second, as regards those Western producers who employ the same process as PEM, it must be pointed out that the quality of the calcium produced by the various producers using the aluminothermic process is not necessarily the same. Thus, United States and Canadian producers achieve 98.5% purity levels, whilst PEM manages only 97% in its standard primary calcium metal. Furthermore, there are other differences in the essential specifications of their products. In that regard, as Mr Laurent, the expert appointed by the applicant, acknowledges in his report, the similarity between processes does not preclude that there might be differences in the quality of the finished product, particularly as regards oxygen. Indeed, according to the expert, several parameters relating both to the quality of the raw material and to the specific operational techniques may lead to differences in the final result of the same process.

73 Accordingly, the fact that United States and Canadian producers are able to supply a product suited to IPS's requirements has no bearing on PEM's ability to manufacture such a product.

74 Consequently, that complaint must be rejected.

(b) IPS's special requirements

Arguments of the applicant

75 The applicant submits that the Commission committed a manifest error of assessment in taking the view that IPS had special requirements, a view reached on the basis of the single finding that the product prepared by PEM did not resemble that prepared by North American producers following the same aluminothermic process, whereas the Commission should have delved into the reasons for that difference between the products. The applicant claims that it did not seek a new specification but merely acknowledgement of a specification which all the other primary calcium metal suppliers already met.

76 In that regard, the applicant explains that the replies from United States producers Minteq and Timminco to the Commission's request for information shows that it made no particular request in relation to their products.

Findings of the Court

77 It must be pointed out that, as the Commission rightly maintains, the specific nature of IPS's requirements is to be determined by reference not to the ability of other suppliers to supply the applicant adequately but to whether PEM can deliver a satisfactory supply out of the products available to it. In that regard, PEM had no standard calcium metal capable of satisfying IPS and IPS was PEM's only customer to request standard calcium metal with a low oxygen content. That

fact, which was never denied by the applicant, is confirmed by the Laurent report (page 13), produced by the applicant, and is not, moreover, contradicted by the fact that Minteq and Timminco stated, in their replies to the Commission's requests for information, that IPS did not have any special request in relation to their products.

78 In those circumstances, the Commission has not committed a manifest error of assessment in taking the view that IPS had special requirements *vis-à-vis* PEM.

79 That complaint must therefore be rejected.

(c) The absence of any indication by the other producers of the oxygen content of their calcium metal

Arguments of the parties

80 The applicant contests the Commission's analysis that none of the global producers indicates the oxygen content of their primary calcium metal, specifically the oxygen content of their standard primary calcium metal. It points out, in that regard, that the Canadian producer Timminco indicates the percentage of oxide in its standard calcium metal in its data sheets.

81 The Commission points out that the documents cited by the applicant are descriptive sheets, provided by Timminco, required for the transportation of

dangerous substances, but which are not sufficient by themselves to prove that the oxygen level constitutes a commercial specification made known to customers and which is binding on the supplier.

82 The intervener submits that the documents produced by the applicant were specially drawn up for it by Timminco.

Findings of the Court

83 Indication of the oxygen content in the descriptive sheets, required for the transportation of dangerous substances, by a single producer does not constitute sufficient evidence to show that the proportion of oxygen constitutes an ordinary commercial specification made known by producers to their customers. Moreover, the replies to the requests for information sent out by the Commission confirm that analysis. Thus, the document produced by the agent for the Russian producers does not contain any specification regarding the oxygen content of their product, and the United States producer Minteq has confirmed that it does not indicate oxygen content in view of the difficulties in measuring it.

84 The applicant has therefore not established that the Commission committed an error of fact in stating that producers of primary calcium metal did not indicate the oxygen content of their calcium.

85 Consequently, that complaint must be rejected.

(d) The exchange of correspondence as evidence of the efforts made by PEM

Arguments of the parties

86 The applicant submits that the Commission was wrong, in its decision, to state that it emerges from the extensive, highly technical, correspondence exchanged between the parties, as well as from the interviews and inspections at the factories, that PEM and IPS collaborated closely in seeking a solution.

87 According to the Commission, the correspondence between IPS and PEM does not constitute evidence of PEM's efforts: it merely announces the production of the calcium metal expected by IPS, only to give rise, finally, to disappointing trial results.

88 Furthermore, the applicant observes that the technical information given by PEM in its correspondence is criticised by it on the ground that it is false. In particular, it points out that PEM's assertions to the effect that the compactness of the calcium metal supplied was not the cause of its oxidation are inconsistent and contrary to a study commissioned by IPS from an independent laboratory. The applicant further highlights the false nature of certain claims made by PEM in a letter of 21 July 1994 regarding the offer made by that undertaking to deliver nuclear calcium metal as far back as November 1993. The offer related rather to the trial of a consignment of nuclear calcium metal in the event that an earlier trial involving primary calcium metal, contemplated at the time but never carried out, proved inconclusive.

89 The Commission refers to the collaboration which existed between the parties and to the numerous technical obstacles facing PEM when producing primary calcium metal adapted to meet IPS's needs.

90 The intervener points out that it had offered as far back as 20 December 1993 to supply nuclear calcium metal and suggested starting with a trial on a consignment of five tonnes in order to confirm that there was a linear relation between the oxygen level and the rate of contamination of IPS's furnaces. It points out that that offer was rejected by IPS which now complains, in the application to the Court, that the nuclear calcium metal had not been tested since 1993.

Findings of the Court

91 The correspondence between the parties between 1991 and 1995 reveals the following facts.

92 First, PEM made seven deliveries of primary calcium metal in order to test its suitability in various trials carried out in April, June, September and November 1993 as well as during the period running from February to March 1995. The fact that those trials, apart from the last one, were not successful only serves to demonstrate PEM's difficulty in manufacturing a product suited to IPS's needs. In that regard, it should be borne in mind that all the trials were carried out with the agreement of IPS.

93 Second, changes were made in PEM's factory and to its production system in order to adapt them to IPS's requirements, namely by equipping the furnaces in PEM's factory with a system of cooling under argon, reprocessing waste from the furnaces and working on the compactness of the product manufactured by means of double-cone condensation. In total, by late March 1994, PEM had committed FRF 1.5 million to the following sectors: investment/'LRR' furnaces, FRF 0.5 million; oxygen control equipment, FRF 0.1 million; unstructured

research and development costs, FRF 0.9 million, which represented, in 1993, 8% of the annual item for 'analyses' of PEM's central research laboratory and 25% of the annual investments at its factory.

94 Lastly, the result of the trials carried out in February and March 1995 show that PEM finally offered IPS on 21 June 1995 calcium metal which satisfactorily fulfilled the requirements of the process used by IPS, as found by Mr Laurent, the IPS expert, and Professor Winand, the PEM expert. However, that offer was rejected by IPS. In that connection, the applicant admitted at the hearing that the only reason for its rejection was the price proposed by PEM, a matter dealt with in the second part of the second plea in law.

95 It must therefore be held that the Commission could properly conclude from the correspondence between PEM and IPS not only that PEM made reasonable efforts in order to adapt its product to the technical requirements of IPS, but also that those efforts resulted in an offer of calcium metal which met such requirements.

96 So far as concerns the fallacious nature of PEM's conclusions regarding the compactness of the calcium, it is sufficient to observe that, according to the results of the analyses carried out by PEM, the degree of compactness of the United States calcium was not less than that of PEM's. It was, therefore, logical for PEM to conclude that compactness was not the cause of the problems encountered by IPS, as confirmed by the fact that a more compact calcium produced by PEM did not improve the results of the abovementioned trials. Such a conclusion is not, therefore, fallacious.

97 So far as concerns the allegedly false nature of the offer made by PEM to deliver nuclear calcium metal from November, suffice it to observe that the offer was

contained in the report of IPS's visit to PEM's plant on 28 November 1993. The fact that the offer was subject to the result of an earlier trial does not alter the fact that the offer was made and, therefore, that PEM's assertion was not false.

98 That complaint must therefore be rejected.

(e) How the problem of lime contamination was dealt with

Arguments of the applicant

99 The applicant claims that it is wrongly asserted in the decision that the analysis of the lime levels contained in PEM's calcium, which was supposedly the cause of its product not meeting IPS's requirements, was dealt with in close cooperation with IPS technicians.

100 It points out that, even though PEM acknowledged, as far back as 21 December 1992, that the oxygen present in its primary calcium metal was the cause of the difficulties it had itself encountered, that company had attempted on three occasions to reverse its finding, namely in an internal memorandum of 2 July 1993, in a technical note of 2 May 1994 and in the first draft of the objective for the experts' mission, drawn up in early 1995.

Findings of the Court

101 It appears from the case-file that PEM was not unaware that it was oxygen which had caused the lime contamination of the IPS furnaces. None the less, PEM wondered about the other possible causes of such contamination.

102 Thus, in its letter of 2 July 1993, relied on by the applicant, PEM merely states that its calcium is characterised more by its high aluminium and magnesium content than by the oxygen present in it. However, that statement does not cast doubt on the finding that the oxygen content was the source of IPS's problems.

103 The technical note of 2 May 1994 summarises the various stages of the search for a suitable type of calcium for IPS. In describing the situation prevailing in September 1993, PEM stated that, 'at this stage, the role played by oxygen has not been clearly defined', which was to lead it to carrying out additional tests relating to the smelting temperature for calcium CaR and the compactness of the calcium. In that regard, it should be borne in mind, first, that the question of compactness had been studied at the same time by IPS and PEM, IPS having agreed that such studies be carried out. Second, it must be pointed out that the aim of PEM's research was always to reduce oxygen. Thus, PEM's technical note begins by recalling the maximum oxidation threshold for calcium acceptable to IPS (0.2%) and the problems in succeeding in producing calcium with those characteristics from its own standard primary calcium metal.

104 Finally, although when drafting the objective for the experts' mission in early 1995 PEM had first of all planned to write that 'PEM and IPS (were) agreed on the view that that phenomenon could be due to too high a concentration of oxygen in the calcium supplied', none the less, following a remark made by IPS concerning use of the expression 'could be due', it confirmed in writing to IPS

that it was a misunderstanding and that it was quite certain that there was a causal link between oxygen content and contamination.

105 It is apparent from the foregoing that PEM did not call in question the cause of the contamination problem in order to delay the search for a solution. Rather, PEM sought, always with IPS's agreement, to find solutions and other possible causes for that problem.

106 It follows that the Commission has not committed a manifest error of assessment in its analysis of the problem over lime.

107 That complaint must therefore be rejected.

(f) The difficulty of arriving at a reliable method of analysis

Arguments of the applicant

108 The applicant submits that the decision is wrong in stating that there does not exist any reliable method for analysing the oxygen content of calcium metal and that attempts to perfect such a method have met, in particular, with the difficulty of finding a representative sample of calcium.

109 The applicant submits that, although analysing the oxygen content is in fact difficult, the method used by IPS, and perfected by the Centre Européen de

Recherche en Métallurgie des Poudres ('Cermep'), Grenoble, was altogether satisfactory. In that connection, the results pointed to by the Commission in the decision in relation to the analysis of samples of Chinese primary calcium, where the greatest discrepancies were discovered, nevertheless revealed an average oxygen content considered acceptable by IPS and much lower than that of PEM's calcium. The applicant states, furthermore, that it emerges from the Laurent report that PEM did have available a method for analysing oxygen content.

110 As regards the matter of representative samples, the applicant explains that that problem is linked to that of the homogeneity of the product analysed which PEM was to improve. The applicant further states that those factors are confirmed by the experts of both parties in their conclusions regarding the trials carried out in February 1995.

Findings of the Court

111 The applicant does not deny that there were difficulties in arriving at a reliable method of analysis but states that that method was already available not only to IPS but also to PEM.

112 In that regard, it should be pointed out that the need to determine a method of analysis for oxygen content was the result of the intention of both the applicant and PEM to place their commercial relationship on a better footing. In that context, all the research and all the trials which, according to the applicant, delayed the alterations to the calcium metal which was to be supplied in accordance with its requirements had been carried out with its consent. Thus, in a letter of 17 May 1993 from IPS to PEM, the applicant states: 'It now remains for us to find a method of analysis which is not open to interpretation and which is guaranteed to give average oxygen, lime and calcium metal values which are acceptable to both our companies'. Accordingly, the applicant is not justified in blaming PEM for the difficulty in managing to arrive at such a method.

113 So far as concerns the existence at PEM of a reliable system of analysis, it should be pointed out that, at the meeting of 21 December 1992 between the person responsible for calcium at PEM and the chairman of IPS, the parties acknowledged that measuring oxygen and taking samples were particularly delicate tasks and that it was necessary to study those problems in order to assess over a period the progress made by PEM in terms of lowering the proportion of oxygen in calcium. Moreover, by letter of 13 July 1993, the applicant specifically criticised PEM for not having a method of analysis enabling it to monitor the quality of its product. As to the Laurent report, it merely affirms, without advancing the slightest evidence, that 'by redistilling standard calcium, PEM has available, at industrial scale, the analytical method favoured in laboratory conditions for analysing oxide deposits left behind after distillation.'

114 So far as concerns the Cermep method, as used by IPS, it is sufficient to note that Cermep itself states that its method leads to significant discrepancies and to 'difficulties of representativity in analysis by samples' (see the report of the visit to Cermep by the parties on 4 June 1993).

115 So far as concerns the matter of a representative sample, it should also be observed that PEM had identified the problem as far back as 21 December 1992. PEM's concern to find a solution to that problem is moreover confirmed in its technical note of 2 May 1994 in which it compares the impact of various methods, including that of Cermep, on the representativity of the sample.

116 Furthermore, it is apparent from the replies given to the questionnaires sent out by the Commission by the Western producers that, as the United States producer Minteq says, there is no known reliable method of measuring oxygen in calcium.

117 It follows that the Commission has not committed a manifest error of assessment by concluding that there were difficulties in finding a reliable method of analysis.

118 That complaint must therefore be rejected.

(g) The effectiveness of PEM's changes

Arguments of the applicant

119 The applicant claims that the Commission is wrong when it states that the changes carried out by PEM at its plant demonstrate that it had actually attempted to improve its product.

120 In that regard, the applicant points out that all PEM's correspondence mentioning the alleged changes it purported to have carrried out is particularly vague. The applicant claims, also, that it informed the Commission by letter of 5 November 1993, following its visit to PEM's installations on 22 October 1993, that it had noticed that no improvement to the manufacturing process had been made. It had to wait until the letter of 20 May 1994 in order to learn what changes had been made by PEM in order to improve the quality of its calcium metal. The applicant was surprised at that time to see that PEM had added to its entire process a system of cooling primary calcium metal under argon, an investment which it considers to be out of proportion to its needs. In view of the fact that cooling under argon would make a saving in metal of 5%, PEM took this course of action in response, not to IPS's needs, but to its own needs.

Findings of the Court

121 The applicant does not deny the existence of the changes listed by the Commission. It merely denies, first, that it was aware of them, second, that, on 22 October 1993, PEM carried out improvements to its manufacturing process and, finally, that PEM made changes solely in IPS's interests.

122 So far as concerns, first, the lack of information concerning the changes carried out by PEM, it is sufficient to observe that PEM informed the applicant of its intention to carry out technological improvements in July 1993 (letter of 2 July 1993), that in September 1993 (letter of 30 September 1993), that is to say, three months later, PEM invited the applicant to inspect the progress in carrying out those changes, that in December 1993 (fax of 20 December 1993) PEM described a number of its changes and that a more detailed account is contained in the letter of 20 May 1994 mentioned by the applicant.

123 Second, so far as concerns the correspondence with the Commission, according to which IPS observed that, on 22 October 1993, PEM had not effected any improvements of its manufacturing process, it must be pointed out that, in the aforementioned correspondence, IPS did not deny the existence of changes at PEM's premises, but merely stated that the changes carried out 'were not likely to improve the calcium content of PEM's product.' However, such a claim is contested by PEM in its letter of 2 December 1993, sent to the Commission, in which PEM asserts that the changes carried out to date had led to an appreciable improvement in the quality of the calcium metal, in particular with regard to the aluminium content and the reduction of the oxygen level. In any event, the applicant does not deny that the final changes, set out in PEM's letter of 20 May 1994, were likely to improve the latter's calcium metal.

124 Third, and finally, as regards the fact that PEM carried out changes in its own interest, it is sufficient to observe that the fact that a change which suits IPS also results in savings for PEM is not something that is open to criticism. As the Court held in Case T-2/95 *Industrie des Poudres Sphériques* v *Council*, cited above, paragraph 258, those investments were also intended to meet IPS's requirements. In that regard, according to the information provided by the applicant itself, the practice of withdrawing calcium ingots from the furnace when hot contributed to oxidation of the calcium. However, even if PEM had been able to solve that problem earlier, the fact remains that withdrawing its ingots when cold was likely to solve, as the applicant itself suggested, the problem of oxidation of PEM's calcium metal.

125 In those circumstances, the Commission has not committed a manifest error of assessment by concluding that the changes carried out by PEM demonstrate that it had actually attempted to improve the quality of its product.

126 That complaint must therefore be rejected.

(h) The fact that the expert's reports confirmed that PEM had employed delaying tactics

Arguments of the applicant

127 The applicant submits that the Commission was wrong not to take into account the expert's report drawn up by Mr Laurent and not to conclude, on the basis of it, that PEM was employing delaying tactics.

128 It states that the expert's report, which it had instructed Mr Laurent to draw up, confirmed that PEM was employing delaying tactics. That expert's report looked into whether it was possible for PEM to perfect a product likely to satisfy IPS. In that regard, the expert observed, first of all, that determination of the cause of the difficulties encountered by the applicant had been ducked. He further noted that the methodology suggested by PEM to remedy the problem quickly was not followed. Thus, numerous instances of negligence were recorded, namely, the failure to carry out, in 1993, a trial on nuclear calcium metal which would serve as a point of reference for the work to follow, failure to take into consideration the results obtained by IPS with Canadian calcium metal obtained by way of a process similar to that used by PEM, failure to remove oxygen systematically and to seek a totally homogenous product and failure to quantify progress made. The expert points out, finally, that PEM appeared to have available a method of analysis to enable it to monitor the improvements made in the quality of its standard calcium metal.

Findings of the Court

129 First of all, it must be borne in mind that, as Mr Laurent acknowledges at page 13 of his report, that report is based exclusively on the examination of the correspondence between IPS and PEM, since its author has no first-hand knowledge of PEM's installations. Next, his conclusions were contradicted by Mr Winand, PEM's expert, in his report. The Winand report is based on an analysis of a single letter from PEM to IPS, that of 20 May 1994, whereas the Laurent report is based on an examination of the whole of the documentation. However, it should be noted that the letter from PEM examined by Professor Winand sets out the essential aspects of the relationship between the two companies for the period from December 1992 to April 1994. In those circumstances, Professor Winand's report is no less reliable than Mr Laurent's. It follows that, as the Court held in Case T-2/95 *Industrie des Poudres Sphériques* v *Council*, cited above, the Laurent report is not decisive (see, in this regard, paragraphs 259 and 260 of that judgment).

130 Moreover, it must be observed that the main statements contained in the Laurent report, namely on how the lime problem and the problem of compactness of PEM's calcium metal were dealt with and on the existence of a method for measuring oxygen content at PEM, have already been analysed in this judgment and held to be unfounded.

131 It follows that the Commission has not committed a manifest error of assessment in not concluding that Mr Laurent's expert's report confirmed that PEM had employed delaying tactics.

132 That complaint must therefore be rejected.

(i) Conclusion

133 It follows from all the foregoing that the Commission has not committed any error of fact or manifest errors of assessment amounting to infringement of Article 86 of the Treaty in concluding that PEM did actually attempt to supply IPS with calcium metal and finally succeeded in offering it a product suited to the latter's technical requirements.

134 Furthermore, in respect of the period from 1991 to October 1994, when the anti-dumping duties were introduced, the Court held in Case T-2/95 *Industrie des Poudres Sphériques* v *Council*, cited above, paragraph 255, that the Community producer PEM made substantial efforts to adapt in order to meet the applicant's technical requirements.

135 Accordingly, the first part of the second plea in law and the first three parts of the third plea in law must be dismissed.

3. *The abusive nature of PEM's offer of 21 June 1995 (second part of the second plea)*

136 The applicant claims that the Commission committed a manifest error of assessment amounting to infringement of Article 86 of the Treaty in considering that PEM's commercial offer of 21 June 1995 was not abusive. In that connection, the applicant observes that: (a) the offer of a quality of primary calcium metal especially produced for it has not been proved; (b) the Commission did not take account of the context in which the offer of nuclear calcium metal was made; (c) the additional cost of the product offered was not justified; and (d) the price proposed by PEM excludes it from the market for broken calcium metal.

(a) The offer of a quality of primary calcium metal especially produced for the applicant

Arguments of the applicant

137 The applicant claims that the offer of a quality of primary calcium metal especially produced for its plant has not been proven. It contests the analysis of the Commission that that quality of product was developed by PEM on the basis of that tested at IPS in February/March 1995. According to the applicant, the only product which it was offered is in fact PEM's nuclear calcium metal, a product whose name has changed over time from 'distilled calcium metal' to 'low-oxygen calcium metal' and finally to 'nuclear calcium metal'.

138 Accordingly, by stating that, on the basis of those trials, PEM developed a new product solely to meet the needs of IPS, the Commission committed a manifest error of assessment which must entail annulment of the decision.

Findings of the Court

139 It is sufficient to observe that, as is clear from the table on page 10 of the decision, the low-oxygen calcium metal proposed by PEM in its offer of 21 June 1995 is different from the nuclear calcium metal produced by PEM in various ways, namely as regards the calcium content (that of nuclear calcium metal is 99.3% minimum whereas that of the calcium metal proposed by PEM is 98.5% minimum), the aluminium content (that of nuclear calcium metal is 0.005% maximum whereas that of the calcium metal proposed by PEM is 0.05% maximum), the magnesium content (that of nuclear calcium metal is 0.7% maximum whereas that of the calcium metal proposed by PEM is 1% maximum), the oxygen content (not measured for nuclear calcium metal whereas that of the calcium metal proposed by PEM is 0.2% maximum) and the granule size (nuclear calcium metal is in the form of chunks measuring less than 100 mm, in grains and in chips measuring 0/6 mm and 0/2.4 mm, whereas the calcium metal proposed by PEM is in the form of chunks of less than 70 mm containing 2% maximum of fines measuring less than 0.2 mm).

140 In those circumstances, in view of the fact that the applicant does not contest that those differences were genuine, it must be held that the Commission has not committed a manifest error of assessment in concluding that the product proposed by PEM in its offer of 21 June 1995 constitutes a different nuclear calcium metal product, even if the two products have to be obtained by distilling standard calcium metal.

141 That complaint must therefore be rejected.

(b) Whether the context in which the offer of 21 June 1995 of nuclear calcium metal was made was taken into account

Arguments of the parties

142 The applicant considers that, in the decision, the Commission has not taken account of the context in which the offer of 21 June 1995 was made. Thus the Commission was satisfied with PEM's commercial offer without looking into the reasons for which the latter had not been able to adapt its standard calcium metal. By reasoning in this way, the Commission committed a manifest error of assessment which must entail annulment of the decision.

143 For the applicant, it is less important to ascertain whether PEM has available a product capable of satisfying it than to ascertain whether that undertaking had made any effort to reduce oxygen.

144 The applicant submits, in that context, that the offer of nuclear calcium metal, which by its nature is more expensive than standard calcium, formed part of PEM's market-exclusion policy. In this respect the applicant points out that the first offer of that product, on 21 July 1994, was made the day after provisional anti-dumping duties were imposed, shortly after PEM realised that there was no reason for which its quality should differ from Timminco's. Moreover, trials on that type of calcium metal took place more than two years after commercial relations were re-established between IPS and PEM. It also raises questions about the reasons for which, during negotiations over the remit of the two experts, PEM concealed for several weeks the nature of the calcium metal intended for testing.

145 According to the Commission, the applicant is distorting the tenor of the decision, since the decision does not state that the offer should be of nuclear calcium metal meeting IPS's requirement or otherwise. The Commission observes that commercial offers were made by PEM on 21 July 1994 and on 21 June 1995 and that both were rejected by IPS.

Findings of the Court

146 It is to be observed that, according to the applicant, the question is whether PEM actually did attempt to adapt its standard calcium metal in order to reduce oxygen. In that regard, it is sufficient to recall that it has been held above (see paragraphs 133 to 135) that the Commission had examined whether PEM had actually made any effort with a view to adapting its standard calcium metal to meet IPS's technical requirements, in particular with regard to oxygen content, and that such examination is not vitiated by a manifest error of assessment amounting to infringement of Article 86 of the Treaty. It has been found, in particular (see paragraphs 92 to 94) that PEM delivered seven consignments of calcium metal for study in various trials, carried out during April, June, September and November 1993 and in February and March 1995, and that changes were carried out at PEM's factory and to its system of production in order to adapt them to IPS's needs. It follows that the Commission did indeed take account of the context in which the offer of 21 June 1995 was made by checking whether PEM had actually attempted to adapt its standard calcium metal.

147 As for IPS's argument that there was a correlation between the stages of the anti-dumping proceeding and the commercial offer, it must be pointed out that such an argument, put forward by the applicant in the context of its first plea in law, is examined and rejected in the context of that plea.

148 So far as concerns the applicant's argument that trials on that type of distilled calcium metal could have been carried out as from the re-establishment of

commercial relations between the two parties, it is sufficient to point out that it was only possible to carry out such trials after a delay on account of IPS's refusal to consider that type of product.

149 Finally, as regards the argument that PEM had concealed during several weeks the nature of the calcium metal intended for testing, it is clear from the file that, from the beginning of negotiations over the remit of the two experts who were to be present at the trials of distilled calcium metal proposed by PEM, the latter clearly indicated and repeated in several of its letters that the calcium involved was 'calcium low in oxygen, obtained by distilling standard calcium metal'.

150 Therefore, the Commission has not committed a manifest error of assessment, since it took account of the context in which the offer of 21 June 1995 was made.

151 It follows that this complaint must therefore be rejected.

(c) The unjustified nature of the additional cost of the product offered by PEM

Arguments of the parties

152 The applicant submits that the Commission is wrong in stating that IPS refused to accept a price which reflects the additional costs arising from the unique specifications of its order. It is also wrong in saying that the existence of such additional costs were verified by the Commission and that there was nothing

discriminatory in PEM's asking for an increase in the price in order to take account of IPS's special needs.

153 The applicant submits, first, that the additional cost is not technically justified. Thus, there was no reason for additional cost relating to analysis of oxygen, since PEM's process required only monitoring by soundings and not consignment-by-consignment. Screening is a very simple operation which is carried out by all calcium producers delivering in chunks and which could not give rise to additional costs for them. As for fines, given that they pose a general threat to safety, it is essential to eliminate them. Finally, as regards cooling under argon, it was IPS which was the cause of that investment, enabling PEM to make substantial savings. Second, the applicant submits that PEM should not pass on the additional costs to which IPS's special requirements gave rise, namely sampling and analysis of oxygen content, screening, monitoring of fines content and the system of cooling under argon, because these are normal requirements placed on every one of its suppliers without giving rise to additional costs and constitute no more than the care which PEM is obliged to take over its products.

154 Finally, the applicant submits that the statement contained in the decision that Russian producers also invoice additional cost is inaccurate, since the decision mentions in that respect a letter from a Russian producer asking for half of the cost of perfecting a process intended to reduce the level of oxygen. The applicant claims that this showed that the price paid for those supplies did indeed remain the same and that no additional cost was invoiced.

155 The Commission contends that the additional cost is in proportion to the work carried out by PEM in order to prepare calcium metal compatible with IPS's plant. In that regard, the fact that the Russian producer did not pass on the additional costs incurred by those requirements does not mean that the same must apply to PEM.

156 The intervener submits that the specific costs linked to the reduction of the oxygen content were not passed on in order to ease relations with the applicant and with a view to establishing a long-lasting relationship between supplier and customer.

Findings of the Court

157 A distinction must be drawn between, on the one hand, the arguments of the applicant seeking to demonstrate that the additional cost was not technically justified and, on the other, those seeking to show that, since the additional cost does not correspond to any unusual demands on its part, it should not be passed on to it.

158 As regards, first, whether the additional cost was technically justified, it must be stressed at the outset that the applicant does not contest PEM's statements contained in point 2.2.2 of its letter to the Commission of 20 October 1995 according to which the only supplementary costs in relation to standard calcium metal included in its offer of 21 June 1995 correspond to the additional cost brought about by IPS's requirements extraneous to the manufacturing process as such and by totally original requirements by comparison with those of other PEM customers. PEM did not, therefore, include in its price the cost of an additional purification stage. Neither does the applicant contest the assertion that its requirements had given rise to exactly the same additional costs irrespective of the variety of standard calcium metal delivered since, apart from the low oxygen content not being reflected in the price proposed by PEM, they do not relate to aspects intrinsic to the substance of the product but concern, rather, its external shape.

159 According to the same letter, the additional cost contained in the price proposed by PEM corresponds to three items, namely, the requirements relating to analysis

and grain-size analysis and packaging. In that regard, the applicant does not contest PEM's assertion that the costs arising from the system of cooling under argon, additional maintenance due to a higher quality, depreciation of the additional material or modifications to PEM's installations and the relevant maintenance, which, according to PEM, strictly speaking should be added to the three abovementioned items, were not included in the commercial offer of 21 June 1995.

160 So far as concerns the requirements relating to analysis, it should be observed that, by its own account, PEM was obliged to take samples from each palette (400 kg) at the factory, distil the sample on the premises and then analyse the distillate in its main laboratory, which entailed additional costs of FRF 962.5 per tonne. In that regard, the applicant challenges not the genuineness of additional costs arising from those analytical requirements but the appropriateness of checking oxygen content consignment by consignment. However, it must be noted that the analytical requirements arise from IPS's requirements and were decided upon with IPS following a meeting organised by the Commission on 20 June 1995.

161 So far as concerns the grain-size analysis requirements, namely screening and the monitoring of fines content, it is apparent from the documents before the Court that IPS requested that the chunks be sifted through 7 cm × 7 cm mesh and that the ex-works content in fines under 0.2 mm should be 2% maximum. Such an operation requires the permanent presence of someone to supervise the chipping/screening stage, whereas, for PEM's usual customers, such permanent supervision is not necessary, which entails an additional cost of FRF 1 490 per tonne.

162 In that regard, the applicant does not deny that such additional costs were genuine, but confines itself to observing, without adducing any evidence, that the elimination of fines is not a special requirement of IPS's.

163 As regards the system of cooling under argon, it must be borne in mind that that additional cost was not included in the commercial offer made by PEM on 21 June 1995.

164 Finally, the applicant does not deny that such additional packaging costs, resulting from the fact that the grain-size of the calcium metal produced by IPS makes it impossible to load any more than 100 kg per drum instead of PEM's usual 150 kg, were genuine and amounted to FRF 518.92 per tonne.

165 It follows from the foregoing that the applicant has not demonstrated that the additional cost included in the commercial offer made by PEM on 21 June 1995 was not technically justified.

166 So far as concerns, second, the applicant's argument that the additional costs should not be attributed to it, it is sufficient to observe that, even assuming that the other suppliers of IPS do not include that kind of additional cost in their sales price, there is nothing to oblige an undertaking, whether or not it is in a dominant position, not to pass on its production costs through its sales price, particularly where such costs are due to an adaptation of its manufacturing process to suit the technical requirements of a particular customer.

167 It follows that the Commission has not committed a manifest error of assessment in affirming that there was nothing discriminatory in PEM's asking for an increase in the price in order to take account of IPS's special needs.

168 That complaint must therefore be rejected.

(d) The price proposed by PEM in its offer of 21 June 1995 purportedly excludes the applicant from the market

Arguments of the parties

169 The applicant submits that the Commission's contention that PEM did not fix the sale price of the calcium metal offered to IPS at a level such as to exclude it from the market for broken calcium metal is unfounded.

170 First, the cost price of primary calcium metal is between FRF 28 and 30 per kilo for PEM and fixed for IPS at FRF 37 (the price proposed by PEM in its offer of 21 June 1995), while those two undertakings sell their broken calcium metal at between FRF 42 and 46 per kilo. PEM's profit is of between FRF 14 to 18 per kilo and of only FRF 5 to 9 per kilo for IPS. Since the profit necessary to remain on the market is in the range FRF 9 to 11 per kilo, IPS is thus badly disadvantaged. The applicant explains that those indications of the respective profit of the two undertakings, on the basis of the database provided by PEM and a manufacturing cost deemed to be equivalent, were in fact forwarded to the Commission in the context of the investigation following the complaint. Moreover, the applicant observes that, at the time of that investigation, the sale price of PEM's standard primary calcium metal was FRF 33. By setting the sale price of the primary calcium metal offered to IPS at FRF 37, PEM managed to make for itself a large profit on it.

171 In that context, the applicant contests the reference in the decision to the increase by PEM of the price of broken calcium metal after the imposition of anti-dumping duties. Although it is true that the price of PEM's broken calcium metal initially increased from FRF 36 to 46, it nevertheless dropped to FRF 42, a level which is not viable for IPS.

172 PEM criticises the factors put forward by the applicant inasmuch as they are erroneous and are based on a conflation of the offers made to IPS and the reference prices charged by PEM to other customers. It submits that the reference to the cost price of its primary calcium metal is irrelevant, since a more sensible comparison would be between the sale price of the different varieties of primary calcium metal and those of broken calcium metal. In that regard, it states that the sale price of its standard primary calcium metal in June 1995 was FRF 35 per kilo (not FRF 33 as claimed by IPS) and the sale price to IPS of its low-oxygen calcium metal was FRF 37. Given that the sale price of broken calcium metal charged by IPS had to increase to FRF 46 in order to remain competitive with that of PEM, the profit to PEM would be FRF 11 and FRF 9 for IPS. In that context, the profits of the two undertakings fall in the FRF 9 to 11 range necessary to remain on the market, on which the applicant bases itself.

173 As regards the applicant's assertion that the price of broken calcium metal dropped from FRF 46 to 42, the intervener responds by saying that it did not make such a price reduction. The average price for broken calcium metal in 1995 was FRF 46.08 and FRF 45.25 in 1996, the reduction being due to the drop in demand in volume.

174 The applicant replies that it is extremely unlikely that PEM would sell its primary calcium metal at FRF 35. As for PEM's assertion that, in those circumstances, IPS's profit would rise to FRF 9, the applicant observes that that amount constitutes the minimum a grinding-process undertaking could tolerate and that PEM calculated the processing costs borne by IPS to be between FRF 12 and 14 during a meeting with IPS shareholders.

175 The Commission contends that IPS acquired primary calcium metal from non-member countries at prices close to, or even greater than, those proposed by PEM at that time and that, once the anti-dumping duties were introduced, the price of broken calcium metal further increased that of primary calcium metal, thus strengthening IPS's competitive position.

176 Second, the applicant contends that the judgment of the Court of Justice in Case *53/85 AKZO Chemie* v *Commission* [1986] ECR 1965 cannot provide a basis for the Commission's refusal to find that PEM abused its dominant position in that that judgment only contemplates a price reduction by an undertaking in a dominant position and not a price increment. The applicant states that, in the present case, the situation and the abusive practice may be distinguished from that considered in that judgment: PEM offers its primary calcium metal at an abnormally high price while at the same time it sells the derived product at such a low price that it forces its competitors to sell at a loss.

Findings of the Court

177 The applicant claims, essentially, that the price of low-oxygen calcium metal set by PEM in its offer of 21 June 1995, that is FRF 37 per kilo, is abnormally high and, therefore, abusive. That price, combined with the very low price for broken calcium metal offered by PEM on the market for the derived product, forces its competitors to sell at a loss if they are to keep themselves in that market.

178 The applicant therefore contends that PEM proceeded to apply what is known as 'price squeezing'. Price squeezing may be said to take place when an undertaking which is in a dominant position on the market for an unprocessed product and itself uses part of its production for the manufacture of a more processed product, while at the same time selling off surplus unprocessed product on the market, sets the price at which it sells the unprocessed product at such a level that those who purchase it do not have a sufficient profit margin on the processing to remain competitive on the market for the processed product.

179 None the less, it must be held that, in view of the arguments put forward above to the effect that the additional costs included in the price proposed by PEM in its offer of 21 June 1995 are justified, the applicant's complaints concerning the alleged exclusion effect of the price proposed by PEM must be rejected in view of

the fact that the applicant has failed to prove even the very premiss on which its argument is predicated, namely, the existence of abusive pricing of the raw material. In the absence of abusive prices being charged by PEM for the raw material, namely low-oxygen primary calcium metal, or of predatory pricing for the derived product, namely broken calcium metal, the fact that the applicant cannot, seemingly because of its higher processing costs, remain competitive in the sale of the derived product cannot justify characterising PEM's pricing policy as abusive. In that regard, it must be pointed out that a producer, even in a dominant position, is not obliged to sell its products below its manufacturing costs.

180 Moreover, the applicant has not shown that the price of low-oxygen calcium metal is such as to eliminate an efficient competitor from the broken calcium metal market.

181 The price at which low-oxygen calcium metal was sold to IPS was FRF 37, whereas the price at which broken calcium metal was sold by IPS had to be, in order to remain competitive with that of PEM, FRF 46, the price charged by PEM in 1995, as the file shows (annex 6 to the rejoinder) and since IPS has failed to prove that such a price had dropped to FRF 42. Therefore the difference, for IPS, between the price of low-oxygen calcium metal and the price of broken calcium metal which it had to charge in order to remain competitive on the market is FRF 9. In that context, it must be held that the range of FRF 9 to 11 corresponding to the calculation, put forward by the applicant, of the profit necessary in order to keep itself on the market was observed.

182 It follows that the price of FRF 37 proposed by PEM in its commercial offer of 21 June 1995 was not in itself such as to exclude a primary calcium metal processor from the broken calcium metal market.

183 None the less, the applicant responds by saying that it is extremely unlikely that PEM would sell its own primary calcium metal at FRF 35. In that connection, it must be pointed out that, in the absence of the applicant having proved that the price charged by PEM on the broken calcium metal market is not such as to exclude its competitors, the way in which PEM, which is a vertically-integrated undertaking, decides its profit margin is of no relevance to its effects on its competitors. Since the applicant does not claim that PEM is following a predatory pricing policy on the broken calcium metal market, its misgivings concerning whether PEM sells its own primary calcium metal at FRF 35 cannot call in question the validity of the decision.

184 The applicant also submits that, although the cost of processing calcium metal is, at the minimum, FRF 9 for a grinding-process undertaking, PEM itself calculated, during a meeting of shareholders of both companies, that that cost was between FRF 12 and 14 for IPS. In that connection, it should be observed that, on the one hand, in its letter of 10 January 1996 to the Commission, PEM denies having been aware of the minutes of the meeting with the IPS shareholders called by the applicant and that, in fact, those minutes are not signed by PEM. On the other hand, even supposing that PEM did know that the applicant's processing costs were greater than those of a grinding-process undertaking, which has not been established, that is not such as to render the price offered on 21 June 1995 abusive.

185 The reason for which IPS's customers are not prepared to bear the additional price to which IPS's higher processing costs give rise is either because its product is equivalent to that of its competitors but is too expensive for the market and therefore its production is not sufficiently efficient in order to survive on the market, or its product is better than that of its competitors and efficiently manufactured but is not sufficiently appreciated by its customers in order to justify its offer on the market. In that regard, the applicant does not contest the Commission's statement (page 2 of the decision) that the physical qualities of its product have enabled it, at least until anti-dumping duties were imposed in October 1994, to charge prices which could be as much as 25% above the prices of competing products.

186 That complaint must therefore be rejected.

187 It follows from all the foregoing that the Commission has not committed a manifest error of assessment amounting to infringement of Article 86 of the Treaty in concluding that the price proposed by PEM in its offer of 21 June 1995 was not such as to eliminate IPS from the market.

188 Consequently, the second part of the second plea must be rejected.

189 The second and third pleas in law must be dismissed in their entirety.

*The first plea in law: manifest error of assessment amounting to an infringement of Articles 86 and 190 of the Treaty, inasmuch as the Commission disregarded the link between PEM's delaying tactics and the use of the anti-dumping measures as an instrument of policy*

190 The applicant submits that recourse to the anti-dumping procedure by PEM constitutes abuse of a dominant position and an aspect of PEM's strategy to exclude IPS from the market, together with its delaying tactics. It accuses the Commission of having committed a manifest error of assessment amounting to an infringement of Article 86 of the Treaty and infringement of Article 190 of the EC Treaty by failing to point out in the decision the link between PEM's delaying tactics and the use of the anti-dumping measures as an instrument of policy.

1. *Admissibility*

Arguments of the Commission

191 The Commission contests the admissibility of the first plea in law, in so far as it is based on Article 190, on the ground that the applicant merely asserts that that article has been infringed without substantiating its assertion.

Findings of the Court

192 Under the first paragraph of Article 19 of the EC Statute of the Court of Justice, applicable to the Court of First Instance by virtue of the first paragraph of Article 46 thereof, and Article 44(1)(c) of the Rules of Procedure of the Court of First Instance, all applications must indicate the subject-matter of the proceedings and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the Court of First Instance to decide the case. In order to ensure legal certainty and the sound administration of justice, if an action is to be admissible the essential facts and law on which it is based must be apparent from the text of the application itself, even if only stated briefly, provided the statement is coherent and comprehensible (order of the Court of First Instance in Case T-85/92 *De Hoe* v *Commission* [1993] ECR II-523, paragraph 20).

193 In particular, the Court of Justice has held that a mere abstract statement of the pleas in law in the application does not alone satisfy the requirements of the Statute of the Court and the Rules of Procedure and that the words 'summary of the pleas in law' used in those instruments mean that the application must specify the nature of the pleas on which the application is based (judgment of the Court of Justice in Joined Cases 19/60, 21/60, 2/61 and 3/61 *Société Fives Lille Cail and Others* v *High Authority* [1961] ECR 281, and the order in *De Hoe* v *Commission*, cited above, paragraph 21).

194 In the present case, the applicant did not restrict itself to an abstract statement of that plea in law in the application but specified the nature of the plea by making clear the essential facts and law. The applicant sets out clearly the questions which, in its submission, the Commission has not examined in the decision. The fact that the applicant might have used the same arguments to claim that Articles 86 and 190 of the Treaty were infringed does not prevent the defendant from preparing its defence and the Court of First Instance from deciding the case.

195 It follows that the first plea in law must be declared admissible in its entirety.

2. *Substance*

(a) Infringement of Article 190 of the Treaty

Arguments of the parties

196 The applicant submits that the Commission should have examined the question as to whether the fact that PEM resorted to an anti-dumping proceeding simultaneously with the practice aimed at excluding IPS from the market could also constitute abusive conduct. However, in the applicant's submission, the decision does not contain any aspect which makes it possible to check whether the question has been looked into. It follows that by failing to proceed to any verification of that matter, the Commission has failed to fulfil the obligation to state reasons under Article 190 of the Treaty.

197 The Commission states that it has provided adequate reasons for the decision because it contains the essential reasons for rejecting that part of the complaint. That may be seen from the fact that the application contains criticisms of the statement of reasons which would have been impossible to make if it had not existed.

Findings of the Court

198 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. The requirements to be satisfied by the statement of reasons depend on the circumstances of each case, in particular the content of the measure in question, the nature of the reasons given and the interest which the addressees of the measure, or other parties to whom it is of direct and individual concern, may have in obtaining explanations. It is not necessary for the reasoning to go into all the relevant facts and points of law, since the question whether the statement of reasons meets the requirements of Article 190 of the Treaty must be assessed with regard not only to its wording but also to its context and to all the legal rules governing the matter in question (see the judgments of the Court of Justice in Joined Cases 296/82 and 318/82 *Netherlands and Leeuwarder Papierwarenfabriek* v *Commission* [1985] ECR 809, paragraph 19; Case C-350/88 *Delacre and Others* v *Commission* [1990] ECR I-395, paragraphs 15 and 16; Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 86; and Case C-367/95 P *Commission* v *Sytraval and Brink's France* [1998] ECR I-1719, paragraph 63).

199 As regards, more in particular, a Commission decision rejecting a complaint, the Court of First Instance has held that the Commission is not obliged to adopt a position, in stating the reasons for the decisions which it is required to take in order to apply the competition rules, on all the arguments relied on by the parties concerned in support of their request. It is sufficient if it sets out the facts and legal considerations having decisive importance in the context of the decision

(Case T-7/92 *Asia Motor France and Others* v *Commission* [1993] ECR II-669, paragraph 31, and Case T-224/95 *Tremblay and Others* v *Commission* [1997] ECR II-2215, paragraph 57).

200 In the present case, as is apparent from examination of the second and third pleas in law, the Commission, in the decision, carried out a close examination of the alleged existence of delaying tactics on the part of PEM, which is at the base of the alleged misuse of the anti-dumping procedure by PEM. Moreover, the points of the contested decision which relate to the complaint regarding the misuse of the anti-dumping procedure are worded as follows:

'From the opening of the procedure, the Commission stressed the fact that recourse to a legitimate instrument of Community law, such as the procedure in dumping matters, cannot itself be considered an abuse within the meaning of Article 86 of the Treaty.

So far as concerns the alleged attempt by PEM during the anti-dumping proceeding to send the Commission misleading information, it must be borne in mind that the anti-dumping procedure, and in particular Regulation No 2423/88, confers on the Commission the necessary powers to verify the information submitted by the interested parties in an investigation. In the present case, (the applicant) was fully involved in the proceeding and, furthermore, brought an action before the Court of First Instance against the regulation as adopted by the Council. It is for the Court, and not the Commission, to decide whether the measures adopted against China and Russia are well founded.

Accordingly, that aspect of the complaint must be rejected.'

201 It must be pointed out that the abovementioned points, read with the decision as a whole, contain the reasons for which the complaint relating to misuse of the

anti-dumping procedure was rejected and enabled the applicant to ascertain sufficiently the reasons for the measure in order to defend its rights. First, the Commission takes a position on the legal possibility of considering resort to the anti-dumping procedure as contrary to Article 86 and, second, it states its position on the legality of the anti-dumping procedure as such.

202 The applicant was, therefore, in a position to identify the facts and legal considerations having decisive importance in the context of the decision.

203 It follows that sufficient reasons were given for the contested decision. The complaint under consideration must therefore be rejected.

(b) *Infringement of Article 86 of the Treaty*

Arguments of the parties

204 The applicant criticises the decision in so far as it states that recourse to a legitimate instrument of Community law, such as the procedure in dumping matters, cannot itself be considered to constitute an abuse within the meaning of Article 86 of the Treaty. Such an assertion, maintained since the beginning of the proceeding, does indeed signal the absence of any examination of possible links between the anti-dumping proceeding and PEM's conduct *vis-à-vis* its competitor.

205 The applicant submits that the main question before DG IV was to ascertain to what extent PEM abused its dominant position by resorting to the anti-dumping procedure simultaneously with its exclusion policy. In that regard, the investiga-

tions undertaken by the Commission are inadequate inasmuch as they only checked whether the documents forwarded by PEM during the 'anti-dumping' and 'competition' investigations agreed with each other and were consistent.

206 The applicant relies on 91/299/EEC: Commission Decision of 19 December 1990 relating to a proceeding under Article 86 of the EEC Treaty (IV/33.133-C: Soda-ash — Solvay) (OJ 1991 L 152, p. 21, 'the Solvay Decision'), in which the Commission pointed out the impact which its intention to maintain anti-dumping measures can have on the commercial policy of an undertaking, and on the *Extramet II* judgment, in which the Court of Justice acknowledged the close link between the field of dumping and the field of competition when assessing the validity of an anti-dumping regulation and annulled a regulation imposing definitive anti-dumping duties on the ground that Community institutions had not considered the possibility that PEM might have contributed to the damage suffered as a result of its refusal to sell to the applicant. In his Opinion, Advocate General Jacobs moreover made clear that the institutions must take account of relevant competition-policy considerations in dumping cases (Opinion of Advocate General Jacobs in *Extramet II*, ECR I-3828).

207 The applicant points out the factors which demonstrate PEM's intention to use the anti-dumping procedure to exclude IPS from the market.

208 The correlation between the stages of the anti-dumping procedure and the various stages of the relations between PEM and IPS are particularly revealing. Thus, the applicant points out, first of all, that, at the start of the anti-dumping proceeding, PEM had offered to deliver to it high-quality primary calcium metal in exchange for an undertaking that it would not contest the anti-dumping proceeding. Second, the applicant submits that, throughout the proceeding, PEM sent out conflicting messages. On the one hand, PEM asked the Commission to introduce anti-dumping duties, explaining that it was not able to develop the primary calcium metal which the applicant expected whilst, on the other hand, PEM told the applicant that it was still working on developing a product which suited its plant. Finally, the applicant points out that, shortly after the adoption of

the provisional anti-dumping duties, relations between PEM and the applicant were re-established, but that PEM had abandoned any possibility of producing a suitable standard primary calcium metal since the adoption of definitive anti-dumping duties.

209 The Commission observes that PEM's recourse to the anti-dumping procedure may be explained by an intention to re-establish fair prices on the Community market just as well as by one to supply its customers both on the primary calcium metal market and the broken calcium metal market. PEM thus had a commercial interest in supplying the applicant.

210 The intervener challenges both the existence and the nature of any interaction, as claimed by the applicant, between the 'anti-dumping' and 'competition' aspects of the various proceedings. According to the intervener, such a statement from the applicant is surprising inasmuch as IPS objected to the Court's proposal to stay proceedings in Case T-2/95 until the written procedure in the present case had been concluded, on the ground that the investigation undertaken by DG IV bore no relation to that undertaken by Directorate-General 'External Relations' (DG I).

Findings of the Court

211 The applicant submits, first of all, that the main matter to verify was the extent to which PEM had abused a dominant position by resorting to the anti-dumping procedure simultaneously with the practice allegedly adopted by it and aimed at excluding IPS from the relevant market.

212 However, it has been held, during the examination of the second and third pleas in law, that PEM did not abuse its dominant position by policies excluding IPS.

Accordingly, the applicant's argument is unfounded given that the factor on which it relies, namely the existence of policies of exclusion, has not been established.

213 As regards, next, the applicant's argument that recourse to the anti-dumping procedure by PEM of itself constitutes an abuse of a dominant position, it must be pointed out that recourse to a remedy in law and, in particular, participation by an undertaking in an investigation conducted by the Community institutions, cannot be deemed, of itself, to be contrary to Article 86 of the Treaty. In the present case, the anti-dumping procedure aims to re-establish undistorted competition in the market in the interest of the Community and is reflected in a thorough investigation conducted by the Community institutions during which the interested parties are heard and which may lead to the adoption of a binding Community measure. To assert that mere recourse to such a procedure is, of itself, contrary to Article 86 of the Treaty amounts to denying undertakings the right to avail themselves of legal instruments established in the interest of the Community.

214 Moreover, the factors relied upon by the applicant in order to prove PEM's intention to use the anti-dumping procedure to exclude IPS from the market have not been established. Thus, the applicant has not adduced any evidence to show the claim that PEM asked it not to contest the anti-dumping procedure under way in exchange for an undertaking by PEM that it would deliver the expected product. That statement only appears in a letter from IPS dated 13 July 1993, which is formally denied by PEM in a letter of 19 July 1993. PEM's letter of 17 May 1993 cited by the applicant in the reply does no more than show that IPS gave undertakings to PEM without establishing that PEM had asked for them.

215 As to the existence of conflicting statements made by PEM to IPS and the Commission, it is sufficient to observe that, as the Commission states without being contradicted by the applicant, DG IV examined the information forwarded by PEM to DG I in the context of the anti-dumping investigation and it confirmed their veracity and consistency.

216 So far as concerns the applicant's argument that PEM abandoned the possibility of producing suitable standard primary calcium metal as from the adoption of the definitive anti-dumping duties, it need merely be observed that, as held in paragraphs 92 to 95 of the present judgment, PEM did not abandon any such possibility and succeeded in offering to IPS on 21 June 1995 low-oxygen primary calcium metal suited to IPS's needs.

217 Finally, the applicant has no basis for relying on the Solvay Decision, cited above, since, in that decision, the intention of the undertaking concerned to maintain anti-dumping measures was only mentioned by the Commission in the factual part of that decision and the Commission drew no conclusions in law from it. Furthermore, the facts were different because the Solvay case concerned deliberate attempts to mislead the inquiry in the context of a proven strategy to exclude competitors from the market. So far as concerns the *Extramet II* judgment and the Opinion of Advocate General Jacobs in that case, cited above, although it is true that annulment of the disputed regulation is the penalty for the failure on the part of the Community institutions to inquire into the possibility that PEM might have contributed to the damage suffered, the Court of Justice has not prejudged the conclusion on that point of the examination by the Community authorities. That examination of PEM's conduct was carried out by the Commission during the second anti-dumping investigation, which led to the adoption of Regulation No 2557/94, and made it clear that PEM's conduct had not contributed to the damage to the Community industry. That analysis is confirmed by the Court of First Instance in Case T-2/95 *Industrie des Poudres Sphériques* v *Council*, cited above.

218 It follows that the Commission has not committed a manifest error of assessment amounting to infringement of Article 86 of the Treaty in concluding that PEM's participation in the anti-dumping procedure did not constitute abuse of a dominant position the purpose of which was to exclude IPS from the European market in calcium metal.

219 Accordingly, the first plea in law must be dismissed.

*The fourth plea in law: breach of essential procedural requirements*

*Arguments of the parties*

220 The applicant accuses the Commission of having infringed essential procedural requirements during the procedure leading to the adoption of the decision by its refusal to forward to it certain items in the file which that institution used in forming its view.

221 The applicant requested the Commission, by letter of 15 April 1996, to send it various documents mentioned in the communication of 18 March 1996 issued pursuant to Article 6 of Regulation No 99/63. They consist, first, of documents showing that PEM studied all the technical propositions and arguments submitted by the applicant and carried out several trials of a modified process and, second, internal memoranda provided to DG IV by PEM in order to underline the urgent nature of the changes to be made in its factory. One such request was rejected by the Commission by letter of 7 June 1996 by reason of the confidential nature of the documents requested. However, according to the applicant, those documents could not be considered to be confidential *vis-à-vis* itself inasmuch as they relate to work intended to ensure for it a satisfactory supply. They should therefore have been forwarded to it.

222 The Commission contends that the decision clearly sets out all the factors on the basis of which the institution rejected the applicant's complaint and that a complainant cannot use a contentious procedure in order to obtain documents containing business secrets to which it has not been able to gain access in the context of an administrative procedure.

223 The applicant responds by saying that the Commission effectively based itself on PEM's internal documents and memoranda in order to demonstrate that

undertaking's intention to deliver to it the calcium it had ordered and that in the present case it is not a question of requesting the Court of First Instance to order the production of confidential documents but of only ascertaining whether the Commission could, on its own authority, decide not to forward certain documents to a complainant.

224 In that respect, the applicant compares the solution established in the judgment of the Court of Justice in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraphs 19 and 20, with the practice of DG IV affirmed in the judgment of the Court of First Instance in Case T-36/91 *ICI* v *Commission* [1995] ECR II-1847, paragraphs 102 and 103, and concludes that it is possible to maintain the confidentiality of certain documents by deleting, in accordance with the directions of the author of the document, the sensitive passages before forwarding the documents to interested third parties. The applicant also cites the order of the Court of First Instance in Case T-90/96 *Peugeot* v *Commission* [1997] ECR II-663, in which the Commission informed the undertaking of its intention to communicate its replies to the complainants and asked the undertaking to identify, giving its reasons, which items of information it wished to be treated as confidential. According to the applicant, the Commission should have acted in this way in the present case.

225 The Commission points out that, in its letter rejecting the request for the abovementioned documents, dated 7 June 1996, it mentioned the possibility of referring the matter to the hearing officer, which IPS did not believe it had to do.

226 The applicant counters by saying that it did indeed request that the matter be referred to the hearing officer in its letter of 15 April 1996 but that it was discouraged from pursuing that course of action by the Commission's reply of 7 June 1996 which made it clear that such a step did not appear appropriate in that it would not succeed, in the present case, in changing the Commission's point of view previously set out in the Commission's communication issued pursuant to Article 6 of Regulation No 99/63, in the light of the factual and legal elements in the file.

*Findings of the Court*

227 It should be noted at the outset that the applicant had the procedural opportunity of referring the matter to the hearing officer in order to obtain the requisite documents but did not, however, do so. In that regard, the applicant is wrong in claiming that, in its letter of 7 June 1996, the Commission had discouraged it from referring the matter to that officer. On the contrary, the Commission official responsible for that case invited the applicant to make such a reference stating: 'Should you continue to find that you cannot agree with the position expressed above with regard to your request to be granted additional access to certain documents in the file and from the hearing, I suggest you make an application to the hearing officer in accordance with the procedure provided for in Commission Decision 94/810/ECSC, EC of 12 December 1994 on the terms of reference of hearing officers in competition procedures before the Commission (OJ 1994 L 330, p. 67).' There was nothing, therefore, to prevent the applicant from deciding that it was appropriate to make such a reference, even though that procedure is not obligatory.

228 Next, it should be observed that, in its letter of 7 June 1996, the Commission informed the applicant that the documents requested by IPS 'concerned manufacturing processes specific to a competing supplier, its costs and cost price, customers, price and sales. That information was obtained under the powers conferred on the Commission by Regulation (No 17) and is confidential.'

229 It has been consistently held that the principle that there must be full disclosure in the administrative procedure before the Commission for the application of competition rules to undertakings applies only to undertakings which may be penalised by a Commission decision finding an infringement of Article 85 of the EC Treaty (now Article 81 EC) or Article 86 of the same Treaty, since the rights of third parties, as laid down by Article 19 of Regulation No 17, are limited to the right to participate in the administrative procedure (judgment of the Court of Justice in Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission* [1987] ECR 4487, paragraphs 19 and 20). It follows that the Commission enjoys

some latitude in taking account, in its decision, of the written observations and any oral observations presented by third parties. In particular, contrary to the applicant's contention, third parties cannot claim a right of access to the file held by the Commission on the same basis as the undertakings under investigation (judgment of the Court of Justice in Case 53/85 *AKZO* v *Commission*, cited above, paragraphs 27 and 28, and Case T-17/93 *Matra Hachette* v *Commission* [1994] ECR II-595, paragraph 34). In that regard, the Court of Justice has held that a complainant may not in any circumstances be given access to documents containing business secrets (*AKZO* v *Commission*, cited above, paragraph 28, and Joined Cases 142/84 and 156/84 *BAT and Reynolds* v *Commission*, cited above, paragraph 21).

230 In any event, in the present case, the information contained in the documents which were not communicated to the applicant was to be found either in the decision or in the other documents sent to the applicant. Failure to communicate the documents in question does not, therefore, mean that the procedure as a whole was improper.

231 So far as concerns the documents showing that PEM studied all the technical propositions and arguments submitted by the applicant and carried out several trials of a modified process, it must be pointed out that the Commission, in its decision, sets out in detail the facts on which it bases itself (page 14 of the decision) and that the applicant was already aware of those facts, in particular through PEM's letter of 20 May 1994 to IPS.

232 So far as concerns the urgent nature of the changes to be made in its factory, it is sufficient to point out that, assuming that proving such urgency is essential in order to substantiate the applicant's complaint, the Commission has proved that the changes were urgent by basing itself on documents in the file, namely the replies to IPS's letters, which had been transmitted to the applicant within the proper time-limits (see page 14 of the decision).

233 Accordingly, even if the Commission had not had available the documents which IPS had asked for, the outcome would have been the same. It follows that the applicant's rights have not been infringed.

234 The fourth plea in law must therefore be rejected.

235 It follows from all the foregoing that the application must be dismissed in its entirety.

## Costs

236 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicant has been unsuccessful, the applicant must be ordered to pay the Commission the costs as applied for by the latter.

237 The intervener PEM has applied for the applicant to be ordered to pay the costs of its intervention. In the circumstances of the case, the applicant must be ordered to pay the costs incurred by PEM.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and pay those of the Commission and of the intervener Péchiney Électrométallurgie.**

García-Valdecasas Lindh Cooke

Vilaras Forwood

Delivered in open court in Luxembourg on 30 November 2000.

H. Jung P. Lindh

Registrar President

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