ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
1 August 2001 *

In Case T-132/01 R,

Euroalliages, having its registered office in Brussels,

Péchiney Electrométallurgie, having its registered office in Courbevoie (France),

Vargön Alloys AB, having its registered office in Vargön (Sweden) and

Ferroatlántica, having its registered office in Madrid,

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

applicants,

v

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,

defendants,

* Language of the case: French.

APPLICATION primarily for suspension of the operation of Commission Decision 2001/230/EC of 21 February 2001 terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Brazil, the People's Republic of China, Kazakhstan, Russia and Ukraine (OJ 2001 L 84, p. 36) and for an order that the Commission re-impose expired anti-dumping duties, and in the alternative, for an order that the Commission require importers of ferro-silicon originating in those four countries to provide security corresponding to the expired anti-dumping duties 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 PRESIDENT OF THE COURT OF FIRST INSTANCE OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal background

1 Article 11(1) and (2) 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, hereafter 'the basic regulation'), entitled 'Duration, reviews and refunds', provides:

'1. An anti-dumping measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury.

2. 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.

...'

2 Article 21(1) of the same regulation, entitled 'Community interest', is worded 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'.

Background to the dispute

3 Definitive anti-dumping measures were imposed on imports of ferro-silicon originating in several countries, first, 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 second, 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).

4 On 10 June 1998 the Commission published a notice of impending expiry of certain anti-dumping measures (OJ 1998 C 177, p. 4).

5 Following the publication of that notice Euroalliages, the liaison committee of the ferro-alloy industry, requested, pursuant to Article 11(2) of the basic regulation, an expiry review of the measures concerning Brazil, China, Kazakhstan, Russia, Ukraine and Venezuela.

6 Having determined, after consultation of the Advisory Committee, that sufficient evidence existed for the initiation of a review under Article 11(2) of the basic regulation, the Commission published a notice of initiation of that procedure in the *Official Journal of the European Communities* (OJ 1998 C 382, p. 9) and commenced an investigation. The investigation of dumping covered the period between 1 October 1997 and 30 September 1998. The examination of injury covered the period from 1994 to the end of the investigation period.

7 On 21 February 2001 the Commission adopted Commission 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, 'the contested decision').

The contested decision

8 The contested decision states that the review led the Commission to conclude that, in respect of imports of ferro-silicon from China, Kazakhstan, Russia and Ukraine, the expiry of the measures would be likely to lead to the continuation or recurrence of dumping and injury.

9 Recital 129 of the contested decision is worded as follows:

'[I]n 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'.

10 The Commission then examined whether the maintenance of the anti-dumping measures would be in the overall interest of the Community. In making this assessment it took account of several factors, namely, first, the fact that the Community industry has not been capable of benefiting sufficiently from the measures in place since 1987, nor, in terms of market share, from the demise of former Community producers (recital 151 of the contested decision), and second, the fact that Community steel producers have had to bear the additional costs brought by the anti-dumping measures during the period of validity of those measures (recital 152).

11 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.'

12 For these reasons the operative part of the contested decision terminated the anti-dumping proceeding in question and, consequently, brought about the expiry of the measures affecting the imports under review.

Procedure

13 By application lodged at the Court Registry on 16 June 2001, the applicants instituted proceedings under the fourth subparagraph of Article 230 EC for the annulment of the sole article of the contested decision.

14 By separate document lodged at the Court Registry on the same day, the applicants 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 Regulation 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 Regulation Nos 3359/93 and 621/94 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.

15 The Commission submitted its written observations on the application for interim measures on 5 July 2001.

16 The Court heard oral argument from the parties on 11 July 2001.

Law

17 It should be stated at the outset that, owing to a clerical error, acknowledged by the Commission in its written and oral observations, Ukraine was not mentioned in recital 129 of the French version of the contested decision. Having heard the parties as to the effect of that mistake on the subject-matter of the present application, the interim measures sought are to be understood as also referring to the contested decision as terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Ukraine.

18 Pursuant to the combined provisions of Article 242 EC and Article 243 EC, and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of 8 June 1993 (OJ 1993 L 144, p. 21), the Court may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

19 Article 104(2) of the Rules of Procedure provides that an application for the adoption of interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case (*fumus boni juris*) for the grant of the interim measures applied for. Those conditions are cumulative, so

that an application for interim measures must be dismissed if any one of them is absent (orders of the President of the Court in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30, and of the President of the Court of First Instance of 1 February 2001 in Case T-350/00 R *Free Trade Foods* v *Commission* [2001] ECR II-493, paragraph 32). Where appropriate, the judge hearing such an application must also weigh up the interests involved (order of the President of the Court of Justice of 23 February 2001 in Case C-445/00 R *Austria* v *Council* [2001] ECR I-1461, paragraph 73).

20 The measures sought must also be provisional inasmuch as they must not prejudge the points of law or fact in issue, or neutralise in advance the effects of the decision subsequently to be given in the main action (order of the President of the Court of Justice in Case C-149/95 P(R) *Commission* v *Atlantic Container Line and Others* [1995] ECR I-2165, paragraph 22).

Arguments of the parties

Prima facie case

21 The applicants put forward two pleas in law in order to establish a *prima facie* case.

22 The first plea, alleging infringement of the provisions of the basic regulation and of the rights of defence in determining the Community interest, is composed of five parts.

23 Under the first part, the applicants submit that the Commission has infringed Articles 11(2) and 21 of the basic regulation in carrying out an analysis of the Community interest over the period from 1987 to the investigation period (recital 132 of the contested decision). The measures in force which the Commission was required to analyse were only adopted in 1993 and 1994 respectively by Regulation Nos 3359/93 and 621/94. The applicants further submit that the analysis of the measures applicable to Venezuela and Brazil should not be taken into account in the Commission's reasoning as to the Community interest (recital 149 of the contested decision) since it concluded that, in respect of those countries, the risk of the continuation or recurrence of injurious dumping did not exist.

24 Under the second part of the plea, the applicants state that the Commission has infringed Article 21(2) and (5) of the basic regulation in making use of information provided by users after the time-limit specified in the notice initiating the review proceeding had expired.

25Under the third part of the plea, the applicants submit that the Commission has infringed Article 21(2) and (5) of the basic regulation in regarding the information provided by the users as being representative.

26 Under the fourth part of the plea, the applicants submit that the Commission infringed Article 21(7) of the basic regulation in taking account of information provided by the users which was unsupported by specific evidence.

27 Under the final part, the applicants contend that the Commission infringed Article 6(6) of the basic regulation and the rights of defence in refusing to organise a meeting between the applicants and the users at which opposing views could be presented.

28 The second plea alleges infringement of Articles 11(2), 21 and 6(6) of the basic regulation, and of the rights of defence, in the determination of the Community interest. The applicants argue that the Commission committed manifest errors in its assessment of: (i) the situation of the Community industry, in that it was mistaken as to the effect of the maintenance and expiry of the measures; (ii) the impact of the measures on users; and (iii) the balance of interests.

29 In its written observations the Commission did not address the question whether a *prima facie* case had been made out on the grounds for annulment pleaded.

Urgency

30 The applicants argue that the condition of urgency is also met, in that they would suffer serious and irreparable damage if an order for interim measures were not made. In the present case, the continued disappearance of the duties would lead to developments within the Community industry that would be very difficult, if not impossible to reverse subsequently (see, to that effect, the order of the President of the Court of First Instance in Case T-395/94 R *Atlantic Container and Others* v *Commission* [1995] ECR II-595).

31 According to the applicants, the seriousness of the damage is established. Referring to recital 129 of the contested decision (see paragraph 9 above), the applicants contend that the risk that serious injury to the Community industry will recur as a result of dumped imports originating in China, Kazakhstan, Russia, and Ukraine is expressly recognised by the Commission.

32 The irreparable nature of the damage is, in the applicants' submission, also established, since the very existence of the undertakings concerned will be jeopardised if the interim measures sought are not granted (order of the President of the Court of First Instance of 17 January 2001 in Case T-342/00 R *Petrolessence and SG2R* v *Commission* [2001] ECR II-67, paragraph 47).

33 In this respect, the applicants, relying on the order of the President of the Court of First Instance in Case T-213/97 R *Eurocoton and Others* v *Council* [1997] ECR II-1609, produce data showing the comparative change in the financial position of the three applicant undertakings, which are producers of ferro-silicon, resulting from the falls of 10 and 15% in the selling price of ferro-silicon within the Community which would occur if the repeal of the anti-dumping measures were maintained.

34 The applicants submit that the financial projections show that the hypothetical fall in the selling price would lead to a very significant decline in the operating results of undertakings concerned such as to jeopardise their business as ferro-silicon producers.

35 Finally, the applicants state that the prospect of the Community producers obtaining compensation for the damage suffered is uncertain and, in any event, incompatible with maintaining the viability of Community producers given the delays inherent in any compensation procedure.

36 The Commission contends that the condition of urgency is not met in the present case since the damage is not irreparable.

37 First, it maintains that the prospect of a 10 or 15% fall in the price of ferro-silicon following the expiry of the anti-dumping measures is not based on any proven fact. The 15% fall in the price of ferro-silicon on the United States market following the abolition of anti-dumping measures by that State in 1999 does not in any way prove that there would be an identical movement of prices in the European Community. Analysis of the effect on the Community industry of a 15% fall in price is purely hypothetical, as is clear from the wording of recital 147 of the contested decision. It is not, therefore, proven that a fall of that magnitude is foreseeable with a sufficient degree of probability. Even if such proof were forthcoming, it would still not be enough to show that the adoption of the interim measures sought is a matter of urgency. The applicants should also have proved that they are not in a position to absorb the losses sustained until the conclusion of the main action, given the lasting nature of the fall in prices caused by the expiry of the anti-dumping measures.

38 Second, the Commission argues that the projections of trends in operating results, established on the basis of past operating costs and hypothetical price reductions, do not have the slightest probative value. In this respect, the Commission emphasises a number of factors which, it claims, the applicants have wholly failed to take into account.

39 First, the applicants have not envisaged that a reduction in their prices in the face of increased competition might enable them to increase their sales volumes and, therefore, to reduce their unit production costs.

40 Next, the applicants do not explain why they do not consider adopting the rationalisation measures usually taken by undertakings in times of difficulty.

41 Furthermore, Péchiney Electrométallurgie and Vargön Alloys A. B. do not explain why the data provided show a substantially lower level of profitability for the

1998 year than that found by the Commission during the investigation period (recital 105 of the contested decision), namely from 1 October 1997 to 30 September 1998. As for Ferroatlántica, no accounting data relating to the activity concerned were produced for the years 1998 to 2000. In the course of the anti-dumping investigation the Commission even revised upwards that company's results. All of these factors give rise to doubts as to the probative value of the data provided by the applicants.

42 Finally, Péchiney Electrométallurgie and Vargön Alloys A. B. have not produced any figures enabling the President of the Court of First Instance to assess their current financial position. As for Ferroatlántica, the data for May 2001 show that the losses it is making represent only a very small percentage of its turnover and, as a proportion of turnover, are lower than those of Péchiney Electrométallurgie and Vargön Alloys A. B. for the year 2000.

43 Third, the Commission denies that it is 'obvious' that the hypothetical decline in results will prevent the ferro-silicon production facility from remaining viable. In the present case, it is simply a question of determining whether the applicants are, by reason of the contested decision, incapable of surviving until the judgment in the main action. According to the report of Vargön Alloys' auditor, that company can survive for a limited time, even at the projected profit levels. Moreover, the applicants have not envisaged the possibility of adopting rationalisation measures designed to reduce costs and ensure their survival until final judgment in the main proceedings.

44 The Commission also points out that the production of ferro-silicon represents only a relatively small part of the range of activities of the economic entities to which the applicants belong. The President of the Court of First Instance must take account of the financial resources available to each applicant, even if those resources do not derive from the activity referred to in the contested decision. The

Commission notes that, during the investigation period, the turnover of Péchiney Electrométallurgie, Vargön Alloys A. B. and Ferroatlántica in the ferro-silicon sector represented, on average, 15% of their total turnover. In particular, the operations of Péchiney Electrométallurgie represent only 4% of those of the Péchiney group. This means that a hypothetical fall of 15% in turnover from sales of ferro-silicon would result in only a 2.25% reduction in the applicant's total turnover.

45 Proof that suspension of the contested decision is necessary to ensure the applicants' survival is also needed given that two of them were already showing a loss whilst the anti-dumping measures were in force. Indeed, Vargön Alloys made a loss in 1998, 1999 and 2000, as did Péchiney Electrométallurgie in 1999 and 2000. Ferroatlántica has not produced any data for the period prior to the adoption of the contested decision.

46 It should therefore have been demonstrated that the rationalisation measures which would enable them to continue their operations in spite of the losses sustained before the adoption of the contested decision are not enough to ensure their survival after that event.

47 Finally, the Commission claims that the applicants have provided no evidence that their financial position has seriously declined since the anti-dumping measures were repealed, nor have they shown any causal link between the alleged deterioration and the adoption of the contested decision.

48 In the light of the foregoing, the Commission concludes that the applicants have not provided economic and/or accounting data enabling the President of the Court to formulate a sufficiently well-founded prediction of their chances of survival during the period prior to delivery of the judgment in the main action.

Balance of interests

49 The applicants weigh their interest in obtaining the measures sought against the interests of the Community users grouped under the concept of the Community interest (order of the President of the Court of Justice in Case 77/87 R *Technointorg* v *Council* [1987] ECR 1793). They maintain that the adoption of anti-dumping measures has had a negligible effect on those users, namely 0.1% of their production costs. The applicants conclude from this that their interest prevails over that of the users.

50 The Commission argues that the interim measures sought prejudge the decision to be made on the substance of the case, and that their possible effect tilts the balance in favour of refusing to grant such measures.

51 Where an importer or exporter obtains the temporary suspension of anti-dumping measures in judicial proceedings for interim relief, he runs the risk of having retroactively to pay anti-dumping duties if his application in the main action is dismissed. This has a tendency to curb the flow of imports. Conversely, where a Community producer applies for an interim relief in the form of the temporary maintenance of anti-dumping duties (or the establishment of a registration procedure, with or without the lodging of securities by the importers), the risk is not borne by the applicant but by third parties, namely the importers. It follows that even if the Community industry concerned does not succeed in the main action, it will have benefited from protection because, even in the case of a simple registration of imports, the importers will be exposed to the risk of having retroactively to pay anti-dumping duties and this will cause the flow of imports to slow.

52 The Commission argues that, in balancing the interests involved, it is necessary to take into account the irrevocable reduction of imports that the importers will face if the present application succeeds.

Findings of the President of the Court

53 It is first necessary to examine whether the complaints raised by the applicants against the contested decision justify *prima facie* the grant of one or other of the interim measures sought.

54 In its written observations, the Commission refrained from examining the question whether the pleas put forward by the applicants appear, *prima facie*, to be well founded.

55 At the hearing, the Commission expressly stated that it did not deny the force of the pleas raised by the applicants.

56 The President of the Court considers that certain of the complaints raised do not seem, *prima facie*, to be wholly unfounded and that they are such as to give rise to doubts regarding the legality of the contested decision. The Commission's submissions at the hearing have not, at this stage, removed those doubts.

57 Thus, in the context of the second part of their first plea, the applicants state that the Commission infringed Article 21(2) and (5) of the basic regulation in using information provided by users after the period specified in the notice initiating the review proceeding had expired. When questioned about this at the hearing, the Commission admitted that some information had been received late, and that in spite of this it had indeed taken that information into consideration.

58 Moreover, the final part of the first plea, in which the applicants contend that the Commission infringed Article 6(6) of the basic regulation in refusing to organise a meeting designed to enable their views to be set against those of the users and to enable them to present argument in rebuttal, raises a delicate question as to the scope of Articles 6 and 21 of the basic regulation and, ultimately, of the extent of the rights of complainants in the assessment of the Community interest. The reply to that question does not emerge clearly from the case-law, as it stands at present, either of the Court of First Instance or of the Court of Justice.

59 In those circumstances, the present application cannot be dismissed on the ground that a *prima facie* case has not been made out and it is therefore necessary to consider whether it satisfies the condition of urgency.

60 On this point, it is settled case-law that the urgency of an application for interim measures is to be assessed by reference to the need for an interim order, in order to prevent the party seeking the interim measure suffering serious and irreparable damage. It is for that party to prove that it cannot wait for the outcome of the main action without suffering damage of that kind (orders of the President of the Court of Justice of 12 October 2000 in Case C-278/00 R *Greece* v *Commission* [2000] ECR I-8787, paragraph 14, and of the President of the Court of First Instance of 28 May 2001 in Case T-53/01 R *Poste Italiane* v *Commission* [2001] ECR II-1479, paragraph 110).

61 It does not have to be established with absolute certainty that the harm is imminent. It is sufficient that the harm in question, particularly when it depends on the occurrence of a number of factors, should be foreseeable with a sufficient degree of probability (order in *Commission* v *Atlantic Container Line and Others*, cited above, paragraph 38, and order of the President of the Court of First Instance of 8 December 2000 in Case T-237/99 R *BP Nederland and Others* v *Commission* [2000] ECR II-3849, paragraph 49). However, the applicant must still prove the facts forming the basis of their claim that serious and irreparable damage is likely (order of the President of the Court in Case C-335/99 P(R) *HFB and Others* v *Commission* [1999] ECR I-8705, paragraph 67).

62 In this case the prospect that the three applicant undertakings will suffer serious damage in the absence of interim measures is established.

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.

65 As for the irreparable nature of the damage alleged by the applicants, it is firmly settled case-law 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 (orders of the President of the Court in Case C-213/91 R *Abertal and Others* v *Commission* [1991] ECR I-5109, paragraph 24, and in Case C-471/00 P(R) *Commission* v *Cambridge Healthcare Supplies* [2001] ECR I-2865, paragraph 113; orders of the President of the Court of First Instance in Case T-70/99 R *Alpharma* v *Council* [1999] ECR II-2027, paragraph 128, Case T-169/00 R *Esedra* v *Commission* [2000] ECR II-2951, paragraph 44, and Case T-339/00 R *Bactria Industriehy-*

giene-Service v *Commission* [2001] ECR II-1721, paragraph 94). That case-law is based on the premiss that damage of a pecuniary nature, which would not disappear simply as a result of compliance by the institution concerned with the judgment in the main proceedings, constitutes economic loss which could be made good by the means of redress provided for in the Treaty, in particular in Articles 235 EC and 288 EC (see, in particular, orders of the President of the Court of First Instance in Case T-6/97 R *Comafrica and Dole Fresh Fruit Europe* v *Commission* [1997] ECR II-291, paragraph 49; Case T-230/97 R *Comafrica and Dole Fresh Fruit Europe* v *Commission* [1997] ECR II-1589, paragraph 38, and *Esedra* v *Commission*, cited above, paragraph 47.

66 On application of those principles, an interim measure is justified if it appears that, without that measure, the applicants would be in a situation that could imperil its existence before final judgment in the main action (see, in particular, the order in *Poste Italiane* v *Commission*, cited above, paragraph 120). In such a case the disappearance of the applicant before the decision on the substance of the case would make it impossible for that party to institute any judicial proceedings for compensation.

67 In the present case the applicants have not succeeded in showing that the impairment of their economic viability is such that rationalisation measures would not be sufficient to enable them to continue producing ferro-silicon until final judgment in the main action.

68 Furthermore, it is firmly settled in case-law that the assessment of the material circumstances of an applicant can be carried out by taking into consideration, amongst other things, the characteristics of the group to which the applicant is linked through its shareholders (orders of the President of the Court of Justice in Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815, paragraph 36; Case C-477/00 P(R) *Commission* v *Roussel and Roussel Diamant* [2001] ECR I-3037, paragraph 105; orders of the President of the Court of First Instance in Case T-18/96 R *SCK and FNK* v *Commission* [1996] ECR II-407, paragraph 35; Case T-260/97 R *Camar* v *Commission and Council* [1997] ECR II-2357, paragraph 50, and Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 155).

69 In this respect, the applicants did not, at the hearing, invalidate the Commission's assertions that each of them is part of a large group of companies and that their turnover attributable to sales of ferro-silicon represents, on average, 15% of the total turnover of the groups in question. In those circumstances the losses which would arise, for the applicant companies, from the application of the contested decision could probably be compensated for, within the group, by profits generated from the sales of other products, and are not therefore such as to jeopardise their very existence.

70 However, it is necessary to take into account the circumstances peculiar to this case.

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 subsequently be compensated. In such a situation, the uncertainty thus identified leads to the conclusion that the damage is also irreparable in nature.

76 Since it has been found that the three applicant undertakings have proven the risk of serious and irreparable damage, the same finding must be made in the case of Euroalliages, the association responsible for studying the problems facing manufacturers of ferro-alloys and other electrometallurgical products in at least one of the Member States of the European Union.

77 Seen solely from the applicants' point of view, the problem leads, therefore, to the conclusion that there is urgency. It is nevertheless necessary in proceedings under Article 242 EC and 243 EC to balance all of the interests at stake.

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* 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.

86 In the light of all of the foregoing, it is appropriate to order 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.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **Imports of ferro-silicon originating in the People's Republic of China, Kazakhstan, Russia and Ukraine are subject to registration without provision of security by importers.**

2. **The costs are reserved.**

Luxembourg, 1 August 2001.

H. Jung — Registrar

B. Vesterdorf — President