JUDGMENT OF THE GENERAL COURT (Second Chamber)

25 October 2011 *

In Case T-190/08,

Chelyabinsk Electrometallurgical Integrated Plant OAO (CHEMK), established in Chelyabinsk (Russia),

Kuzneckie Ferrosplavy OAO (KF), established in Novokuznetsk (Russia),

represented by P. Vander Schueren, lawyer,

applicants,

v

Council of the European Union, represented initially by J.-P. Hix, and subsequently by J.-P. Hix and B. Driessen, acting as Agents, assisted initially by G. Berrisch and G. Wolf, and subsequently by G. Berrisch, lawyers,

defendant,

* Language of the case: English.

supported by

European Commission, represented initially by H. van Vliet and K. Talabér-Ritz, and subsequently by H. van Vliet and M. França, acting as Agents,

intervener,

APPLICATION for partial annulment of Council Regulation (EC) No 172/2008 of 25 February 2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ferro-silicon originating in the People's Republic of China, Egypt, Kazakhstan, the former Yugoslav Republic of Macedonia and Russia (OJ 2008 L 55, p. 6), in so far as it affects the applicants,

THE GENERAL COURT (Second Chamber),

composed of I. Pelikánová, President, K. Jürimäe (Rapporteur) and S. Soldevila Fragoso, Judges,

Registrar: N. Rosner, Administrator,

having regard to the written procedure and further to the hearing on 18 May 2010,

gives the following

Judgment

Background to the dispute

1 The applicants — Chelyabinsk Electrometallurgical Integrated Plant OAO (CHEMK) and Kuzneckie Ferrosplavy OAO (KF) (Kuznetsk Ferroalloy Works OAO) — are two companies established in Russia and active in the production of ferro-silicon. At the material time, the sales of those two companies in the European Community were effected through related companies.

2 Following a complaint filed on 16 October 2006 by Euroalliages (the Liaison Committee of the Ferro-Alloy Industry), the Commission of the European Communities (now 'the European Commission'; 'the Commission') initiated an anti-dumping proceeding, concerning imports of ferro-silicon originating in the former Yugoslav Republic of Macedonia, China, Egypt, Kazakhstan and Russia, pursuant to 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), as amended ('the basic regulation') (replaced by Council Regulation (EC) No 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (OJ 2009 L 343, p. 51, corrigendum in OJ 2010 L 7, p. 22)) and, in particular, pursuant to Article 5 of the basic regulation (now Article 5 of Regulation No 1225/2009). The notice of initiation of the proceeding was published in the *Official Journal of the European Union* of 30 November 2006 (OJ 2006 C 291, p. 34).

The investigation into dumping and injury covered the period from 1 October 2005 to 30 September 2006 ('the investigation period'). The examination of trends relevant for the assessment of injury covered the period from January 2003 to the end of the investigation period ('the period under consideration').

3 In the course of that proceeding, the applicants and their related companies lodged their replies to the Commission's anti-dumping questionnaire on 15 January 2007. On the same date, they also submitted comments concerning the injury; the causal link between the alleged injury and the imports at issue; and the lawfulness of the initiation of the anti-dumping proceeding ('the comments on the injury').

4 From 2 May to 7 May 2007, Commission officials visited the premises of the applicants and their related companies in order to verify the data which they had supplied.

5 On 5 June 2007, a hearing was held at the Commission, during which the applicants presented their point of view on the injury, the causal link between that injury and the dumped imports, and the lawfulness of the decision to initiate the anti-dumping proceeding. As regards the causal link, the applicants highlighted, during the hearing, the role of steel demand and production costs, in particular energy costs, as well as the decision taken by a number of the Community producers voluntarily to switch to the production of other products and, in some cases, to cease production of ferro-silicon.

6 On 29 August 2007, the Commission published Regulation (EC) No 994/2007 of 28 August 2007 imposing a provisional anti-dumping duty on imports of ferro-silicon originating in the People's Republic of China, Egypt, Kazakhstan, the former Yugoslav Republic of Macedonia and Russia (OJ 2007 L 223, p. 1; 'the provisional regulation').

The provisional regulation imposed inter alia a provisional anti-dumping duty, the rate of which was set at 22.8 % for the applicants' products.

7 By letter dated 30 August 2007, the Commission disclosed to the applicants the essential facts and considerations on the basis of which the provisional measures had been adopted ('the provisional disclosure document'). By letter of 10 September 2007, the Commission sent the applicants a supplement to the provisional disclosure document concerning, more specifically, the question of the lawfulness of the initiation of the anti-dumping proceeding ('the supplementary provisional disclosure document').

8 On 1 October 2007, the applicants submitted their comments on the provisional disclosure document and on the supplementary provisional disclosure document. They reiterated their arguments concerning the assessment of the injury, the existence of a causal link between that injury and the dumped imports, and the lawfulness of the initiation of the anti-dumping proceeding. They also stated that the calculation of the export price was incorrect since the related importer's profit margin, which was used to make that calculation, had been overstated, and that they had been the subject of 'discrimination', since the provisional disclosure document had been communicated early to Silmak Ltd, a producer of ferro-silicon established in the former Yugoslav Republic of Macedonia.

9 On 18 December 2007, the Commission sent the applicants a letter setting out the essential facts and considerations on the basis of which it proposed to recommend the imposition of definitive measures ('the definitive disclosure document'). The definitive disclosure document contained an annex specifically relating to CHEMK ('the definitive disclosure document specific to CHEMK'). In the definitive disclosure document, the Commission repeated its findings regarding the injury and the causal link. With regard to the calculation of the export price, the Commission explained

that it had corrected the profit margin used to determine that price, no longer using the profit margin of the importer related to the applicants but the profit deemed to have accrued to an unrelated importer. However, the Commission did not, in the definitive disclosure document, alter its position regarding the lawfulness of the initiation of the anti-dumping proceeding and did not address the problem raised by the applicants concerning the early disclosure of the provisional disclosure document to Silmak.

10 The applicants submitted their comments on the definitive disclosure document by letter sent to the Commission on 7 January 2008. In that letter, as in the comments on the provisional disclosure document, the applicants devoted considerable argument to the matters of the determination of injury and the causal link between the alleged injury and the dumped imports. They also disputed the new method of calculating the profit margin to be taken into account in constructing the export price.

11 On 8 February 2008, the applicants submitted to the Commission a request for suspension of the anti-dumping measures, in accordance with Article 14(4) of the basic regulation (now Article 14(4) of Regulation No 1225/2009).

12 On 25 February 2008, the Council of the European Union adopted Regulation (EC) No 172/2008 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of ferro-silicon originating in the People's Republic of China, Egypt, Kazakhstan, the former Yugoslav Republic of Macedonia and Russia (OJ 2008 L 55, p. 6; 'the contested regulation'). Under Article 1 of the contested regulation, the rate of the definitive anti-dumping duty applicable to the net, free-at-Community-frontier price, before duty, was set at 22.7 % for the products manufactured by the applicants.

13 By letter of 28 February 2008, the Commission refused the applicants' request for suspension.

Procedure and forms of order sought by the parties

14 By application lodged at the Court Registry on 14 May 2008, the applicants brought the present action, claiming that the Court should annul not only the contested regulation but also, in the alternative, the Commission decision of 28 February 2008 refusing the request, which they had sent to the Commission by letter of 8 February 2008, for suspension of the anti-dumping measures. The action has been brought against the Council and the Commission.

15 By document lodged at the Court Registry on 30 May 2008, the applicants applied for the adoption of measures of organisation of procedure and measures of inquiry.

16 By document lodged at the Court Registry on 19 September 2008, the Commission raised an objection of inadmissibility in respect of the application for annulment of its decision of 28 February 2008. By separate document, also lodged at the Court Registry on 19 September 2008, the Commission sought leave to intervene in the present proceedings in support of the form of order sought by the Council, in the event that the action is declared inadmissible in so far as it is directed against the above decision.

17 By document lodged at the Court Registry on 12 January 2009, the applicants submitted their observations on that objection of inadmissibility.

18 By order of 12 May 2009 in Case T-190/08 *CHEMK and KF* v *Council and Commission*, not published in the ECR, the General Court (Second Chamber) dismissed the action as inadmissible in so far as it was directed against the Commission decision of 28 February 2008. By the same order, the Court granted the Commission leave to intervene in support of the form of order sought by the Council.

19 By letter of 26 June 2009, the Commission informed the Court that it waived the right to lodge a statement in intervention, but that it would take part in the hearing.

20 The applicants claim that the Court should:

— annul the contested regulation in so far as it affects the applicants;

— order the Council to pay the costs.

21 The Council, supported by the Commission, contends that the Court should:

— dismiss the action;

— order the applicants to pay the costs.

Law

22 In support of the action, the applicants put forward five pleas in law. By the first plea, the applicants contest the determination of the export price. The second plea concerns the price undertaking offered by Silmak. By the third plea, the applicants challenge the assessment of injury. By the fourth plea, the applicants call in question the finding of a causal link between the dumped imports and the injury. Lastly, by the fifth plea, the applicants take issue with the Commission for failing to grant their requests for additional non-confidential information regarding the complaint.

1. *First plea: use of a notional profit margin for the construction of the export price*

The first part of the first plea: error of law in the interpretation of Article 2(9) of the basic regulation

Arguments of the parties

23 The applicants maintain that the Council erred in law in the interpretation of Article 2(9) of the basic regulation (now Article 2(9) of Regulation No 1225/2009), in so far as it considered that, under that provision, it had an obligation to use the notional

profit margin of unrelated importers and not the actual profit margin of the related importer. According to the applicants, whilst Article 2(9) of the basic regulation does not require any specific method to be used for determining the reasonable margin for profit, it does not preclude the Council from using the actual profit margin of related importers, as is demonstrated by the Council's past practice. In any event, neither Article 2(9) of the basic regulation nor alleged consistent practice makes it legally binding for the Council to use the profit margin of unrelated importers.

24 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

25 As a preliminary point, it should be noted that Article 2(8) of the basic regulation (now Article 2(8) of Regulation No 1225/2009) provides that the export price is the price actually paid or payable for the product when sold for export to the Community. The first subparagraph of Article 2(9) of the basic regulation (now the first subparagraph of Article 2(9) of Regulation No 1225/2009) provides that, in cases where there is no export price or where it appears that the export price is unreliable because of an association or a compensatory arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or, if the products are not resold to an independent buyer, or are not resold in the condition in which they were imported, on any reasonable basis.

26 It is therefore apparent from Article 2(9) of the basic regulation that the Commission and the Council may treat the export price as unreliable in two cases, namely where there is an association between the exporter and the importer or a third party or a compensatory arrangement between the exporter and the importer or a third party. In any other case, where an export price exists, the institutions are required to base their determination of dumping on that price (Case T-88/98 *Kundan and Tata* v *Council* [2002] ECR II-4897, paragraph 49).

27 It should also be noted that, under the second subparagraph of Article 2(9) of the basic regulation (now the second subparagraph of Article 2(9) of Regulation No 1225/2009), where the export price is constructed on the basis of the price to the first independent buyer, or on any reasonable basis, adjustment for all costs incurred between importation and resale, and for profits accruing, is to be made so as to establish a reliable export price, at the Community frontier level. The third subparagraph of Article 2(9) of the basic regulation (now the third subparagraph of Article 2(9) of Regulation No 1225/2009) provides that the items for which adjustment is to be made are to include a reasonable margin for selling, general and administrative costs and profit.

28 Although Article 2(9) of the basic regulation provides that an adjustment is to be made for a profit margin, that provision does not — as the parties point out — lay down the method for calculating or determining that margin. It merely states that the profit margin that is to be adjusted must be reasonable.

29 According to case-law, such a reasonable profit margin may, where there is an association between producer and importer within the Community, be based not on information from the associated importer, which may be influenced by that association, but on information from an unrelated importer (see, with regard to Article 2(8)(b) of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped

or subsidised imports from countries not members of the European Economic Community (OJ 1984 L 201, p. 1), which is substantively identical to Article 2(9) of the basic regulation, Joined Cases 273/85 and 107/86 *Silver Seiko and Others* v *Council* [1988] ECR 5927, paragraph 25, and Joined Cases 277/85 and 300/85 *Canon and Others* v *Council* [1988] ECR 5731, paragraph 32).

30 Accordingly, in the light of the foregoing, Article 2(9) of the basic regulation must be interpreted as giving institutions the choice between using the actual profit margin of the related importer and using a notional profit margin of unrelated importers, the sole obligation being that the margin must be reasonable.

31 It is in the light of those principles that it is appropriate to consider the applicants' allegation that the Council erred in law in the interpretation of Article 2(9) of the basic regulation.

32 First of all, it should be noted that it is agreed between the parties that, during the investigation period, sales of ferro-silicon produced by the applicants took place through related companies. Consequently, the institutions were not caught by the obligation, laid down in Article 2(8) of the basic regulation, to take as the basis the actual export price, that is to say, the price actually paid for the product when sold for export to the Community. On the contrary, it was possible in the circumstances to apply Article 2(9) of the basic regulation; in other words, it was permissible to construct the export price, which means also that the institutions were free to choose any method which would enable a reasonable profit margin to be determined.

33 Also, it should be noted that the applicants do not dispute that finding. On the contrary, they state that the institutions were free to choose between the notional profit margin of an unrelated importer and the actual profit margin of the related importer. None the less, as the applicants stated in reply to a question raised by the Court by way of a measure of organisation of procedure, it is apparent, in their opinion, from the words used by the institutions — both in paragraph 41 of the definitive disclosure document and in recital 41 to the contested regulation — that the institutions considered themselves to be under an obligation, pursuant to Article 2(9) of the basic regulation, to use the notional profit margin of an unrelated importer when calculating the export price.

34 The Court considers that the wording of paragraph 41 of the definitive disclosure document and of recital 41 to the contested regulation do not support the applicants' assertion. The institutions state at those points that, in line with consistent practice, the profit to be used should be based on the profit achieved by unrelated importers. That statement makes no mention of an obligation to use the notional profit margin of an unrelated importer. It is simply a reference to the institutions' practice, in accordance with which that margin is generally used for calculating the export price where there is an association between an exporter and an importer.

35 That interpretation of paragraph 41 of the definitive disclosure document and of recital 41 to the contested regulation — to the effect that the institutions intended to refer merely to a practice which, according to circumstances, is or is not observed — is borne out by the institutions' past practice as described by the applicants themselves in their pleadings. Thus, the applicants refer in their pleadings to Council Regulation (EEC) No 374/87 of 5 February 1987 definitively collecting the provisional anti-dumping duty and imposing a definitive anti-dumping duty on imports of housed bearing units originating in Japan (OJ 1987 L 35, p. 32), in which the Council used the actual profit margin of related importers to construct export prices.

36 In the light of the foregoing, it must be held that the use, in the present case, of the notional profit margin of unrelated importers did not come about because the institutions believed themselves to be under an obligation to use the profit margin of unrelated importers but because they chose to do so, since the profit margin of a related importer is distorted by the transfer price between the related companies.

37 It follows that, contrary to what the applicants claim, no error of law was made in that regard.

38 For the sake of completeness, it should be noted that it is settled law that, in the field of measures to protect trade, the institutions enjoy a wide discretion and the powers of review enjoyed by the Courts of the European Union are restricted accordingly (Case T-97/95 *Sinochem* v *Council* [1998] ECR II-85, paragraph 51, and Case T-118/96 *Thai Bicycle* v *Council* [1998] ECR II-2991, paragraphs 32 and 33). In the application of that case-law, no exception falls to be made for the determination of a reasonable profit margin since it necessarily entails complex economic assessments (see, by analogy, Case T-51/96 *Miwon* v *Council* [2000] ECR II-1841, paragraph 42, and *Kundan and Tata* v *Council*, paragraph 26 above, paragraph 50).

39 As it is, in the context of this part of the first plea, the applicants merely claim that the Council erred in law in interpreting Article 2(9) of the basic regulation, since it erroneously believed that it was under an obligation to use the notional profit margin of unrelated importers, whereas that provision does not preclude the use of the actual profit margin of related importers, and at no time do they try to show that the institutions made a manifest error of assessment in so far as they decided in fact to use that notional profit margin rather than the actual profit margin of the related importer.

40 It follows that the first part of the first plea must be rejected as unfounded.

The second part of the first plea: breach of the obligation to state reasons

Arguments of the parties

41 The applicants claim that the Council acted in breach of the obligation to state reasons, as laid down in Article 253 EC, when it decided, without an adequate explanation, not to use the actual profit margin of the related importer and to construct the export price on the basis of a notional profit margin for an unrelated importer.

42 First, the applicants argue, the Council never provided them with the reasons which had led it to find that the actual profit of their related importer was less reasonable than a notional profit margin based on the profit margins of unrelated importers. Secondly, the mere reference by the Council to its past practice of using a notional profit margin determined by reference to the profit margin of unrelated importers is not an adequate explanation for the purposes of Article 235 EC.

43 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

44 According to the case-law, the statement of reasons required by Article 253 EC must show clearly and unequivocally the reasoning of the European Union ('EU') 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 Courts of the European Union to exercise their powers of review (Case C-76/01 P *Eurocoton and Others* v *Council* [2003] ECR I-10091, paragraph 88, and Case T-48/96 *Acme* v *Council* [1999] ECR II-3089, paragraph 141).

45 In that regard, it should be made clear that the Council is not required to reply, in the statement of reasons for the regulation, to all the points of fact and law raised by the persons concerned during the administrative procedure (Case T-171/97 *Swedish Match Philippines* v *Council* [1999] ECR II-3241, paragraph 82). Moreover, the statement of reasons need not give details of all relevant factual or legal aspects, and the question whether it meets the applicable requirements must be assessed with particular regard to the context of the measure and to all the legal rules governing the matter in question (Case T-164/94 *Ferchimex* v *Commission* [1995] ECR II-2681, paragraph 118). It is sufficient if the Council sets out the facts and legal considerations which have decisive importance in the context of the regulation (see, to that effect, Case T-387/94 *Asia Motor France and Others* v *Commission* [1996] ECR II-961, paragraphs 103 and 104).

46 In the present case, the Council explained, in recital 41 to the contested regulation and in paragraph 41 of the definitive disclosure document, that: (i) the profit used for constructing the export price at the provisional stage was that of the related importer concerned; (ii) in line with the consistent practice of the EU institutions, the amount of profit to be used should be based on that achieved by unrelated importers; and (iii)

the profit margin used at the provisional stage had therefore had to be corrected, leading to a slight increase in the profit used, although the applicants claimed that the profit level was overstated.

47 Contrary to the assertions made by the applicants, it is shown clearly and unequivocally, in recital 41 to the contested regulation and in paragraph 41 of the definitive disclosure document, that the institutions' decision, taken at the stage when the definitive anti-dumping measures were adopted, not to use the actual profit margin of the importer related to the applicants and to construct the export price on the basis of a notional profit margin for an unrelated importer was the direct consequence of the link existing between the applicants and their importer. At the same time, the institutions informed the applicants that they considered it more reasonable to use the notional profit margin of unrelated importers rather than the profit margin of the related importer.

48 Moreover, it should be observed that, in their comments on the definitive disclosure document, the applicants challenged the institutions' decision to use a notional profit margin, thus showing that they had understood the institutions' reasoning perfectly and were in a position to defend their rights. In particular, the applicants explained the reasons why they considered it inappropriate in the circumstances to use the profit margin of an unrelated company. Secondly, they explained that the actual profit margin of the related importer was reliable and reasonable. Thirdly, they argued that, even though it had been the Commission's consistent practice to use a notional profit margin of an unrelated importer, there was nothing in the basic regulation to prevent the Commission from using the actual profit margin of a related company.

49 The second part of the first plea must therefore be rejected as unfounded.

The third part of the first plea: infringement of the rights of defence

Arguments of the parties

50 The applicants maintain that the Council adversely affected their rights of defence since, as it had not stated reasons, they were not in a position to defend their interests properly. Thus, until the defence was lodged, the Council had never presented the applicants with an opportunity to comment on its rationale for the use of the notional profit margin. In particular, it was only at the defence stage that the Council explained the nature of the error made, at the provisional regulation stage, when determining the actual profit margin, an error of which the applicants were not informed until 3 March 2008, after the contested regulation had been adopted.

51 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

52 It is settled law that the rights of the defence must be observed not only in the course of proceedings which may result in the imposition of penalties, but also in investigative proceedings prior to the adoption of anti-dumping regulations which may directly and individually affect the undertakings concerned and entail adverse consequences for them (Case C-49/88 *Al-Jubail Fertilizer* v *Council* [1991] ECR I-3187,

paragraph 15). In particular, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury (*Al-Jubail Fertilizer*, paragraph 17).

53 It is in the light of the above considerations that it must be determined whether the Council acted in breach of the applicants' rights of defence.

54 First, with regard to the applicants' argument that, prior to the statement in defence, the Council never presented the applicants with an opportunity to comment on its rationale for the use of the notional profit margin, it should be pointed out that, as was stated in paragraphs 47 and 48 above, both paragraph 41 of the definitive disclosure document and recital 41 to the contested regulation stated clearly and unequivocally that the institutions' decision not to use the actual profit margin of the importer related to the applicants had been the direct consequence of the link existing between the applicants and their importer. Moreover, in their comments on the definitive disclosure document, the applicants challenged the institutions' decision to use a notional profit margin. It follows that, not only were the applicants in a position in which they could effectively make known their views on the use of a notional profit margin, but also they did in fact make known their views in that respect.

55 With regard to the applicants' argument that, until the defence stage, the Council gave them no explanation concerning the nature of the error made when determining the actual profit margin, it should be pointed out that the actual profit margin was

used to construct the export price for the purposes of introducing the provisional anti-dumping measures. On the other hand, it is apparent from recital 41 of the contested regulation that a notional profit margin was used at the stage of introducing the definitive anti-dumping measures. However, the applicants have not shown how the explanations which, they argue, they received out of time were relevant for the defence of their interests in the context of the adoption of the contested regulation.

56 It follows that there was no infringement of the applicants' rights of defence.

57 The third part of the first plea must therefore be rejected as unfounded.

The fourth part of the first plea: breach of the principle of sound administration

Arguments of the parties

58 The applicants maintain, in the reply, that the Council failed to observe its duty to exercise due care and acted in breach of the principle of sound administration. In their submission, it is clear from the defence that the Council made a manifest error of

assessment which the applicants were prevented from challenging in the application because the Council had not addressed their arguments in a timely manner.

59 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

60 Under the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to the General Court by virtue of the first paragraph of Article 53 of that Statute and Article 44(1)(c) and (d) of the Rules of Procedure of the General Court, all applications must indicate the subject-matter of the proceedings and the form of order sought by the applicant, and include a brief statement of the grounds relied on. The information given must be sufficiently clear and precise to enable the defendant to prepare his defence and the General Court to decide the case. In order to ensure legal certainty and the sound administration of justice, it is necessary, if an action is to be admissible, for the essential facts and points of law on which the action is based to be apparent from the text of the application itself, even if only stated briefly, provided that the statement is coherent and comprehensible (Case T-195/95 *Guérin automobiles* v *Commission* [1997] ECR II-679, paragraph 20, and Case T-19/01 *Chiquita Brands and Others* v *Commission* [2005] ECR II-315, paragraph 64).

61 As it is, the facts and points of law on which the applicants base this complaint are not stated in a comprehensible manner in their pleadings. Thus, they claim that, because the Council had not addressed their arguments in a timely manner, they were prevented from challenging a manifest error of assessment. However, the applicants do not specify the arguments to which they refer; nor do they identify the manifest error of assessment alleged.

62 Accordingly, the fourth part of the first plea must be rejected as inadmissible and, consequently, the first plea must be rejected in its entirety.

2. *The second plea, concerning the price undertaking offered by Silmak*

The first part of the second plea: breach of the principle of equal treatment

Arguments of the parties

63 The applicants claim that the Council acted in breach of the principle of equal treatment by communicating the provisional disclosure document to Silmak early, thus enabling it to offer a price undertaking. They point out that the Council failed to disclose that document to them at the same time, even though they were in exactly the same situation as Silmak. They also submit that, according to the judgment in Case C-323/88 *Sermes* [1990] ECR I-3027 (paragraphs 46 and 47), 'discrimination' cannot be justified by reference to differences in the legal status of the interested parties unless there is a legislative basis for those differences. As it is, the Council itself referred to consistent practice, not to a legal act.

64 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

65 The principle of non-discrimination prohibits both treating similar situations differently and treating different situations in the same way unless there are objective reasons for such treatment (Case C-422/02 P *Europe Chemi-Con (Deutschland)* v *Council* [2005] ECR I-791, paragraph 33).

66 In that regard, the Court considers that the applicants and Silmak could not be regarded as being in similar situations.

67 It should be recalled that the Council explains in its pleadings that the institutions acted in accordance with the principles set out in the conclusions of the European Council which took place in Essen, Germany, on 9 and 10 December 1994, and in Article 36(2) of the Stabilisation and Association Agreement between the European Communities and their Member States, of the one part, and the former Yugoslav Republic of Macedonia, of the other part (OJ 2004 L 84, p. 13; 'the SAA'). In the light of those principles, the Commission has established a consistent practice with respect to anti-dumping investigations concerning countries which are candidates for accession whereby, approximately two months before the imposition of provisional measures, it informs the Stabilisation and Association Council, the government concerned and the exporting producers of the facts on the basis of which it proposes to recommend the imposition of provisional measures. The Council states that that information, which relates only to the facts establishing dumping, is mainly intended to enable the exporter to offer a price undertaking.

68 It should be noted that, as the Council observed, Article 36(2) of the SAA provides that (i) the Stabilisation and Association Council must be informed of the dumping case as soon as the anti-dumping investigation has been initiated and (ii) if no end has been put to the dumping or no other satisfactory solution has been reached within

30 days of the matter being referred to the Stabilisation and Association Council, appropriate measures may be adopted. It is clear from that provision that exchanges between the Commission and exporting producers established in the former Yugoslav Republic of Macedonia must necessarily take place before provisional anti-dumping measures are imposed; otherwise, no satisfactory solution for the purposes of that provision can be envisaged. For the same reason, it is clear from that provision that the essential considerations and facts on the basis of which the institutions propose to recommend the imposition of provisional anti-dumping measures must be disclosed to the exporting producers; otherwise it might be difficult for those producers to propose a satisfactory solution.

69 As Silmak was a producer established in the former Yugoslav Republic of Macedonia, it was covered by that provision and received the provisional disclosure document early, which enabled it to make an offer of a price undertaking to the Commission. Consequently, the early disclosure of that document to Silmak does not constitute a breach of the principle of equal treatment, since, given that Article 36(2) of the SAA applied, Silmak was in a different situation from that of the applicants.

70 That finding is not affected by the argument put forward by the applicants on the basis of *Sermes*, paragraph 63 above.

71 First, contrary to the assertions made by the applicants, the Court of Justice does not state in a general manner in that judgment that 'discrimination' cannot be justified by reference to differences in the legal status of the interested parties unless there is a legislative basis for those differences. In *Sermes*, the applicant claimed that the application of specific provisions relating to German internal trade — which enabled exports to be made, exempt from anti-dumping duties, from the German Democratic Republic to the Federal Republic of Germany — entailed 'discrimination'. In its

judgment, the Court replied that the difference in treatment referred to by Sermes had a legislative basis in a protocol which formed an integral part of the Treaty and could not therefore be regarded as 'discriminatory'. The Court therefore merely held that the fact that a protocol forming an integral part of the Treaty laid down specific provisions relating to German internal trade constituted an objective reason justifying more favourable treatment for exporting producers established in the German Democratic Republic, in accordance with the case-law cited in paragraph 65 above.

72 Secondly, it should in any event be noted that in the present case, as stated in paragraph 68 above, there is a legislative basis for the difference in treatment between Silmak and the applicants, namely, Article 36(2) of the SAA.

73 For the sake of completeness, it should be observed that the applicants have not proved to the requisite legal standard that the finding of 'discriminatory treatment' with regard to disclosure of the provisional disclosure document could have affected the lawfulness of the contested regulation, thereby justifying its annulment. When questioned on that point at the hearing, the applicants stated that they had explained in their pleadings that a result of that 'discriminatory treatment' was that in the contested regulation the Council imposed an obligation to pay anti-dumping duties for a period of five and a half years in the case of the applicants, and for only five years in the case of Silmak.

74 However, assuming, on the one hand, that that contention must be interpreted as meaning that the contested regulation should be annulled, so far as the applicants

are concerned, on the ground that Silmak should also have been obliged to pay anti-dumping duties for a period of five and a half years, it should be borne in mind that, according to case-law, respect for the principle of equal treatment or non-discrimination, as set out in paragraph 65 above, must be reconciled with respect for the principle of legality, according to which a person may not rely, in support of his claim, on an unlawful act committed in favour of a third party (see, to that effect, Case 134/84 *Williams* v *Court of Auditors* [1985] ECR 2225, paragraph 14 and the case-law cited; Case T-308/94 *Cascades* v *Commission* [1998] ECR II-925, paragraph 259; and Case T-23/99 *LR AF 1998* v *Commission* [2002] ECR II-1705, paragraph 367). Accordingly, the applicants cannot base their application for annulment of the contested regulation, in so far as it affects them, on the fact that that regulation, unlawfully, imposes on Silmak an obligation to pay duties for five years only.

75 Assuming, on the other hand, that that contention must be interpreted as meaning that the contested regulation should be annulled, so far as the applicants are concerned, on the ground that the they, like Silmak, should have been obliged to pay anti-dumping duties for a period of five years only, it should be noted that, as emerges from recital 132 to the contested regulation, the applicants offered a price undertaking to the Commission and the latter rejected that undertaking. However, the applicants have not put forward any argument to show that the price undertaking that they could have offered earlier — at the same time as Silmak — would have been different in content from the undertaking they offered after the disclosure of the definitive disclosure document and would therefore have had a better chance of being accepted by the Commission. Thus, the finding of 'discriminatory treatment' in favour of Silmak was not, in any event, capable of justifying annulment of the contested regulation.

76 In the light of all the foregoing considerations, the first part of the second plea must be rejected as unfounded.

The second part of the second plea: infringement of Article 6(7), Article 8(4) and Article 20(1) of the basic regulation

Arguments of the parties

77 The applicants maintain that the Council infringed Article 20(1), Article 6(7) and Article 8(4) of the basic regulation (now Article 20(1), Article 6(7) and Article 8(4) of Regulation No 1225/2009).

78 First, the applicants point out that Article 20(1) of the basic regulation provides that the provisional disclosure document can be communicated to exporters only after provisional anti-dumping measures have been adopted and upon a written request. As it is, according to the applicants, despite the fact that Silmak had made no written request to the Commission for disclosure of the provisional disclosure document, the Commission sent it the document on 11 July 2007, well in advance of the adoption of the provisional regulation.

79 Secondly, the applicants maintain that the price undertaking proposed by Silmak on the basis of the unlawful disclosure of the provisional disclosure document was not added to the non-confidential file of the proceeding until after the formal publication of the provisional regulation, which was, in their view, contrary to Articles 6(7) and 8(4) of the basic regulation. Indeed, the applicants first learned of the price undertaking from the provisional regulation and were not able to inspect its non-confidential version until 3 September 2007.

80 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

81 In the first place, as regards the complaint alleging infringement of Article 20(1) of the basic regulation, it should be pointed out that that provision concerns disclosure to the parties. More specifically, it provides that the parties concerned may request disclosure of the essential facts and considerations on the basis of which provisional measures have been imposed and lays down the practical details. Thus, Article 20(1) of the basic regulation provides that requests for disclosure are to be made in writing immediately following the imposition of provisional measures, and the disclosure is to be made in writing as soon as possible thereafter.

82 However, there is nothing in the wording of that provision from which to conclude, as do the applicants, that the provisional disclosure document cannot be disclosed to exporters until after the adoption of provisional anti-dumping measures and upon a written request. Although it may be inferred from Article 20(1) of the basic regulation that the parties concerned cannot request disclosure of the disclosure document before the imposition of provisional measures and must make their request in writing, that provision does not preclude the Commission from taking the initiative of disclosing that document before the imposition of provisional measures and without a request being made to it in writing to that effect.

83 Thus, the applicants' complaint is based on a misreading of Article 20(1) of the basic regulation and must therefore be rejected.

84 In the second place, as regards the complaint alleging infringement of Article 6(7) and Article 8(4) of the basic regulation, it should be noted that, in essence, Article 6(7) of the basic regulation provides that the parties concerned may apply in writing for leave to inspect the non-confidential file of the proceeding, and that they may make comments on the information on that file and that the Commission must take those comments into consideration. Article 8(4) of the basic regulation provides that parties which offer an undertaking are required to provide a non-confidential version of that undertaking, so that it can be made available to interested parties to the investigation.

85 Again, it should be noted that there is nothing in the wording of those provisions to support the applicants' claim that the fact that the price undertaking offered by Silmak was not added to the non-confidential file of the proceeding until after the formal publication of the provisional regulation was contrary to Articles 6(7) and 8(4) of the basic regulation. Although those provisions impose both an obligation for parties which have offered a price undertaking to provide a non-confidential version of that undertaking and an obligation for the Commission to provide access to that non-confidential version for interested parties which have made a request for it in writing, they do not mention — and, *a fortiori*, impose no obligation — as regards the precise time at which a copy of the price undertaking must be added to the non-confidential file of the proceeding.

86 Accordingly, as with the preceding complaint, it must be held that this complaint is based on a misreading of Article 6(7) and Article 8(4) of the basic regulation and must therefore be rejected.

87 Furthermore, it should be pointed out that a procedural irregularity such as the irregularity relied upon by the applicants in the present case cannot lead to annulment of the contested regulation unless it is actually capable of affecting the applicants'

rights of defence, hence the content of that regulation (see, to that effect, Case 30/78 *Distillers Company* v *Commission* [1980] ECR 2229, paragraph 26).

88 As it is, the applicants have not put forward any argument to show that the price undertaking that they could have offered earlier, after inspecting Silmak's undertaking and the provisional disclosure document, would either have differed in content from the undertaking that they offered after the disclosure of the definitive disclosure document or have had a better chance of being accepted by the Commission. Accordingly, they have not demonstrated that, in the absence of the alleged irregularities, the content of the contested regulation would have been different so far as they are concerned.

89 In the light of the foregoing considerations, the second part of the second plea must be rejected as unfounded.

The third part of the second plea: breach of the obligation to state reasons

Arguments of the parties

90 The applicants maintain that the Council failed to fulfil its obligation to state reasons. They explain that, even though, in their comments on the provisional disclosure document, they had alleged breach of the principle of equal treatment, the Council never explained to them, even in the contested regulation, the reasons why it had

disclosed the provisional disclosure document early, initiated talks on the price undertaking and adopted that undertaking.

91 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

92 This complaint must be examined in the light of the case-law cited in paragraphs 44 and 45 above.

93 In the present case, the Commission set out, in recitals 175 and 180 to the provisional regulation, the reasons why it found Silmak's offer of an undertaking to be acceptable. The Council, too, explained, in recitals 130 to 132 to the contested regulation, the reasons why it had decided not to accept the undertakings offered by the four exporting producers and to withdraw acceptance of the undertaking offered by Silmak. In so doing, the institutions complied with the requirements laid down in the case-law cited in paragraphs 44 and 45 above.

94 However, according to the same case-law and contrary to the assertions made by the applicants, the Council was not required to reply to their comments relating to the allegation that the early disclosure of the provisional disclosure document had given rise to breach of the principle of equal treatment. Although the reasons why price undertakings offered to the Commission are accepted or rejected are essential in the context of the contested regulation, it cannot be said that that is also the case as regards the reasons for early disclosure of the definitive disclosure document to Silmak. In that regard, it should be noted that it has been established in paragraphs 73 to 75 above that the finding of a breach of the principle of equal treatment in connection

with the early disclosure of that document was not capable of affecting the lawfulness of the contested regulation. Accordingly, even if the applicants had obtained explanations concerning the reasons for the early disclosure of the provisional disclosure document, those explanations would not have enlightened them as to the reasons why their price undertaking had been rejected, and Silmak's had been accepted at the provisional stage and rejected at the definitive stage. In other words, the reasons for the early disclosure of the provisional disclosure document cannot be regarded as fundamental to the contested regulation, so that, without explanations concerning those reasons, the applicants would be unable to understand that regulation.

95 The third part of the second plea must therefore be rejected as unfounded.

The fourth part of the second plea: infringement of the applicants' rights of defence

Arguments of the parties

96 The applicants claim that their rights of defence have been infringed, in so far as Silmak's price undertaking was not added to the non-confidential file in due time, that is to say, at a time when the non-confidential data served the rights of defence of the interested parties. Although the Council claims to have added the undertaking to the non-confidential file on 3 August 2007, the applicants point out that the copy of the undertaking that they consulted in the non-confidential file bears the date of 3 September 2007, which means that it was not in fact added to the non-confidential file

before that date. Accordingly, the applicants were unable to offer a price undertaking before the adoption of the provisional measures and their rights of defence were infringed.

97 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

98 It should be noted that, according to the case-law referred to in paragraph 52 above, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views. It is also apparent from the case-law that there can be no question of infringement of the rights of defence if it is established that, in spite of the irregularity committed by the institutions, the applicants were in a position, during the administrative procedure, effectively to make known their views (Case T-147/97 *Champion Stationery and Others* v *Council* [1998] ECR II-4137, paragraph 79). Lastly, it is for the applicant to show that in the absence of that irregularity it would have been better able to defend itself (see, to that effect, Case C-51/92 P *Hercules Chemicals* v *Commission* [1999] ECR I-4235, paragraph 81, and Joined Cases C-238/99 P, C-244/99 P, C-245/99 P, C-247/99 P, C-250/99 P to C-252/99 P and C-254/99 P *Limburgse Vinyl Maatschappij and Others* v *Commission* [2002] ECR I-8375, paragraph 318).

99 In the present case, the applicants claim that the non-confidential version of the price undertaking offered by Silmak should have been added to the file of the proceeding on 3 August 2007, before the adoption of the provisional regulation. However, they do not explain how that irregularity prevented them from effectively making known their views; nor do they explain how, in the absence of that irregularity, they would have been better able to defend themselves. In that regard, although the applicants did not have access to the non-confidential version of the price undertaking offered by Silmak before the adoption of the provisional regulation, they were none the less in a position

to submit such an undertaking to the Commission, as is mentioned in recital 132 to the contested regulation, following disclosure of the definitive disclosure document. The applicants have not put forward any evidence to show that the undertaking that they could have offered earlier, after inspecting Silmak's undertaking, would either have differed in content from the undertaking that they offered following disclosure of the definitive disclosure document or have had a better chance of being accepted by the Commission. It must therefore be held that the applicants would not have been better able to defend themselves if they had had access to Silmak's undertaking before the adoption of the provisional regulation.

100 No breach of the applicants' rights of defence can therefore be imputed to the institutions. It follows that the fourth part of the second plea must be rejected as unfounded.

101 In the light of the foregoing considerations, the second plea must be rejected in its entirety.

3. *The third plea, concerning the injury analysis*

Arguments of the parties

102 The applicants claim that the Council infringed Article 3(6) of the basic regulation (now Article 3(6) of Regulation No 1225/2009) because most of the Community industry did not suffer injury. Indeed, it is common ground that FerroAtlántica SL

and FerroPem SAS, two Community producers of ferro-silicon, which during the investigation period constituted a very substantial part of the Community industry in terms of production capacity and production volume, did not suffer any injury during that period, since their production, sales and capacity utilisation rates remained stable and even increased. The Council nevertheless found, on the basis of Article 4 and Article 3(5) of the basic regulation (now Article 4 and Article 3(5) of Regulation No 1225/2009), that it had to determine the material injury to the Community industry as a whole. The applicants submit that, by so doing, the Council clearly made several 'significant errors'.

103 First, it is erroneous in law, the applicants argue, to state that the assessment of injury requires the Council to consider only those economic factors which affect all members of the Community industry in the same way. In that regard, the applicants submit that, while Article 3 of the basic regulation indeed requires that the material injury should be determined by reference to the Community industry, that provision does not say whether the Commission must rely solely on the performance, established in the form of a weighted average, of the Community industry as a whole or should also consider the individual performance of each Community producer.

104 Secondly, the applicants argue that the Council is required to establish the existence of material injury, within the meaning of Article 3(1) and (6) of the basic regulation (Article 3(1) of the basic regulation having become Article 3(1) of Regulation No 1225/2009). First of all, according to the applicants, since most of the Community industry did not suffer any injury, there can be no material injury to the Community industry, as a matter either of law or of fact. The applicants go on to argue that measures imposed in such circumstances are disproportionate. Lastly, they maintain that a finding that material injury has been caused to the Community industry, when

most of that industry did not in fact suffer injury, cannot be regarded as based on 'reliable and creditworthy evidence' or as having been arrived at in an even-handed manner. As it is, Article 3(2) of the basic regulation (now Article 3(2) of Regulation No 1225/2009) requires that a determination of that kind is to be based on positive evidence and on an objective examination of the impact on the Community industry of the imports alleged to have been dumped.

105 Thirdly, the applicants maintain that the Council's approach, which consists in determining the injury on the basis of weighted average results for the Community industry as a whole, is not provided for in the basic regulation and *a fortiori* is not set forth in that regulation as the only method of determining whether injury exists. Furthermore, if the Council's approach, which consists in determining injury on the basis of the weighted average results for the Community industry as a whole, is correct, that would be at odds with the prohibition against the abuse of rights, which is a general principle of EU law, as demonstrated by the case-law.

106 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

107 The applicants dispute, in essence, the Council's conclusion that the Community industry suffered injury, when, according to the applicants, the production, sales and capacity utilisation rates of two Community producers representing the major part

of the Community industry remained stable and even increased. They argue that, in reaching that conclusion, the Council infringed Article 3(6) of the basic regulation.

108 Examination of the third plea requires a two-stage approach. First, it is necessary to interpret Article 3(6) of the basic regulation and, more generally, Article 3 of that regulation, which concerns determination of injury, in order to determine the obligations which that provision imposes on the institutions in terms of the method for assessing the injury. It is then necessary to decide whether, in the present case, the institutions acted in accordance with the principles laid down in that provision, in the light, inter alia, of the situation of FerroPem and of FerroAtlántica, as described by the applicants.

109 In the first place, with regard to the interpretation of Article 3(6) of the basic regulation, which the applicants claim has been infringed, it should be noted that that provision sets out three principles: (i) an injury analysis requires the institutions to demonstrate the impact of the dumped imports on the Community industry; (ii) it is the impact of the volume and/or price levels of the dumped imports which must be analysed; and (iii) the injury must be material.

110 However, that provision does not describe the method to be followed by the institutions when analysing the impact of the volume and/or prices of dumped imports on the Community industry. In that regard, reference should be made to Article 3(2) and (5) of the basic regulation. Article 3(2) of that regulation provides, generally, that determination of injury is to be based on positive evidence and involve an objective examination. Article 3(5) of the basic regulation provides that the examination of the impact of the dumped imports on the Community industry concerned is to include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry. It sets out a non-exhaustive list of those relevant economic

factors and indices and specifies that 'nor can any one or more of these factors necessarily give decisive guidance'.

111 Accordingly, it is apparent in essence from paragraphs 2, 5 and 6 of Article 3 of the basic regulation, read together, that determination of injury involves an objective examination based on positive evidence of the impact of the volume and/or prices of dumped imports on the state of the Community industry and that that examination consists in an evaluation of the relevant economic factors and indices with regard to the state of that industry.

112 It should also be pointed out that the term 'Community industry', to which paragraphs 2, 5 and 6 of Article 3 of the basic regulation refer, is defined in Article 4(1) of that regulation (now Article 4(1) of Regulation No 1225/2009), which provides that the term 'Community industry' is to be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5(4) of the basic regulation (now Article 5(4) of Regulation No 1225/2009), of the total Community production of those products.

113 Article 5 of the basic regulation concerns the initiation of the anti-dumping proceeding. Article 5(4) provides that a complaint leading to the initiation of an anti-dumping investigation is to be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 % of the total Community production of the product concerned.

114 Thus, it is apparent from analysis of the provisions referred to in paragraphs 109 to 113 above that, although the examination by the institutions must lead to the finding that the injury to the Community industry is material, it is not necessary for all the relevant economic factors and indices to show a negative trend. Also, the institutions must evaluate the impact of the dumped imports on the state of the Community industry as a whole — that is to say, on Community producers as a whole or at least on the state of Community producers which have supported the initiation of the anti-dumping proceeding whose collective output represents more than 50 % of the total Community production of the product concerned — but they are free to choose the method to be used in order to do so. By way of example, as the applicants point out, the institutions are just as entitled to prove that injury has been caused to each Community producer as to prove such injury on the basis of the aggregated or weighted data of Community producers as a whole comprising the Community industry within the meaning of Article 4(1) and Article 5(4) of the basic regulation.

115 In the second place, it is necessary to determine whether, in the circumstances, the analysis carried out by the institutions was consistent with Article 3(6) of the basic regulation and with Article 3 of that regulation more generally, as interpreted in paragraphs 109 to 114 above.

116 In that regard, it should be recalled as a preliminary point that, in the sphere of the common commercial policy and, most particularly, in the realm of measures to protect trade, the institutions of the European Union enjoy a broad discretion by reason of the complexity of the economic, political and legal situations which they have to examine (see Case C-351/04 *Ikea Wholesale* [2007] ECR I-7723, paragraph 40 and the case-law cited, and Case C-535/06 P *Mosaer Baer India* v *Council* [2009] ECR I-7051, paragraph 85).

117 According to case-law, the determination of injury to the Community industry requires an assessment of complex economic situations and review by the Courts of

such an assessment must therefore be limited to verifying whether the procedural rules have been complied with, whether the facts have been accurately stated, and whether there has been a manifest error in the appraisal of those facts or a misuse of powers (*Mosaer Baer India* v *Council*, paragraph 116 above, paragraph 86).

118 In that context, it should be observed that the injury analysis was carried out by the institutions on the basis of data relating to six Community producers, including FerroPem and FerroAtlántica. It should also be observed that the explanations provided by the Commission in that regard — set out in recitals 77 and 78 of the provisional regulation — are not disputed by the applicants. The Commission thus explained that there were seven Community producers of ferro-silicon during the investigation period; that the complaint which prompted the anti-dumping proceeding which gave rise to the contested regulation had been lodged by five Community producers; that a sixth Community producer had decided to support the proceeding by cooperating in the investigation; and that the seventh producer had not taken any position and had supplied no data. According to the Commission, the six cooperating Community producers accounted for 95 % of the Community production of ferro-silicon during the investigation period.

119 On that basis, the institutions analysed the development of the relevant economic factors and indices, from the point of view of the state of the Community industry, in accordance with Article 3(5) of the basic regulation. That analysis was carried out on the basis of the aggregated or weighted data, depending on the type of economic factor or index, of the six Community producers which cooperated in the proceeding. Thus, in recitals 91 to 106 of the provisional regulation, the Commission analysed in particular the evolution of the following: Community production, production capacity, capacity utilisation, stocks, sales, market shares, weighted average prices, profitability, cash flows, investments, return on investments, ability to raise capital, employment, productivity and wages. The figures given in those recitals are not disputed

by the applicants. The Commission concluded in recitals 107 to 109 of the provisional regulation that, although certain economic indices had remained stable or had shown a positive trend, the state of the Community industry had deteriorated significantly during the period under consideration. That analysis was fully confirmed by the Council in recital 82 of the contested regulation.

120 More specifically, the analysis of the evolution of production, of capacity utilisation and of sales — set out in recitals 91, 93 and 95, respectively, of the provisional regulation — disclosed negative trends, although, as the applicants observe, the data provided by FerroPem and FerroAtlántica, which were included in that analysis, were stable or revealed a positive trend.

121 It must therefore be held that the methodology used by the institutions in carrying out that analysis — the use of aggregated or weighted data — is consistent with Article 3(6) of the basic regulation and, more generally, with Article 3 of that regulation, as interpreted in paragraphs 109 to 114 above. It follows that, since none of the arguments raised by the applicants demonstrates that that analysis is flawed by a manifest error of assessment, that analysis cannot be called into question.

122 First, it is irrelevant to argue that it is erroneous in law to state that the injury analysis requires the Council to consider only the economic factors which affect all members of the Community industry in the same way, in view of the fact, established in paragraphs 119 and 120 above, that the Council did not consider only the economic factors which affected all members of the Community industry in the same way.

123 Secondly, it is unconvincing to argue that the determination of material injury to the Community industry, most of which did not in fact suffer injury, cannot be regarded as based on 'reliable and creditworthy evidence' or as having been made in an even-handed manner. It was established in paragraphs 119 and 120 above that the data of FerroPem and FerroAtlántica had been taken into account and that the analysis carried out by the institutions was broadly consistent with Article 3(6) of the basic regulation and, more generally, with Article 3 of the basic regulation. Moreover, the applicants have not adduced any evidence to show that that analysis was flawed by a manifest error of assessment — indicating, for example, that the data of FerroPem and FerroAtlántica concerning production, sales and production capacity should have been weighted and not aggregated.

124 Thirdly, since it lacks precision, the applicants' complaint alleging an abuse of rights must be declared inadmissible, pursuant to the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to the General Court by virtue of the first paragraph of Article 53 of that Statute and Article 44(1)(c) and (d) of the Rules of Procedure of the General Court, as interpreted by the case-law referred to in paragraph 60 above.

125 It follows that the third plea must be rejected as being in part unfounded and in part inadmissible.

4. *The fourth plea, concerning the analysis of the causal link between the dumped imports and the injury*

126 The fourth plea can be broken down into six parts.

The first part of the fourth plea: the impact on the Community industry of the withdrawal from the Community market of third country producers, and of production switches and reductions made by a number of Community producers

Arguments of the parties

127 In the first place, the applicants claim that the Council's findings relating to the impact on the Community industry of the volume of dumped imports, set out in recitals 112 to 114 of the provisional regulation and confirmed in recital 86 to the contested regulation, are manifestly wrong and accordingly in breach of Article 3(6) of the basic regulation. They point out that, in their comments on the provisional disclosure document, they showed that, although the industry had suffered injury, that injury could not have been caused by the dumped imports, since those imports had not facilitated the capture of any market share that was not willingly vacated by the Community ferro-silicon producers.

128 In that regard, first, the applicants maintain that they have established that the increase in the volume of dumped imports was due, to a large extent, to the 'void' left on the Community market as a result of the withdrawal of producers from Norway, Iceland and Venezuela, and the inability of the Community ferro-silicon producers to satisfy the subsequent demand from Community users. Also, the remaining increase in the volume of dumped imports can be explained by the facts that: (i) OFZ a.s., a ferro-silicon producer, switched production to another product; (ii) Huta Laziska S.A., a large Community producer, cut back production very substantially owing to a serious dispute with its energy supplier; and (iii) Vargön Alloys AB, another Community ferro-silicon producer, cut back production owing to high energy costs.

129 Secondly, the applicants add that, even if it were true that the displacement of third country ferro-silicon does not explain a decrease in the market share of the Community industry, its unused capacity or price undercutting, that in itself does not mean that the dumped imports are a material cause of that poor performance. Accordingly, the increase in imports from Venezuela and Iceland is in large part responsible for the Community industry's fall in production, in the same way as the voluntary measures taken by the Community producers because of disputes with electricity suppliers and increasing production costs.

130 In the second place, the applicants maintain — in the reply — on the basis of Article 48(2) of the Rules of Procedure, that the Council made a manifest error of assessment in determining the magnitude and cause of the voluntary production cuts made by the Community industry. In particular, the Council's statements that Huta Laziska switched to the production of silico-manganese owing to electricity cuts and ceased production of ferro-silicon is inconsistent with the data in the file submitted by the applicants and by the complainant; the Council's statement that OFZ did not switch production to silico-manganese contradicts statements made by the complainant as well as OFZ's financial statements; the Council's statement that Vargön Alloys did not have the technological capability to switch production to ferro-chrome is incorrect, as that company's financial statements show; those same financial statements enabled the applicants to claim that Vargön Alloys had decided to cease production owing to electricity cuts.

131 In the third place, the applicants state — again in the reply — that the fact that the Council's allegations concerning Huta Laziska and OFZ, referred to in paragraph 130 above, appear for the first time in the defence constitutes an infringement of their rights of defence.

132 In the fourth place, the applicants claim that the Council failed in the duty to exercise due care, as contemplated inter alia in the judgment in Case T-413/03 *Shandong*

Reipu Biochemicals v *Council* [2006] ECR II-2243 (paragraph 49), and in the obligation to state reasons. Accordingly, in the definitive disclosure document, the Council conceded — in reply to the applicants' arguments, as set out in paragraph 128 above — that the imports at issue may have replaced third country imports. However, when assessing the existence of a causal link, the Council stated that the increase in dumped imports 'also coincided with a considerable decline in the sales volumes of the Community industry (-37 %) and a significant loss in market share (-11 %) which indeed points towards a strong causation link between the dumped imports and the injury suffered by the Community industry'. That reasoning, however, is only a reiteration of the finding already made at the provisional regulation stage and does not answer the arguments raised by the applicants, which, according to the applicants, shows that the Council neither analysed those arguments with due care nor provided adequate reasoning.

133 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

— The complaint relating to market shares vacated by third country producers and Community producers

134 In essence, the applicants claim that the institutions made a manifest error of assessment and infringed Article 3(6) of the basic regulation by failing to acknowledge that the dumped imports had taken over the market shares previously vacated by third country producers and Community producers.

135 In that regard, it should be noted that Article 3(6) of the basic regulation provides that it must be shown that the volume and/or prices of dumped imports have had an impact on the Community industry.

136 In addition, it is settled law that the question whether the Community industry has suffered injury and, if so, whether that injury is attributable to dumped imports and whether other known factors contributed to the injury to the Community industry involves the assessment of complex economic matters in respect of which the institutions enjoy a wide discretion. Consequently, review by the Courts of the European Union of the assessments made by the institutions must be confined to ascertaining whether the procedural rules have been complied with, whether the facts on which the contested measure is based have been accurately stated and whether there has been any manifest error of assessment of the facts or any misuse of powers (see, to that effect, Case T-107/04 *Aluminium Silicon Mill Products* v *Council* [2007] ECR II-669, paragraph 71, and Case T-462/04 *HEG and Graphite India* v *Council* [2008] ECR II-3685, paragraph 120).

137 In the light of the above considerations, it should be noted that, in recitals 112 to 114 to the provisional regulation, the Commission set out clearly and precisely the reasons why it considered that the dumped imports had had a significant negative impact on the state of the Community industry.

138 It set out, first, in recital 112 to the provisional regulation, the facts on which it had based its finding: the volume of dumped imports increased significantly during the period under consideration and the corresponding market share of the Community market also increased; although the average price of those imports increased during the period under consideration, they remained significantly lower than those of the Community industry during the same period; during the investigation period, the average price of the dumped imports undercut the prices of the Community industry

by 3.7 % to 11 %, depending on the exporting producer, with the exception of three cooperating exporting producers for which no undercutting was found, and prices of the Community industry were depressed.

139 In recital 113 to the provisional regulation, the Commission went on to analyse those facts. In that regard, it stated that the increase in the volume of imports at low prices and the gain in market shares over the period under consideration coincided with the deterioration of the situation of the Community industry. Moreover, according to the Commission, the Community industry was not able to increase its prices up to the necessary level to cover its full costs, as its sales prices were undercut during the investigation period by the dumped imports.

140 That analysis was confirmed by the Council in recitals 85 and 86 to the contested regulation.

141 The applicants challenge that analysis. They maintain that the dumped imports could not have caused the injury, since those imports had merely taken over the market shares previously vacated by the Norwegian, Icelandic and Venezuelan exporting producers and by three Community producers of ferro-silicon, OFZ, Huta Laziska and Vargön Alloys, which had reduced or switched production.

142 However, the applicants' assertion is unconvincing on two counts.

143 First, it is not supported by sufficient evidence. Thus, the applicants refer inter alia to their comments on the provisional disclosure document, in the context of which they claim to have produced evidence to show both that the increase in the volume of dumped imports was in great part due to the 'void' left on the Community market as a result of the withdrawal of producers from Norway, Iceland and Venezuela, and the inability of the Community ferro-silicon producers to satisfy the subsequent demand from Community users, and that the remaining increase in the volume of dumped imports could be explained by the decisions of OFZ, Huta Laziska and Vargön Alloys to decrease or switch production.

144 It should be noted that the applicants produced evidence that imports from Norway decreased in 2005 and during the investigation period. They also produced a table showing that imports from Iceland and Venezuela decreased in 2005, but increased in 2006. Similarly, they produced evidence that OFZ, Huta Laziska and Vargön Alloys decreased or switched production and that, in the case of Huta Laziska, the decrease was due to a dispute with its electricity supplier.

145 Apart from the case of Huta Laziska, it must be held that the applicants provide no evidence to show that the decrease in imports from Norway, Iceland and Venezuela and the decrease in Community production were not caused by dumped imports.

146 Moreover, the applicants have shown no exact, precise correspondence between the increase in the volume of dumped imports and the volume vacated by the Norwegian, Icelandic and Venezuelan exporting producers and by OFZ, Huta Laziska and Vargön Alloys.

147 Secondly, the applicants give only a fragmentary and one-sided presentation of the facts and fail to mention the evolution of a number of significant economic factors.

148 First of all, the applicants fail to take into account the influence of price. It should be noted that, as the Council observed, the trend in the volume of imports must be assessed in conjunction with the prices of dumped imports, a comparison being made of those prices both with the prices of imports from third countries and with prices charged by the Community industry. In the present case, the prices of imports from third countries, the withdrawal of which created a 'void' on the market, were higher than those of dumped imports. Moreover, the prices of the Community industry were undercut as a result of those imports.

149 Also, the applicants fail to take into account the fact that the market share of the Community industry decreased. If dumped imports had merely occupied the market shares vacated by exporting producers established in other third countries, the market share of the Community industry would have remained stable. The applicants should therefore have shown that the market share lost by the Community industry during the period under consideration corresponded to the decreases in production of OFZ, Huta Laziska and Vargön Alloys, which they did not do.

150 Lastly, the applicants failed to mention the fact that the Community producers had unused production capacity. The applicants claim that the Community producers voluntarily decided not to use that capacity, but provide no evidence of this.

151 Accordingly, it must be held that none of the arguments put forward by the applicants demonstrates that the analysis made by the institutions, set out in recitals 112 to 114 to the provisional regulation and confirmed in recitals 85 and 86 to the contested regulation, is flawed by a manifest error of assessment and infringes Article 3(6) of the basic regulation.

152 It follows that this complaint must be rejected as unfounded.

— The complaint relating to the magnitude and cause of voluntary production cuts made by the Community industry

153 The applicants maintain, in essence, that the explanations provided by the Council, in the defence, concerning the assessment of the magnitude and cause of the production cuts and switches made by OFZ, Huta Laziska and Vargön Alloys, constitute a manifest error of assessment which they were not able to invoke in the application.

154 It should be observed that the object of that complaint is the same as that of the preceding complaint, namely to establish a manifest error of assessment and infringement of Article 3(6) of the basic regulation, since it is alleged that the institutions carried out an incorrect assessment of the impact of the volume of the dumped imports on the Community industry and, in particular, that they failed to take into account the fact that OFZ, Huta Laziska and Vargön Alloys had voluntarily decreased and switched production.

155 Accordingly, since the preceding complaint was rejected as unfounded, the present complaint must be rejected on the same grounds.

— The complaint alleging infringement of the applicants' rights of defence

156 The applicants claim, in essence, that the explanations provided by the Council, in the defence, concerning the magnitude and cause of the production cuts and switches by OFZ, Huta Laziska and Vargön Alloys appeared for the first time in that document, which constitutes an infringement of their rights of defence.

157 This complaint must be assessed in the light of the case-law set out in paragraphs 52 and 98 above. According to that case-law, an infringement of the rights of defence comes about only if, owing to an irregularity committed by the institutions, the applicants were not in a position, during the administrative procedure, effectively to make known their views.

158 In the present case, it should be observed that the applicants did have an opportunity during the anti-dumping proceeding effectively to make known their views. Thus, their comments on the provisional disclosure document and those on the definitive disclosure document contain considerable argument focussing on the fact that Community producers voluntarily reduced their production.

159 Moreover, in the definitive disclosure document, the institutions responded to the evidence provided by the applicants in their comments on the provisional disclosure document. No irregularity was therefore committed by the institutions which, in the defence, merely respond to the evidence provided by the applicants in the application.

160 This complaint must therefore be rejected as unfounded.

— The complaint alleging breach of the duty to exercise due care and of the obligation to state reasons

161 In essence, the applicants state that the Council failed to fulfil its duty to exercise due care and acted in breach of the obligation to state reasons, since the reasoning in the definitive disclosure document regarding the impact of dumped imports on the Community industry is no more than a reiteration of the finding already made at the provisional regulation stage and does not answer the arguments put forward by the applicants in their comments on the provisional disclosure document.

162 In that regard, it should be noted that applicants cannot rely on failure to fulfil the duty to exercise due care and breach of the obligation to state reasons when they are in reality challenging the soundness of the finding made by the institutions. The fact that the applicants consider the explanations provided by the institutions to be unsatisfactory by no means shows that those institutions acted in breach of their duty of due care and the obligation to state reasons.

163 Moreover, it should be noted that it has been held in paragraph 159 above that the definitive disclosure document responded to the allegations made by the applicants in their comments on the provisional disclosure document as regards the impact of dumped imports on the Community industry. Accordingly, no breach of the duty to exercise due care or of the obligation to state reasons can be imputed to the Council.

164 It follows that this complaint must be rejected as unfounded and, in consequence, the first part of the fourth plea must be rejected in its entirety.

The second part of the fourth plea, relating to the causes of the injury suffered by individual members of the Community industry

Arguments of the parties

165 The applicants claim that the Council infringed Article 3(5) and (6) of the basic regulation by refusing to undertake a causation analysis at the level of individual Community producers and by stating, in recitals 63 to 65 to the contested regulation, that such an analysis had to be conducted at the level of the Community industry as a whole.

166 In support of that assertion — which, they submit, is different from the third plea — the applicants argue that Article 3(5) of the basic regulation does not require the investigating authorities to consider only the economic factors which affected all the Community producers in the same way. That provision requires the investigating authorities not only to assess all economic factors but also to make that assessment in the light of 'the state of the industry', which is a much wider concept than 'the Community industry'. Similarly, according to the applicants, Article 3(6) of the basic regulation must be read in conjunction with Article 3(5) thereof, and accordingly, it is impossible to determine whether the dumped imports are a cause of material injury unless all economic factors having a bearing on the state of the Community industry

are taken into account. This means that economic factors which are shown to affect Community producers differently cannot be ignored. The applicants add that, if those factors were ignored, it would be all too easy to conclude that there is a causal link between the dumped imports and any injury, on the basis of the temporal coincidence of those imports and the injury.

167 The applicants also state that they presented ample evidence demonstrating that: (i) according to the production data of two Community producers, representing the greater part of the Community industry, dumped imports did not cause the decrease in output; (ii) four Community producers, representing the greater part of the Community industry, had implemented significant price increases; and (iii) Huta Laziska, a major Community producer, scaled back production by 60 000 tonnes owing to problems with the electricity supply. The Council did not contest those facts.

168 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

169 Although the object of this part of the fourth plea is to call into question the soundness of the institutions' assessment of the causal link, it should be pointed out that all the arguments relied on by the applicants in support of this part, with one exception, concern in essence the assessment of the injury suffered by the Community industry. Thus, only the argument concerning Huta Laziska concerns the causation analysis, since the applicants attempt to demonstrate that the injury suffered by that

Community producer was not caused by dumped imports but by problems with the electricity supply. On the other hand, the discussion relating to Article 3(5) and (6) of the basic regulation concerns not the causation analysis but the assessment of the injury factors. That applies also to the arguments concerning the production of two Community producers, representing the greater part of the Community industry, and the price increases implemented by four Community producers, also representing the greater part of the Community industry.

170 In the first place, it should accordingly be noted, with regard to the arguments concerning in essence the assessment of the injury, that it has been established in paragraphs 118 to 123 above that the methodology used by the institutions for the purposes of assessing the injury to the Community industry was consistent with Article 3 of the basic regulation and that the figures concerning Community production, production capacity, capacity utilisation, stocks, sales, market shares, weighted average prices, profitability, cash flows, investments, return on investments, ability to raise capital, employment, productivity and wages were not challenged by the applicants.

171 Accordingly, it cannot be contended that the institutions ignored certain economic factors which, according to the applicants, show trends that differ from one Community producer to another. In particular, as regards the evolution of production and prices, the institutions took due account of the data relating to all Community producers cooperating in the investigation.

172 In the second place, with regard to the argument relating to Huta Laziska, it should be observed at the outset that the analysis of causation does not necessarily have to be carried out at the level of the Community industry as a whole, with no possibility

of taking into consideration injury caused to a single Community producer by a factor other than the dumped imports. In the context of the 'non-attribution' analysis envisaged in Article 3(7) of the basic regulation (now Article 3(7) of Regulation No 1225/2009), the institutions must, examine all the other known factors which caused injury to the Community industry at the same time as the dumped imports and, ensure that the injury caused by those other factors is not attributed to the dumped imports. Article 3(7) of the basic regulation does not state that that examination must take account only of injury caused by the other factors to the Community industry as a whole. In the light of the purpose of that provision, which is to ensure that the institutions separate and distinguish the injurious effects of the dumped imports from those of the other factors, it is possible that, in certain circumstances, injury caused individually to a Community producer by a factor other than the dumped imports must be taken into consideration, where it has contributed to the injury observed in relation to the Community industry as a whole.

173 However, it should be noted that the injury which Huta Laziska may have suffered owing to problems with the electricity supply was duly taken into consideration in recital 101 to the contested regulation. Thus, the Council explained in that recital that, even if the data pertaining to that producer were excluded from the injury analysis, the trends observed for the Community industry would continue to show the existence of injury. Nevertheless, the applicants have not sought to establish that that finding was flawed by a manifest error of assessment.

174 It must therefore be held that the applicants' argument concerning the situation of Huta Laziska cannot succeed and that, in the light of all the foregoing considerations, this part of the fourth plea must be rejected as unfounded.

The third part of the fourth plea, relating to the decrease in production in the Community industry

Arguments of the parties

175 The applicants submit that the Council's finding that the dumped imports brought about a decrease in production in the Community industry is manifestly erroneous, since most of the Community producers did not reduce production.

176 The applicants state that they provided evidence demonstrating that FerroAtlántica and FerroPem, two Community producers representing the greater part of the Community industry, had not cut back production despite the dumped imports. According to the applicants, if the imports at issue had, in themselves, had a negative impact on the production of the Community industry, a similar negative pattern would have had to be observed in the case of all Community producers. Since the data in the file of the proceeding show patterns which differ appreciably from one Community producer to another, the 'simple conclusion' that the dumped imports increased substantially and must therefore have caused the simultaneous decrease in production in the Community industry should be rejected.

177 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

178 The applicants claim, in essence, that the Council's finding that the dumped imports brought about a decrease in production in the Community industry is manifestly erroneous, since the two producers representing the majority of Community producers did not reduce production.

179 It should be noted that, although the object of this part of the plea is to challenge the soundness of the institutions' causation analysis, whilst the object of the third plea is to challenge the soundness of the determination of injury, the fact remains that the arguments put forward by the applicants in connection with this part of the plea are the same as those put forward in the context of the third plea. It follows that those arguments are unfounded, for the reasons set out in paragraphs 107 to 123 above.

180 This part of the fourth plea must therefore be rejected as unfounded.

The fourth part of the fourth plea, relating to the impact of the increased costs borne by the Community industry

Arguments of the parties

181 In the first place, the applicants submit that the statements made in the provisional regulation and in the contested regulation to the effect that energy costs rose

throughout the world, including in the countries concerned, and sometimes even to a higher degree than in Europe, and that the presence of low-cost dumped imports prevented the Community industry from passing on the cost increase to its customers, are based on manifest errors of assessment.

182 First, the applicants argue that the Council made a manifest error in its assessment of the impact of increased production costs. In that regard, they point out that, during the investigation procedure, they adduced evidence to demonstrate that the labour costs per unit borne by the Community industry increased on average by 45 % per ton and that, for all producers except one, energy costs increased by more than 10 %. In addition, the applicants claim to have provided evidence that those costs increased significantly more in the European Union than in other parts of the world, including the countries involved in the anti-dumping proceeding. The Council did not consider this evidence, but nor did it contest it.

183 Secondly, the applicants argue that the Council made a manifest error in its assessment of the role of the demand from the steel sector in relation to the possibility of the Community industry passing on the cost increase to consumers. In that regard, the applicants state that, on the basis of a graph showing a lack of correlation between the world production of crude steel and ferro-silicon contract prices in the European Union, the Council stated, in the definitive disclosure document, that the demand from steel producers had played no role in price-setting since, at Community level, ferro-silicon prices were in certain periods decreasing despite increasing demand from the steel industry.

184 According to the applicants, however, the graph used by the Council demonstrates that, by and large, prices developed in line with steel demand. Also, the Council did

not use the right graph and should have analysed the development of Community steel production in relation to the development of ferro-silicon prices in the Community market. That analysis would have shown that Community ferro-silicon prices faithfully followed Community steel production, that Community steel production was the main price-setting force for ferro-silicon and that therefore it was the demand from steel producers which limited the opportunities for passing on the increase in production costs to the customers.

185 In the second place, the applicants submit that the Council acted in breach of its duty of due care and its obligation to state reasons since although, during the investigation procedure, the applicants had provided ample evidence concerning the increase in production costs, the Council neither contested nor responded to those arguments.

186 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

— The complaint alleging manifest errors of assessment

187 The applicants claim, in essence, that the Council made manifest errors of assessment in its evaluation of the impact of the increased costs borne by the Community industry.

188 In that regard, it should be noted that, according to case-law, the Council and the Commission are under an obligation to consider whether the injury on which they intend to base their conclusions actually derived from dumped imports and must disregard any injury deriving from other factors (Case C-358/89 *Extramet Industrie* v *Council* [1992] ECR I-3813, paragraph 16).

189 Moreover, according to the case-law referred to in paragraph 136 above, the question whether factors other than dumped imports contributed to the injury to the Community industry involves the assessment of complex economic matters in respect of which the institutions enjoy a wide discretion, which means that the Courts of the European Union can exercise only limited review of that assessment.

190 In that context, it should be noted that, in recitals 131 to 133 to the provisional regulation and in recitals 97 to 99 to the contested regulation, the institutions explained the reasons why they considered that increasing production costs could not have broken the causal link between the dumped imports and the injury. Their reasoning comprises three stages: (i) they stated that the cost increases in the alloy industry had usually occurred on a worldwide scale, thereby affecting equally the worldwide industry; (ii) they observed that costs had indeed increased over the period under consideration; and (iii) they found that, even if those increases were partly offset by sale price increases, the presence of low-priced dumped imports did not allow the Community industry to pass on the full effect of those increases.

191 The applicants dispute that reasoning and state that, during the administrative procedure, they produced two sets of evidence demonstrating the absence of a causal

link between the dumped imports and the injury. First, they claim to have provided evidence that energy prices in the European Union were higher than international prices. In making that claim they refer to assertions of a general nature made by the Commission in the 'Third Energy Package' and by the Alliance of Energy-Intensive Industries. Secondly, the applicants state that they demonstrated that the demand for steel played a decisive role in the fact that the Community industry could not pass on the cost increase in prices. In that regard, they produce a graph showing the development of Community steel production in relation to Community ferro-silicon prices. According to the applicants, that graph shows that prices for ferro-silicon in the Community precisely mirror steel production in the Community and that, therefore, Community steel production is the main price-setting force for ferro-silicon. They contrast that graph with the one produced by the institutions in the definitive disclosure document, which shows a lack of correlation between the world production of crude steel and ferro-silicon contract prices in the Community.

192 However, none of the evidence put forward by the applicants is decisive. First of all, with regard to the evidence that energy prices in the Community were higher than international prices, it should be pointed out that the applicants merely refer to assertions of a general nature without supplying any figures. In particular, they did not give a precise, statistical comparison of Community energy prices and world energy prices; nor did they prove that that rise in energy prices, in the Community, was such that it had caused the injury suffered by the Community industry.

193 Also, with regard to the graph showing the development of steel production in the Community in relation to ferro-silicon prices in the Community, it should be observed that the applicants merely state in a general manner, on the basis of that graph, that prices for ferro-silicon in the Community precisely mirror steel production. They

did not, however, analyse that graph in order to show that the demand for steel (that is to say, steel production) had evolved in such a way that Community producers were unable, during the investigation period, to pass on the increase in production costs in prices. Moreover, it should be noted that the graph shows an increase in steel production during the first three quarters of the investigation period, running from 1 October 2005 to 30 September 2006, with a decrease only in the fourth quarter. The graph also shows that ferro-silicon prices in the Community increased throughout the investigation period. However, the applicants do not explain why the increase in steel production during the first three quarters of the investigation period was not sufficient to lead to an increase in prices that allowed Community producers of ferro-silicon to pass on the increased production costs to consumers.

194 Accordingly, the evidence put forward by the applicants does not demonstrate that the increase in costs caused the injury suffered by the Community industry.

195 In the light of the foregoing, in particular the institutions' reasoning in the provisional regulation and in the contested regulation and the inadequate evidence produced by the applicants, it is necessary to reject the applicants' allegations of manifest errors of assessment.

196 This complaint must therefore be rejected as unfounded.

— The complaint alleging breach of the principle of sound administration and of the obligation to state reasons

197 In essence, the applicants claim that the Council acted in breach of its duty to exercise due care and its obligation to state reasons in that, although during the investigation procedure they had provided ample evidence concerning the increase in production costs, the Council neither contested nor responded to the submission of that evidence.

198 In that regard, it should be pointed out first of all that, contrary to the assertions made by the applicants, the Council did respond to the evidence that they had put forward. Thus, the institutions responded to the applicants' claims concerning production costs in recitals 131 to 133 to the provisional regulation, in the definitive disclosure document, in the definitive disclosure document specific to CHEMK and in recitals 97 to 99 to the contested regulation. Also, the institutions responded to the applicants' claims concerning the demand for steel in the definitive disclosure document and in the definitive disclosure document specific to CHEMK. Accordingly, no breach of the principle of sound administration or of the obligation to state reasons can be validly imputed to the institutions.

199 Moreover, as noted in paragraph 162 above, applicants cannot rely on failure to fulfil the duty to exercise due care and breach of the obligation to state reasons when they are in reality challenging the soundness of the finding made by the institutions. The fact that the applicants consider the explanations provided by the institutions to be unsatisfactory by no means shows that the latter acted in breach of their duty of due care and the obligation to state reasons.

200 It follows that this complaint must be rejected as unfounded.

201 In the light of all the foregoing considerations, the fourth part of the fourth plea must be rejected as unfounded.

The fifth part of the fourth plea: breach of the obligation to state reasons in respect of the analysis of the injury suffered by Huta Laziska

Arguments of the parties

202 The applicants state that the Council acted in breach of the obligation to state reasons as delimited inter alia in the judgment in Case C-76/00 P *Petrotub and Republica* v *Council* [2003] ECR I-79 (paragraph 87), in so far as its assertion in recital 101 to the contested regulation concerning the impact, for the determination of injury, of the data specifically pertaining to Huta Laziska, is unsupported by evidence. According to the applicants, that assertion is a 'repetition' which is uninformative and does not provide any verifiable reasons for its conclusion; this is in spite of the requests for reasons made by the applicants, particularly in their comments on the definitive disclosure document, and in spite of the evidence which they presented during the investigation procedure. That evidence demonstrates that Huta Laziska, the largest Community producer of ferro-silicon, ceased producing ferro-silicon in 2005 to 2006 owing to a dispute with its electricity supplier and that, consequently, Huta Laziska

suffered injury that was not caused by the imports to which the investigation procedure relates. The applicants also point out that the fall in the production output at Huta Laziska was of such a magnitude as to make it responsible for the major part of the decrease in the production output by the Community industry as a whole.

203 In the reply, the applicants dispute the validity of the Council's comment that they did not request details of the injury assessment in which the Council had excluded the data relating to Huta Laziska, as is apparent from recital 101 to the contested regulation. Accordingly, the applicants made a specific request to that effect on 7 January 2008.

204 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

205 In essence, the applicants claim that the Council acted in breach of the obligation to state reasons, in that recital 101 to the contested regulation, concerning the impact, for the determination of injury, of the data specifically relating to Huta Laziska, is a 'repetition' which is uninformative and does not provide any verifiable reasons for its conclusion in spite of the requests for reasons made by the applicants.

206 As noted in paragraph 162 above, applicants cannot rely on failure to fulfil the obligation to state reasons when they are in reality challenging the soundness of the finding made by the institutions. The fact that the applicants consider the explanations

provided by the institutions to be unsatisfactory by no means shows that the latter acted in breach of the obligation to state reasons.

207 Moreover, it should be added that it is apparent from paragraphs 99 and 100 of the definitive disclosure document and from recitals 100 and 101 to the contested regulation that the institutions found, on the one hand, that the cause of the injury suffered should be analysed at the level of the Community industry as a whole and that the information pertaining to Huta Laziska had been taken into account and, on the other hand, that even if the data pertaining to that producer had been excluded from the analysis, the trends observed for the remainder of the Community industry would have remained highly negative. Although those explanations may indeed be regarded as brief, they none the less show clearly and unequivocally the reasoning of the institutions, in accordance with the case-law referred to in paragraph 44 above. In any event, the situation in the present case can by no means be compared with that at issue in *Petrotub and Republica* v *Council*, paragraph 202 above, which the applicants cite in their pleadings. In that case, the Court of Justice held that the Council had merely made a reference to the provisions of Community law, not giving any explanatory element of such a kind as to enlighten the parties concerned and the judicature.

208 Lastly, it should be observed that the fact that the institutions did not respond to the request for disclosure of the assessment of the injury suffered by the Community industry, made without reference to Huta Laziska, does not in itself constitute a breach of the obligation to state reasons.

209 It follows that the fifth part of the fourth plea must be rejected as unfounded.

The sixth part of the fourth plea: breach of the obligation to state reasons in respect of the Council's conclusions regarding the effect of third country imports

Arguments of the parties

210 The applicants claim that the Council acted in breach of the obligation to state reasons by asserting, in recital 95 to the contested regulation, that imports from other third countries had not contributed to the injury suffered by the Community industry. In that regard, they refer to their comments on the definitive disclosure document in which, by reference to the evidence presented with their comments on the provisional disclosure document, they claimed that that assertion was wrong since imports from Iceland and Venezuela had strongly increased from 2005 to the investigation period, thereby capturing market share from the Community ferro-silicon producers.

211 In the reply, the applicants add that, contrary to the assertions made by the Council, there is no contradiction between the argument that imports from other third countries contributed to the injury suffered by the Community industry and the argument that dumped imports took the 'place vacated' by imports from Norway, Venezuela and Iceland. Dumped imports replaced ferro-silicon from Venezuela and Iceland from 2004 to 2005. At the same time, imports from Venezuela and Iceland increased from 2005 to the investigation period — that is, over a different period — and thus adversely affected the Community industry.

212 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

213 In essence, the applicants submit that the Council acted in breach of the obligation to state reasons by stating, in recital 95 to the contested regulation, that imports from other third countries had not contributed to the injury suffered by the Community industry.

214 Once again, as was noted inter alia in paragraph 162 above, applicants cannot rely on failure to fulfil the obligation to state reasons when they are in reality challenging the soundness of the finding of the institutions. The fact that the applicants consider the explanations provided by the institutions to be unsatisfactory by no means shows that the latter acted in breach of the obligation to state reasons.

215 Moreover, it should be pointed out that the institutions examined in detail, in recitals 115 to 121 to the provisional regulation, the impact of imports from other third countries on the state of the Community industry. They confirmed, in recital 95 to the contested regulation, the analysis given in the provisional regulation. More specifically, the institutions devoted considerable argument to the examination of the impact of imports from Venezuela and Iceland in recitals 118 and 120 of the provisional regulation. In those recitals, the institutions stated in particular that, while it could not be excluded that imports from Iceland and from Venezuela may have had a negative effect on the state of the Community industry, that effect could not be considered

to be of any significance when compared with the volume and prices of the dumped imports. It follows that the institutions showed their reasoning clearly and unequivocally in those recitals and, accordingly, no breach of the obligation to state reasons can validly be imputed to them.

216 The sixth part of the fourth plea must therefore be rejected as unfounded.

5. *The fifth plea: infringement of the applicants' rights of defence as regards the disclosure of data relating to the initiation of the anti-dumping proceeding*

Arguments of the parties

217 The applicants claim that the Council infringed their rights of defence since it did not respond to their requests for inclusion in the non-confidential file of additional non-confidential information relating to the evidence which the complaint is required to contain for the initiation of an anti-dumping proceeding.

218 In that regard, the applicants point out, first, that in their comments on the injury, lodged on 15 January 2007, and in their comments on the provisional disclosure document, they asked to be provided with non-confidential summaries of the information contained in the complaint, specifically regarding the calculation of the apparent consumption, the basis for the dumping margin calculation and the costs of production for the companies supporting the complaint. They maintain that those

summaries should have been provided in order to establish that such information was indeed submitted with the complaint to an extent sufficient to support the allegations made in it, and to enable the targeted exporters to review in a non-confidential summary form the information on the basis of which the Commission found that initiation of the anti-dumping proceeding was necessary. The applicants argue that, without those summaries, they could not respond to the allegations made by Euroalliages in the complaint.

219 More specifically, as regards the information about the calculation of apparent consumption, the applicants explain that the complaint contained two divergent sets of data on consumption (imports, exports, sales, stocks and production), the divergence resulting from different adjustments. Because of this divergence, the applicants requested details and a reconciliation of calculations for the two sets of data. They received nothing from the institutions. Also, in response to the Council's argument that the formula used for conversion of different kinds of ferro-silicon to 75 % grade ferro-silicon had been disclosed, the applicants point out, in the reply, that they were not asking for the formula but for a justification for the use of such a formula in a situation where no formula was needed.

220 As regards the information concerning the basis for the dumping margin calculation, the applicants state that the non-confidential version of the complaint reflects in Annex C bis all the details on the dumping provided to the applicants. However, those pages are in fact blank, which means that the applicants cannot verify whether the complaint contains any — let alone, sufficient — evidence of dumping.

221 As regards the information on the production costs for the companies supporting the complaint, the applicants state that, in the course of the administrative proceeding, they made a comparison of the cost of production developments, as referred to in

the complaint, for the whole of the Community industry, with the data for individual Community producers contained in the responses to the anti-dumping questionnaire. The comparison revealed significant differences, which prompted the applicants to request the Commission to disclose non-confidential data of individual Community producers, as this data featured in the complaint. The Commission refused disclosure and offered no justification.

222 Secondly, the applicants state that no 'meaningful non-confidential version' of the information provided by the individual companies supporting Euroalliages' complaint was added to the file of the proceeding. They also point out that, although some information was ultimately provided, its credibility is undermined by the lack of consistency between the data contained in the various documents submitted by those companies.

223 The Council, supported by the Commission, disputes the applicants' arguments.

Findings of the Court

224 According to the case-law to which reference was made in paragraph 52 above, pursuant to the principle of respect for the rights of the defence, the undertakings concerned should have been placed in a position during the administrative procedure in which they could effectively make known their views on the correctness and relevance of the facts and circumstances alleged and on the evidence presented by the Commission in support of its allegation concerning the existence of dumping and the resultant injury. In that regard, the institutions must provide the undertakings concerned, as far as is compatible with the obligation not to disclose business secrets,

with information relevant to the defence of their interests, choosing, if necessary on their own initiative, the appropriate means of providing such information (*Al-Jubail Fertilizer* v *Council*, paragraph 52 above, paragraph 17).

225 With regard to business secrets, it should also be noted that Article 19(1) of the basic regulation (now Article 19(1) of Regulation No 1225/2009) provides that any information which is by nature confidential or which is provided on a confidential basis by parties to an investigation is, if good cause is shown, to be treated as such by the authorities. Moreover, Article 19(2) of the basic regulation (now Article 19(2) of Regulation No 1225/2009) provides that interested parties providing confidential information are required to furnish non-confidential summaries thereof, save in exceptional circumstances where such information is not susceptible of summary. That provision also states that those summaries must be in sufficient detail to permit a reasonable understanding of the substance of the information submitted in confidence.

226 It is in the light of the above considerations that the Court must determine whether the Council did in fact infringe the applicants' rights of defence by not responding to their requests for inclusion in the non-confidential file of additional non-confidential information.

227 In the first place, the applicants claim that in their comments on the injury, sent to the Commission on 15 January 2007, they requested that non-confidential summaries of the information contained in the complaint regarding the calculation of consumption, the basis for the dumping margin calculation and the costs of production for the companies supporting the complaint should be added to the non-confidential file of the proceeding. As a result of the absence of that information from the non-confidential file, the applicants were unable to respond to the allegations made in the complaint.

228 First of all, regarding the calculation of consumption, it should be noted that the applicants asked, in the comments on the injury, to be provided with three types of data: (i) justification for the formula used for the overall conversion of import data to 75 % grade ferro-silicon; (ii) clarification as to how that conversion was calculated for domestic shipments; and (iii) the estimated production for two Community producers, SKW Trostberg AG and TDR — Metalurgija d.d., referred to in the table relating to apparent consumption given in the non-confidential version of the complaint, and how the conversion was calculated for those estimates.

229 It should be noted that the formula that was used for conversion of different kinds of ferro-silicon to 75 % grade ferro-silicon is given in the non-confidential version of the complaint. Moreover, justification for the use of that formula was given to the applicants by the Commission in the supplementary provisional disclosure document, sent to the applicants on 10 September 2007, from which it is apparent that the conversion formula used was needed in order to be able to compare the data appropriately.

230 It should also be pointed out, with regard to domestic shipments, that it is apparent from the non-confidential version of the complaint that the figures for such shipments were based on actual shipments for which the data had been supplied by the various complainants, based on 75 % grade ferro-silicon, and on estimates concerning SKW and TDR. It is also apparent from that version of the complaint that the data for actual shipments were regarded as confidential. Since the figures given in the non-confidential version of the complaint are the total figures for domestic shipments, it must be held that the institutions acted in compliance with Article 19(1) and (2) of the basic regulation.

231 Lastly, it should be noted, with regard to the estimated production of SKW and TDR, that the Commission explained, in the supplementary provisional disclosure document, that this was based on the complainants' market knowledge and was therefore regarded as confidential. As mentioned in paragraph 230 above, since the figures given in the non-confidential version of the complaint are the total figures for domestic shipments, the institutions acted in compliance with Article 19(1) and (2) of the basic regulation.

232 In the light of the foregoing, it must be held that the applicants are wrong to maintain that the information about the calculation of consumption which they had requested in non-confidential form was not disclosed to them. It was either added to the non-confidential file or given in the supplementary provisional disclosure document. Accordingly, as regards that aspect of the complaint, the applicants have no grounds for pleading infringement of their rights of defence.

233 Also, as regards the basis for the dumping margin calculation, it must be stated that the non-confidential version of the complaint contains a brief but clear explanation of the way in which the normal value and the export price were calculated. Moreover, the supplementary provisional disclosure document provides detailed explanations of the way in which the normal value was calculated. In particular, the Commission made reference in that document to the prices used as a basis for calculating normal value which are given in Annexes C.1, C.2, C.3 and C.4 to the non-confidential version of the complaint. Accordingly, it must be held that the applicants had sufficient evidence concerning the basis for calculating the dumping margin for them to be able to exercise their rights of defence and that the fact that the pages relating to Annex C bis, in the non-confidential version of the complaint, were blank was irrelevant.

234 Lastly, as regards the production costs of the companies supporting the complaint, it must be observed that the production costs of the complainants taken together appear in Annex 5 to the non-confidential version of the complaint. Since the data on

the actual production costs of each complainant are undeniably confidential data and the figures given in the non-confidential version of the complaint are the total figures for the complainants' production costs, the institutions acted in compliance with Article 19(1) and (2) of the basic regulation. It follows that the institutions gave the applicants information relevant to the defence of their interests, whilst not disclosing business secrets. Accordingly, as regards the production costs of the companies supporting the complaint, the applicants again have no grounds for pleading infringement of their rights of defence.

235 Secondly, the applicants criticise the Council for not adding to the file of the proceeding a 'meaningful non-confidential version' of the information provided by the individual companies supporting Euroalliages' complaint. They also state that, although some information was ultimately provided, its credibility is undermined by the lack of consistency between the data contained in the various documents submitted by those companies.

236 In that regard, it should be pointed out that those allegations lack detail and that they must be declared inadmissible under the first paragraph of Article 21 of the Statute of the Court of Justice, applicable to the General Court by virtue of the first paragraph of Article 53 of that Statute and Article 44(1)(c) and (d) of the Rules of Procedure of the General Court, as interpreted by the case-law cited in paragraph 60 above. The applicants give no detail as to the non-confidential versions they regard as being insufficiently meaningful. In particular, they do not explain whether these are the non-confidential versions of documents produced in support of the complaint or of documents produced subsequently. Moreover, they give no detail as to the data they consider to be inconsistent. This complaint must therefore be rejected as unfounded.

237 It follows that the fifth plea must be rejected as being in part unfounded and in part inadmissible.

238 In the light of all the foregoing considerations, the action must be dismissed in its entirety.

239 It is also necessary to reject the applicants' application for the adoption of measures of organisation of procedure and measures of inquiry. First, the applicants ask the Court to order the production of information to support recital 101 to the contested regulation concerning the impact, for the determination of injury, of the data specifically relating to Huta Laziska. Since it was established, in paragraphs 205 to 209 above, that proper reasons had been stated for that recital, it would not be appropriate to accede to the applicants' request. Secondly, the applicants ask the Court to order the production of information regarding the calculation of consumption, the basis for the dumping margin calculation and the costs of production for each of the companies supporting the complaint, in order to establish whether the investigation was initiated on the basis of sufficient evidence of dumping and injury. However, it was established in paragraphs 224 to 234 above that the applicants had received information relevant to the defence of their interests relating to each of those three factors. It would therefore not be appropriate to accede to the applicants' request in that regard either.

Costs

240 Under Article 87(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for in the successful party's pleadings. Since the applicants have been unsuccessful, they must be ordered to pay the costs, as applied for by the Council.

241 In addition, under the first subparagraph of Article 87(4) of the Rules of Procedure, the Member States and institutions which have intervened in the proceedings are to bear their own costs. The Commission must therefore bear its own costs.

On those grounds,

THE GENERAL COURT (Second Chamber)

hereby:

1. **Dismisses the action;**

2. **Orders Chelyabinsk Electrometallurgical Integrated Plant OAO (CHEMK) and Kuzneckie Ferrosplavy OAO (KF) to bear their own costs as well as those incurred by the Council of the European Union;**

3. **Orders the European Commission to bear its own costs.**

Pelikánová Jürimäe Soldevila Fragoso

Delivered in open court in Luxembourg on 25 October 2011.

[Signatures]

Table of contents

Background to the dispute ..... II - 7368

Procedure and forms of order sought by the parties ..... II - 7372

Law ..... II - 7374

1. First plea: use of a notional profit margin for the construction of the export price ..... II - 7374

The first part of the first plea: error of law in the interpretation of Article 2(9) of the basic regulation ..... II - 7374

Arguments of the parties ..... II - 7374

Findings of the Court ..... II - 7375

The second part of the first plea: breach of the obligation to state reasons ..... II - 7380

Arguments of the parties ..... II - 7380

Findings of the Court ..... II - 7381

The third part of the first plea: infringement of the rights of defence ..... II - 7383

Arguments of the parties ..... II - 7383

Findings of the Court ..... II - 7383

The fourth part of the first plea: breach of the principle of sound administration ..... II - 7385

Arguments of the parties ..... II - 7385

Findings of the Court ..... II - 7386

2. The second plea, concerning the price undertaking offered by Silmak ..... II - 7387

The first part of the second plea: breach of the principle of equal treatment ..... II - 7387

Arguments of the parties ..... II - 7387

Findings of the Court ..... II - 7388

The second part of the second plea: infringement of Article 6(7), Article 8(4) and Article 20(1) of the basic regulation ..... II - 7392

Arguments of the parties ..... II - 7392

Findings of the Court ..... II - 7393

The third part of the second plea: breach of the obligation to state reasons ..... II - 7395

Arguments of the parties ..... II - 7395

Findings of the Court ..... II - 7396

The fourth part of the second plea: infringement of the applicants' rights of defence ..... II - 7397

Arguments of the parties ..... II - 7397

Findings of the Court ..... II - 7398

3. The third plea, concerning the injury analysis ..... II - 7399

Arguments of the parties ..... II - 7399

Findings of the Court ..... II - 7401

4. The fourth plea, concerning the analysis of the causal link between the dumped imports and the injury ..... II - 7407

The first part of the fourth plea: the impact on the Community industry of the withdrawal from the Community market of third country producers, and of production switches and reductions made by a number of Community producers .. II - 7408

Arguments of the parties ..... II - 7408

Findings of the Court ..... II - 7410

— The complaint relating to market shares vacated by third country producers and Community producers ..... II - 7410

— The complaint relating to the magnitude and cause of voluntary production cuts made by the Community industry ..... II - 7415

— The complaint alleging infringement of the applicants' rights of defence ..... II - 7416

— The complaint alleging breach of the duty to exercise due care and of the obligation to state reasons ..... II - 7417

The second part of the fourth plea, relating to the causes of the injury suffered by individual members of the Community industry ..... II - 7418

Arguments of the parties ..... II - 7418

Findings of the Court ..... II - 7419

The third part of the fourth plea, relating to the decrease in production in the Community industry ..... II - 7422

Arguments of the parties ..... II - 7422

Findings of the Court ..... II - 7423

The fourth part of the fourth plea, relating to the impact of the increased costs borne by the Community industry ..... II - 7423

Arguments of the parties ..... II - 7423

Findings of the Court ..... II - 7425

— The complaint alleging manifest errors of assessment ..... II - 7425

— The complaint alleging breach of the principle of sound administration and of the obligation to state reasons ..... II - 7429

The fifth part of the fourth plea: breach of the obligation to state reasons in respect of the analysis of the injury suffered by Huta Laziska ..... II - 7430

Arguments of the parties ..... II - 7430

Findings of the Court ..... II - 7431

The sixth part of the fourth plea: breach of the obligation to state reasons in respect of the Council's conclusions regarding the effect of third country imports ..... II - 7433

Arguments of the parties ..... II - 7433

Findings of the Court ..... II - 7434

5. The fifth plea: infringement of the applicants' rights of defence as regards the disclosure of data relating to the initiation of the anti-dumping proceeding ..... II - 7435

Arguments of the parties ..... II - 7435

Findings of the Court ..... II - 7437

Costs ..... II - 7442