JUDGMENT OF THE COURT
28 November 1989 *

In Case C-121/86

(i) Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE

(ii) Makedonikoi Lefkolithoi Metalleftiki Viomichaniki kai Naftiliaki Etaireia AE

(iii) Ellinikoi Lefkolithoi Metalleftiki Viomichaniki Naftiliaki kai Emporiki Etaireia AE

(iv) Magnomin Geniki Metalleftiki Etaireia AE, Metalleftiki Emporiki kai Metapoiitiki

companies incorporated under Greek law, all of whose registered offices are in Athens, represented by Panagiotis Bernitsas, of the Athens Bar, with an address for service in Luxembourg at the Chambers of Aloyse May, 31 Grand-rue,

applicants,

v

Council of the European Communities, represented by Erik Stein, Legal Adviser, and Christos Mavrakos, a member of its Legal Department, with an address for service in Luxembourg at the office of Jörg Käser, Director of the Legal Affairs Directorate of the European Investment Bank, 100, boulevard Konrad-Adenauer,

defendant,

APPLICATION under Article 173 of the EEC Treaty for a declaration that Council Decision 86/59/EEC of 6 March 1986 terminating the anti-dumping proceeding concerning imports of dead-burned (sintered) natural magnesite orig-

* Language of the case Greek

inating in the People's Republic of China and North Korea (Official Journal 1986, L 70, p. 41) and any prior or subsequent connected decision are void,

THE COURT

composed of: O. Due, President, Sir Gordon Slynn and C. N. Kakouris (Presidents of Chambers), T. Koopmans, R. Joliet, J. C. Moitinho de Almeida, G. C. Rodríguez Iglesias, F. Grévisse and M. Díez de Velasco, Judges,

Advocate General: G. Tesauro
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing as amended following the hearing on 16 May 1989,

after hearing the Opinion of the Advocate General delivered at the sitting on 11 July 1989,

gives the following

Judgment

1 By an application lodged at the Court Registry on 23 May 1986, Anonymos Etaireia Epicheiriseon Metalleftikon Viomichanikon kai Naftiliakon AE and three other undertakings incorporated under Greek law brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Council Decision 86/59/EEC of 6 March 1986 terminating the anti-dumping proceeding concerning imports of dead-burned (sintered) natural magnesite originating in the People's Republic of China and North Korea (Official Journal 1986, L 70, p. 41) and any other prior or subsequent connected decision are void.

2 In June 1982 the applicant undertakings, which are producers of dead-burned natural magnesite, lodged a complaint with the Commission under Council Regulation (EEC) No 3017/79 of 20 December 1979 on protection against dumped or

subsidized imports from countries not members of the European Economic Community (Official Journal 1979, L 339, p. 1) in which it complained of the dumping of imports of that product originating in the People's Republic of China and North Korea.

3 The preliminary investigation established the existence of dumping and of various factors indicating that injury had been suffered by the relevant Community industry. By Regulation (EEC) No 3542/82 of 22 December 1982 (Official Journal 1982, L 371, p. 5), the Commission therefore imposed a provisional anti-dumping duty valid for a period of four months with effect from 1 January 1983, which was extended for a further period of two months by Council Regulation No 991/83 of 25 April 1983 (Official Journal 1983, L 110, p. 27).

4 On 9 June 1983 the Commission submitted to the Council a proposal for the imposition of a definitive anti-dumping duty on the imports of magnesite which had led to the complaint. After examining in greater detail the question of the comparability of the products in issue, the Council decided, however, not to adopt the regulation proposed by the Commission.

5 On 19 April 1985 the complainant undertakings transmitted to the Commission fresh information amounting to initial evidence of dumping and of injury caused by Chinese imports of dead-burned natural magnesite. The Commission subsequently pursued its investigations on the basis of Council Regulation No 2176/84 of 23 July 1984 (Official Journal 1984, L 201, p. 1), hereinafter referred to as the 'basic regulation', which replaced Council Regulation No 3017/79, mentioned above. At the end of its investigation, the Commission came to the conclusion that the Community industry was no longer suffering serious injury. Accordingly, it submitted to the Council a proposal for terminating the anti-dumping proceeding concerning imports into the Community of dead-burned natural magnesite originating in the People's Republic of China and North Korea. The Council approved that proposal and on 6 March 1986 adopted the aforementioned Decision 86/59 terminating the anti-dumping proceeding concerning such imports.

6 In support of their application for a declaration that Council Decision 86/59 is void, the applicants claim that the decision lacks a statement of reasons, that the rules of law contained in the basic regulation have been infringed and that there has been a misuse of powers. According to the applicant undertakings, the validity of those submissions is borne out by the information contained in the Commission's non-confidential files.

7 Reference is made to the Report for the Hearing for a fuller account of the facts of the case, the course of the procedure and the submissions and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

8 At the outset it should be pointed out that, in accordance with the consistent case-law of the Court (see in particular the judgment of 14 July 1988 in Case 187/85 *Fediol* v *Commission* [1988] ECR 4155, paragraph 6), even though a discretion has been conferred on the Community institutions, the Court is required to verify whether or not they have observed the procedural guarantees afforded by the basic regulation and whether or not they have committed manifest errors in their assessment of the facts, have omitted to take any essential matters into consideration or have based the reasons for their decision on considerations amounting to a misuse of powers.

9 The various submissions put forward fall to be examined in the light of those considerations.

The allegation of a lack of reasoning

10 In their submission the applicants claim, in particular, that the contested decision takes no account of the fact that dumping is taking place and that the decision is based solely on comparative information which does not prove that the Community industry suffered no injury.

11 As regards the fact that the Commission, after finding that no serious injury was being suffered by the Community industry, took the view that there was no need to continue the investigation into the alleged dumping, it should be stated that

Article 4(1) of the basic regulation does not in proper circumstances preclude the existence of injury allegedly suffered by Community industries from being ascertained independently of the two other conditions required for the imposition of anti-dumping duties, namely a definitive finding of dumping and the need to act in the interests of the Community. Moreover, it is clear from Articles 2 and 4 of the basic regulation that the findings of dumping and of injury are based on different factors which may therefore be analysed separately.

12 As far as injury is concerned, it is clear from the recitals in the preamble to the contested decision that the Community authorities based themselves on several matters of fact relating essentially to the lack of any impact of the imports of the product in question on the relevant Community production and, accordingly, the lack of any injury capable of justifying the imposition of a definitive anti-dumping duty.

13 The findings made in that connection in fact relate to an increase in Community production, an increase in the utilization of production capacity of all Community producers, a rise in their sales on the Community market and in their market share as well as a rise in their average sale prices, an increase in their profit and an increase in the number of persons employed.

14 It should be pointed out first of all that the assessment which was thus carried out, which does not seem arbitrary or unreasonable, is in conformity with the criteria laid down in Article 4(2) in the context of the examination of injury.

15 It should then be observed that, although Articles 4(1) and 12(1) of the basic regulation make the imposition of a definitive anti-dumping or countervailing duty conditional on the existence of a causal link between the dumping and the injury suffered by the Community industry, a finding of an absence of injury is sufficient to justify the termination of the proceeding without the imposition of any anti-dumping duty.

16 It follows that the submission based on a lack of reasoning must be rejected.

The infringement of rules of law contained in the basic regulation

17 In their second submission, the applicants allege first of all an infringement of Article 7(1)(c) of the basic regulation, according to which the investigation into dumping is normally to cover a period of not less than six months prior to the initiation of the proceeding, that provision also being applicable to the investigation into injury. Yet, so the applicant undertakings allege, the Commission took no account of the data relating to 1985, which they say are decisive for showing the extent of injury suffered by the Community industry.

18 That line of argument cannot be accepted. In fact, it is clear from the evidence before the Court that both the data relating to the six months prior to the notice of initiation of the proceeding of 29 June 1982 and the data relating to the period prior to the notice of continuation of the proceeding of 19 June 1985 were taken into consideration in order to verify both the alleged injury and the existence of dumping. That finding cannot be invalidated by the fact that it was not considered necessary to continue the investigation into dumping.

19 Certainly, the contested decision does not expressly mention the data relating to the first months of 1985. It must, however, be acknowledged that such an omission does not constitute a flaw capable of affecting the validity of the decision, inasmuch as those data appear in the working document transmitted to the Anti-dumping Advisory Committee on 13 November 1985, in which the Commission indicated to the Greek producers the grounds on which it considered that those data were not of such a nature as to alter the finding that there was no serious injury.

20 It should also be recalled that Article 4 of the basic regulation confers a wide discretionary power on the Commission as regards the period to be taken into consideration for the purpose of determining the injury. Yet the applicants have put forward no argument to support the conclusion that in the present case the Commission exceeded the margin of appreciation available to it. On the contrary, it is clear from the documents before the Court that the Commission took into consideration a period of approximately four years, in conformity with Community practice in this area.

21 Secondly, the applicants claim that the proceeding lasted for four and a half years, which, they say, is contrary to Article 7(9) of the basic regulation and the principles of legal certainty, the protection of legitimate expectations and the resolution of disputes within a reasonable period.

22 In that connection it should be pointed out that, as the Court held in its judgment of 12 May 1989 in Case 246/87 *Continentale Produkten-Gesellschaft Erhardt-Renken GmbH & Co.* v *Hauptzollamt München-West* [1989] ECR 1151, paragraph 8,) the period of one year mentioned in Article 7(9) of the basic regulation is a guide rather than a mandatory period. That interpretation is borne out both by the wording of the provision, according to which the investigation is 'normally' to be concluded within that period, and by the nature of the anti-dumping proceeding whose progress does not depend solely on the efforts of the Community authorities. It should, however, be pointed out that it follows from that provision that the anti-dumping proceeding must not be extended beyond a reasonable period to be assessed according to the particular circumstances of each case.

23 In the present case, it appears that the proceeding was longer than usual, since it extended over a period of approximately four years. However, it is clear from the documents before the Court that the Community authorities were not in a position to terminate the proceeding within the one-year period on account of certain specific circumstances mentioned in the recitals in the preamble to the contested decision, in particular the complexity of the proceeding and the contradictory conclusions reached by the experts.

24 Thirdly, the applicants claim that in spite of their fresh request for the proceeding to be reopened in 1985 only in relation to the People's Republic of China, the Commission preferred to continue the pending proceeding concerning both China and North Korea.

25 On that point and in the light of the data contained in the working document transmitted to the Anti-dumping Advisory Committee on 13 November 1985, it should be observed that during the reference period imports originating in China decreased even more than all imports originating in those two countries. In those circumstances, it must be stated that, even if the Community institutions had conducted a separate examination of the data relating to China, the result of the investigation would not have been different.

26 Finally, it should be stated that, at all events, the fact that the complaint lodged by the Community industry on 19 April 1985 related only to imports from China is of no relevance, given that the proceeding, which was initiated in 1982 and covered both China and North Korea, had not yet been terminated.

27 On the basis of all the foregoing considerations, the second submission must also be rejected.

The allegation of a misuse of powers

28 In their third submission, the applicants maintain that the contested decision amounts to a misuse of powers inasmuch as the limits of the Commission's discretionary power were widely exceeded and the Council in June 1983 embarked on an examination of the merits of the question of the comparability of the products, which, they argue, runs counter to the objectives laid down by the Community legislature.

29 It should be stated, however, that the basic regulation confers on the Community authorities a wide power of discretion, and that the applicant has adduced no factual evidence to warrant the conclusion that in the present case the Commission exceeded the margin of appreciation which it had.

30 As regards the fact that the Council conducted an examination of the comparability of the products in June 1983, it should be emphasized that Article 12 of the basic regulation provides that: 'Where the facts as finally established show that there is dumping or subsidization during the period under investigation and injury caused thereby, and the interests of the Community call for Community intervention, a definitive anti-dumping or countervailing duty shall be imposed by the Council, acting by qualified majority on a proposal submitted by the Commission after consultation'. It is clear from that provision that the Council is competent to rule on all the conditions which must be satisfied for the imposition of an anti-dumping duty without being obliged to adopt every proposal made in that connection by the Commission.

31 This submission must therefore also be rejected.

The allegation that the data used were inaccurate

32 The applicants challenge the accuracy of the data which formed the basis of the contested decision, inasmuch as they are, in their view, in contradiction both with official statistics and the Commission's earlier decisions, proposals and findings. The applicants point out in particular that the Commission's non-confidential files do not contain the questionnaires relating to imports of natural magnesite originating in North Korea from 1982 and to imports of that product originating in China from the second quarter of 1983 onwards.

33 As regards the accuracy of the data mentioned in the contested decision, it should be emphasized first of all that in the present case the Community authorities were entitled to take as their basis the specific data obtained during the investigation conducted by the Commission, even if those data do not coincide with Community statistics. In fact, it is clear from the documents before the Court that it became apparent during the course of the investigation that dead-burned natural magnesite was classified in the Nimexe code under different headings and that the official statistics made no distinction in respect of products whose MgO content is between 85 and 92%, which were the only products concerned by the anti-dumping proceeding. It is also undisputed that the reasons for the contradiction between the data used in the reasoning of the contested decision and the official statistics were explained to the Greek producers in a communication from the Commission dated 4 February 1986.

34 It should further be observed that the data underlying the Commission's earlier findings and proposals were, in the majority of cases, provisional data which were therefore capable of being altered during the course of the investigation.

35 Moreover, it is clear from the structure of the basic regulation that injury must be established in relation to the time when any decision imposing protective measures is adopted, which provides justification for the fact that the data indicated in the proposal for a decision submitted by the Commission in 1983 were brought up to date in the context of its 1986 proposal which led to the adoption of the contested decision.

36 As regards the allegation concerning the absence of questionnaires relating to imports of natural magnesite originating in North Korea from 1982 and to imports of that product originating in China from the second quarter of 1983 onwards, it should be observed first of all that the Commission explained that those questionnaires were of a confidential nature and for that reason were not contained in the files transmitted to the applicants. However, it is undisputed that the applicants were on several occasions informed by the Commission of the data used during the investigation into injury.

37 It should further be borne in mind that the contested decision is based on a set of data concerning not only imports of the product in question into the Community but also the increase in Community production, the increase in the utilization of production capacity of all Community producers, a rise in their sales on the Community market, a rise in the market share held by them, a rise in their average sale prices, improved profits and an increase in the number of persons employed.

38 Consequently, it has not been established that the Community authorities committed any manifest errors of assessment or omitted to take essential matters into consideration.

39 It follows that the submission that the data contained in the Commission's non-confidential files were inaccurate cannot be upheld and that the application must accordingly be dismissed.

Costs

40 Under Article 69(2) of the Rules of Procedure the unsuccessful party is to be ordered to pay the costs. Since the applicants have failed in their submissions, they must be ordered to pay the costs.

On those grounds,

THE COURT

hereby:

(1) Dismisses the application;

(2) Orders the applicants to pay the costs.

Due Slynn Kakouris Koopmans

Joliet Moitinho de Almeida Rodríguez Iglesias Grévisse Díez de Velasco

Delivered in open court in Luxembourg on 28 November 1989.

J.-G. Giraud
Registrar

O. Due
President