regulation, so that no specific statement of reasons is required.

4. In accordance with the actual wording of Article 4(2)(c) of the basic anti-dumping regulation, No 2423/88, the impact of the imports must be assessed on the basis of the trends in the relevant economic factors. That implies that it is possible to draw valid conclusions on the impact of the imports only if, in particular, the Community producers' financial situation at the time of the investigation can be compared with that of preceding years, which presupposes that the undertakings concerned will collaborate with the Commission and provide it with the data relating to their financial situation in preceding years.

REPORT FOR THE HEARING
in Case C-315/90 *

I — Facts and procedure

1. *Background*

In July 1989 the applicants, whose total production at that time represented the whole of Community production of single-phase two-speed electric motors for washing machines, lodged with the Commission, pursuant to the provisions of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the EEC (Official Journal 1988 L 209, p. 1) a complaint against dumping practices involving imports of the like product originating in Bulgaria, Romania and Czechoslovakia.

The Commission, taking the view that the complaint might be regarded as containing sufficient evidence of dumping and consequent injury, published in the Official Journal of 14 November 1989 a notice of initiation of an anti-dumping proceeding concerning imports of certain single-phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia falling within CN code 8501 40 90 (Official Journal 1989 C 286, p. 11) and started the necessary investigation.

The Commission's investigation related to the period from 1 January to 30 September 1989. The Commission's conclusions, which it arrived at on the basis of all the in-

* Language of the case: French.

formation obtained, may be summarized as follows:

'Since no exports to the Community of electric motors originating in Bulgaria had been recorded in 1988 or during the investigation period, the Commission first eliminated Bulgaria from the proceeding.'

As regards imports of electric motors originating in Romania and Czechoslovakia, the Commission then concluded that such imports had not caused significant injury to the Community industry in question. It based that conclusion in particular on the following findings:

'The increase of the imports in question originating in Romania and Czechoslovakia was less than that of Community consumption. The reduction in such imports was particularly noticeable during the investigation period, when they fell by 8%, whilst Community consumption remained relatively stable. Compared with Community consumption, the market share of imports of Romanian and Czechoslovakian motors therefore fell by 2.7% during the period 1986 to 1989, from 26.6% in 1986 to 23.9% in 1989.'

In spite of undercutting on the two main markets for the imports, namely the Italian market (with the Romanian exporter undercutting by between 3 and 26% and the Czechoslovak exporter by between 5 and 26%) and the Spanish market (the Czechoslovak exporter undercutting by between 4 and 18%), examination of the impact of these imports on the Community industry showed that all the indicators relating to the Community industry concerned were positive apart from one factor.

In fact Community producers were able to increase their production by 20.6%, their sales within the Community by 16.1% and their export sales by 13%. The market share of Community producers accordingly rose by 2.6%, that is, from 73.4% in 1986 to 76% during the investigation period. The Community producers' selling prices also rose perceptibly during the period covered by the investigation.

In the Commission's opinion the only less positive feature concerned the financial results, which deteriorated during the investigation period. The Commission was not in a position to verify that trend because two undertakings accounting for almost half the Community production during the investigation period supplied no data on their financial situation in preceding years. In any event it found that two producers were still showing a profit, one of them a producer of electric motors integrated into a group making washing machines, and the other an independent producer, that is, one not linked to a washing-machine manufacturer. Of the Community producers making losses, one was an integrated producer and the other the subsidiary of an independent producer. In that connection the Commission found that the losses recorded by the integrated producer were a consequence more of the group's purchasing

policy than of the imports alleged to have been dumped. In the case of the independent producer's subsidiary, in the absence of data regarding its financial situation in preceding years, it was not possible to prove that the losses found during the investigation period had been caused by the imports in question.

As regards the existence of a threat of injury concerning particularly the Spanish market, the Commission finally came to the conclusion that the conditions set out in Article 4(3) of Regulation No 2423/88 had not been fulfilled. In that connection the Commission found, on the one hand, that Romania had not exported to Spain in 1988 and 1989 and that exports from Czechoslovakia had fallen considerably during the investigation period, and on the other hand that there was nothing to indicate a probable expansion in the near future of the Czechoslovak undertaking's export capacity.

The Commission announced the conclusions of the investigation to the complainants at a meeting on 23 May 1990 in the Commission's offices in Brussels.

Following that meeting, the applicants asked the Commission, in two successive letters of 1 June and 17 July 1990, to reconsider its decision to terminate the proceeding, and to fix anti-dumping duties on imports originating in Bulgaria, Romania and Czechoslovakia.

The Commission took the view that none of the points raised by the applicants was such as to alter its conclusions and by letters of 4 July and 2 August 1990 refused to continue the investigation.

Finally, on 26 July 1990, the Commission, in pursuance of Article 9 of the said Regulation No 2423/88, adopted Decision 90/399/EEC terminating the anti-dumping proceeding concerning imports of certain single-phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia, which is the subject of the present action.

2. *Procedure before the Court*

By application lodged at the Court Registry on 15 October 1990, the French trade association Gimelec, the Spanish trade association Sercobe and the companies Sole SpA and Nuova IB-MEI SpA, incorporated under Italian law, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that the said Commission Decision 90/399/EEC was void.

By decision of 15 May 1991, the Court assigned the case to the Third Chamber under Article 95 of the Rules of Procedure and decided to open the oral procedure without any preparatory inquiry.

II — Forms of order sought

The *applicants* claim that the Court should:

(i) declare void Decision 90/339/EEC of 26 July 1990 terminating an anti-dumping proceeding concerning imports

of certain single-phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia;

(ii) order the Commission to pay the costs.

The *Commission* contends that the Court should:

(i) dismiss the application as unfounded; and

(ii) order the applicants to pay the costs.

III — Pleas in law and arguments of the parties

The *applicants* first claim that they have a right to bring the action since the contested decision is of direct and individual concern to them. The *Commission* does not contest the admissibility of the claim.

As regards the substance of the case, the arguments which the applicants put forward in support of their action, but which the Commission contends are unfounded, concern on the one hand the lack of significant injury resulting from imports originating in Romania and Czechoslovakia (point 17 of the contested decision) and, on the other hand, the elimination from the proceeding of imports originating in Bulgaria (point 7).

1. *The lack of significant injury*

The *applicants* claim that the Commission's conclusion that there has been no significant injury, which is based, on the one hand, on the supposed reduction in the market share of the imports in question and, on the other hand, on the supposed lack of effect of the imports on the Community producers' prices, is obviously mistaken and the statement of the reasons on which it is based is insufficient and incorrect.

In this connection the *Commission* first observes that the applicants are contesting only two of the factors which led it to the conclusion that there was no significant injury. Points 8 and 16 of the contested decision show that it took into account all the factors listed in Article 4(2) of Regulation No 2423/88, the majority of which are not contested by the applicants. It follows, according to the Commission, that even if the applicants' criticisms of the Commission's statement of reasons were justified, they would by no means be enough to invalidate the Commission's finding that there was no significant injury.

(a) Reduction in the market share of the imports in question

(1) The *applicants* first of all express the greatest reservations as to the reliability of the data used by the Commission relating to the volume of the imports in question. These data were taken exclusively from the replies to the anti-dumping questionnaires supplied by the Romanian and Czechoslovak exporters and, although they

did not correspond to the data available to the applicants, they were not checked in any way at either the exporters' or the importers' head office.

The *Commission* observes on this point that the applicants submit no evidence to contradict the data provided by the exporters. The data supplied by the applicants in their complaint do not represent such evidence because they are based on Community statistics covering products other than those involved in the present anti-dumping proceeding. The Commission points out moreover that it is a constant practice to take as the basis for its findings the figures given in the answers to the questionnaires, corroborated where possible by Eurostat statistics.

According to the applicants that requirement is, moreover, obviously contrary to the previous practice followed by the Commission in numerous cases and to the Court's case-law. In this context the applicants draw attention in particular to the Commission decision in the case of the standardized multi-phase electric motors, in which the Commission based its determination of injury exclusively on the fact that the market share of electric motors originating in the countries concerned remained considerable and was accompanied by significant price undercutting, and that is the position also in this case. That decision was confirmed by the Court of Justice which on that occasion, as regards the reduction in the market share of the imported electric motors and the increase in Community production, on which the applicants in this case rely, expressly emphasized that the examination of injury must involve a series of factors, no one or several of which can necessarily give decisive guidance (judgment in Case C-157/87 *Electroimpex* v *Council* [1990] ECR I-3021 at paragraph 41).

(2) Next the *applicants* claim that, even on the basis of the figures used by the Commission, the conclusion which it has drawn is manifestly incorrect because it is based on the idea that an increase in the importers' market share is a condition *sine qua non* for a determination of injury within the meaning of Article 4 of Regulation No 2423/88. According to the applicants, such a requirement is incompatible with the actual terms of Article 4(2) of that regulation, which shows clearly that the 'volume of . . . imports' is only one factor amongst others which must be taken into account to determine the existence of injury. In fact, it appears from that paragraph that any increase in imports may also be evaluated 'either in absolute terms or relative to production or consumption in the Community'.

The *Commission* agrees with the applicants' view that an increase in the market share of the imports is not a condition *sine qua non* for a determination of injury, and stresses that it did proceed in that way, as may be seen in particular from its conclusions on injury (point 17 of the contested decision).

(3) Finally, the *applicants* claim that there is also manifest discrimination against them based on the fact that the Commission refused for no reason to apply to this case

its consistent practice of assessing the existence of injury only on the basis of the 'free market' for the product in question. It follows from that practice that when a part of Community production is not sold on the free market but rather transferred within the 'captive market' of an integrated group, it cannot be regarded as being the subject of normal trading transactions and is not therefore subject to the effects of the imports responsible for the price undercutting. According to the applicants the Commission ought to have applied that policy also in this case, because the existence of a 'captive market' and a 'free market' is in fact characteristic of the sector of single-phase electric motors for washing machines. If the Commission had proceeded in that way, as it was several times requested by the applicants to do, it would have been found that the sales of the producers concerned from Eastern Europe represent not only a considerably larger market share (39 to 40%, with over 50% on the Italian market) but also that that share remained stable or increased slightly between 1986 and 1989.

The *Commission* confirms that in certain quite specific anti-dumping proceedings the institutions took account of so-called 'non-captive' or 'free' market shares to emphasize the trend of imports in those cases. It stresses, however, that that is not a consistent practice but an exception to the rule set out in Article 4(2)(a) of Regulation No 2423/88 according to which the examination of injury is to be based on 'the volume of ... imports ... relative to ... consumption in the Community', that is, relative to the share of the 'whole market' and not to the share of the 'free market'. In this case the Commission thought it inappropriate to take into account only sales on the 'free market' because the market as a whole represented a better index of the state of the Community industry than the share of imports in the free market. In support of this conception the Commission points out that the electric motors in question, whether imported or of Community origin, are sold on the same market and used for the same purpose, namely the manufacture of washing machines. Electric motor manufacturers who are linked to washing-machine manufacturers also sell their motors to other washing-machine producers and clearly charge the same prices for such sales as far sales to the washing-machine manufacturers to whom they are linked. What is more, the subsidiary producing motors available to the washing-machine manufacturers also buys imported electric motors and two so-called independent producers sell their motors to washing-machine manufacturers who have subsidiaries manufacturing the same motors. Finally the Commission observes that even if it had evaluated the trend of imports on the 'free market', the figures produced by the applicants show clearly that it would not have come to any other conclusion.

In their reply the *applicants* observe that they were informed for the first time in the Commission's defence that in this case the Commission regarded an examination on the basis of the 'free market/captive market' concept as inappropriate and that it therefore examined the trend of market shares on the 'whole market'. They say that no reasons are given for this choice in the contested decision, which on the contrary uses the 'free market/captive market' concept in the second and third paragraphs

of point 16. In any case, even if the percentages of the market shares of imports are regarded in relation to the 'whole market' — in this case nearly 25% — the impact of the imports is, according to the applicants, just as significant. In fact, the Commission had already acknowledged that there was significant injury in situations in which the market share of the imports was considerably less than that calculated in this case.

The *Commission* claims, in its rejoinder, first that the examination of injury relative to the 'whole market' is required under Article 4(2)(a) of Regulation No 2423/88 and it is therefore unnecessary to state the reasons for effecting it. The Commission remarks in addition that, even if it had examined the injury by reference to the 'free market' only, it would not have come to any other conclusion. In fact the distinction between the 'free market' and the 'captive market' was relevant only in the case of two of the four companies, namely Sole SpA and Selni, and could have been validly applied only to Selni. The Commission observes that as Sole SpA had been until October 1987 a division of the Zanussi group and had then become a member of the Electrolux group, it was not in a position to provide the Commission with the figures needed to enable it to draw a distinction between free sales and captive sales for 1986, 1987 and 1988. As regards Selni, the Commission thinks that the company did not suffer greatly from competition from imports originating in Romania and Czechoslovakia; that is shown by an examination of Selni's sales for the 'free market', which rose from 32 775 motors in 1986 to 384 855 motors in 1989 on the Italian market and which, on the Spanish market, rose from zero in 1986, 1987 and 1988 to 1 860 motors in 1989.

(b) Effect of the imports on the prices charged by the Community producers

In this respect the *applicants* state that the Commission, whilst acknowledging in point 16 of the contested decision that there seemed to be a general deterioration in the financial situation of the Community producers, nevertheless systematically refused to acknowledge that the imports had any impact on the Community industry's financial situation in this case. They think that the reasoning put forward by the Commission in reaching that conclusion shows a fundamental inconsistency and that basically it consists in interpreting each factor as a reason for terminating the proceeding. The statement of reasons, moreover, does not meet the requirements of Article 190 of the EEC Treaty as interpreted by the Court of Justice, in particular in its judgment in Joined Cases C-304/86 and C-185/87 *Enital* v *Council and Commission* [1990] ECR I-2939, since the identity of the Community producers concerned is not mentioned and the reasons given partially overlap.

To demonstrate the inconsistency in the statement of the reasons on which the contested decision was based, the applicants analyse the situation of each complainant company. As regards those companies which still showed a profit, namely Selni and IB-MEI, the applicants challenge the Commission's deduction that because there were profits there was no injury. According to the applicants, the Commission should also have considered whether the profits were reasonable and should have checked whether they had been made on the 'free

market'. Finally, the Commission ought to have taken into account the fact that Article 4 of Regulation No 2423/88 in no way demands that the whole of the Community industry must show a loss before measures of protection against dumping can be adopted. Had they followed such a course, the Commission's officers would have been in a position to note that the profit still shown by Selni was due solely to the fact that the prices paid by the Thomson group for sales on the 'captive market' offset the losses suffered on the 'free market'. In fact, as may be seen from the questionnaire which Selni completed, the company sells on the 'free market' at prices below its production costs and total sales of the motors in question fell considerably during the investigation period and in 1989 were less than 3.8%. As regards the profits of the Spanish company IB-MEI, the applicants claim that the Commission ought to have examined whether the profits were still reasonable in view of the fact that they had fallen considerably in recent years, from 18.2% in 1986 to 4.9% in 1989. Such an examination was all the more necessary because the imports in question penetrated the Spanish market, on which IB-MEI principally operates, to a lesser extent than the Italian market and the Commission also found less undercutting of prices on the Spanish market than in Italy. That explains why IB-MEI is not in an even worse position on its national market.

As regards the complainant companies which made losses, namely Sole SpA and Nuova IB-MEI, the applicants criticize the Commission's finding that the losses were a consequence of the group's purchasing policies and state that the Commission ignored the fact that on the 'whole market' by reference to which it claims that its assessment was made, sales were made at a loss since these companies' results on the 'free market' were — and still are — very unfavourable. According to the applicants, the Commission went beyond the data relating to the 'whole market' and assessed the situation on the 'captive market' only because it needed to find a justification for eliminating a factor which was incompatible with its concern to terminate the proceeding. In support of this idea, the applicants refer to the situation of Sole SpA, whose losses were not regarded as relevant by the Commission because its prices, it is suggested, were imposed by the parent company manufacturing washing machines. In the applicants' opinion, that statement of reasons is clearly inconsistent and they think the Commission has lost sight of the fact that the 'purchasing policies' within an integrated producer's group have no effect on the prices obtained by the same producer on the 'free market'. That is confirmed by Section D of the questionnaire on selling prices issued by the Commission, a section in which the Commission itself asked the complainants to supply only the prices invoiced to independent customers and to exclude those relating to transactions within the group. The answer to the questionnaire supplied by Sole SpA and checked by the Commission shows that the prices obtained by the company on the 'free market' are lower than its production costs. The Commission was therefore wrong in considering that the clear price undercutting caused by the imports in question had no impact on the situation of Sole SpA. As regards the situation of Nuova IB-MEI, the applicants doubt the relevance of the Commission's statement of reasons for rejecting the causal link between the undercutting by the imports in question and the profit margins of Nuova IB-MEI, namely the lack of information on the company's financial situation during the preceding years. In that connection the applicants claim in particular that even if these data had been available it would still have been

impossible for the Commission to evaluate the causal link since it examined the price undercutting by the imports in question only for the period of the investigation. In any event, they state that the examination of the situation of Nuova IB-MEI could not have a decisive effect on the overall examination of the injury suffered by the Community industry, since Article 4(5) of Regulation No 2423/88 provides that the examination must be conducted in relation 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 of the total Community production of those products' and since Nuova IB-MEI represents no more than 5% of the Community production in question.

As regards that analysis, the applicants' opinion is that the fact that the Community producers' selling prices went up considerably during the investigation period, as the Commission mentions in point 15 of the contested decision, cannot be relied upon to prove that there was no injury. On this subject they make the criticism that the Commission simply noted the complainant companies' statement that these increases were not enough to offset the increase in production costs, but did not consider whether such increases were actually sufficient to re-establish the Community producers' financial situation. It was all the more necessary to do so since Article 4(2)(c) of Regulation No 2423/88 makes a determination of injury possible even if there has been an increase in the Community producers' prices to the extent to which, as in this case, the dumped imports prevent a price increase which would otherwise have occurred.

The *Commission* first points out that its conclusion that there was no injury was based on an appreciation of all the factors set out in Article 4(2) of Regulation No 2423/88, most of which are not challenged by the applicants.

As regards the effect of the imports on prices and profits, on which the applicants do not share its views, the Commission thinks that the reasoning set out in points 15 and 16 of the contested decision explains clearly why it was not in a position to conclude that the Community industry had suffered injury as far as prices and profits were concerned. In that respect it notes that in point 15 it stated that 'Community producers raised their prices considerably during the investigation period' and in point 16 it stated, as regards the question of profits, that it was not able to make conclusive findings because two undertakings accounting for almost half the Community production did not supply the necessary data.

The Commission's reply to the applicants' complaint that the statement of reasons on which the decision is based was rather difficult to follow — since the identity of the Community producers in question is not mentioned and the reasons given partially overlap — is that its examination of injury

relates, in accordance with Article 4(5) of Regulation No 2423/88, to 'the Community producers as a whole' and that there is no need for producers to be individually identified. The reasons given partially overlap because they are interrelated.

For these reasons the Commission takes the view that the statement of the reasons on which the contested decision is based meets the requirements of Article 190 of the EEC Treaty.

2. *The elimination from the proceeding of imports from Bulgaria*

The *applicants* claim that there is no foundation for the Commission's decision to eliminate imports from Bulgaria from the proceeding on the ground that no exports from that country had been recorded in 1988 or during the investigation period. They wonder in particular what data the Commission referred to in arriving at such a conclusion, since the Bulgarian producer did not reply to the questionnaire sent it by the Commission, the importers supplied no information regarding their imports from Bulgaria and the Eurostat statistics, even though they relate to a tariff heading not covering exclusively the motors involved in the complaint, mention significant imports from Bulgaria.

In these circumstances and in view particularly of the Bulgarian exporter's failure to cooperate, the Commission was obliged, the applicants claim, to follow its normal practice of applying Article 7(7)(b) of Regulation No 2423/88 according to which preliminary or final findings, affirmative or negative, may be made on the basis of the facts available. The Commission could therefore have relied on the information relating to imports from Bulgaria which the complainants had provided in their complaint.

The *Commission* observes in this connection that the applicants did not supply any evidence regarding imports of Bulgarian motors into the Community during the investigation period. In the complaint the applicants had referred only to imports into Spain in 1988, that is, before the period covered by the investigation.

Next the Commission emphasizes that it did, on the contrary, ascertain that Eurostat statistics contained no mention of the import into the Community of electric motors originating in Bulgaria. That was corroborated on the one hand by the Spanish administration which confirmed that no motors originating in Bulgaria had been imported during either 1988 or the reference period and on the other hand by a declaration from the Bulgarian exporter confirming that he had not exported anything to the Community in 1988 or 1989.

The Commission thinks that in these circumstances it was right to eliminate the Bulgarian exporter from the proceeding.

In their reply the *applicants* make the criticism that for the sake of good administration and being aware of the risk of injury the Commission ought to have checked on imports not only with the Spanish customs but also with the Italian and French customs.

In its rejoinder the *Commission* observes on this subject that it regards the Eurostat statistics as reliable and that it was only so as to leave nothing to chance that it had carried out a double check with the Spanish customs, since the complainants had referred to imports on that market. As regards other markets, it took the view that such a step was unnecessary inasmuch as the Eurostat statistics were corroborated by a written declaration from the Bulgarian exporters.

M. Zuleeg
Judge-Rapporteur