

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

20 June 2000 *

In Case T-597/97,

Euromin SA, established in Geneva, Switzerland, represented initially by D. Horovitz, J. Bäverbrant, G. Vandersanden and N. Stockwell, of the Brussels Bar, and by N. Robson, Solicitor, and subsequently by D. Horovitz, G. Vandersanden, N. Stockwell, M.E. Pitt and S. Sheppard, Solicitors, with an address for service in Luxembourg at the offices of Société de Geston Fiduciaire SARL, 2-4 Rue Beck,

applicant,

v

Council of the European Union, represented by S. Marquardt, of its Legal Service, acting as Agent, assisted by H.-J. Rabe and G. Berrisch, Rechtsanwälte, Hamburg and Brussels, with an address for service in Luxembourg at the office of A. Morbilli, General Counsel of the Legal Affairs Directorate in the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

* Language of the case: English.

supported by

Commission of the European Communities, represented by V. Kreuzschitz and N. Khan, of the Legal Service, acting as Agents, with an address for service in Luxembourg at the office of C. Gómez de la Cruz, of the Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for annulment of Council Regulation (EC) No 1931/97 of 22 September 1997 imposing a definitive anti-dumping duty on imports of unwrought, unalloyed zinc originating in Poland and Russia and definitively collecting the provisional duty imposed (OJ 1997 L 272, p. 1),

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

composed of: M. Jaeger, President, K. Lenaerts, V. Tiili, J. Azizi and P. Mengozzi, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 6 July 1999,

gives the following

Judgment

Facts and procedure

- 1 On 10 June 1994 the Association Européenne des Métaux (Eurométaux) lodged a complaint with the Commission alleging that imports of unwrought, unalloyed zinc originating from Kazakhstan, Poland, Russia, Ukraine and Uzbekistan were being dumped.
- 2 Following that complaint, on 9 June 1995, the Commission published a notice of the initiation of an anti-dumping proceeding (OJ 1995 C 143, p. 12).
- 3 The applicant did not make itself known within the time-limit provided for in that notice.
- 4 On 25 March 1997, acting pursuant to Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1), the Commission adopted Decision 97/223/EC terminating the anti-dumping proceeding concerning imports of unwrought, unalloyed zinc originating in Kazakhstan, Ukraine and Uzbekistan (OJ 1997 L 89, p. 47).

- 5 On the same day, the Commission adopted Regulation (EC) No 593/97 imposing a provisional anti-dumping duty on imports of unwrought, unalloyed zinc originating in Poland and Russia (OJ 1997 L 89, p. 6; hereinafter 'the Commission Regulation').
- 6 On 9 April 1997 the applicant asked the Commission for information as to factual aspects of the basis of that Regulation. It also requested a hearing.
- 7 On 18 April 1997 the applicant expressed misgivings as to the soundness of the facts on which its Regulation was based, and repeated its request for a hearing.
- 8 On 28 April 1997 the Commission informed the applicant that it could not be granted a hearing because it had failed to make itself known within the time-limit set in the notice of initiation of the proceeding.
- 9 By letter of 4 July 1997, the Commission informed the applicant that it would after all be granted a hearing and could submit observations.
- 10 On 18 July 1997 the applicant was heard by the Commission. It lodged written observations on the provisional duty Regulation. In those observations, the applicant claimed to be a Russian exporter and complained that the Commission had not sent it a copy of the questionnaire relating to the dumping investigation. It maintained that it had done business with several undertakings belonging to the complainant association and that its name had been omitted from the complaint because the members of that association wished to exclude it from the market by preventing it from defending itself properly. The applicant admitted that it had

adopted a 'wait and see' approach, but explained that it had been convinced that the Commission would find that there was no dumping.

- 11 On 28 July 1997 the Commission disclosed to certain interested parties the essential facts and considerations on the basis of which it intended to recommend to the Council the imposition of definitive duties and the definitive collection of amounts secured by way of provisional anti-dumping duty, of which the applicant learned in due course.

- 12 By fax of 31 July 1997, the Commission informed the applicant of its position regarding the latter's observations.

- 13 On 31 August 1997 the applicant submitted new observations regarding the Commission's findings and conclusions.

- 14 On 22 September 1997 the Council adopted Regulation (EC) No 1931/97 imposing a definitive anti-dumping duty on imports of unwrought, unalloyed zinc originating in Poland and Russia and definitively collecting the provisional duty imposed (OJ 1997 L 272, p. 1; hereinafter 'the contested Regulation'). That Regulation imposed anti-dumping duty on the Russian imports at a rate of 5.2% of the net, free-at-Community-frontier price, before duty (Article 1(3)) and confirmed virtually all the findings set out in the Commission Regulation.

- 15 By application lodged at the Registry of the Court of First Instance on 17 December 1997, the applicant brought the present proceedings.

- 16 By a separate document lodged at the Registry of the Court of First Instance on 1 April 1998, the defendant raised a preliminary plea of inadmissibility under Article 114 of the Rules of Procedure of the Court of First Instance.

- 17 On 7 April 1998 the Commission sought leave to intervene in support of the forms of order applied for by the Council.

- 18 On 28 April 1998 the applicant submitted a request that certain information be treated as confidential.

- 19 On 17 June 1998 the applicant submitted its observations on the preliminary plea of inadmissibility.

- 20 By decision of 26 October 1998, the Court of First Instance reserved its decision on the preliminary plea for the final judgment.

- 21 By order of 20 April 1999, the Court of First Instance granted the Commission leave to intervene in support of the defendant and rejected the applicant's request concerning confidential treatment.

- 22 On 16 March 1999 the Court of First Instance, acting pursuant to Article 64(3) of the Rules of Procedure, requested the parties to produce certain documents and put to them a number of written questions. The parties duly complied with those measures of organisation of procedure.

- 23 By letter of 17 May 1999, the applicant waived its right to lodge a reply.
- 24 The Commission lodged its statement in intervention on 4 June 1999, the date on which the written procedure was closed.
- 25 The parties presented oral argument at the hearing on 6 July 1999.

Forms of order sought

- 26 The applicant claims that the Court should:
- annul Articles 1 and 2 of the contested Regulation in so far as they apply to the applicant;
 - declare the contested Regulation void as regards the applicant;
 - order the Council to take the necessary measures to comply with the Court's ruling, including by way of acting to ensure that all provisional and definitive duties which have been collected or paid in relation to the applicant are fully reimbursed together with payment of legal interest on those amounts;

— order the defendant to pay the costs.

27 The defendant, after raising a preliminary plea of inadmissibility, contends that the Court should:

— dismiss the application as inadmissible;

— in the alternative, declare the application unfounded;

— order the applicant to bear the costs.

28 In its observations on the preliminary plea of inadmissibility, the applicant claims that the Court should:

— reject the preliminary plea of inadmissibility or, in the alternative, reserve its decision thereupon for the final judgment;

— order the defendant to pay the costs.

29 In its statement in intervention, the intervener claims that the Court should:

- dismiss the action as inadmissible or, in the alternative, as unfounded.

Admissibility

Arguments of the parties

30 According to the defendant, the application fails to satisfy the criteria set out in the case-law governing the admissibility of actions brought by individuals contesting anti-dumping regulations. The relevant criteria are as follows:

- producer-exporters are normally individually concerned if they were charged with practising dumping and were identified in the contested regulations or concerned by the preliminary investigations;
- related importers are normally individually concerned if the findings of dumping or findings as regards the amount of duty were made by reference to their resale prices;

- unrelated importers are normally not individually concerned but may be individually concerned if they can identify certain attributes which are peculiar to them or circumstances which differentiate them from all other unrelated importers;

 - non-producing exporters are to be treated as related importers or unrelated importers depending on whether or not the dumping margin has been established by reference to their prices;

 - original equipment manufacturers are normally individually concerned if the particular features of the exporters' sales to them are taken into account by the Community institutions in constructing the normal value.
- 31 The defendant maintains that the information provided by the applicant during the administrative proceeding does not enable the precise role played by the applicant in the zinc trade between Russia and the Community to be determined.
- 32 Nor is the applicant identified in the contested regulation, given that the regulation makes no reference to the applicant's particular position as the basis for its findings, whether as regards the existence of dumping or as to the dumping margin (orders of 8 July 1987 in Case 279/86 *Sermes v Commission* [1987] ECR 3109, paragraphs 17 and 19, and Case 301/86 *Frimodt Pedersen v Commission* [1987] ECR 3123, paragraphs 17 and 19; and of 11 November 1987 in Case 205/87 *Nuova Ceam v Commission* [1987] ECR 4427, paragraphs 14 and 16). Furthermore, the Commission was not in a position to make definitive findings — particularly as regards establishing the export price — on the basis of data relating to the applicant, since the applicant did not make itself known within the time-limit specified in the notice of initiation of the proceeding and did not cooperate during the investigation.

- 33 The defendant, with the support of the intervener, adds that the mere fact that at a later stage in the proceeding the applicant submitted observations to the Commission pursuant to the first paragraph of Article 2 of the provisional duty Regulation and that its arguments were addressed in the contested Regulation is not enough to identify it for the purposes of the fourth paragraph of Article 173 of the EC Treaty (now after amendment, the fourth paragraph of Article 230 EC). The distinction between a regulation and a decision is based solely on the nature of the measure itself and the legal effects which it produces, not on the procedures for its adoption (Case 307/81 *Alusuisse v Council and Commission* [1982] ECR 3463, paragraph 13; the orders in *Sermes*, cited in paragraph 32 above, paragraph 19, in *Frimodt Pedersen*, cited in paragraph 32 above, paragraph 19, and in *Nuova Ceam*, cited in paragraph 32 above, paragraph 16).
- 34 Lastly, according to both the defendant and the intervener, the applicant has failed to demonstrate that it possesses special attributes which distinguish it from all other traders. In particular, the defendant submits that the applicant has not shown that the contested Regulation materially affected its business activities, inasmuch as it has provided no indication of the volume of its zinc sales in the Community or the proportion of its overall activities represented by the export of Russian zinc to the Community.
- 35 The intervener adds that the applicant has failed to produce any evidence of its market share in the Russian zinc trade. The contracts appended to its observations on the preliminary plea of inadmissibility do not show that it is the largest importer of zinc in the Community or that there is a limited and defined group of importers of Russian zinc, or that it was the only such exporter in 1997. Unlike the applicant in the case which gave rise to the judgment in Case C-358/89 *Extramet Industrie v Council* [1991] ECR I-2501, the applicant has provided no evidence to show that its business depends on zinc. The documents which the applicant has produced give no indication of the proportion of its

business accounted for by zinc. Nor has it shown that the anti-dumping duties at issue have caused the loss of its customers in the Community. On the contrary, the documents produced disclose that the applicant's sales increased in 1997.

36 The applicant denies that the application is inadmissible.

37 It points out that the Community judicature has found the following persons to be individually concerned by measures imposing anti-dumping duties:

- producers and exporters who are able to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations (see Joined Cases 239/82 and 275/82 *Allied Corporation and Others v Commission* [1984] ECR 1005, paragraphs 11 and 12; Case 53/83 *Allied Corporation v Council* [1985] ECR 1621, paragraph 4; Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others v Commission and Council* [1990] ECR I-719, paragraph 14; and Case C-156/87 *Gestetner Holdings v Council and Commission* [1990] ECR I-781, paragraph 17);
- importers whose resale prices for the goods at issue have been used as a basis for establishing the export price (see Joined Cases C-304/86 and C-185/87 *Enital v Commission and Council* [1990] ECR I-2939; Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport v Commission and Council* [1990] ECR I-2945; Case C-157/87 *Electroimpex and Others v Council* [1990] ECR I-3021; and Case T-161/94 *Sinochem Heilongjiang v Council* [1996] ECR II-695);
- persons who are able to demonstrate that they are concerned by such measures by reason of certain attributes which are peculiar to them or by factual circumstances which differentiate them from all other persons (see

Case 25/62 *Plaumann v Commission* [1963] ECR 95, p. 107, and *Extramet Industrie*, cited in paragraph 35 above, paragraph 14).

- 38 The applicant maintains that it satisfies several of those conditions.
- 39 First, it exports the product in question.
- 40 Second, it was identified by implication in the contested Regulation, which refers in several places to the observations submitted by the applicant pursuant to Article 2(1) of the Commission Regulation. Indeed, the contested Regulation refers — in recitals 3, 5 and 23 of the preamble thereto — to the applicant's participation in the proceeding. Furthermore, recitals 24, 27, 32, 40, 43 and 44 refer to certain comments on essential points which only the applicant was in a position to submit.
- 41 Third, by virtue of those observations, the applicant was involved in the preliminary investigations, especially as it was the only undertaking active in the Russian zinc trade to have participated in the proceeding.
- 42 Lastly, the applicant argues that it is concerned by the contested Regulation by reason of certain attributes which are peculiar to it and which distinguish it from other traders. It is a long-established major exporter of Russian zinc to the Community which, since 1991, has exported approximately 70% of the zinc produced by the Chelyabinsk Electrolytic Zinc Plant ('the CEZP') and 100% of that produced by Electrozinc; it belongs to a limited group of exporters of zinc originating in Russia; it has a majority interest in the CEZP (through Euromin Holdings Cyprus Ltd and Southwell Ltd, the former controlling 37.53% of the CEZP, the latter 10.49%); it is party to important contracts with the CEZP and

Electrozinc — zinc smelters — and with a Community importer; and it suffered serious injury on account of the imposition of the anti-dumping duty at issue.

Findings of the Court

- 43 Although it is true that, in the light of the criteria set out in the fourth paragraph of Article 173 of the Treaty, regulations imposing anti-dumping duty are, by virtue of their nature and scope, of a general nature in that they apply generally to the economic operators concerned, their provisions may none the less be of individual concern to particular traders (see Case C-75/92 *Gao Yao v Council* [1994] ECR I-3141, paragraph 26, and the case-law cited therein; and Case T-147/97 *Champion Stationery and Others v Council* [1998] ECR II-4137, paragraph 30, and the case-law cited therein).
- 44 Thus, measures imposing anti-dumping duties may be of individual concern to traders who can prove the existence of certain attributes which are peculiar to them and which differentiate them from all other traders (see *Plaumann*, cited in paragraph 37 above; *Extramet Industrie*, cited in paragraph 35 above, paragraphs 16 and 17; and *Sinochem Heilongjiang*, cited in paragraph 37 above, paragraph 46).
- 45 The Community judicature has held that, generally speaking, in the case of producers and exporters who are alleged to be involved in dumping, particular provisions of regulations imposing anti-dumping duties may be considered to be of direct and individual concern to them on the basis of data concerning their commercial activities. That is particularly so where producers or exporters are able to demonstrate that they were identified in the measures adopted by the Commission or the Council, or were concerned by the preliminary investigations (see *Sermes*, cited in paragraph 32 above, paragraph 15; *Nashua Corporation*, cited in paragraph 37 above, paragraph 14; and *Gestetner Holdings*, cited in

paragraph 37 above, paragraph 17, and the case-law cited therein). It is equally necessary that such a factor should have in some way prompted the intervention of the institutions or to have formed part of the *raison d'être* of the regulation itself (see the argument formulated, albeit in a different context, in the Opinion of Advocate General Tesauro in Case C-244/88 *Usines Coopératives de Déshydratation du Vexin and Others v Commission* [1989] ECR 3811, at p. 3819, point 4). As a general rule, certain provisions of regulations imposing anti-dumping duties are also of direct and individual concern to importers whose resale prices were taken into account for the construction of export prices (see *Nashua Corporation*, cited above, paragraph 15, and *Gestetner Holdings*, cited above, paragraph 18). Finally, the Court of Justice has also recognised the admissibility of an action contesting such a regulation where it was brought by an independent importer in exceptional circumstances, in particular, when that regulation seriously affected its business activities (see *Extramet*, cited in paragraph 35 above, paragraph 17).

46 In the present case, the first point to note is that the dumping practices against which the contested Regulation was directed were attributed to Polish and Russian undertakings and not to the applicant. Secondly, the applicant was not involved in the investigation. Thirdly, neither the finding that dumping was taking place, nor the determination of the dumping margin, nor the setting of the rate of duty imposed was based on data pertaining to the applicant's business activities. Fourthly, the applicant has not even given a precise and detailed description of the exact nature of its activities in relation to the product concerned (see paragraph 49 below).

47 It does not follow from the mere fact that the applicant submitted observations on the Commission Regulation, and that there are references to these in the contested Regulation, that its action must be regarded as admissible because it was involved in the preliminary investigation or impliedly identified in the contested Regulation. In the absence of evidence of other special circumstances adduced by the applicant, the mere fact that it participated in the administrative proceeding after the adoption of the Commission Regulation and its identification by implication in the contested Regulation — assuming that the references in that measure to the observations submitted by an importer of zinc originating in Russia (recitals 3, 5, 23, 24, 27, 32, 40, 43 and 44 in the preamble thereto) relate

to the observations submitted by the applicant — cannot be said in any way to have prompted the Community institutions' intervention or to have formed any part of the *raison d'être* of the Regulation itself.

48 The applicant has failed to demonstrate the existence of special circumstances which distinguish it in relation to the measure at issue.

49 As for the possibility of relying on paragraph 17 of the judgment in *Extramet* (cited in paragraph 35 above), the applicant has stated that the contested Regulation caused it serious injury. Admittedly, the Court held in that judgment that the applicant undertaking, an independent importer, was individually concerned by the regulation at issue by reason of exceptional circumstances, and particularly because the regulation had seriously affected its business activities. Nevertheless, in the present case, the applicant's argument on that point must be rejected for lack of evidence. For one thing, despite being called upon by the Court, both in the written questions and during the hearing, to produce evidence that the contested Regulation caused it the loss of most of its Community customers and consequently materially impaired its position on the relevant market, the applicant failed to do so. Furthermore, it has even failed to provide a specific and detailed description of its activities, whether in the form of a general summary or one which focused on its marketing of Russian zinc within the Community as an exporter, an importer or in any other capacity (see paragraph 46 above). Nor has it produced figures to indicate changes in the volume of its sales of unwrought, unalloyed Russian zinc to Community undertakings or the proportion of its overall turnover accounted for by such sales; on the contrary, some of the documents which it did produce show that such sales increased after the contested Regulation entered into force.

50 Moreover, the argument based on the applicant's holding of capital in two shareholders of a Russian producer of the product at issue (the CEZP) (see paragraph 42 above) must be rejected. An applicant must show that it has a legal interest in bringing proceedings separate from that possessed by an undertaking

which it partly controls and which is concerned by a Community measure (which might possibly be the position here in the case of the CEZP). Otherwise, in order to defend its interests in relation to that measure, its only remedy lies in the exercise of its rights as a member of the undertaking which itself has a right of action. In the present case, the applicant has failed to show that it has a legal interest separate from that possessed by the CEZP. However, even if a holding in the CEZP could constitute the basis of a right of action, the applicant's holding is insufficient because it is both indirect (being held through two other companies, Euromin Holdings Cyprus Ltd and Southwell Ltd) and partial (since those two companies own no more than 48.02% of the CEZP's capital).

- 51 It follows that the contested Regulation concerns the applicant, not by reason of certain attributes peculiar to it or factual circumstances which differentiate it from all other persons, but by reason solely of its objective status as a trader in Russian zinc, in the same way as any other trader who is or may be in the same circumstances.
- 52 It follows that the action must be dismissed as inadmissible.

Costs

- 53 Article 87(2) of the Rules of Procedure of the Court of First Instance provides that the unsuccessful party is to be ordered to pay the costs provided they have been applied for in the successful party's pleadings. As the applicant has been unsuccessful and the defendant has applied for costs, the applicant will be ordered to pay both its own costs and those incurred by the defendant. Article 87(4) of the Rules of Procedure provides that institutions which have intervened in a dispute are to bear their own costs; accordingly, the Commission will bear its own costs.

On those grounds,

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

hereby:

1. Dismisses the action as inadmissible;
2. Orders the applicant to pay its own costs together with those incurred by the defendant;
3. Orders the Commission to bear its own costs.

Jaeger

Lenaerts

Tiili

Azizi

Mengozi

Delivered in open court in Luxembourg on 20 June 2000.

H. Jung

Registrar

K. Lenaerts

President