JUDGMENT OF THE COURT OF FIRST INSTANCE (Third Chamber)

27 June 1995 *

In Case T-169/94,

PIA HiFi Vertriebs GmbH, a company incorporated under German law, having its registered office in Weiterstadt (Germany), represented by F. Michael Boemke, of the Hamburg Bar, with an address for service in Luxembourg at the Chambers of Marc Loesch, 11 Rue Goethe,

applicant,

v

Commission of the European Communities, represented initially by Eric White, of its Legal Service, and Claus-Michael Happe, a national civil servant on secondment to the Commission, and subsequently by Jörn Sack, of its Legal Service, acting as Agents, with an address for service in Luxembourg at the office of Georgios Kremlis, of its Legal Service, Wagner Centre, Kirchberg,

defendant,

* Language of the case: German.

APPLICATION for the annulment of Commission Decision 93/363/EEC of 9 June 1993 concerning applications for refund of anti-dumping duties collected on imports of certain compact disc players originating in Japan (Amroh BV, PIA HiFi, MPI Electronic) (OJ 1993 L 150, p. 44),

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

composed of: J. Biancarelli, President of the Chamber, C. P. Briët and C. W. Bellamy, Judges,

Registrar: H. Jung,

having regard to the written procedure and further to the hearing on 4 April 1995,

gives the following

Judgment

Background

1 The applicant is an importer of compact disc players manufactured and exported by the Japanese company Accuphase Laboratory ('Accuphase').

2 On 12 July 1989, following a complaint made by the Committee of Mechophonics Producers and Connected Technologies ('Compact'), the Commission adopted Regulation (EEC) No 2140/89 imposing a provisional anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea (OJ 1989 L 205, p. 5). The definitive duties were subsequently fixed by Council Regulation (EEC) No 112/90 of 6 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and South Korea and collecting definitively the provisional duty (OJ 1990 L 13, p. 21). For some products, including those of Accuphase, Regulation No 112/90 fixed the rate of duty at 32%.

3 In November 1990, the applicant and two other importers lodged applications in accordance with Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1) for reimbursement of the definitive anti-dumping duties imposed by Regulation No 112/90 which they had paid on imports of Accuphase products.

4 In April 1991 the applicant and Accuphase lodged a request pursuant to Article 14 of Regulation No 2423/88 for review of Regulation No 112/90.

5 In consequence of those applications and that request, the Council published on 4 July 1991 a Notice of initiation of a partial review of the anti-dumping measures concerned (OJ 1991 C 173, p. 3), announcing that, in accordance with Article 14 of Regulation No 2423/88, it had re-opened an investigation concerning the compact disc players produced in Japan by Accuphase and imported into the Community.

6 It is apparent from that notice that in order to justify their application for review, the applicant and Accuphase had claimed, first, that Accuphase's dumping margin was considerably lower than 32% and, secondly, that the compact disc players produced within the Community were not similar to those produced by Accuphase. In that notice, the Commission also stated that in checking a refund application lodged by Accuphase in accordance with Article 16 of Regulation No 2423/88 its staff had established that Accuphase's dumping margin was considerably lower than 32%.

7 Almost simultaneously, following another complaint in which Compact maintained that the anti-dumping duties imposed by Regulation No 112/90 had been borne by the exporters, the Commission published on 5 July 1991 a Notice of the initiation of an investigation in accordance with Article 13(11) of Regulation No 2423/88 (OJ 1991 C 174, p. 15).

8 Subsequently, in a Notice published on 28 December 1991 (OJ 1991 C 334, p. 8), the Commission announced that in the light of the new information it had received, and in order to eliminate the possibility of potentially discriminatory action, it had decided to undertake a full review of Regulation No 112/90.

9 On 9 June 1993 the Commission adopted Decision 93/363/EEC concerning applications for refund of anti-dumping duties collected on imports of certain compact disc players originating in Japan (Amroh BV, PIA HiFi, MPI Electronic) (OJ 1993 L 150, p. 44). In that decision, it granted those refund applications to the amount of 16.9% of the value used by the relevant authorities for calculating the amount of the anti-dumping duty in question.

10 On 24 August 1993, considering that protective measures were no longer necessary on the twofold ground that the two major Community producers had given notice of their intention to cease production of compact disc players and that the

complainant (Compact) had withdrawn its complaints, the Council adopted Regulation (EEC) No 2347/93 repealing Regulation No 112/90 (OJ 1993 L 215, p. 4).

Procedure

11 Those were the circumstances in which, by application lodged on 12 August 1993 at the Registry of the Court of Justice, the applicant brought this action.

12 In a separate document lodged at the Court Registry on 13 September 1993, the defendant objected that the action was inadmissible on the ground that it did not set out the forms of order sought and was therefore not in conformity with the requirements of Article 38(1)(d) of the Rules of Procedure of the Court of Justice.

13 By document lodged on 18 October 1993, the applicant asked the Court to dismiss the objection of inadmissibility.

14 By order of 7 February 1994 in Case C-388/93 *PIA HiFi* v *Commission* [1994] ECR I-387, the Court dismissed the objection of inadmissibility. In paragraph 10 of the order, the Court found that the action was for the annulment of Decision 93/363 of 9 June 1993 in so far as it restricted the refund of anti-dumping duties claimed by the applicant to 16.9% of the value used by the competent authorities for calculating the amount of the anti-dumping duty in question.

15 By order of 18 April 1994, the Court referred the case to the Court of First Instance pursuant to Article 4 of Council Decision 93/350/Euratom, ECSC, EEC

of 8 June 1993 amending Decision 88/591/ECSC, EEC, Euratom establishing a Court of First Instance of the European Communities (OJ 1993 L 144, p. 21) and Article 1 of Council Decision 94/149/ECSC, EC of 7 March 1994 amending Decision 93/350 (OJ 1994 L 66, p. 29).

16 Upon hearing the Report of the Judge-Rapporteur, the Court of First Instance (Third Chamber) decided to open the oral procedure without undertaking any preparatory inquiries. The oral procedure took place on 4 April 1995.

Forms of order sought by the parties

17 In the absence of a formal statement of the form of order sought, the Court of First Instance considers that the applicant seeks the annulment of Decision 93/363 of 9 June 1993 in so far as it restricts the refund of anti-dumping duties claimed by the applicant to 16.9% of the value used by the competent authorities for calculating the amount of the anti-dumping duty in question, as the Court of Justice found in its order of 7 February 1994.

18 In its defence, the Commission contends that the Court should:

— declare the action inadmissible or, in any event, dismiss it as unfounded;

— order the applicant to pay the costs.

Substance

Summary of the arguments of the parties

19 In its application, PIA HiFi puts forward one main plea in law alleging breach of Article 2(1) of Regulation No 2423/88, according to which the fixing of an anti-dumping duty in respect of a product is justified only if the product concerned has been dumped and its free circulation in the Community causes injury.

20 The applicant considers itself entitled to the refund of the total amount of anti-dumping duties which it has been required to pay, on the ground that the compact disc players which it imported have never caused injury.

21 In this connection, the applicant points out that the Accuphase products which it imported were expensive appliances produced in small quantities only. Secondly, the products at issue were offered for sale on the Community market at high prices, that is to say at prices at least twice as high as the selling price of the most expensive appliance produced in the Community. Thirdly, it claims that only the 'top of the range' models produced by Community producers were similar to Accuphase products, and that there had never been injury in that sector of the market, as is noted in paragraph 100 of the preamble to Regulation No 2140/89. According to the criteria set out in Article 4(2) of Regulation No 2423/88, the imports from Accuphase did not, therefore, cause any injury to Community production.

22 The applicant states that it has brought this action in order to safeguard its legal interests in the absence of any other legal remedy which would have enabled it to argue that its imports did not injure the Community industry.

23 PIA HiFi acknowledges, however, that the normal value of the compact disc players produced by Accuphase was greater than the normal price at which they were exported. It does not dispute that dumping took place or the level of the dumping margin which was calculated by the defendant in the decision at issue. Furthermore, it does not challenge the defendant's finding that it was clear from a cumulative analysis of compact disc players imported from Korea and Japan at dumping prices that those imports were causing injury to the Community industry. Moreover, it considers that it is normal practice for the Commission not to be required to show the injurious effects of the imports of each of the importers concerned.

24 None the less, the applicant maintains that the defendant is not entitled to refuse from the outset to consider whether the imports of a particular importer, viewed individually, may have an injurious effect on the Community industry, when the importer concerned adduces evidence establishing that that cannot be the case.

25 Referring to the judgment of the Court of Justice in Case 312/84 *Continentale Produkten Gesellschaft* v *Commission* [1987] ECR 841, the applicant acknowledges that the procedure for examining applications for reimbursement laid down in Article 16 of Regulation No 2423/88 makes provision only for a comparison between the amount of the duties actually collected from the importer and the dumping margin, and does not permit the validity of a regulation imposing anti-dumping duties to be challenged on the ground that the regulation is based on inaccurate findings concerning the existence of injury to the Community industry. The applicant points out, however, that the Court gave as a reason for its analysis the fact that it was already open to interested parties either to call in question the legality of the regulation itself or to take legal proceedings to challenge the decision adopted following a procedure for review of the anti-dumping duties.

26 In the case in point, according to the applicant, the Commission has not adopted any act, other than the contested decision, which is open to challenge and has not stated its views with regard to the applicant's argument that the Community

industry has not been injured. Regulation No 112/90 is not of direct and individual concern to the applicant, and the latter cannot benefit from any challengeable decision under the review procedure because Regulation No 112/90 has been repealed by Regulation No 2347/93. Moreover, the applicant claims that in this case there is a close and direct connection between the review procedure and the refund application procedure which is the subject of the disputed decision.

27 Furthermore, in so far as the contested decision refunds only part of the duties at issue, it imposes a definitive individual anti-dumping duty of 15.1% on the compact disc players imported by the applicant. That decision therefore affects the products imported by the applicant, although no challengeable act, namely a definitive decision for the purposes of Article 12 of Regulation No 2423/88, has been adopted.

28 The defendant considers that it is inappropriate for it to comment on the factual considerations put forward by the applicant because in its view the action is inadmissible or, in any event, unfounded. According to the judgment in *Continentale Produkten Gesellschaft* v *Commission*, cited above, the procedure for examining applications for reimbursement, as laid down in Article 16 of Regulation No 2423/88, merely involves a review of the actual dumping margin and does not permit the question whether the decision to impose anti-dumping duties was justified to be reviewed.

29 The fact that a formal decision on the request for review made by the applicant under Article 14 of Regulation No 2423/88 is now excluded, since the anti-dumping duties imposed by Regulation No 112/90 were abolished by Regulation No 2347/93, cannot confer on the applicant a wider right of action on the basis of Article 16 of Regulation No 2423/88 enabling it to challenge the very legality of the anti-dumping duties imposed. To take the opposite view would lead to duplication of procedures, which would be open to criticism in terms of legal certainty. According to the defendant, the applicant could have brought an action before a national court against national decisions implementing the anti-dumping duties in

question and thus, if necessary, have brought about a reference to the Court of Justice by way of Article 177 of the EC Treaty.

30 On that point, the Commission adds that the applicant's argument that the contested decision imposes 'individual' anti-dumping duties of a given amount is incorrect since under the procedure for examining applications for reimbursement laid down in Article 16 of Regulation No 2423/88, the Commission has no power at all to fix anti-dumping duties.

31 As regards the question whether the Community industry has suffered injury, the Commission points out, in order to preserve its position, that every importer, regardless of the quality and the features of the appliances imported, clearly plays a part, where dumping occurs, in inflicting injury on the Community industry, in so far as he encourages other dumping practices. That is so where appliances of very considerable value are sold at dumping prices, even though the importer concerned holds only a small share of the market. The Commission also maintains certain reservations as to the relevance of the selling prices communicated by the applicant.

Findings of the Court

32 First of all, the Court notes that the contested decision was adopted on the basis of Article 16 of Regulation No 2423/88, following the applications for reimbursement made by the applicant and two other importers pursuant to Article 16(2). Article 16 is headed 'Refund' and provides that 'Where an importer can show that the duty collected exceeds the actual dumping margin (...), consideration being given to any application of weighted averages, the excess amount shall be reimbursed' (Article 16(1)).

33 As the Court of Justice ruled in its judgment, cited above, in *Continentale Produkten Gesellschaft* v *Commission*, paragraph 12, Article 16 of Regulation No 2423/88 gives an importer the opportunity to establish, on the assumption that the relevant findings were generally accurate, that the actual dumping margin is lower in his individual case than the margin on the basis of which the anti-dumping duties were imposed. That provision does not however permit the validity of the regulation imposing the duties to be challenged or a review of the general findings made during the previous investigations to be requested.

34 In this case, the applicant has not contested the accuracy of the recalculation of the dumping margin established in respect of Accuphase products, as worked out in the contested decision, on the basis of which the Commission reduced the rate of the anti-dumping duty from 32% to 16.9%. On the contrary, the applicant has expressly stated that 'it has no objections regarding the findings of the defendant as to the existence and extent of the dumping (...). Accordingly it considers the amount of the dumping margin calculated by the defendant to be correct' (see paragraph 3(a) of the application).

35 It follows that the applicant has not adduced any evidence to challenge the legality of the contested decision, in so far as the latter grants in part the applications for reimbursement made on the basis of Article 16 of Regulation No 2423/88.

36 In the light of the purpose of Article 16 of Regulation No 2423/88, as defined by the Court of Justice in its judgment in *Continentale Produkten Gesellschaft* v *Commission*, cited above, the Court of First Instance considers that in an action challenging a decision concerning applications for reimbursement made pursuant to Article 16 of Regulation No 2423/88, the applicant is not entitled to raise the issue whether the imports of Accuphase products caused injury within the meaning of Article 2(1) and Article 4 of that regulation. That question has nothing to do with

the legality of the decision on the refund applications but concerns the legality of Regulation No 112/90.

37 As regards the applicant's argument that its action against the contested decision was the only means by which it could raise the question of lack of injury, the Court finds in the first place that this argument cannot justify disregard of the precise scope of Article 16 of Regulation No 2423/88 which permits a review only of the actual dumping margin and not of the general question of injury.

38 In any event, without there being any need to consider whether the applicant could have brought an action for annulment against Regulation No 112/90 under Article 173 of the EC Treaty, it must be pointed out that the applicant could have raised the question of lack of injury caused by imports from Accuphase by challenging with a plea of illegality in proceedings before a national court the provisions of national law implementing the regulation. The national court in its turn could have referred a question on the validity of that regulation to the Court of Justice for a preliminary ruling under Article 177 of the Treaty (see the judgment in *Continentale Produkten Gesellschaft* v *Commission*, cited above, paragraph 10; and the judgments of the Court of Justice in Case C-323/88 *Sermes* v *Directeur des Services des Douanes de Strasbourg* [1990] ECR I-3027 and in Case C-16/90 *Nölle* v *Hauptzollamt Bremen-Freihafen* [1991] ECR I-5163).

39 As regards the applicant's arguments that no decision is likely to be adopted in the course of the review procedure under Article 14 of Regulation No 2423/88, and that there is a close and direct connection between that procedure and its applications for reimbursement, it must be borne in mind that Article 14(1) of Regulation No 2423/88 states that regulations imposing anti-dumping duties are subject to review, in whole or in part, where warranted. Such review may be carried out either

at the request of a Member State or on the initiative of the Commission. A review is also to be held at the request of an interested party who adduces evidence of changed circumstances sufficient to justify the need for it, provided that at least one year has elapsed since the conclusion of the investigation.

40 It follows that the review procedure provided for by Article 14 of Regulation No 2423/88 and the reimbursement procedure provided for by Article 16 of Regulation No 2423/88 are separate procedures reflecting different objectives. Even if those two procedures may be undertaken at the same time (see paragraph 5 of the Commission Notice, published on 22 October 1986, concerning the reimbursement of anti-dumping duties, OJ 1986 C 266, p. 2), the fact remains that the applicant may not challenge the Commission's acts or omissions in the context of the procedure for review under Article 14 by means of an action directed against a decision adopted in the context of a procedure for examining applications for reimbursement under Article 16.

41 Moreover, it is apparent from the Notice of initiation of a partial review of anti-dumping measures, published by the Commission on 4 July 1991 (see above, paragraph 5), that the request for review made by the applicant was based, in the first place, on the fact that Accuphase's dumping margin was considerably lower than the 32% anti-dumping duty to which imports of its products were subject and, secondly, on the fact that Accuphase's products were not similar to those manufactured by Community producers. It is not, therefore, apparent from the documents before the Court that the applicant's request for review, or the review itself, turned directly on the question whether the applicant's imports had caused or were causing the injury in question.

42 On the assumption that the applicant did raise the question of lack of injury caused to the Community industry in its request for review submitted to the Commission under Article 14 of Regulation No 2423/88 and that the Commission refused to consider that complaint, the applicant could, if it believed it had grounds for doing so, have availed itself of the legal remedies provided for by the Treaty to that end in order to challenge the Commission's decision not to review the matter.

43 Furthermore, the Court considers that it follows, implicitly but necessarily, from paragraph 11 of the judgment in *Continentale Produkten Gesellschaft* v *Commission*, cited above, according to which 'interested parties may challenge the results (of a review procedure) by bringing legal proceedings ...', that once the Commission has set in motion a procedure for review under Article 14 of Regulation No 2423/88, any interested party is entitled to urge the Commission to take a decision in that regard. It is not apparent from the documents before the Court that the applicant has made any such approach to the Commission.

44 Finally, the applicant's argument to the effect that the contested decision imposed a *de facto* anti-dumping duty of 15.1% before the adoption of a definitive decision for the purposes of Article 12 of Regulation No 2423/88 is unfounded. The legal basis for the residual anti-dumping duty of 15.1% lay in Regulation No 112/90, as the decision at issue granted the reimbursement sought by the applicant only in part.

45 It follows from all the foregoing considerations that the action must be dismissed, without there being any need to rule on its admissibility.

Costs

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

On those grounds,

THE COURT OF FIRST INSTANCE (Third Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs.

Biancarelli Briët Bellamy

Delivered in open court in Luxembourg on 27 June 1995.

H. Jung J. Biancarelli

Registrar President