ORDER OF THE COURT OF FIRST INSTANCE
(Fifth Chamber, Extended Composition)
10 July 1996 *

In Case T-208/95,

Miwon Co. Ltd, a company incorporated under Korean law, with its principal place of business at Dongdaemun-Ku (Seoul, South Korea), represented by Jean-François Bellis, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Freddy Brausch, 8 Rue Zithe,

applicant,

v

Commission of the European Communities, represented by Nicholas Khan, of its Legal Service, acting as agent, with an address for service in Luxembourg at the office of Carlos Gómez de la Cruz, Wagner Centre, Kirchberg,

defendant,

APPLICATION for annulment of Commission Regulation (EC) No 1754/95 of 18 July 1995 imposing a provisional anti-dumping duty on imports of monoso-

* Language of the case: English.

dium glutamate originating in Indonesia, the Republic of Korea, Taiwan and Thailand, (OJ 1995 L 170, p. 4), in so far as it concerns Miwon Co. Ltd,

THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES
(Fifth Chamber, Extended Composition),

composed of: R. Schintgen, President, R. García-Valdecasas, V. Tiili, J. Azizi and R. Moura Ramos, Judges,

Registrar: H. Jung,

makes the following

Order

The facts

1 By Regulation (EEC) No 547/90 of 2 March 1990 (OJ 1990 L 56, p. 23) the Commission imposed a provisional anti-dumping duty on imports of monosodium glutamate and its salts originating in Indonesia, the Republic of Korea, Taiwan and Thailand, but accepted minimum-price undertakings from all exporters who, like Miwon Co. Ltd, had cooperated during the investigation.

2 By Regulation (EEC) No 1798/90 of 27 June 1990 (OJ 1990 L 167, p. 1), most recently amended by Council Regulation (EEC) No 2455/93 of 2 September 1993 (OJ 1993 L 225, p. 1), the Council imposed a definitive anti-dumping duty on imports of monosodium glutamate (hereinafter 'MSG') originating in those countries, except in respect of products of producers whose undertakings had been accepted.

3 Following a complaint lodged by the Community industry, the Commission announced (notice published in OJ 1994 C 187, p. 13) the initiation of a review of the anti-dumping measures pursuant to Article 14 of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidised imports from countries not members of the European Economic Community (OJ 1988 L 209, p. 1, hereinafter 'the Basic Regulation'). The complaint claimed in particular that MSG originating in the countries concerned had been imported into the Community at lower prices than those provided for by the existing price undertakings.

4 During the course of its investigation the Commission reached the conclusion that the price undertakings, in particular the undertaking given by the applicant, had been breached and, pursuant to Article 10(6) of the Basic Regulation, it adopted Regulation (EC) No 1754/95 on 18 July 1995, which terminated those price undertakings and imposed a provisional anti-dumping duty on imports of MSG originating in Indonesia, the Republic of Korea, Taiwan and Thailand (OJ 1995 L 170, p. 20). In accordance with Article 11(5) of the Basic Regulation, that duty was extended for a period of two months by Council Regulation (EC) No 2685/95 of 17 November 1995 (OJ 1995 L 275, p. 22).

5 On 19 January 1996, the Council adopted Regulation (EC) No 81/96 (OJ 1996 L 15, p. 20) amending Regulation No 2455/93 of 2 September 1993 and imposing a definitive anti-dumping duty on imports of MSG originating in the countries concerned. That regulation is the subject-matter of a second action brought by the applicant on 12 April 1996 (Case T-51/96).

Procedure

6 By application lodged at the Registry of the Court of First Instance on 3 November 1995, the applicant brought an action for annulment of Commission Regulation No 1754/95.

7 By a document dated 29 January 1996 the Commission raised an objection to admissibility under Article 114(2) of the Rules of Procedure, contending that, following the Council's adoption of Regulation No 81/96, there was no longer any need for the Court to give judgment in this case.

8 The applicant lodged its observations on the objection to admissibility on 27 March 1996.

Pleas in law and arguments of the parties

9 The Commission claims that, according to settled case-law, the Council's adoption of Regulation No 81/96 imposing definitive duties has made redundant the action brought against Commission Regulation No 1754/95 imposing provisional duties (Case 56/85 *Brother* v *Commission* [1988] ECR 5655; Cases 294/86 and 77/87 *Technointorg* v *Commission and Council* [1988] ECR 6077; Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council* [1990] ECR I-2945).

10 It considers that there is nothing before the Court to justify a departure from that settled case-law. It observes that the only different aspect of the present case is the fact that the provisional duty was imposed on account of the breach of an undertaking and not as the first measure adopted during an initial anti-dumping investigation.

11 The Commission submits that the replacement of an undertaking by a duty is not a sanction, but merely a change from one type of anti-dumping measure to another.

12 Finally, the Commission observes that Council Regulation No 81/96 confirms the Commission's finding that the applicant was in breach of its undertaking and, in points 25 to 28, justifies the construction of the applicant's export price in accordance with Article 2(8)(b) of the Basic Regulation by the fact that the undertaking had been breached. It concludes from this that the question of the breach of the undertaking has therefore shifted from the contested regulation to Regulation No 81/96 and that any plea or argument concerning that issue may be raised in an action brought against Regulation No 81/96. There is therefore no longer any need for the Court to give judgment in the present case.

13 The applicant contends that the Commission's argument that the question of the breach of the undertakings has shifted from the contested regulation to Regulation No 81/96 and that the Council's conclusion in that respect can be contested in an action brought against the latter regulation is incompatible with the provisions of the Basic Regulation.

14 The applicant observes that the contested regulation was adopted on the basis of Article 10(6) of the Basic Regulation, which confers on the Commission the sole power to find that an undertaking has been breached and is therefore to be terminated. It considers that, in that sense, the Commission's finding that the undertaking has not been kept, and should be terminated, is final.

15 It contends that in Regulation No 81/96 the Council did not address the question whether the undertaking is to be terminated on the ground that it had allegedly been breached, but merely noted the Commission's decision in the contested regulation to terminate the undertaking and to amend the definitive anti-dumping duty

which had been imposed by Regulation No 1798/90 of 27 June 1990, most recently amended by Regulation No 2455/93 of 2 September 1993.

16 According to the applicant, the fact that some of the grounds on which the Council has relied in order to justify the construction of the export price in Regulation No 81/96 are the same as those relied upon by the Commission in the contested regulation cannot support the conclusion that the question of the breach of the undertaking was reexamined in Regulation No 81/96. The applicant states that the Council has, moreover, abandoned some of the findings made by the Commission and based its decision, in part, on other grounds.

17 The applicant observes that the Council's findings in points 25 to 28 of Regulation No 81/96 are substantially different from those made by the Commission in the contested regulation, since the Commission's finding that the applicant had breached its undertaking was made on the basis of Article 10(6) of the Basic Regulation, while the Council considered that the applicant's export price should be constructed in accordance with Article 2(8)(b) of the Basic Regulation. It is therefore wholly incorrect to claim that the question of the breach of the undertaking dealt with in the contested regulation is now governed by Regulation No 81/96.

18 The applicant observes that the fact that some of the Commission's and the Council's grounds are the same is purely coincidental and is the result of the Commission's conclusion that the relatively low retail prices charged by the applicant's independent importers can be explained only by the applicant's granting of secret compensation to those importers. The Council adopted that line of reasoning in order to apply Article 2(8)(b) for the purpose of calculating definitive anti-dumping duties, but it is easy to imagine situations in which none of the grounds adopted by the Commission in concluding that an exporter has breached its undertaking is relevant to the calculation of the definitive anti-dumping duty imposed on that exporter. The admissibility of an action for annulment of a Commission

decision pursuant to Article 10(6) cannot depend on whether some grounds relied on by the Commission are reused by the Council for the purposes of a completely different decision.

19 The applicant considers that the Commission's argument that an exporter must await adoption of the Council's regulation imposing a definitive anti-dumping duty in order to contest the Commission's finding that it breached its undertaking would lead to impossible situations where, for whatever reason, the Council decided not to impose a definitive anti-dumping duty. In such a case, because of the expiry of the time-limit, the exporter would no longer be able to bring an action against the Commission's finding that it had breached its undertaking, whereas that finding could subsequently be relied on against it as a ground for rejecting its offer of an undertaking, even in other proceedings concerning different products. It concludes that an exporter has a legitimate interest in challenging the legality of a finding by the Commission under Article 10(6) that an undertaking has been breached, regardless of whether or not the Council imposes a definitive anti-dumping duty.

Findings of the Court

20 It is settled case-law (*Brother* v *Commission*, cited above, paragraph 6, *Technointorg* v *Commission and Council*, cited above, paragraph 12; Case C-304/86 and C-185/87 *Enital* v *Commission and Council* [1990] ECR I-2939 and *Neotype Techmashexport* v *Commission*, cited above, that since the amounts secured by way of provisional anti-dumping duty have been collected in their entirety under Article 2 of the definitive regulation, the applicant may place no reliance on any legal effect arising out of the provisional regulation. Consequently, following the Council's adoption of the definitive regulation, the applicant, in principle, has no further interest in contesting the provisional regulation.

21 Nevertheless, the Court finds that the present action contests the provisional regulation, in particular in regard to its finding of a breach of the applicant's of its price undertaking and the Commission's termination of that undertaking.

22 Consequently, it is necessary to consider whether the fact that the Commission found in the contested regulation that the applicant had breached its price undertaking and therefore terminated that undertaking is of such a nature as to preserve the applicant's interest in pursuing the annulment of that regulation.

23 The applicant claims that, since Article 10(6) of the Basic Regulation gives the Commission exclusive power to decide whether an undertaking has been breached and is therefore to be terminated, the Commission's finding in that regard is final and may not be contested in an action brought against the Council's regulation.

24 That argument cannot be accepted.

25 As the Court of Justice held in Case C-156/87 *Gestetner Holdings* v *Council and Commission* [1990] ECR I-781, paragraphs 6 to 9 (see also Joined Cases C-133/87 and C-150/87 *Nashua Corporation and Others* v *Commission and Council* [1990] ECR I-719), the Commission's role forms an integral part of the Council's decision-making process. It follows from the provisions of the Basic Regulation that the Commission is responsible for carrying out investigations and for deciding, on the basis of those investigations, whether to terminate the proceedings or to continue them by adopting provisional measures and by proposing that the Council adopt definitive measures. However, it is the Council which has the

power to take a final decision. It is not obliged to make any decision at all if it disagrees with the Commission, but may, if it wishes, adopt a decision on the basis of the latter's proposal.

26 In those judgments the Court of Justice concluded that the rejection by the Commission of a proposed undertaking is not a measure having binding legal effects of such a kind as to affect the interests of the applicant, because the Commission may revoke its decision or the Council may decide not to introduce an anti-dumping duty, but that it constitutes an intermediate measure whose purpose is to prepare for the final decision, and is not a measure which may be challenged.

27 It should be noted that the Court of Justice reached that conclusion when, just as in the case of a decision to terminate an undertaking, Article 10(1) of the Basic Regulation expressly confers the power to accept a proposed undertaking only on the Commission.

28 It is therefore evident that contrary to the applicant's claims, the fact that Article 10(6) of the Basic Regulation confers, at least expressly, only on the Commission the power to decide whether an undertaking has been breached, is not of such a nature as to make a decision to terminate an undertaking a measure which may be challenged.

29 Furthermore, a decision to terminate an undertaking has, in principle, the same consequences for the traders concerned as a decision to refuse a proposed undertaking, that is to say, the imposition of a provisional anti-dumping duty. However,

in both cases the decision concerned is an intermediary measure whose purpose is to prepare for the Council's definitive decision.

30 Moreover, point 13 of the contested regulation states that 'all findings made for the purpose of this Regulation are provisional and may be reconsidered for the purpose of any definitive duty which the Commission may propose'.

31 The Commission's decision to terminate a price undertaking on account of its breach does not therefore constitute a measure which may be challenged and it is by challenging the regulation imposing definitive anti-dumping duties that traders can raise any irregularity in the Commission's finding that they breached their undertakings.

32 Consequently, the fact that the contested provisional regulation finds that the applicant breached its undertaking is not of such a nature as to establish the applicant's interest in bringing proceedings to contest that regulation.

33 As a subsidiary consideration, the Court finds that in any event the question of the breach of the undertaking came under Council Regulation No 81/96. Contrary to the applicant's claims, in Regulation No 81/96 the Council reexamined, or at least addressed, the question of the breach of the undertaking. So, in points 25 to 28 of Regulation No 81/96, and in particular in point 26, as also in points 57 and 69, the Council referred to the facts which showed, in its view, the existence of a breach of the undertakings.

34 The Court considers that the fact that some of the grounds on which the Council based its finding of a breach of the undertaking are not the same as those adopted by the Commission confirms the Commission's claim that the question of the breach of the undertaking was indeed reconsidered in the Council's regulation.

35 The applicant may therefore raise in an action contesting the definitive regulation any plea concerning the unlawfulness of the finding that it breached its undertaking, and it therefore no longer has an interest in contesting the provisional regulation in that regard.

36 The applicant also wrongly claims that the findings of the Council and Commission are substantially different, in that the Commission made its finding on the basis of Article 10(6) of the Basic Regulation, while the Council held, in points 25 to 28 of its regulation, that the export price should be constructed on the basis of Article 2(8)(b). Although the Council reached the conclusion that the export price should be reconstructed in accordance with Article 2(8)(b), that was precisely because it had first found no convincing reason, other than the existence of compensatory arrangements, to explain the fact that the importers all sold the relevant product at a loss, and that the on-site investigations showed that the undertakings given by Miwon Co. Ltd had been breached.

37 It follows that, following the adoption of the definitive regulation, the action brought to contest the provisional regulation has become devoid of purpose and it is not necessary for the case to proceed to judgment.

Costs

38 Under Article 87(6) of the Rules of Procedure, where a case does not proceed to judgment, the costs shall be in the discretion of the Court of First Instance. The Court considers that an order that each party should bear its own costs would fairly reflect the circumstances of the case.

On those grounds,

THE COURT OF FIRST INSTANCE (Fifth Chamber, Extended Composition)

hereby orders:

1. The case is not to proceed to judgment.

2. Each party shall bear its own costs.

Luxembourg, 10 July 1996.

H. Jung — R. Schintgen

Registrar — President