ORDER OF THE PRESIDENT OF THE COURT
14 December 2001 *

In Case C-404/01 P(R),

Commission of the European Communities, represented by V. Kreuschitz and S. Meany, acting as Agents, assisted by A.P. Bentley, Barrister, with an address for service in Luxembourg,

appellant,

supported by

TNC Kazchrome, established in Almaty (Kazakhstan)

and by

Alloy 2000 SA, established in Luxembourg (Luxembourg),

represented by J.E. Flynn, barrister, J. Magnin and S. Mills, Solicitors,

interveners in the appeal,

* Language of the case: French.

APPEAL against the order of the President of the Court of First Instance of the European Communities of 1 August 2001 in Case T-132/01 R *Euroalliages and Others* v *Commission* [2001] ECR II-2307, seeking to have that judgment set aside,

the other parties to the proceedings being:

Euroalliages, established in Brussels (Belgium),

Péchiney Électrométallurgie, established in Courbevoie (France),

Vargön Alloys AB, established in Vargön (Sweden),

and

Ferroatlántica SL, established in Madrid (Spain),

represented by D. Voillemot and O. Prost, avocats,

applicants at first instance,

supported by

Kingdom of Spain, represented by L. Fraguas Gadea, acting as Agent, with an address for service in Luxembourg,

intervener in the appeal,

THE PRESIDENT OF THE COURT,

after hearing Advocate General F.G. Jacobs,

makes the following

Order

1 By application lodged at the Court Registry on 11 October 2001, the Commission of the European Communities brought an appeal under Article 225 EC and the second paragraph of Article 50 of the EC Statute of the Court of Justice, against the order of the President of the Court of First Instance of the European Communities of 1 August 2001 in Case T-132/01 R *Euroalliages and Others* v *Commission* [2001] ECR II-2307 (hereinafter the 'contested order'), ordering that imports of ferro-silicon originating from China, Kazakhstan, Russia and Ukraine be subject to a system of registration, without provision of security by importers.

2 By a document lodged at the Court Registry on 15 November 2001, Euroalliages, Péchiney Électrométallurgie, Vargön Alloys AB and Ferroatlántica SL (hereinafter 'Euroalliages and Others') submitted their written observations to the Court.

3 By application lodged at the Court Registry on 19 October 2001, the Kingdom of Spain sought leave to intervene in the present proceedings in support of the form of order sought by Euroalliages and Others.

4 Under the first and fourth paragraphs of Article 37 of the EC Statute of the Court of Justice and Article 93(1) and (2) of the Rules of Procedure, the Kingdom of Spain was granted leave to intervene.

5 By application lodged at the Court Registry on 6 November 2001, TNC Kazchrome (hereinafter 'Kazchrome') and Alloy 2000 SA (hereinafter 'Alloy 2000') sought leave to intervene in the present proceedings in support of the form of order sought by the Commission.

6 Since the arguments put forward by Kazchrome and Alloy 2000 in support of their application for leave to intervene revealed a prima facie interest in the result of the present appeal, they were granted leave to intervene and were informed of this by the Court Registry on 12 November 2001.

7 The Kingdom of Spain and Kazchrome and Alloy 2000 submitted their written observations on 15 November 2001.

8 The Commission claims that the Court should:

— set aside the contested order,

— dismiss the application for interim relief submitted by Euroalliages and Others in Case T-132/01 R and

— order Euroalliages and Others to pay the costs occasioned by this appeal, as well as by the application for interim relief and the application to amend the contested order.

9 Kazchrome and Alloy 2000 claim that the Court should:

— set aside the contested order,

— dismiss the application for interim relief submitted by Euroalliages and Others and

— order Euroalliages and Others to pay the costs occasioned by the intervention of Kazchrome and Alloy 2000.

10 Euroalliages and Others contend that the Court should:

— dismiss the appeal,

— in any event, allow their claims before the Court of First Instance and

— order the Commission to pay the costs of the present appeal and the costs of the proceedings for interim relief in Case T-132/01 R.

11 The Kingdom of Spain contends that the Court should:

— dismiss the appeal as inadmissible and, in the alternative, as unfounded,

— order the Commission to pay the costs.

12 Since the written observations of the parties contain all the information necessary for the Court to adjudicate on the present appeal, there is no need to hear oral argument from the parties.

Legal background

13 Article 11 of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1, hereinafter the 'basic regulation'), entitled 'Duration, reviews and refunds', provides, in the first subparagraph of paragraph 2 thereof, as follows:

'A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and injury. Such an expiry review shall be initiated on the initiative of the Commission, or upon request made by or on behalf of Community producers, and the measure shall remain in force pending the outcome of such review.'

14 Article 21 of that regulation, entitled 'Community interest', provides, in paragraph 1 thereof, as follows:

'A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury

found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.'

Facts and procedure

15 The contested order shows, that definitive anti-dumping measures were imposed on imports of ferro-silicon originating in a number of countries, firstly, by Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland, Norway, Sweden, Venezuela and Brazil (OJ 1993 L 302, p. 1) and, secondly, by Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China (OJ 1994 L 77, p. 48).

16 Following publication by the Commission of a notice of impending expiry of certain anti-dumping measures, Euroalliages, the Liaison Committee of the Ferro-Alloy Industry, lodged a request for review of the expiring measures in respect of imports from Brazil, China, Kazakhstan, Russia, Ukraine and Venezuela, pursuant to Article 11(2) of the basic regulation. The Commission then published a notice of initiation of such a proceeding in the *Official Journal of the European Communities* (OJ 1998 C 382, p. 9) and commenced an investigation.

17 On 21 February 2001 the Commission adopted Decision 2001/230/EC terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Brazil, the People's Republic of China, Kazakhstan, Russia, Ukraine and Venezuela (OJ 2001 L 84, p. 36, hereinafter the 'contested decision').

18 That decision states that the review has led the Commission to conclude that, as regards imports of ferro-silicon from China, Kazakhstan, Russia and Ukraine, continuation or recurrence of dumping and injury would be encouraged if the measures were allowed to lapse. Recital 129 of the contested decision reads thus:

'In the light of the findings of a likelihood of continuation and recurrence of dumping, and of the findings that dumped imports originating in China, Kazakhstan, Russia and Ukraine may significantly increase should measures be allowed to lapse, it is concluded that the situation of the Community industry would deteriorate. Even though the extent of this deterioration is difficult to evaluate, taking into account the declining trends in prices and profitability of this industry, it is none the less likely that injury will recur. In respect of Venezuela, should measures be allowed to lapse, there is unlikely to be any material injurious effect.'

19 The Commission then examined whether it would be in the overall interest of the Community to maintain the anti-dumping measures. As part of its assessment, it took account of a number of factors, which were, firstly, that the Community industry had not been in a position to benefit sufficiently from the measures in force since 1987 and had also been unable to benefit in terms of market share from the demise of former Community producers (recital 151 of the contested decision) and, secondly, that Community steel producers had to bear additional costs brought by the anti-dumping measures over the period of validity of those measures (recital 152 of the contested decision).

20 In recitals 153 and 154 of the contested decision the Commission concluded as follows:

'(153) Thus, while the precise impact of the expiry of measures on the Community industry is uncertain and while past experience shows that

it is not guaranteed that maintaining measures will provide sizeable benefits to the Community industry; it is clear that the steel industry has experienced long-term cumulated negative effects which would be unduly prolonged if measures were maintained.

(154) Therefore, after an appreciation of the impact of the continuation or expiry of the measures on the various interests involved, as required by Article 21 of the basic Regulation, the Commission could clearly conclude that maintaining the existing measures would be contrary to the interests of the Community. The measures should, therefore, be allowed to expire.'

21 On those grounds, the operative part of the contested decision terminates the anti-dumping proceeding concerned and, consequently allows the measures in respect of the imports under examination to lapse.

22 By application lodged at the Court Registry on 16 June 2001, Euroalliages and Others instituted proceedings under the fourth paragraph of Article 230 EC for the annulment of the sole article of the contested decision.

23 By separate document lodged at the Court Registry on the same day, they also applied, primarily, for an order suspending application of the contested decision terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in China, Kazakhstan, Russia and Ukraine, and an order that the Commission re-impose anti-dumping duties imposed by Regulations Nos 3359/93 and 621/94, alternatively, for an order that the Commission require the importers of ferro-silicon originating in those four countries to

provide security corresponding to the anti-dumping duties imposed by those regulations and to subject their imports to registration or, in the further alternative, for an order that the Commission require the said importers to subject their imports to registration.

The contested order

24 By the contested order the President of the Court of First Instance ordered imports of ferro-silicon originating in China, Kazakhstan, Russia and Ukraine to be subject to a system of registration, without provision of security by importers.

25 Firstly, as regards the question whether there was a prima facie case, the President of the Court of First Instance considered that, at first sight, certain of the complaints raised did not seem to be wholly unfounded and that they were such as to give rise to doubts regarding the legality of the contested decision. Those complaints are, firstly, the alleged infringement of Article 21(2) and (5) of the basic regulation in that the Commission took account of information provided by users after the period specified in the notice initiating the review proceeding in respect of the anti-dumping measures had expired and, secondly, the alleged infringement of Article 6(6) of that regulation in that the Commission refused to organise a meeting to enable the views of Euroalliages and Others to be set against those of the users and to rebut them.

26 Next, as regards the requirement of urgency, the President of the Court of First Instance considered, firstly, that the probability of Péchiney Électrométallurgie,

Vargön Alloys AB and Ferroatlántica SL suffering serious injury in the absence of interim measures had been established. The basis for reaching that conclusion was as follows:

'63 The Commission concluded, at recital 129 of the contested decision, that the situation of the Community industry "would deteriorate" should the anti-dumping measures be allowed to lapse. It notes in that respect that "[e]ven though the extent of this deterioration is difficult to evaluate, taking into account the declining trends in prices and profitability of this industry, it is none the less likely that injury will recur".

64 The Commission does not, admittedly, regard the damage that the Community industry will probably suffer should the anti-dumping measures be allowed to lapse as serious. However, according to Article 3(1) of the basic regulation, the term "injury" is to be taken to mean, in particular, "material injury to the Community industry". In this context, the qualifier "material" can only be understood as a synonym for "serious". In the present case, the Commission must therefore be held to have admitted, in the contested decision, the serious nature of the damage. That finding is reinforced by the Commission's failure to challenge, either in its written observations or at the hearing, the seriousness of the damage that the applicants will probably suffer from the lapse of the anti-dumping measures.'

27 Secondly, as regards the irreparable nature of the injury alleged by the applicants, the President of the Court of First Instance held it to be well established that damage of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable, or even as being reparable only with difficulty, if it can ultimately be the subject of financial compensation. He held that, in the present case, Péchiney Électrométallurgie, Vargön Alloys AB and Ferroatlántica SL had not succeeded in showing that the impairment of their economic viability was such that rationalisation measures would not be sufficient to enable them to

continue producing ferro-silicon until final judgment in the main action. The grounds on which he reached that conclusion included the fact that each of those companies was part of a large group of companies and that their turnover attributable to sales of ferro-silicon represented, on average, 15% of the total turnover of those groups.

28 However, the President of the Court of First Instance considered it necessary to take into account the circumstances peculiar to this case. In that respect, he made the following observations:

'71 First, as regards the imports under review, the Commission acknowledges in the contested decision the risk that the applicants will suffer serious damage should the anti-dumping measures be allowed to lapse.

72 Next, it should be noted that the likelihood of recurrence of injury should the measures be allowed to lapse, together with the likelihood of continuation or recurrence of dumping, which were the Commission's conclusions, in the contested decision, with respect to the imports in question, characterise that decision in that they are not effects that are inherent in any decision terminating an expiry review of anti-dumping measures. By virtue of the first subparagraph of Article 11(2) of the basic regulation, a decision terminating a review may be justified by the mere finding that the expiry of the anti-dumping measures in force will not be likely to result in a continuation or recurrence of dumping or of injury to the Community industry.

73 Finally, it might be that the injury suffered by the applicants would not disappear simply as a result of the Commission's compliance with a judgment annulling the contested decision. The only remedy then

remaining open to the applicants would be an action in damages under Article 235 EC and the second paragraph of Article 288 EC to make good the losses sustained by them.

74 In that regard, it should be borne in mind that the Community's liability under the second paragraph of Article 288 EC depends on the fulfilment of a set of conditions as regards the unlawfulness of the conduct alleged against the Community institution, the fact of damage and the existence of a causal link between that conduct and the damage complained of (judgments of the Court of Justice in Joined Cases C-258/90 and C-259/90 *Pesquerias De Bermeo and Naviera Laida* v *Commission* [1992] ECR I-2901, paragraph 42, and of the Court of First Instance in Case T-277/97 *Ismeri Europa* v *Court of Auditors* [1999] ECR II-1825, paragraph 95). As regards the first of these three conditions, it has been stated that, where damage is caused to individuals, the conduct with which the institution is charged must constitute a sufficiently serious infringement of a rule of law intended to confer rights on individuals. In the present case it is thus for the applicants to show that the Commission has manifestly and gravely disregarded the limits on its discretion in assessing the Community interest (see, on this point, judgment of the Court in Case C-352/98 P *Bergaderm and Goupil* v *Commission* [2000] ECR I-5291, paragraphs 41 to 43). Given the wide discretion that the Commission has, here, in particular in assessing the Community interest (judgments of the Court of Justice in Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraph 63, and Case C-179/87 *Sharp Corporation* v *Council* [1992] ECR I-1635, paragraph 58; judgment of the Court of First Instance in Case T-2/95 *Industrie des Poudres Sphériques* v *Council* [1998] ECR II-3939, paragraph 292), reparation, at a later stage, of the damage sustained would, at the very least, be uncertain.

75 It follows from the foregoing (paragraphs 71 to 74) that the applicants risk suffering serious damage, for which it is not certain that they will be compensated in due course. In such a situation, the uncertainty thus identified leads to the conclusion that the damage is also irreparable in nature.'

29 Lastly, having concluded that there was urgency, the President of the Court of First Instance considered it necessary to balance all of the interests at stake. On that point he made the following observations:

'78 In that respect it is necessary to weigh the interest of the applicants in obtaining one or other of the interim measures sought against the interest of the importers, exporters and users in the maintenance of the effects of the contested decision. The Commission points out, more specifically, that the grant of one or other of the interim measures would have the effect of curbing imports of ferro-silicon originating in the countries concerned.

79 It is indisputable that suspension of the operation of the contested decision would leave out of account the interests of importers, exporters or users, and would completely nullify the intended effect of that decision. A system of registration of imports requiring importers to lodge a security could also have the effect of significantly curbing imports and, as a result, creating an irreversible situation.

80 Accordingly, in order to limit, at one and the same time, the creation of an irreversible situation and the occurrence of damage to the applicants, the effects of the interim measure must be confined to the absolute minimum necessary to preserve the interests of the applicant until judgment in the main action.

81 By way of a claim formulated as a further alternative, the applicants seek an order that imports of ferro-silicon be made the subject of a registration procedure, without the provision of security by importers. The obligation to register imports would, in itself, in the applicants' submission, contribute to the introduction of a certain market discipline with regard to dumping practices.

82 At the hearing the Commission contended that the registration of imports would have the same effects as those of anti-dumping measures. It maintained that the effect of annulment of the contested decision would be that importers would have to pay the initial anti-dumping duties on registered imports, even though the products imported had not been the subject of dumping practices.

83 Article 233 EC provides that the institution whose act has been declared void is to be required to take the necessary measures to comply with the judgment. In this respect, it was held in the judgment in *Industrie des Poudres Sphériques* v *Council*, cited above, (paragraphs 87 to 95) that Article 233 EC leaves it to the Commission to decide either to resume the proceeding on the basis of all the acts in the proceeding which were not affected by the annulment ordered by the Court, or to conduct a new investigation relating to a different reference period, on condition that it complies with the conditions deriving from the basic regulation (judgment of the Court of First Instance in Case T-188/99 *Euroalliages* v *Commission* [2001] ECR II-1757, paragraph 28).

84 Moreover, it has been held that the rule that data which postdate the investigation period are not normally taken into account applies to expiry reviews. An exception to that rule has, however, been allowed where data postdating the investigation period disclose new developments which make the imposition or maintenance of anti-dumping duties manifestly inappropriate (judgments of the Court of First Instance in Case T-161/94 *Sinochem* [Heilongjiang] v *Council* [1996] ECR II-695, paragraph 88, and *Euroalliages* v *Commission*, cited above, paragraphs 70 to 77).

85 Accordingly, the retroactive levying of anti-dumping duties at the rates laid down by Regulation Nos 3359/93 and 621/94 on imports of ferro-silicon originating in China, Kazakhstan, Russia and Ukraine cannot be regarded as the only possible means of complying with a judgment of the

Court of First Instance annulling the contested decision. The Commission's assertion is not, therefore, one that compels assent and, as a result, cannot be upheld.'

The appeal

Arguments of the parties

30 Euroalliages and Others and the Kingdom of Spain argue that the plea is inadmissible in its entirety. First, they note that the appeal was brought on the basis of Article 49 of the EC Statute of the Court of Justice and not on Article 50, which is the provision applicable. Secondly, Euroalliages and Others maintain that the Commission has no legal interest in bringing the proceedings, since it has not shown that the appeal is capable of benefiting it. Euroalliages and Others, and the Kingdom of Spain, claim, firstly, that the individual pleas in the appeal are inadmissible inasmuch as they are new pleas or call in question the assessment of the facts by the President of the Court of First Instance.

31 As regards the requirement of urgency, the Commission submits, under its first plea, that the President of the Court of First Instance misconstrued Article 3(1) of the basic regulation in finding, at paragraph 64 of the contested order, that the qualifier 'material' can only be understood as a synonym for 'serious'.

32 Under its second and third pleas, the Commission calls in question the considerations set out by the President of the Court of First Instance, in paragraphs 72 to 74 of the contested order, to the effect that the requirement relating to urgency had been met in this case. According to the Commission, it is settled case-law that, as the damage was purely financial, it cannot, save in

exceptional circumstances, be regarded as irreparable or even as being reparable only with difficulty. The President of the Court of First Instance misdirected himself as to the case-law regarding the conditions on which purely financial damage may exceptionally be regarded as irreparable damage.

33 Firstly, the Commission contends that, for the purpose of characterising damage as irreparable, the point, mentioned in paragraph 72 of the contested order, that the contested decision is based on the failure to meet the condition regarding the Community's interest in maintaining the anti-dumping duties is not relevant. The Commission stresses that, if it is to maintain measures nearing expiry, it must be able to conclude, first, that the expiry of the measures will be likely to result in a continuation or recurrence of dumping (first subparagraph of Article 11(2) of the basic regulation), second, that expiry of the measures will be likely to result in a continuation or recurrence of the injury caused by dumping (first subparagraph of Article 11(2) of the basic regulation) and, third, that it is clearly in the interest of the Community to maintain those measures (Article 21 of the basic regulation). For the Commission, there is no reason to attach greater importance to any one of those three conditions than to the others since each of them must be met before the measures nearing expiry may be maintained. The fact that, according to the contested decision, the third condition was not met does not individualise that decision as an exceptional case.

34 The Commission maintains, next, that, by adopting a generally applicable criterion, namely the uncertainty that attaches to a claim for reparation of damage resulting from acts falling within the Commission's wide discretion, in order to verify whether the injury was irreparable, the President of the Court of First Instance failed to have regard to the principle that each applicant party must prove that the conditions for granting interim relief are satisfied in its particular case.

35 Kazchrome and Alloy 2000 maintain, for their part, that a party seeking interim relief cannot merely rely on effects which are inherent in the contested decision itself. That follows from established case-law on applications for interim relief in the form of suspension of anti-dumping duties (order in Case C-358/89 R

Extramet Industrie v *Council* [1990] ECR I-431, summary publication, paragraphs 20 to 23). By virtue of that case-law, which Kazchrome and Alloy 2000 say is also applicable to a decision terminating an anti-dumping proceeding, it is for the party seeking interim relief to adduce evidence to show that, without such relief, its survival would be endangered or its market position would be irremediably affected.

36 As regards the seriousness of the damage, they state that the President of the Court of First Instance did not examine whether Euroalliages and Others had adduced sufficient evidence to establish the likelihood of serious damage, but based himself solely on the abstract proposition that the Commission had implicitly admitted the likelihood of serious damage to Euroalliages and Others as a result of the contested decision. The Commission's findings in the contested decision do not meet the condition that the damage be serious, which must be established in any application for interim relief.

37 As regards the irreparable nature of the damage, Kazchrome and Alloy 2000 contend that the conclusion of the President of the Court of First Instance conflicts with settled case-law according to which the involvement of the judge hearing an application for interim relief is confined to assessing whether pecuniary damage is capable of being made good in an action for damages and does not extend to ruling on the prospects of success of such an action, which would be difficult to envisage at the interlocutory stage.

38 According to Euroalliages and Others, and the Kingdom of Spain, the Commission's first plea, on the seriousness of the damage, is a new plea and hence inadmissible, since the Commission did not contest the seriousness of the damage at first instance. As regards the substance of this plea, they state that 'material' damage, within the meaning of the basic regulation, may be 'serious', for the purposes of proceedings for interim relief, when set within a specific context. They claim that it is clear from paragraph 64 of the contested order that the President of the Court of First Instance specifically emphasised the context of the facts of the case in reaching such a conclusion.

39 As regards the Commission's second and third pleas, on the irreparable nature of the damage, Euroalliages and Others again contend that they are inadmissible because, in the case at first instance, the Commission did not dispute the uncertainty and the duration of proceedings for damages.

40 As regards the substance of those pleas, Euroalliages and Others and the Kingdom of Spain maintain that the President of the Court of First Instance made an overall assessment of the circumstances specific to the case. Moreover, it may be concluded from the lack of certainty of compensation — unarguable in the light of the case-law cited in paragraph 74 of the contested order —that the damage would be 'reparable only with difficulty' in the sense of the case-law relating to the conditions in which purely pecuniary damage may, exceptionally, be regarded as irreparable.

41 As regards the balancing of interests by the President of the Court of First Instance, both the Commission, under the first part of its fourth plea, and also Kazchrome and Alloy 2000, complain that the President of the Court of First Instance adopted inconsistent reasoning at paragraphs 79 to 82 and 85 of the contested order, in holding that the registration of imports without the provision of security would not create an irreversible situation, whilst registration together with the provision of security would do so.

42 On that point, the Commission states that the provision of security does not alter the 'non-inevitable' nature of the retroactive levying of anti-dumping duties, but merely makes this easier and ensures that it can be done. Whether the importer has provided security or not, he runs the risk of having to pay anti-dumping duty retroactively and the President of the Court of First Instance should therefore have come to the conclusion that the effects of registering imports without providing security would also be irreversible.

43 Under the second part of its fourth plea, the Commission contends that, at paragraphs 82 and 85 of the contested order, the President of the Court of First

Instance misinterpreted Article 7 of the basic regulation in holding that the registration of imports would not have the same effects as those of anti-dumping measures. According to the Commission, it is not relevant that the retroactive levying of anti-dumping duties is not the only possible means of complying with the judgment of the Court of First Instance annulling the contested decision. The relevant point is that retroactive levying of duty is a real possibility and may dissuade operators from importing. That possibility gives the registration of imports the nature of a provisional anti-dumping duty within the meaning of Article 7 of the basic regulation.

44 Under the first part of its fifth plea, the Commission contends that in the operative part of the contested order the President of the Court of First Instance failed to have regard to the principle laid down in Article 7(1) of the basic regulation, under which provisional anti-dumping duties are to be imposed no earlier than 60 days from the initiation of the proceeding. If it were accepted that the notice published, pursuant to Article 24(6) of the Rules of Procedure of the Court of First Instance, on 11 August 2001 in the *Official Journal of the European Communities* may replace the notice of initiation of investigation, the operative part of the contested order would be unlawful inasmuch as it refers to imports effected prior to the expiry of the 60-day period that began to run on 11 August 2001.

45 Under the second part of its fifth plea, the Commission argues that the President of the Court of First Instance infringed Article 7(7) and Article 14(5) of the basic regulation under which provisional anti-dumping measures and measures requiring registration of imports may not last for more than nine months.

46 Kazchrome and Alloy 2000 add that the President of the Court of First Instance attached too much importance to the possibility of damage to Euroalliages and Others, although such damage is uncertain, but did not take into account the certain injury that would be suffered by Kazchrome and Alloy 2000 as a result of the measure that he ordered, requiring registration of imports, even though it would not be open for Kazchrome and others to bring an action for damages. Moreover, the reasoning of the President in paragraphs 83 to 85 of the contested

order is mistaken because, instead of evaluating the immediate effects of the measure requiring registration of imports that was sought by Euroalliages and Others, he concentrated on the possible consequences of annulment of the contested decision.

47 Euroalliages and Others, and the Kingdom of Spain, argue that the Commission's fourth and fifth pleas are inadmissible because the Commission produces no legal argument to show that registration of imports without provision of security would create an irreversible situation and because, in any case, it did not rely on Articles 7 and 14 of the basic regulation in the proceedings for interim relief.

48 As regards the substance of those pleas, they contend that the Commission has not shown how registration of imports without the provision of security would create an irreversible situation. In paragraphs 79 and 81 of the contested order, the President of the Court of First Instance explains the difference between a system of registration of imports requiring a security and one that does not, as regards the effects of each. For Euroalliages and Others, the true difference between the two systems would be as follows: under the former, the importer immediately incurs a financial burden through the lodging of the security, whereas, in the latter, no immediate financial burden is imposed on him.

49 As regards infringement of Article 7 of the basic regulation, Euroalliages and Others, and the Kingdom of Spain, maintain that at no time did the President of the Court of First Instance consider the matter before him from the point of view of that article and argue that to allow the interim measures ordered by him to be reviewed in the light of that article would amount to depriving him of the discretion which he enjoys in adopting those interim measures which he believes to be most appropriate.

50 Euroalliages and Others also dispute the Commission's description of registration without the provision of security as a provisional measure within the meaning of Article 7 of the basic regulation; in particular, they argue that provisional duties

are secured by a guarantee, and that is not the case with the registration of imports ordered by the President of the Court of First Instance. Furthermore, for Euroalliages and Others, Article 14 of that regulation applies only to measures for registration of imports where a security is provided.

Findings

Admissibility

51 In the appeal reference is made to Article 49 of the EC Statute of the Court of Justice alone. In that regard, it must be observed that the incorrect reference in the application to a provision of the Statute claimed as a legal basis for the appeal, although the Rules of Procedure do not require a reference to any such provision, constitutes a clerical error. That error has had no effect on the subsequent progress of the proceedings and is not a ground for inadmissibility of the appeal [see order in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, at paragraphs 13 and 14].

52 As regards a legal interest in bringing proceedings, it need merely be observed that the Commission was party to the case at first instance and was unsuccessful.

53 With respect to the contention that the pleas raised by the Commission at the appeal stage are new, it must be borne in mind, firstly, that the reason for which a plea presented for the first time at the appeal stage must be declared inadmissible is that the Court of Justice, which has limited jurisdiction of the Court of Justice in an appeal, would otherwise be hearing a case of wider ambit than that which came before the Court of First Instance. In an appeal, the jurisdiction of the Court

of Justice is thus confined to review of the findings of law on the pleas argued before the Court of First Instance (see Case C-136/92 P *Commission* v *Brazzelli Lualdi and Others* [1994] ECR I-1981, paragraph 59).

54 Furthermore, it is important to take into account the particular urgency characteristic of proceedings for interim relief and the cumulative nature of the requirements to be satisfied in order for interim relief to be granted. In procedural contexts of this type, the parties will necessarily concentrate their arguments on the points which they regard as fundamental.

55 That being so, it must be observed that, in this case, the Commission's pleas in support of its appeal call in question the findings on the pleas argued before the President of the Court of First Instance. The grounds of appeal essentially relate to the matters examined at first instance, which were whether the condition of urgency was met, whether a grant of the measures sought might prejudge the decision on the substance of the case and whether the balance of the interests at stake favoured Euroalliages and Others. The Court is therefore not seised of a case of wider ambit than that which came before the Court of First Instance.

56 As regards the assertions that, in its appeal, the Commission is challenging findings of fact, it should be noted that, in accordance with Article 225 EC and Article 51 of the EC Statute of the Court of Justice, an appeal is to be confined to points of law and must be based upon pleas alleging the lack of competence of the Court of First Instance, procedural irregularities before the Court of First Instance which prejudice the interests of the appellant, or infringement of Community law by the Court of First Instance.

57 The Court of First Instance has exclusive jurisdiction, firstly, to find the facts, save where a substantive inaccuracy in its findings is attributable to the documents submitted to it and, secondly, to appraise those facts. That appraisal thus does not, save where the clear sense of the evidence has been distorted, constitute a point of law which is subject, as such, to review by the Court of

Justice in an appeal (see, among others, Case C-390/95 P *Antillean Rice Mills and Others* v *Commission* [1999] ECR I-769, paragraph 29).

58 It would seem appropriate here to examine that issue when analysing each of the pleas in the appeal, since it is not possible, without further consideration, to declare the appeal inadmissible in its entirety.

Substance

59 As regards the Commission's first plea, concerning the assessment by the President of the Court of the seriousness of the injury suffered by Euroalliages and Others, it has to be acknowledged that, although in general it cannot be accepted that 'material' injury in accordance with Article 3 of the basic regulation necessarily means 'serious' injury for the purposes of proceedings for interim relief, it is none the less the case that, firstly, those two terms were held to be equivalent only in the specific context of the case and, secondly, the President of the Court of First Instance concluded that the injury had to be characterised as serious on the basis of a specific appraisal of the particular case.

60 Since the findings made of fact by the President of the Court cannot be challenged in an appeal, as noted in paragraph 57 of this order, the Commission's first plea must be rejected as inadmissible.

61 For the purpose of assessing the Commission's second and third pleas, regarding the assessment made by the President of the Court of First Instance of the irreparable nature of the injury, it must be observed, as a preliminary point, that the purpose of interlocutory proceedings is to guarantee the full effectiveness of

the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by the Court of Justice [see, in particular, the orders in Case 27/68 R *Renckens* v *Commission* [1969] ECR 274, at 276, in Case C-399/95 R *Germany* v *Commission* [1996] ECR I-2441, paragraph 46, and in Case C-393/96 P(R) *Antonissen* v *Council and Commission* [1997] ECR I-441, paragraph 36].

62 It is for the purpose of attaining that objective that urgency must be assessed in the light of the need for an interlocutory order in order to avoid serious and irreparable damage to the party seeking the interim relief (see order in Case C-180/01 P-R *Commission* v *NALOO* [2001] ECR I-5737, at paragraph 52).

63 It is for the party claiming serious and irreparable damage to establish its existence [see, to that effect, order in Case C-329/99 P(R) *Pfizer Animal Health* v *Council* [1999] ECR I-8343, paragraph 75]. While it is not necessary for it to be absolutely certain that the damage will occur, a sufficient degree of probability being enough, the applicant is none the less required to prove the facts which are considered to establish the prospect of such damage (see, most recently, order in *Commission* v *NALOO*, at paragraph 53).

64 In this case, the President of the Court of First Instance found that Euroalliages and Others had not shown that they were in a position which was likely to jeopardise their existence before the judgment concluding the main proceedings was delivered. However, he did conclude, on the basis of the considerations set out in paragraphs 72 to 74 of the contested order, that the injury was irreparable.

65 As regards paragraph 72 of the contested order, it should be observed that although, under the first subparagraph of Article 11(2) of the basic regulation, a decision terminating a review may be justified by the mere finding that the expiry of the anti-dumping measures in force will not be likely to result in a continuation or recurrence of dumping or of injury to the Community industry, it does not

therefore follow that finding the opposite is sufficient to justify maintaining the anti-dumping measures. As is stated in Article 21(1) of the basic regulation, '[m]easures, as determined on the basis of the dumping and injury found, may not be applied where the authorities... can clearly conclude that it is not in the Community interest to apply such measures.'

66 It follows that, when a decision terminating a review of anti-dumping measures is adopted on the ground that it is not in the Community interest to maintain them, the resulting injury to the Community industry is an effect inherent in that decision.

67 It is settled case-law that, in order to suspend the imposition of a definitive anti-dumping duty with a view to preventing serious and irreparable injury to the party seeking suspension, that party cannot merely plead the effects inherent in the imposition of such a duty but must demonstrate injury which is specific to itself (see the orders in Case 77/87 R *Technointorg* v *Council* [1987] ECR 1793, at paragraph 17, in Case 69/89 R *Nakajima All Precision* v *Council* [1989] ECR 1689, summary publication, in *Extramet Industrie* v *Council* and in Case C-6/94 R *Descom* v *Council* [1994] ECR I-867, at paragraphs 16 and 17). The same principles must apply when the position is reversed, that is to say, when, in an appeal against a decision of the Community institutions not to introduce an anti-dumping duty, Community undertakings are seeking to establish that it is urgent to adopt interim measures.

68 In paragraphs 73 and 74 of the contested order, the uncertainty of the prospect of success if an action for damages is brought following the possible annulment of the contested decision, '[g]iven the wide discretion that the Commission has, here, in particular in assessing the Community interest', appears as determinative in finding that the injury is irreparable.

69 On that point, it must be borne in mind that it is settled case-law that damage of a pecuniary nature cannot, save in exceptional circumstances, be regarded as irreparable, since financial compensation is generally capable of restoring the position of the person suffering the damage to what it had been before (see, among others, order in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, at paragraph 24).

70 The Court of Justice has, admittedly, sometimes noted that such compensation might be obtained in an action for damages brought by the applicant (orders in Case 174/80 R *Reichardt* v *Commission* [1980] ECR 2665, at paragraph 6, in Case 120/83 R *Raznoimport* v *Commission* [1983] ECR 2573, at paragraph 15, in Case 294/86 R *Technointorg* v *Commission* [1986] ECR 3979, at paragraph 28, and in Case 229/88 R *Cargill and Others* v *Commission* [1988] ECR 5183, at paragraph 18). However, it has never examined the actual likelihood of success of an action for damages which might be brought in the event of the contested measure being annulled.

71 On that point, it must be observed that the uncertainty of obtaining compensation for pecuniary damage if an action for damages is brought cannot in itself be regarded as a factor capable of establishing that such damage is irreparable in the sense contemplated in the case-law of the Court.

72 At the interlocutory stage, the possibility of subsequently obtaining compensation for pecuniary damage if an action for damages is brought following annulment of the contested measure is necessarily uncertain.

73 Interlocutory proceedings are not intended to replace the action for damages in order to remove that uncertainty. Their purpose, as noted in paragraph 61 of the present order, is only to guarantee the full effectiveness of the definitive future

decision that will be made in the main action (in this case an action for annulment) to which the interlocutory proceedings are an adjunct.

74 That conclusion is not affected by the link that is made in paragraph 74 of the contested order between the wide discretion that the Commission had enjoyed in this case and the uncertainty of success in any action for damages. If that criterion were applied systematically, the irreparable nature of the injury would depend on the characteristics of the contested measure and not on the applicant's individual circumstances.

75 It follows from the foregoing that, by taking exclusively the uncertainty of success in any action for damages, in view of the nature of the contested decision, as a ground for finding that the damage is irreparable and thus for granting interim measures, the contested order is vitiated by an error in law.

76 Consequently, without its being necessary to rule on the other pleas raised by the Commission and Kazchrome and Alloy 2000, the appeal must be allowed and the contested order set aside.

77 Under the first paragraph of Article 54 of the EC Statute of the Court of Justice, if an appeal is well founded, the Court of Justice is to quash the decision of the Court of First Instance. It may itself give final judgment in the matter, where the state of the proceedings so permits, or refer the case back to the Court of First Instance for judgment.

78 The state of the proceedings in the present case is not such as to enable judgment to be given and the case must therefore be referred back to the Court of First Instance for it to adjudicate on the application by Euroalliages and Others.

On those grounds,

THE PRESIDENT OF THE COURT

hereby orders:

1. **The order of the President of the Court of First Instance of the European Communities of 1 August 2001 in Case T-132/01 R *Euroalliages and Others* v *Commission* is set aside.**

2. **The case is referred back to the Court of First Instance.**

3. **Costs are reserved.**

Luxembourg, 14 December 2001.

R. Grass — Registrar

G.C. Rodríguez Iglesias — President