

Case T-2/95

Industrie des Poudres Sphériques

v

Council of the European Union

(Anti-dumping measures — Regulation (EEC) No 2423/88 —
Calcium metal — Resumption of an anti-dumping investigation —
Right to a fair hearing — Like product — Damage — Community interest —
Statement of reasons — Misuse of powers — Unenforceability
of an anti-dumping regulation against an importer)

Judgment of the Court of First Instance (Fifth Chamber, Extended Composition), 15 October 1998 II - 3944

Summary of the Judgment

1. *Actions for annulment — Natural or legal persons — Measures of direct and individual concern to them — Regulation imposing anti-dumping duties — Importer and user of the product concerned*
(EC Treaty, Art. 173, fourth para.)
2. *Actions for annulment — Judgment annulling a measure — Effect — Consequences of the annulment of a regulation imposing anti-dumping duties — Whether acts of the administrative procedure not affected by the judgment are thereby annulled — Not annulled — Resumption of the investigation — Whether permissible — Period to be taken into account — Discretion of the institutions*
(EC Treaty, Art. 176)

3. *Common commercial policy — Protection against dumping — Anti-dumping proceeding — Access to the case-file — Communication of non-confidential summaries — Irregularities not preventing the person concerned from having knowledge of the content of the documents in order to make observations*
(Council Regulation No 2423/88, Arts 7(4)(a) and 8)
4. *Common commercial policy — Protection against dumping — Damage — Community production concerned — Like products — Discretion of the institutions — Basic products — Taking into account of preferences of the end users — Taking into account of competition between the products incorporating the basic product — No error of assessment*
(Council Regulation No 2423/88, Arts 2(12) and 4(1) and (4))
5. *Common commercial policy — Protection against dumping — Appraisal of Community interest by the institutions — Judicial review — Limits — Factors to be considered — Situation following the adoption of the regulation fixing anti-dumping duties — Excluded — Undistorted competition in the common market*
(EC Treaty, Art. 3(g); Council Regulation No 2423/88, Art. 12(1))
6. *Acts of the institutions — Statement of reasons — Obligation — Scope — Regulation imposing anti-dumping duties*
(EC Treaty, Art. 190)
7. *Common commercial policy — Protection against dumping — Application of the Community legislation — Importer exempted from payment of anti-dumping duties — Conditions — Non-discrimination*
(Council Regulation No 2423/88)

1. Although, in the light of the criteria set out in the second paragraph of Article 173 of the Treaty, regulations imposing anti-dumping duties are in fact, as regards their nature and their scope, of a legislative character, inasmuch as they apply to all the traders concerned, their provisions may none the less be of individual concern to certain traders.

subject-matter of the anti-dumping measure and the end-user of that product, and who shows in addition that his business activities depend to a very large extent on his imports and are seriously affected by the contested regulation in view of the limited number of producers of the product concerned and of the difficulties which he encounters in obtaining supplies from the sole Community producer, who is his main competitor for the processed product.

They must be regarded as of individual concern to a trader who is both the largest importer of the product forming the

That set of factors constitutes a situation peculiar to him which differentiates him,

as regards the measure in question, from all other traders.

2. Under Article 176 of the Treaty, it is for the institution concerned to draw the appropriate consequences of a judgment annulling a measure. In order to implement that judgment fully, the institution is required to have regard not only to its operative part but also to the grounds which led to it and constitute its essential basis.

In the case of an act concluding an administrative proceeding which comprises several stages, its annulment does not necessarily entail the annulment of the entire procedure prior to the adoption of the contested act regardless of the grounds, procedural or substantive, of the judgment pronouncing the annulment.

In an anti-dumping proceeding, where a regulation determining the duties to be imposed is annulled on the basis of a finding that the institutions have not followed the proper procedure in determining the injury suffered by the Community producer, the preliminary measures preparatory to the investigation which led to the adoption of the regulation, in particular the initiation of the proceeding under Article 7(1) of the basic anti-dumping Regulation No 2423/88, are not affected by the unlawfulness found by the Court.

In those circumstances, the Commission can lawfully resume the proceeding on the basis of all the acts in the proceeding which were not affected by the annulment and, if the dumping is still continuing, at the same time conduct a fresh investigation on the basis of a different reference period. By so doing the Commission does not exceed the wide discretion the institutions have when deciding the period to be taken into account for the purpose of determining injury in an anti-dumping proceeding.

3. In an anti-dumping proceeding, irregularities in the communication by the Commission of non-confidential summaries within the meaning of Article 8 of the basic anti-dumping Regulation No 2423/88 are capable of constituting a breach of procedural rights justifying annulment of the regulation determining the anti-dumping duties only if the person concerned has not had sufficient knowledge of the essential content of the document or documents in question and as a result has been unable properly to express his point of view as to their validity or relevance.
4. The institutions enjoy a wide discretion in determining like products under Article 2(12) of the basic anti-dumping Regulation No 2423/88. They may consider that a Community product and a dumped product are like products despite the existence of physical or technical and

other differences which restrict their potential use by the ultimate purchasers.

With basic products, their similarity — that is, their interchangeability — must be evaluated having regard in particular to the preferences of the end users.

It is not enough, on the other hand, to consider the preferences of processing undertakings, which may for technical or economic reasons prefer one basic product to another; it must also be considered whether or not the products which incorporate the basic product are in competition with one another.

In such a case, an increase in demand for the imported basic product as a result of dumping may entail a fall in the price of the processed product on the Community market. That situation may bring about a fall in demand for the product processed from the basic product of Community origin, a fall which may in turn cause a decline in demand for that product, causing damage to the Community producer.

5. The question whether, if there is damage caused by dumping, the interests of the

Community call for intervention involves appraisal of complex economic situations, and judicial review of such an appraisal must be limited to verifying whether the procedural rules have been complied with, whether the facts on which the contested choice is based have been accurately stated, and whether there has been a manifest error of assessment of those facts or a misuse of powers. That review must relate solely to the evidence available to the institutions at the time of adoption of the contested regulation.

Where the institutions, faced with dumping of a basic product which is processed in the Community, consider on the basis of the evidence available to them that imposing anti-dumping duties would not in itself have the consequence of preventing imports of that product, they do not exceed their discretion by concluding that the anti-dumping duties in question are not liable to create a situation in the Community market which is contrary to competition law.

Moreover, the imposition of such duties cannot be contested on the sole ground that the consequence would be the elimination of processing undertakings competing with the Community producer in the market in the processed products, since the competitive disadvantage suffered by those undertakings is a result of their higher production costs.

First, since the essential aim of establishing a system ensuring that competition in the common market is not distorted, provided for in Article 3(g) of the Treaty, is to enable a correct allocation of economic resources, the elimination of economically viable undertakings in order to ensure the survival of an undertaking with higher production costs cannot be justified. Second, the aim of the anti-dumping legislation is to maintain fair conditions of competition for the various sectors of production where they suffer injury as a result of dumped imports.

6. The statement of reasons required by Article 190 of the Treaty must show clearly and unequivocally the reasoning of the Community authority which adopted the contested measure, so as to inform the persons concerned of the justification for the measure adopted and thus to enable them to defend their rights and the Community judicature to exercise its powers of review.

However, the statement of the reasons on which regulations are based is not required to specify the often very numerous and complex matters of fact and law dealt with in the regulations, provided

that they fall within the general scheme of the body of measures of which they form part.

With respect more particularly to the statement of reasons for regulations imposing anti-dumping duties, the institutions are not in principle obliged to respond to complaints lodged pursuant to Article 3 of Regulation No 17 by importers of the product which is the subject of the anti-dumping duties, on the basis of possible infringements of the Treaty rules on competition by Community producers. It is sufficient for the reasoning of the institutions in the regulations to appear clearly and unequivocally.

7. No provision of the basic anti-dumping Regulation No 2423/88 expressly prohibits the exemption of a specified importer from payment of anti-dumping duties. However, both Article 8(2) of the Agreement on Implementation of Article VI of GATT and the general principles of Community law preclude anti-dumping duties from being levied in a discriminatory manner. The wide discretion enjoyed by the institutions cannot dispense them from observance of that principle.