JUDGMENT OF THE COURT OF FIRST INSTANCE
(Second Chamber, Extended Composition)
28 October 1999 *

In Case T-210/95,

European Fertilizer Manufacturers' Association (EFMA), an association formed under Swiss law, established in Zurich (Switzerland), represented by Dominique Voillemot and Olivier Prost, of the Paris Bar, with an address for service in Luxembourg at the Chambers of Carlos Zeyen, 67 Rue Ermesinde,

applicant,

supported by

French Republic, represented by Catherine de Salins, Head of Subdirectorate in the Legal Affairs Directorate at the Ministry of Foreign Affairs, and Gautier Mignot, and, in the oral procedure, Sujiro Seam, Ministry of Foreign Affairs Secretaries, acting as Agents, with an address for service in Luxembourg at the French Embassy, 8B Boulevard Joseph II,

intervener,

* Language of the case: English.

Council of the European Union, represented initially by Yves Cretien, Legal Adviser, and Antonio Tanca, of its Legal Service, acting as Agents, then solely by Mr Tanca, assisted by Hans-Jürgen Rabe and Georg Berrisch, Rechtsanwälte, Hamburg, with an address for service in Luxembourg at the office of Alessandro Morbilli, Director-General of the Legal Affairs Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer,

defendant,

supported by

Commission of the European Communities, represented by Nicholas Khan, of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, of its Legal Service, Wagner Centre, Kirchberg,

intervener,

APPLICATION for the annulment of Article 1 of Council Regulation (EC) No 2022/95 of 16 August 1995 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia (OJ 1995 L 198, p. 1),

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

composed of: A. Potocki, President, K. Lenaerts, C.W. Bellamy, J. Azizi and A.W.H. Meij, Judges,

Registrar: A. Mair, Administrator,

having regard to the written procedure and further to the hearing on 17 March 1999,

gives the following

Judgment

Facts

1 By Decision 94/293/EC of 13 April 1994 accepting undertakings given in connection with the anti-dumping proceeding concerning imports of ammonium nitrate originating in Lithuania and Russia and terminating the proceeding with regard to these countries as well as terminating the anti-dumping proceeding concerning imports of ammonium nitrate originating in Belarus, Georgia, Turkmenistan, Ukraine and Uzbekistan (OJ 1994 L 129, p. 24, hereafter 'the decision adopted in the regional proceeding'), the Commission terminated the investigation it had conducted in the anti-dumping proceeding concerning imports into the United Kingdom of ammonium nitrate of Lithuanian and Russian origin (hereinafter 'the regional proceeding') by accepting the undertaking to limit the volume of exports from each of those two countries into the United Kingdom to 100 000 tonnes per annum.

2 On 9 June 1994, following a complaint lodged by the applicant, the Commission announced, in a notice published in the *Official Journal of the European Communities*, the initiation of an anti-dumping proceeding concerning imports into the Community of ammonium nitrate originating in Lithuania and Russia and commenced an investigation at Community level (OJ 1994 L 158, p. 3).

3 On 6 December 1994 the Commission announced the initiation of a review of the decision adopted in the regional proceeding (OJ 1994 C 343, p. 9) on the ground, in particular, that, should protective measures prove to be necessary at Community level, such measures would apply to the whole of the Community, including the United Kingdom.

4 On 15 December 1994 the Commission forwarded to the applicant a disclosure document containing the preliminary conclusions of the Community-wide proceeding conducted by it, as well as the facts and considerations on the basis of which it planned to introduce anti-dumping measures at Community level by way of a variable duty on imports of ammonium nitrate originating in Lithuania and Russia. It stated in particular that in order to establish the price increase of the dumped imports required to remove injury to the Community industry, a profit of 5% would be added to the weighted-average cost per tonne of production of the Community industry for bagged ammonium nitrate.

5 In its reply of 9 January 1995 the applicant stated in particular that in calculating the 'target price', namely the minimum price required to remove injury to the Community industry, the Commission should have used a profit margin of 10% on the aforementioned costs, as it had done in the decision adopted in the regional proceeding.

6 On 6 April 1995 the Commission sent the applicant a second disclosure document amending its document of 15 December 1994 and setting out the

facts and considerations on the basis of which it planned to propose to the Council that anti-dumping measures in the form of a variable duty should be imposed on imports of ammonium nitrate originating in Russia and to close the investigation so far as imports from Lithuania were concerned. The Commission also replied to the applicant's arguments while maintaining its view that calculation of the target price should be based on a 5% profit margin on costs.

7 In its reply of 14 April 1995, the applicant maintained its view that calculation of the target price should be based on a 10% profit margin in order to enable the Community industry to obtain a reasonable return on the capital invested.

8 On 25 April 1995 the applicant forwarded to the Commission two memoranda dated 24 April 1995 from French fertilizer manufacturers, one from Hydro Agri France and the other from Grande Paroisse. According to the applicant, the documents demonstrate that a profit margin of 10% on costs was the absolute minimum required for the survival of the industry.

9 On 2 May 1995 the Commission sent the applicant a note with the intention of justifying the choice of a profit margin on costs of 5% for the Community industry. According to that note, to which were appended the Commission's proposed figures, the 10% margin applied in the regional proceeding was not suitable to be applied in the Community as a whole, since production costs in the United Kingdom were lower than the Community average.

10 In a letter dated 1 June 1995 to Sir Leon Brittan, the Member of the Commission with responsibility for anti-dumping matters, the applicant challenged that assessment.

11 On 2 June 1995 the Commission sent the applicant a third disclosure document whereby it made a number of modifications to the standpoints it had adopted previously, in particular as regards calculation of the dumping margin, the injury threshold and the minimum price necessary to eliminate the injury suffered. It maintained, however, that the profit margin on costs to be taken into account when calculating the target price must be 5%.

12 In a letter to the Commission dated 15 June 1995 the applicant reiterated its arguments in favour of setting the profit margin at 10%.

13 In its reply of 23 June 1995 to the applicant's letter of 15 June 1995, the Commission pointed out in particular that, in addition to the considerations set out in its document of 2 June 1995, account had to be taken of the fact that, first, the 10% profit margin used in the regional proceeding was applied not to the actual costs of production in the United Kingdom industry, but to the costs adjusted to exclude the impact of factors other than the dumped imports; and, secondly, the Community industry's fixed costs were slightly inflated by the maintenance of over-capacity.

14 On 3 August 1995 the Commission adopted Decision 95/344/EC terminating the anti-dumping proceeding in respect of imports of ammonium nitrate originating in Lithuania (OJ 1995 L 198, p. 27).

15 On the same date the Commission adopted Decision 95/345/EC terminating the anti-dumping proceeding concerning imports into the United Kingdom of ammonium nitrate originating in Russia and terminating the anti-dumping review investigation concerning imports into the United Kingdom of ammonium nitrate originating in Lithuania (OJ 1995 L 198, p. 29). That decision brought to

an end the existing regional measures which limited the volume of exports of ammonium nitrate originating in Russia to the United Kingdom while maintaining those measures in so far as concerned ammonium nitrate of Lithuanian origin.

16 On 16 August 1995 the Council adopted Regulation (EC) No 2022/95 of 16 August 1995 imposing a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia (OJ 1995 L 198, p. 1, hereinafter 'the contested regulation').

17 In accordance with Articles 23 and 24 of Council Regulation (EC) No 3283/94 of 22 December 1994 on protection against dumped imports from countries not members of the European Community (OJ 1994 L 349, p. 1), the contested regulation was adopted on the basis of the provisions 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, hereinafter 'the basic regulation').

18 Article 1 of the contested regulation introduces a definitive anti-dumping duty on imports of ammonium nitrate originating in Russia, the amount of which is the difference between ECU 102.9 per tonne net of product and the net CIF (cost-insurance-freight) price, at the Community frontier before customs clearance, where this is lower.

19 Recitals 89 to 93 in the contested regulation set out the reasons why, in order to establish the price increase of the dumped imports required to eliminate injury to the Community industry, the weighted-average cost per tonne of production of the Community industry for bagged ammonium nitrate has been calculated, and a profit margin of 5% added.

Procedure and forms of order sought by the parties

20 By application lodged at the Court Registry on 7 November 1995, the applicant brought the present action.

21 By order of 28 June 1995, the Court of First Instance (Second Chamber, Extended Composition) granted the French Republic and the Commission leave to intervene in support of the forms of order sought by the applicant and the defendant respectively.

22 By letter of 7 May 1997 the applicant requested to be authorised to plead in French at the hearing. The other parties lodged their observations on that request between 28 May and 4 June 1997.

23 On 17 December 1997 the Court of First Instance delivered its judgment in Case T-121/95 *EFMA* v *Council* [1997] ECR II-2391. By letter from the Registry of 19 December 1997, the Court of First Instance (Second Chamber, Extended Composition) requested the parties to submit their observations regarding the possible consequences of that judgment for the further course of the procedure in the present case. The applicant, the French Republic and the Council lodged observations in response to that request between 8 January and 9 February 1998.

24 Upon hearing the report of the Judge-Rapporteur, the Court of First Instance (Second Chamber, Extended Composition) decided to open the oral procedure without measures of inquiry or of organisation of procedure. The applicant's request to be allowed to plead in a language other than the language of the case was refused. The hearing, initially fixed for 13 January 1999, was adjourned at the request of the parties to 17 March 1999 when, in open court, the parties presented oral argument and replied to the Court's questions.

25 The applicant claims that the Court should:

— annul Article 1 of the contested regulation;

— order that the anti-dumping duty imposed by that provision be maintained until the competent institutions adopt the measures necessary to comply with the judgment of the Court;

— order the Council to pay the costs.

26 The French Republic claims that the Court should:

— annul Article 1 of the contested regulation;

— order that the anti-dumping duty imposed by the contested provision be maintained until the competent institutions adopt the measures necessary to comply with its judgment;

— order the Council to pay the costs.

27 The defendant contends that the Court should:

— dismiss the application;

— order the applicant to pay the costs.

28 The Commission, which had been granted leave to intervene in support of the form of order sought by the Council, did not submit a statement in intervention.

Substance

Arguments of the parties

29 In its application, the applicant puts forward a single plea in law. Referring to the wording of recital 89 in the contested regulation, it submits that by adopting a 5% profit margin for Community producers of ammonium nitrate the Council committed a manifest error of appraisal of the facts of the case.

30 Referring, first of all, to its letters of 9 January, 14 April, 25 April, 1 June and 15 June 1995, the applicant states that it had raised, in particular, the following points: (a) the Community industry requires a 10% profit margin in order to obtain a reasonable return on the capital invested; (b) the 10% profit margin applied to the same product in the decision adopted in the regional proceeding is also of decisive importance for the purpose of calculating the target price at

Community level, having regard, in particular, to recital 46 in the decision which provides that 'this industry requires a minimum profit margin of 10% on costs in order to remain competitive, and to cover the costs of new investments'; (c) no distinctions should have been drawn between the various Community producers, and in particular so far as the French producers were concerned, for the purposes of calculating the profit margin; (d) the profit margin of 5% in the case concerning imports of urea ammonium nitrate solution, known as 'UAN' (hereinafter referred to as 'the UAN case' — see Council Regulation (EC) No 3319/94 of 22 December 1994 imposing a definitive anti-dumping duty on imports of urea ammonium nitrate solution originating in Bulgaria and Poland, exported by companies not exempted from the duty, and collecting definitively the provisional duty imposed (OJ 1994 L 350, p. 20), and in the case concerning urea imports (hereinafter referred to as 'the urea case' — see Council Regulation (EC) No 477/95 of 16 January 1995 amending the definitive anti-dumping measures applying to imports into the Community of urea originating in the former USSR and terminating the anti-dumping measures applying to imports into the Community of urea originating in the former Czechoslovakia (OJ 1995 L 49, p. 1) cannot serve as a basis for assessing the profit margin with regard to ammonium nitrate production.

31 The applicant points out, in particular, that in its letter of 25 April 1995, it supplied detailed analyses carried out by Hydro Agri France and Grande Paroisse, showing that a 10% profit margin was the absolute minimum necessary for the Community industry to survive.

32 The applicant refers, moreover, to a study conducted by Z/Yen Ltd, a consultancy practice which specialises in analysing the balance between risk and reward, in particular in industry ('Z/Yen study'). That shows that a profit margin of 10% on actual costs represents the minimum profit margin required by the Community ammonium nitrate industry to prevent substantial injury which could lead to its decline. Moreover, a 15% profit margin is the vital minimum which would enable the Community industry, on the one hand, to finance the investment which is necessary for its survival and, on the other hand, to reinvest in the modernisation and replacement of existing plant.

33 Although that study was carried out in November 1995, that is to say after the adoption of the contested regulation, the applicant considers itself entitled to produce it before the Court as additional evidence (see the Opinion of Advocate General Fennelly in Case C-56/93 *Belgium* v *Commission* [1996] ECR I-723, paragraph 30, and the Opinion of Advocate General Mancini in Case 187/85 *FEDIOL* v *Commission* [1988] ECR 4155, paragraph 7).

34 The applicant adds that, during the administrative proceeding, in reply to the questionnaire from the Commission on profitability, the Community producers indicated profit margins which varied from 10% to 41%, which amount to a weighted-average, based on the actual production during the investigation period, of 16.2%. That amount is consistent with the level of profitability of 15.6% achieved by the Community industry in 1990-91 before the dumped imports entered the Community (see recital 51 in the contested regulation).

35 To the Council's argument, set out in its defence (see in particular paragraph 15), that the 5% profit margin is justified by the fact that factors other than the imports in question have also contributed to the injury suffered by the Community industry, the applicant replies that this argument was raised neither in the contested regulation nor during the administrative proceeding. This, it claims, is a breach of the obligation to state reasons laid down in Article 190 of the EC Treaty (now Article 253 EC), and a breach of the rights of defence.

36 In any event, the Council committed a manifest error of assessment with regard to the other factors which, according to its defence to the application, were taken into account when the level of the anti-dumping duty was determined. In the first place, the reduction in stocks, referred to in recital 70 in the contested regulation, did not entail increased costs. Secondly, the fall in the amount of ammonium nitrate used for internal consumption is small in comparison with total production and did not have any negative effects on costs. Thirdly, there was no overcapacity in the Community industry at the material time, contrary to what is stated in recital 71 in the contested regulation. Fourthly, any overcapacity

would have had only a slight impact on costs, given that, in particular, ammonium nitrate production plants also produce other nitrogenous products. In any event, according to the documents forwarded by the Commission, the employment index dropped from 100 in 1990/91 to 93.9 in 1993/94. That improvement in productivity shows that fixed costs were not maintained at a level which was higher than necessary.

37 Finally, in reply to the argument that the application in an anti-dumping proceeding concerning ammonium nitrate imports of a profit margin which differs from that adopted in the urea and UAN cases could upset the competitive balance between these products, the applicant states that the choice by a farmer of a particular type of fertilizer does not depend on the profit margin at the production stage but on various other factors such as soil acidity, the type of crop and the weather conditions as well as the price per tonne of the nitrogen used in the fertilizer concerned.

38 The French Republic, intervening in the proceedings, supports the applicant's case, adding, in particular, that the usual practice followed by the Community institutions is to set the profit margin at the minimum level required to ensure the viability of the Community industry (see Council Regulation (EC) No 5/96 of 22 December 1995 imposing definitive anti-dumping duties on imports of microwave ovens originating in the People's Republic of China, the Republic of Korea, Malaysia and Thailand and collecting definitively the provisional duty imposed, OJ 1996 L 2, p. 1, recital 64, and Commission Regulation (EC) No 2997/95 of 20 December 1995 imposing a provisional anti-dumping duty on imports of unwrought magnesium originating in Russia and Ukraine, OJ 1995 L 312, p. 37, recital 76).

39 Similarly, the Community institutions frequently refer to the margin obtaining before the emergence of dumping practices (see Commission Regulation (EC) No 2318/95 of 27 September 1995 imposing a provisional anti-dumping duty on

imports of certain tube or pipe fittings, of iron or steel, originating in the People's Republic of China, Croatia and Thailand and terminating the anti-dumping proceeding in respect of imports of these fittings, originating in the Slovak Republic and Taiwan, OJ 1995 L 234, p. 4, recital 78, and Commission Regulation (EC) No 1648/94 of 6 July 1994 imposing a provisional anti-dumping duty on imports of furazolidone originating in the People's Republic of China, OJ 1994 L 174, p. 4, recital 42). However, in the present case, the Council found, at recital 53 in the contested regulation, that in 1990/1991 the Community industry made a profit of 15.6%, which it described as a 'healthy profit'.

40 Moreover, the finding that between 1990/1991 and 1993/1994 the Community industry was able to reduce its average production cost from ECU 126 to ECU 115 per tonne (see recital 72 in the contested regulation) shows that, in the absence of dumped imports, the profit margin of the Community industry did not diminish significantly in comparison with its 1990/1991 level.

41 Furthermore, in the decision adopted in the regional proceeding, the United Kingdom industry's average profit margin between 1989 and 1991 was calculated at 11% and the minimum profit margin was set at 10%.

42 In the UAN and urea cases, the setting of the profit margin of the Community industry at 5% was vigorously challenged by the Community producers, so that, in the French Republic's view, the Council cannot rely on that precedent. Far from justifying the adoption of an under-estimated profit margin, the requirement to respect the competitive balance between urea, UAN and ammonium nitrate means that it should apply an appropriate profit margin with respect to ammonium nitrate.

43 So far as concerns the maintenance of over-capacity, the only factor expressly referred to in recital 91 in the contested regulation, the Council acknowledged, in indicating that the production costs of the costs of the Community industry were 'slightly inflated' as a result, that this factor could only have had a limited effect on those costs. Moreover, for the reasons put forward by the applicant in its reply, the French Republic denies that, during the investigation period there was any overcapacity such as to increase fixed costs.

44 With regard to the allegedly lower costs of production of the United Kingdom industry, the Council set the reasonable profit margin at 10% in its case, when that industry represents at least 45% of Community production during the investigation period (see recital 84 in the contested regulation). Accordingly, to adopt an average profit margin of 5% for the Community producers taken as a whole would imply that more than one half of the Community production shows a profit margin of virtually 0%, which is manifestly unreasonable.

45 Finally, the calculations of the comparative costs of production of the United Kingdom and continental producers carried out by the Commission (see its note of 2 May 1995) do not take account of the effect of the devaluation of sterling at the end of 1992, that is to say, immediately after the investigation period to which the regional proceeding related.

46 According to the Council, it follows from Article 4 of the basic regulation that the aim of anti-dumping measures is to make good, in full, only the material injury caused by dumped or subsidised imports, and not injury caused by other factors. The amount of the anti-dumping duty cannot exceed the level necessary to attain that objective (see Article 13(3) of the basic regulation).

47 In accordance with those principles, the Council established the anti-dumping duty, in the present case, on the basis of the minimum price which the dumped Russian imports must reach in order for the injury caused by them to the

Community industry to be eliminated. In order to determine that target price or 'minimum price', it added to the actual weighted-average per tonne of costs of production of the Community industry a profit margin of 5%.

48 The Council would not dispute that the minimum price calculated in this way does not necessarily correspond to the price which the Community industry, as it is structured at present, considers necessary in order to obtain a sufficient return on investment and to remain viable and competitive. The main reason for this is that part of the injury suffered by the Community industry was caused by other factors (see recital 75 in the contested regulation). The strategy of the Community producers of reducing stocks and the fall in their internal consumption of ammonium nitrate significantly contributed to the decline in their production. Furthermore, the maintenance of overcapacity resulted in fixed costs that were higher than necessary (see recitals 70 and 71 in the contested regulation). The Council considers that it had to exclude that part of the injury attributable to those factors when determining the target price.

49 So far as concerns the decision adopted in the regional proceeding, the target price set for ammonium nitrate imports into the United Kingdom was not based on actual costs of production but on costs of production adjusted in order to exclude the effect of an increase in those costs which occurred during the investigation period and was due to factors other than dumped imports (see recital 121 in the decision adopted in the regional proceeding). The Council did not proceed in the same way in the present case because of the large number of producers in diverse circumstances and the problems that would have been encountered in taking account of several different currencies. Consequently, as in the case of UAN importations, it reduced the profit margin in order to take account of the fact that actual, rather than adjusted, costs were used. Both approaches lead to the same result.

50 Moreover, the production costs of the United Kingdom industry are lower than those of other Community industry.

51 The Council also took account of the fact that in the UAN and urea cases it adopted anti-dumping measures on the basis of a 5% profit margin (see recital 89 in the contested regulation). Although they command different prices in various Community markets, depending on climate, soil type etc., urea, UAN and ammonium nitrate are similar products whose nitrogenous content is the determining factor, so that to apply a profit margin for ammonium nitrate which differed from the 5% used in the urea and UAN cases would have upset the competitive balance between those products.

52 The applicant is not entitled to rely on the Z/Yen study before the Court of First Instance since it did not produce it during the administrative proceeding. In any event, the study merely analyses the level of profit the Community industry must allegedly achieve in order to stay in business, without discussing the level to which prices of Russian imports of dumped ammonium nitrate must be raised in order to prevent those imports from being a cause of further injury to the Community industry.

53 Similarly, the two letters from Hydro Agri France and from Grande Paroisse produced by the applicant on 25 April 1995 merely deal with the sales price for the imports in question desired by those two producers, but not with the profit margin necessary to eliminate the injury caused by those imports to the Community industry.

Findings of the Court

Introductory remarks

54 In the present case, the anti-dumping duty introduced in the form of a variable duty by Article 1 of the contested regulation corresponds to the increase in the price of imports of ammonium nitrate originating in Russia which is necessary in order to eliminate the injury to the Community industry caused by such imports. In order to establish the extent of the injury caused by the imports at issue, the Council compared their weighted sales price in the Community, adjusted according to a certain difference in quality, with the target price for the Community production. That target price was calculated on the basis of the weighted-average cost per tonne of production of the Community industry for bagged ammonium nitrate, to which a profit margin of 5% was added.

55 In recital 89 in the contested regulation, the Council explained its choice of a profit margin of 5% in calculating the target price in the following terms: 'A profit of 5% on cost has been used in recent anti-dumping cases concerning urea and UAN solutions, and was therefore considered as a reasonable profit margin for nitrogen fertilizers in anti-dumping proceedings'.

56 In recital 91 in the contested regulation, the Council dealt with the applicant's argument that a profit margin of 10% of the costs would be a more appropriate level of profit in the following terms:

'The profit margin used in the regional proceeding was not applied on the actual costs of production of the United Kingdom industry, but on the costs adjusted to exclude the impact of factors other than the dumped imports. In any event, the United Kingdom industry represents only a minority of Community production

of ammonium nitrate, and has lower costs than the rest of the Community producers. Therefore the cost structure of the United Kingdom industry appears to lend itself to the reasonable expectation of a higher level of profit under normal market conditions than [is] the case for the Community industry as a whole. Furthermore, it has been established that the Community industry's fixed costs are slightly inflated by the maintenance of over-capacity (Recital 71). EFMA also claimed that the use of a higher profit figure was more appropriate because of certain costs associated with ammonium nitrate which are not present in the production of urea or UAN solutions. However, EFMA did not forward sufficient evidence to substantiate this claim. In view of these factors, and after considering this matter carefully, it is concluded that 5% on actual costs remains an appropriate level of profit'.

57 Where assessment of a complex economic situation is involved, the Council has a broad margin of appreciation when determining the appropriate profit margin. The Community judicature must therefore restrict its review to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based are accurate or whether there has been a manifest error of appraisal or a misuse of powers (see, for example, Case T-164/94 *Ferchimex* v *Council* [1995] ECR II-2681, paragraph 67).

58 It is for the applicant to adduce evidence which would enable the Court of First Instance to find that the Council made a manifest error of appraisal as defined in that case-law (see *EFMA* v *Council*, cited above, paragraph 106).

The basic criterion for calculating the profit margin

59 The applicant's first argument that the profit margin which is to be used by the Community institutions must be the margin necessary to ensure the survival of the Community industry and/or an adequate return on capital, has no basis whatever in the basic regulation. It should be borne in mind that, under

Article 4(1) of that regulation, there is no injury unless the imports in question, through the effects of dumping, are causing or threatening to cause material injury to an established Community industry or are materially retarding the establishment of such an industry. Similarly, it is clear from Article 13(3) of the basic regulation that the anti-dumping duty imposed cannot exceed the level necessary to remove the injury caused by the dumped imports. It follows that an injury attributable to other factors is not relevant when determining the injury within the meaning of Article 4(1).

60 It follows that the profit margin to be used by the Council when calculating the target price that will remove the injury in question must be limited to the profit margin which the Community industry could reasonably count on under normal conditions of competition, in the absence of the dumped imports. It would not be consistent with Articles 4(1) and 13(3) of the basic regulation to allow the Community industry a profit margin that it could not have expected if there were no dumping.

61 The criterion of the profit margin necessary to ensure the survival of the industry in question is not therefore consistent with the basic regulation. Such a criterion would not enable the Community institutions to comply strictly with the provisions of the basic regulation, in particular where factors other than dumping, such as excess-production capacity (see paragraph 103 et seq. below) also have the effect of reducing the profitability of the Community industry. If it were otherwise, the Community industry would be protected not only against dumped imports, but also against any other factor of a nature such as to affect the return on its investments.

62 It follows that the applicant's first argument, which constitutes the main premiss of its case, must be rejected.

The evidence adduced by the applicant during the pre-litigation procedure

63 It should be pointed out that, in its memorandum of 24 April 1995, Hydro Agri France merely gives the minimum price, at the Community frontier before customs clearance, which, in its view, enables it to obtain a return on investment before tax of 15%.

64 Similarly, in its memorandum of 24 April 1995, Grande Paroisse provides only a series of calculations of the sales prices judged to be necessary to cover the cost of its investments in that sector.

65 None of those documents touches on the question as to what profit margin the Community industry would have been able to achieve but for the dumped imports. Those documents are not therefore such as to establish that the Community institutions committed a manifest error of assessment on this point.

66 During the pre-litigation procedure, the applicant did not produce any evidence on the above point, namely what profit margin the Community industry would have achieved on average but for the dumped imports.

67 The applicant's argument based on the evidence adduced in the course of the pre-litigation procedure must therefore be rejected.

The Z/Yen Study

68 As to the applicant's argument that the Z/Yen study shows that the Community institutions committed a manifest error of assessment, it is common ground that that study was not forwarded to the Commission during the pre-litigation procedure.

69 It should be borne in mind, in that regard, that, at paragraph 108 of the judgment in *EFMA* v *Council*, the Court of First Instance held that a study on the level of profit margins which had not been presented to the Commission during the administrative procedure was not to be taken into account in proceedings before the Court. It stated that, in anti-dumping proceedings, it must ascertain whether the institutions based their decisions on correct material facts and whether the assessment of those facts was not manifestly erroneous, in the situation as it appeared at the time of adoption of the contested measure. Since the applicant in that case did not produce during the administrative procedure any evidence in support of its assertion that a higher profit margin was required, the institutions were unable to take that factor into account when they adopted the regulation contested before the Court.

70 That case-law must be applied in the present case. Otherwise, the applicant would be able to circumvent the time-limits set by the Commission in the pre-litigation procedure.

71 It should be pointed out, in that regard, that in anti-dumping cases the Council and the Commission depend on the willingness of the parties to cooperate in providing it with the necessary information within the prescribed periods. Even though, in the present case, the strict time-limits introduced by Regulation No 3283/94 of 22 December 1994, cited above, in the wake of the new agreements entered into in 1994 on the implementation of Article VI of General Agreement on Tariffs and Trade, were not applicable (see paragraph 17 above), the Community institutions were nevertheless obliged, in accordance with Article 7(9)(a) of the basic regulation, to conclude the investigation within one year of the initiation of the proceeding or, at the latest, within a reasonable period (Joined Cases T-163/94 and T-165/94 *NTN Corporation and Koyo Seiko* v *Council* [1995] ECR II-1381, paragraph 119).

72 To that end, in each of the three disclosure letters of 15 December 1994, 6 April and 2 June 1995, the Commission requested that the applicant state its point of view within a given period. It follows that the applicant, which had itself set the pre-litigation procedure in motion by lodging its complaint, had ample time in which to provide the Commission with the facts contained in the Z/Yen study.

73 That being so, the applicant is not entitled, in the present proceedings, to rely, in support of a plea alleging manifest error of assessment, on facts which it did not submit to the Commission during the pre-litigation procedure.

74 Even if the applicant were entitled to rely on the Z/Yen study, it should be pointed out that the study indicates merely the return on investment which is judged to be necessary to provide a return on the existing capital or to renew the Community industry's production plant. It therefore contains nothing to show that, in the absence of the imports at issue, the Community industry would have been able to achieve the returns which it mentions. Neither does it show what profit margin the Community industry would have obtained but for those imports.

75 It follows that, on any view, the Z/Yen study does not serve to demonstrate that the Community institutions committed a manifest error of assessment when calculating the profit margin in question.

76 It follows that the applicant's arguments based on the Z/Yen study must be rejected.

The relevance of the decision adopted in the regional proceeding

77 It is true that, in recital 46 in the decision adopted in the regional proceeding, the Council stated in relation to the United Kingdom industry that 'that industry requires a minimum profit margin of 10% on cost in order to remain competitive, and to cover the costs of new investment'. According to the applicant, that remark also applies to the Community industry as a whole.

78 It should first be pointed out that, as the Court has held in paragraphs 59 to 62 above, the criteria for the minimum profit margin which the industry concerned must achieve in order to 'remain competitive, and to cover the costs of new investment', does not, as such, enable the profit margin to be determined in accordance with Articles 4(1) and 13(3) of the basic regulation. Such a criterion does not necessarily determine the profit margin which the Community industry could have attained but for the dumped imports.

79 It follows that recital 46 in the decision adopted in the regional proceeding is not relevant for the purpose of deciding the present case.

80 Secondly, the mere fact that the Council determined a particular profit margin in an earlier anti-dumping proceeding is not in itself sufficient to establish that it committed a manifest error of assessment in not adopting the same profit margin in a subsequent anti-dumping proceeding. It should be pointed out, moreover, that, in the decision adopted in the regional proceeding, the investigation covered the period from 1 January to 30 September 1992 (recital 6 in that decision), and related to the particular situation of the United Kingdom industry at the time, whereas, in the present case, the investigation took place during the period from 1 April 1993 to 31 March 1994 (recital 9 in the contested regulation) and covered the whole of the Community industry.

81 Thirdly, it is clear from recital 121 in the decision adopted in the regional proceeding that the target price established for the United Kingdom producers 'would consist of the cost of production plus a reasonable profit of 10%, this cost having been adjusted to exclude an increase during the investigation period due to factors other than dumped imports'. It follows that, even assuming that a minimum price had to be calculated in the context of that proceeding (see recitals 118 to 121 in the decision adopted in the regional proceeding), the Community authorities would necessarily have applied a profit margin of less than 10% in order to take account of those other factors. Moreover, the Council clearly stated, in recital 91 in the contested regulation, that the 10% adopted as a profit margin in the regional proceeding was not appropriate to be applied in the present case since 'the profit margin used in the regional proceeding was not applied on the actual production costs of the United Kingdom industry, but on the costs adjusted to exclude the impact of factors other than the dumped imports' (see also paragraph 103 et seq. below).

82 Fourthly, it is clear from the evidence put forward by the Council that the production costs of the United Kingdom industry were indeed lower than those of the other Community producers (see, in particular, the calculations appended to the letter of the Commission of 2 June 1995). However, the applicant has not adduced any evidence to show that the finding, in recital 91 in the contested regulation, that the cost structure of the United Kingdom industry appears to lend itself to the reasonable expectation of a higher level of profit under normal market conditions than is the case for the Community industry as a whole is vitiated by a manifest error of assessment.

83 Fifthly, where, as in this case, the undertakings in the Community industry have different production costs, and thus different profit levels, the Community institutions have no choice, when determining the target price, but to calculate the weighted average of the production costs of the Community producers as a whole and to add to it the average profit margin which they consider reasonable in view of all the relevant circumstances.

84 In the present case, it is clear from the calculations appended to the Commission's memorandum of 2 June 1995 that, in order to verify whether the 5% profit margin in question was appropriate, the Commission examined, in particular, the weighted-average cost per tonne of the Community industry for the periods 1990 to 1991 and 1993 to 1994 and also calculated the average profit margin necessary to enable the Community industry as a whole to achieve a target price equivalent to the United Kingdom industry's production costs, plus a profit margin of 10%. The result of those calculations is as follows:

Cost of production for bagged ammonium nitrate

Ecus per tonne

	1990-1991	1993-1994	% difference
United Kingdom industry	130	116	- 11
Rest of the Community industry	136	130	- 4
EC average (including the United Kingdom)	134	124	- 7

Calculation of target price

	1990-1991	1993-1994
Target price in Ecus/tonne for the United Kingdom industry on the basis of costs of production + 10%	143	127.6
Profit margin on average costs for EC production as a whole required in order to achieve the United Kingdom target price	6.7%	2.9%
Average profit margin for the periods 1990 to 1991 and 1993 to 1994	4.8%	

85 The result of that method of calculation was a profit margin of approximately 5%. The applicant, however, has adduced no evidence to show that the above calculation is vitiated by a manifest error of assessment.

86 It follows from all the foregoing that the profit margin adopted in the decision adopted in the regional proceeding is not capable of being applied to the present case.

87 The applicant's arguments based on the decision adopted in the regional proceeding must therefore be rejected.

The weighted average profit on the sales achieved by the Community industry

88 So far as concerns the argument based on the weighted average profit of 15.6% on the Community industry sales in the period 1990 to 1991 (see recital 51 in the contested regulation), it is true that the profitability found to exist before the appearance of the dumped imports may constitute a valid indicator for the purpose of determining the profit margin which the Community industry would have been able to achieve but for those imports.

89 However, the amount of that profit, noted in recital 51 in the contested regulation, in respect of a single year (namely, in this case, the period running from 1 April 1990 to 31 March 1991), is not sufficient, by itself, to establish that the Council committed a manifest error of assessment when determining the profit margin on costs which the Community industry could reasonably have achieved, in the absence of those imports, during the investigation period, namely, between 1 April 1993 and 31 March 1994.

90 Since profit on sales depends on numerous factors which may vary over time, the results of a single year prior to the arrival of the imports at issue do not make it possible to determine with any certainty what was the profit margin which the Community industry could reasonably have expected, under normal market conditions, during a given subsequent period. That is so *a fortiori* where, as in the present case, what is involved is a raw material whose resale price, and thus whose profitability, may vary from year to year according, in particular, to variations in supply and demand at international level, although such a variation may have no direct relationship with production costs.

91 So far as concerns the profit margins indicated by the Community producers in reply to the Commission's questionnaire, which are also relied on by the applicant, since the applicant has not adduced any evidence to establish the truth and reliability of those figures, they cannot affect the results of the investigation carried out by the Commission.

92 The applicant's arguments based on the average-weighted profit on sales achieved by the Community industry must therefore be rejected.

The UAN and urea cases

93 As regards the argument that the UAN and urea cases, referred to in recital 89 in the contested regulation, do not constitute a valid precedent, it is not disputed that, in those two cases, concluded on 22 December 1994 and 16 January 1995 respectively (see paragraph 30 above), the Council adopted a profit margin on costs of 5% when calculating the target price.

94 In the UAN case, the Council stated, in recital 36 in Regulation No 3319/94 of 22 December 1994, cited above, that:

'... the Community producers put forward in the response to the questionnaire a variety of profit targets used by the companies internally. These targets varied significantly among companies and in a number of cases were not established specifically for UAN but were the result of an overall group policy in the assessment of investment projects. In these circumstances, the Commission considered at the provisional stage that the Community industry had not specifically supported its claim on the level of a reasonable profit margin. After the provisional determinations, EFMA has supplied no new information.

For the provisional determination, the Commission derived the profit margin used by reference to the fact that the product concerned is a mature product needing only moderate funding for investment and research and development. No information has been received from EFMA justifying a different assessment at the definitive stage...'.

95 The applicant does not challenge Regulation No 3319/94 of 22 December 1994, cited above.

96 In the urea case, the Council pointed out, in recital 73 in Regulation No 477/95 of 16 January 1995, cited above, that:

'[t]he majority of Community producers claimed that a minimum pre-tax profit of 10 to 15% was required for them to remain competitive. However, this was not substantiated and, as urea is a long established product, this figure is

considered to be high. The Commission is of the opinion that after taking account of the decline in demand for urea, the need to finance additional investments in manufacturing facilities and the profit which is considered reasonable in the original anti-dumping investigation concerning this product, a pre-tax profit rate of 5% should be used as the basis for assessing profit shortfall in this present proceeding'.

97 The action brought by the applicant against Regulation No 477/95 of 16 January 1995, cited above, was dismissed by the Court of First Instance in *EFMA* v *Council*, cited above. In that judgment, the Court stated, in particular, that the applicant had not adduced, during the pre-litigation procedure, any evidence such as to cast doubt on the 5% profit margin applied by the Council (see paragraph 69 above).

98 It is apparent from the case-file that UAN is a mixture of urea and ammonium nitrate and that those three products are nitrogen fertilizers which can, if appropriate, be manufactured in the same factory.

99 It appears, moreover, that those three products are in competition with each other and that, as the applicant itself admits, the choice which farmers make between them depends on, among other factors, their respective prices.

100 What is more, in the present case, the applicant has not challenged the Council's statement, in recital 91 in the contested regulation, that the costs of production for ammonium nitrate are no higher than for UAN and urea.

101 In those circumstances, the applicant has not shown that the Community institutions committed a manifest error of assessment by taking into account the

profit margin adopted by the Council in the UAN and urea cases with the purpose, in particular, of adopting a consistent approach *vis-à-vis* the three products in question.

102 In addition, the applicant has not adduced any evidence to show that the considerations relied on in the UAN and urea cases — that the products concerned had reached a certain maturity and needed only modest resources in terms of investment, research and development — are not equally applicable to ammonium nitrates.

The complaints concerning the other factors causing injury, put forward in the reply

103 In its reply, the applicant claimed that the Council had infringed the rights of the defence, failed to fulfil its obligation to provide a statement of reasons and committed manifest errors of assessment by referring, for the first time in its defence, to the existence of other factors causing the injury sustained by the Community industry, in particular its excess production capacity, in order to justify a lower profit margin.

104 It must be observed, in that regard, that the Council stated, in recital 91 in the contested regulation, that 'it has been established that the Community industry's fixed costs are slightly inflated by the maintenance of over-capacity: (Recital 71).'

105 In recital 71 in the contested regulation, the Council found, in particular, that 'it is clear that in general the capacity of the Community industry would still comfortably exceed market demand in the Community, even in the absence of the dumped imports from Russia and Lithuania. This state of affairs appears to have contributed to maintaining a higher than necessary level of fixed costs for this product'.

106 In recital 72 in the contested regulation, the Council also indicated that the factors identified in recitals 67 to 71, and, in particular, the strategy of Community producers (recital 70) and the maintenance of a level of production capacity (recital 71), 'have played a part as regards the decline in the Community industry's production, capacity utilisation and employment, and the maintenance of an excessive level of capacity may have contributed to a higher than necessary production cost, and therefore to a negative impact on profits'. The Council concluded, in recital 75, that 'a certain part of the injury to the Community industry has been caused by factors other than the dumped imports'.

107 Although it is true that, in recital 91 in the contested regulation, the Council down-played the excess in fixed costs caused by the maintenance of over-capacity as relative by using the adverb 'slightly', it is clear from recitals 70 to 72, 75 and 91, taken together, that its assessment of the profit margin nevertheless took account of the fact that: (a) the Community industry had excess capacity; (b) that situation contributed to the maintenance of a level of fixed costs which was higher than necessary; (c) part of the injury suffered by the Community industry was caused by factors other than the dumped imports, and, in particular, by the existence of such over-capacity.

108 Moreover, in point 4.3 of its second disclosure letter of 6 April 1995, the Commission set out, essentially, all the above facts which are presented in recitals 70 to 72 and 75 in the contested regulation. Similarly, in its letters of 6 April, 2 June and 23 June 1995, the Commission also referred to all the matters of fact which are set out in recitals 89 to 91. The applicant never contested those facts during the pre-litigation procedure.

109 Contrary to what is asserted by the applicant in its reply, the defence does not therefore contain significant new facts, whether as compared with the content of the contested regulation or with the information submitted during the course of the pre-litigation procedure.

110 In particular, paragraph 15 of the defence, according to which the Council applied in the present case a profit margin below that used in the decision adopted in the regional proceeding, in order to take account of the fact that, in the present case, it is the actual rather than the adjusted costs of production which were taken into account, does not constitute a statement of new reasons, since that argument is already set out in recital 91 in the contested regulation (see paragraph 81 above). Moreover, that statement of reasons, and the fact that the Community industry's fixed costs were 'slightly inflated' by over-capacity, had already been set out in the Commission's letter of 23 June 1995 (paragraph 13 above).

111 It follows from all the foregoing that the pleas in law raised at the stage of the reply, alleging breach of the rights of the defence, failure to fulfil the obligation to provide a statement of reasons and manifest error of assessment as to the existence of over-capacity, are not based on matters of fact or law which have come to light in the course of the procedure.

112 Those pleas in law must therefore be dismissed as inadmissible, pursuant to Article 48(2) of the Rules of Procedure.

The allegedly unreasonable nature of the profit margin adopted by the Community institutions

113 The argument that the profit margin adopted by the Council means that the Community industry other than the United Kingdom industry has a margin of practically 0% is equally irrelevant. It must be pointed out that, in the present case, the Council was faced with a specific situation in which part of the Community industry, namely the United Kingdom industry, which represented approximately 45% of the Community production, had costs which were lower than those of the other Community producers who accounted for approximately 55% of that production, and, in particular, the French industry.

114 According to the Commission's memorandum of 2 June 1995, the costs of production in the period 1993 to 1994 for bagged ammonium nitrate were ECU 116 per tonne for the United Kingdom industry and ECU 130 per tonne for the other Community producers (paragraph 84 above).

115 None the less, in a Community-wide anti-dumping proceeding which must lead to the setting of a target price which is valid for the Community industry as a whole, the Council is necessarily obliged to take account of the costs of production of the Community industry as a whole. In particular, the Council has no authority to calculate the target price solely on the basis of the highest production costs; as to do so would result in the setting of a target price which was unrepresentative of the Community as a whole.

116 Moreover, when a profit margin on costs is calculated, the higher the costs are, the higher the minimum price will be. That being so, if the prices used for the purpose of such a calculation are those of the producers whose production costs are the highest, the resulting profit margin for the other producers could be too great, while the former could be over-protected.

117 It follows that, in the present case, the Community institutions had to base themselves, for the purpose of calculating the target price, on the weighted average costs of production of the Community industry as a whole, that is to say, according to the Commission's memorandum of 2 June 1995, approximately ECU 124 per tonne.

118 Next, the Community institutions were required to add to the weighted average costs of production the profit margin they deemed reasonable in order to determine the target price.

119 In that regard, it follows from the foregoing that, in the present case, the Council's assessment that a profit margin of 5% was appropriate is based on a certain number of factors, namely, among others: (a) the considerations put forward in the UAN and urea cases, in particular as to the maturity of the product at issue; (b) the requirement not to apply a profit margin different from that adopted in the other two cases; (c) the calculation of the average profit margin necessary to enable the Community industry as a whole to achieve a target price equal to the costs of production of the United Kingdom industry plus a 10% profit margin; (d) the fact that the 10% profit margin used in the regional proceeding applied to the adjusted rather than to the actual costs; (e) the absence of other factors justifying a higher profit margin; and (f) the existence of some excess-production capacity (paragraphs 59 to 112 above). For the reasons set out above, the applicant has not established that the Council's evaluation of those various factors is vitiated by a manifest error of assessment.

120 That conclusion is not invalidated by the mere fact that a large part of the Community industry was thus allocated an extremely low or even non-existent profit margin in relation to the target price thus established.

121 That consequence results from the fact that the section of the Community industry involved had production costs which were higher than the average production costs of the Community industry as a whole. Moreover, the applicant has not adduced any evidence to show that it was impossible for the producers concerned to reduce their production costs further and thus to obtain the profit margin prescribed by the Council in relation to the target price.

122 Moreover, the applicant has not adduced any evidence to show that the calculations made by the Commission and confirmed by the Council were distorted by the devaluation of sterling in 1992. In any event, in the absence of a

single currency, the Community institutions had no other option, for the purposes of the calculations at issue, than to convert the various national currencies into ecus in accordance with the exchange rate in force at the material time.

123 The argument that the profit margin in question is manifestly unreasonable as regards a large part of the Community industry must therefore be rejected.

124 It follows from all of the foregoing that the applicant has not established that, by adopting, in the contested regulation, a profit margin of 5% on costs, the Council committed a manifest error of assessment.

125 The application must therefore be dismissed in its entirety.

Costs

126 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. Under Article 87(4), Member States and institutions which intervene in the proceedings are to bear their own costs. Since the applicant has been unsuccessful, it must be ordered to bear its own costs and also to pay the Council's costs, as applied for by that institution. The French Republic and the Commission, as interveners, shall bear their own costs.

On those grounds,

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

hereby:

1. **Dismisses the application;**

2. **Orders the applicant to bear its own costs and pay the costs of the Council. The Commission and the French Republic shall bear their own costs.**

Potocki Lenaerts Bellamy

Azizi Meij

Delivered in open court in Luxembourg on 28 October 1999.

H. Jung A. Potocki

Registrar President