industry of all such imports and consequently take appropriate action against all exporters, even if the volume of each individual exporter's exports is relatively small.

5. None of the provisions of Regulation No 2176/84 obliges the institutions to accept price undertakings offered by traders concerned by an investigation prior to the imposition of anti-dumping duties. On the contrary, it is clear from Article 10 of the regulation that it is for the institutions to determine whether such undertakings are acceptable.

It is within the discretion of the institutions to refuse a proposal for an undertaking, after examining it, on the ground that the price increase offered is not sufficient to eliminate injury, is spread over too long a period and is subject to a condition compliance with which cannot be verified by the institutions.

REPORT FOR THE HEARING (Fifth Chamber) delivered in Joined Cases 294/86 and 77/87 *

I — Summary of the facts

1. On 11 December 1985 the Commission announced in a notice published in the *Official Journal of the European Communities* (Official Journal 1985, C 319, p. 3) the initiation of an anti-dumping proceeding concerning imports of certain deep-freezers originating in the German Democratic Republic, the Union of Soviet Socialist Republics and Yugoslavia. It commenced its investigation.

2. On 9 September 1986 the Commission adopted Regulation No 2800/86 imposing a provisional anti-dumping duty of 33% on upright deep-freezers (Nimexe Codes 84.15-41 and 84.15-46) originating in the USSR.

In Regulation No 2800/86 the Commission accepted undertakings given by exporters established in the Federal Republic of Germany and in Yugoslavia and terminated the investigation with regard to chest freezers.

3. On 22 December 1986 the Council adopted Regulation No 29/87 imposing a definitive anti-dumping duty of 33% on certain upright freezers (Nimexe Codes 84.15-41 and 84.15-46) originating in the USSR and definitively collecting the amount secured by way of provisional anti-dumping duty under Commission Regulation No 2800/86, cited above.

4. The applicant considers that, since the anti-dumping duty is imposed only on

* Language of the Case: English.

freezers originating in the USSR and is thus only imposed on freezers exported by Technointorg, which is the sole USSR exporter, it is directly and individually concerned by the regulations in question.

5. The Council confines itself to stating that a fuller account of the facts appears from the chronology, setting out the sequence of events, which is annexed to its defence.

II — Written procedure and conclusions of the parties

1. The applications were lodged at the Court Registry on 26 November 1986 and 18 March 1987.

2. By an order dated 8 May 1987 the Court granted the Commission leave to intervene in Case 77/87 in support of the conclusions of the Council.

3. By a telex message received at the Court Registry on 6 April 1987, the applicant requested that Cases 294/86 and 77/87 be joined. By an order dated 8 July 1987 the Court ordered the joinder of the two cases.

4. The written procedure followed its usual course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided to open the oral procedure without any preparatory inquiry.

5. In Case 294/86 the *applicant* claims that the Court should:

(i) declare Commission Regulation No 2800/86 of 9 September 1986 void, at least in so far as it applies to the applicant, specifically in its Article 1;

(ii) order the Commission to bear the costs.

In Case 77/87 the *applicant* claims that the Court should:

(i) declare Council Regulation No 29/87 of 22 December 1986 void in so far as it applies to the applicant;

(ii) order the Council to pay the costs.

6. In Case 294/86 the *Commission*, defendant, contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs, including the costs relating to the application for interim measures.

7. In Case 77/87 the *Council*, defendant, contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs, including the costs relating to the application for interim measures.

8. In Case 77/87 the *Commission*, intervening, contends that the Court should:

(i) reject Technointorg's arguments;

(ii) order the applicant to pay the costs.

III — Submissions and arguments of the parties

1. The applicant has made the same submissions with regard to Commission Regulation No 2800/86 and Council Regulation No 29/87 (hereinafter referred to as 'the contested regulations').

2. The Commission states that it is in full agreement with the defence and rejoinder submitted by the Council in Case 77/87.

3. In its intervention in Case 77/87, the Commission limits its observations to two issues: Technointorg's failure to cooperate with the Commission and the Commission's refusal to accept the undertaking offered by Technointorg.

A — *Breach of the general principle that the rights of the defence should be protected and of the essential procedural requirement that the parties involved should be granted a fair hearing*

1. The applicant claims that the Commission and the Council did not take account of the proxy given to Mr Astakhov, Director of EWA (East-West Agencies SA, Brussels), Technointorg's associated importer in Brussels, to represent the applicant *vis-à-vis* the Commission in the anti-dumping proceeding in question. Consequently, it was impossible for Technointorg to defend itself against the charges levelled against it.

In that connection the applicant states that:

(i) the Commission received a copy of the proxy given to Mr Astakhov on 14 February 1986;

(ii) the Commission sent the questionnaire intended for exporters to addressees in the Soviet Union who were not concerned; it ought to have sent it to Mr Astakhov, in accordance with Article 7 (1) (b) of Regulation No 2176/84;

(iii) by telex message of 18 February 1986, the applicant informed the Commission of its mistake and requested more time: because the Commission had used the wrong address, the questionnaire had arrived late and it had not been able to collect all the information necessary to reply to the questionnaire; the Commission never replied to this telex message;

(iv) by telex message of 27 February 1986 addressed to the Commission, it confirmed that Mr Astakhov was authorized to represent Technointorg in the

proceeding in question; the Commission's allegation that it was not informed that the applicant was represented by Mr Astakhov until 'three months after the procedure had been initiated, and in any case after expiry of the time-limit laid down by the Commission for sending in questionnaires' is not true. The time-limit had been extended to 28 February 1986 (leaving Technointorg just over a week for filling in the questionnaire, received on 16 February 1986);

(v) lastly, during the investigation conducted by the Commission at the premises of the Belgian importer (EWA) on 1 April 1986, Mr Astakhov reiterated that he was in possession of a proxy, a copy of which was in the Commission's possession, and that he was able to supply the Commission with any information that it might wish to obtain concerning the exporter.

The applicant therefore considers that the Commission's statement in the third paragraph of Recital 4 of Regulation No 2800/86 and the Council's statement in Recitals 2 and 3 of Regulation No 29/87 that Technointorg 'had so far refused to cooperate' are materially inexact.

Lastly, after Regulation No 2800/86 had been adopted, the Commission continued making reproaches to Technointorg for not having cooperated, although Technointorg had offered to cooperate on numerous occasions. The applicant denies the statement contained in Recital 4 of Council Regulation No 29/87 that 'the Commission notes that ... Technointorg supplied no information as to its exports to the Community' and states that, on the contrary, the Commission never requested any such information or ever alluded to the usefulness of submitting that information, albeit belatedly. In any event, Recital 4, referred to above, clearly shows that the Commission did not want to receive any information as, if it had, it would have been obliged to carry out a supplementary investigation, which it was not prepared to do.

2. The Council states that the facts relied upon by Technointorg are not correct.

In the first place, the requirements of Article 7 (1) (b) of Regulation No 2176/84 were fulfilled: on the one hand, by sending copies of the exporter's questionnaire and the notice of the opening of the investigation by registered post to Technointorg at its address in Moscow and, on the other hand, by sending a telex message (also at the telex number in Moscow which it had used for telex messages addressed to the Commission), stating that the questionnaire had been sent to it.

Secondly, the Council states that a copy of the proxy given to Mr Astakhov was not received by the Commission until 7 March 1986 and that the first time that the Commission heard about the proxy in question was in a telex message sent by Technointorg on 27 February 1986. Mr Astakhov's letter dated 14 February 1986 was concerned only with his position as coordinator for the Dutch and Belgian importers.

Lastly, Mr Astakhov never asked for an exporter's questionnaire (even now, neither

Technointorg nor Mr Astakhov has completed an exporter's questionnaire). On 6 February 1986, EWA asked only for an importer's questionnaire to be sent to it.

As regards Technointorg's failure to cooperate, the Council states that neither Technointorg nor EWA reacted to telex messages sent by the Commission on 14 March 1986, stating that Technointorg had failed to cooperate. Secondly, it was after the adoption of Regulation No 2800/86 that EWA and its attorney informed the Commission that they were prepared to cooperate 'from now on'.

The Council therefore concludes that the Commission did not infringe any procedural requirement.

3. The applicant reiterates in its reply that it was the Commission which manoeuvred it into a situation of non-cooperation.

4. The Council states that the Commission could not have started discussions with Mr Astakhov until the questionnaire had been filled in and, if the necessary information had been available and there had been any evidence that the applicant was willing to cooperate, it would certainly have been willing to carry out a supplementary investigation at an appropriate time.

5. The Commission, intervening, draws attention first to the need for the cooperation of the interested parties in anti-dumping investigations: it of course could not have powers to carry out compulsory inspections of exporters' premises outside the Community and it does not possess powers of this kind even in the case of importers within the Community. In relation to Community industry, no such powers are needed since it is normally in the interests of Community industry to cooperate with the Commission. Secondly, it states that Article 7 (7) (b) of Regulation No 2176/84 allows the institutions to make findings on the basis of the facts available, in the absence of cooperation, and how satisfactory or otherwise this may be depends on whether the information available is complete enough to be a reasonable substitute for the full details.

The Commission considers that it should try to ensure that a company which has not cooperated is not treated more favourably than if it had cooperated (the Commission is very dependent on the cooperation of the parties concerned, and it is essential not to allow the impression to be created that a company can benefit from refusing to cooperate) but it has never tried to treat a company less favourably merely because it did not cooperate.

The Commission states that the need for full information, and therefore for full cooperation, is especially great when the Commission is considering whether to accept an undertaking, since an undertaking concerns the whole behaviour of the exporter in the future and implies a willingness to cooperate.

In order to consider adequately all the questions that normally arise in anti-dumping investigations, the Commission generally needs most of the information

requested by the exporter's questionnaire (Annex 1).

B — *Infringement of Article 190 of the EEC Treaty and of the general principle of law that decisions should contain a proper statement of reasons*

1. The applicant considers that the contested regulations should be declared void on the ground that they do not contain a proper statement of reasons. In that regard it states that:

(a) the Council took account of separate segments of the EEC market to show the relative increase in Technointorg's market share (Recital 14 of Regulation No 29/87). The applicant admits that its relative market share in the United Kingdom and Belgium has increased but nevertheless considers that this does not mean that its overall market share in the entire Community has increased or that any injury was caused to the EEC industry as a whole;

(b) in Recital 17 of Regulation No 29/87 the Council has not stated why it considers that the Community interest had to prevail;

(c) also, as regards the imposition of duty of 33%, neither the Commission nor the Council states the reasons on which this decision is based (Recital 33 of Regulation No 2800/86 and Recital 18 of Regulation No 29/87). The applicant is unclear why a duty of 33% removes the injury, especially considering the fact that according to the Council (Recital 6 of Regulation No 29/87) neither the injury nor the duty would have been different if the dumping margin found had been 70% instead of 204% as found by the Commission.

2. As regards the examination of the applicant's market share, the Council states that it is clear from Recital 14 of Regulation No 29/87 that the applicant's market share had increased in the entire Community market. Moreover, Recital 13 of the regulation specifically endorses the points made by the Commission in Regulation No 2800/86.

Furthermore, as regards the Community interest, Recital 17 of Regulation No 29/87 states clearly and concisely the reasoning which led the Council to its conclusion, as required by the Court (judgment of 7 May 1987 in Case 258/84 *NSK* v *Council* [1987] ECR 1923, paragraphs 27 to 30) in which the Court stated that 'the statement of reasons required by Article 190 of the Treaty must disclose in a clear and unequivocal fashion the reasoning followed by the Community authority which adopted the measure in question in such a way as to make the persons concerned aware of the reasons for the measure and thus enable them to defend their rights, and to enable the Court to exercise its supervisory jurisdiction'.

Lastly, as regards the imposition of duty of 33%, the Council maintains, first, that the Commission stated the reasons in Recital 33 of Regulation No 2800/86 and, secondly, that the Council also stated the reasons for the measure in Recital 18 of Regulation No 29/87, which refers to 'the sale price

necessary to provide efficient Community producers with a reasonable profit'.

Moreover, the Council states that there is no necessary connection between the dumping margin and the extent of injury, except that under Article 13 (3) of Regulation No 2176/84 the duty cannot exceed the dumping margin. The calculation of the dumping margin (which reflects the difference between the export price and the price on the exporter's domestic market or on a comparable market) and the calculation of the amount of injury (which depends upon the difference between the price of dumped imports and the price of Community products on the Community market, among other factors) are wholly independent. Consequently, there is no reason why a lower dumping margin should affect the extent of injury or should necessarily result in a lower duty.

3. The applicant stresses in its reply that during the period in which its market share increased in the United Kingdom and in Belgium, consumption increased equally (by 35% in the United Kingdom). Furthermore, neither the Commission nor the Council has ever tried to quantify the possible outside influences on the EEC market situation, and the Commission merely indicated the existence of intra-Community competition in Recital 28 of Regulation No 2800/86, without showing that the alleged stagnation of the market was due to dumping rather than competition between Community producers.

The Council's statement concerning Recital 17 of Regulation No 29/87 is untrue in so far as that recital merely points to the difficulties facing Community production and to the economic and social importance of such production, without showing the existence of any causal connection between those problems and the applicant's market behaviour. The mere reference to existing problems in a specific market, in times of depression, does not fulfil the requirement laid down in the judgment of 7 May 1987, cited above.

Lastly, the applicant states that if the dumping margin is unrelated to injury and thus to the anti-dumping duty, then the calculation of the dumping margin cannot be a proper reason for imposing a specific anti-dumping duty. In Technointorg's opinion, the Council does not show why an anti-dumping duty of 33% gives a reasonable profit to an efficient Community producer. Furthermore, the Council and the Commission do not show why the relation between the selling price needed to provide efficient Community producers with a reasonable profit margin, on the one hand, and the selling prices in the Community of dumped imports, on the other hand, should lead to the imposition of an anti-dumping duty of 33% and not 31 or 34%. The first element of the relationship, which must be examined under Article 4 (2) (c) of Regulation No 2176/84, is a precondition for the finding of injury and not a reason for a finding of injury.

4. In its rejoinder the Council states that it is irrelevant whether overall consumption increased in the United Kingdom in the

period under consideration, since what is at issue is the relative market share of Technointorg.

The allegation that neither the Commission nor the Council has tried to 'quantify the possible outside influences on the EEC market situation' is unclear. If what is alleged is a failure to give precise quantitative data for the effects of such influences, the allegation is a new one (and is inadmissible under Article 42 (2) of the Rules of Procedure). It is in any event impossible to quantify separately the effect of one influence on a market which is affected by several elements. If what is alleged is that no account was taken of other factors which could have caused injury, then the complaint is answered in Recitals 27 and 28 of Regulation No 2800/86.

The complaint concerning the effect of competition between Community producers is answered in Recital 28 of Regulation No 2800/86, referred to by the applicant. Moreover, it was not stated, as inferred in the reply, that the stagnation of the market was due to dumping or to intra-Community competition. It was due to the factors mentioned in Recital 27. The question raised there was whether the injury to the Community industry suggested by its declining profitability was due merely to market stagnation; however, it was found that, while market stagnation might have been expected to affect imports also, dumped imports in fact increased threefold from 1981 to 1985.

The Council draws the applicant's attention to the scheme of the basic regulation and states that when, as in this case, the dumping margin is greater than the extent of the injury (these two elements having to be calculated separately), the duty should not be higher than is needed to eliminate the injury (Article 13 (3) of Regulation No 2176/84). The precise rate of duty to be imposed thus often depends on the injury calculation, and not on the dumping calculation.

As regards the fixing of duty at the level of 33%, the Council states that the costs of production of Community producers as found by the institutions plus the margin of profit which the institutions considered reasonable require a price increase which should result from a duty of 33%, as is clearly explained in Recital 18 of Regulation No 29/87. In the Council's opinion, a more detailed explanation could not be given without providing calculations based on the profitability of individual Community producers which, even if such calculations were appropriate in the preamble to a regulation, would necessarily disclose confidential information.

C — Infringement of Article 2 (5) of Council Regulation No 2176/84 and of Article 190 of the EEC Treaty

1. The applicant claims, first, that it did not have an opportunity of objecting to the choice of Yugoslavia as a comparable country, since the Commission failed to take into account the proxy given to Mr Astakhov and never requested information from him.

Secondly, it challenges the validity of determining normal value on the basis of the price in the Yugoslav market, and refers to the following substantial differences between that market and the USSR domestic market:

(a) income levels in Yugoslavia are higher than those in the USSR (the average monthly salary in Yugoslavia, converted to Belgian francs, is BFR 30 000 and in the USSR is only BFR 13 000) and, in a country with higher wages, a product costs more to manufacture;

(b) two particular elements characterize the manufacturing process employed for deep-freezers in Yugoslavia: first, certain components of these products are manufactured under licence granted by non-Yugoslav undertakings, entailing payment of a fee or royalty, and, secondly, certain components are acquired by the Yugoslav producers outside their country, entailing considerable supplementary purchasing costs.

Consequently, the Commission and the Council ought to have constructed the normal value in Yugoslavia instead of using the domestic price in that country. Furthermore, by not accepting any of the allowances requested by Technointorg in order to neutralize the characteristics referred to, the Commission and the Council applied Article 2 (5) of Regulation No 2176/84 in an unreasonabe and inappropriate manner.

2. The Council states that Technointorg had opportunities of commenting but chose not to do so, and the objections to the choice of Yugoslavia as the comparable country were only expressed after the imposition of the provisional anti-dumping duty, for example at the preparatory meeting prior to the official hearing, dated 16 October 1986.

The Council refers to Article 2 (5) of Regulation No 2176/84 and states that the normal value in Yugoslavia should only be constructed if there are circumstances which make it unreasonable to use the domestic price of the Yugoslav market. The applicant's argument exclusively concerns comparisons between the markets in the USSR and Yugoslavia. However, the whole purpose of Article 2 (5) is precisely to avoid having to try to take into account prices and costs in non-market economies, since they are never the result of market forces.

Moreover, the applicant's arguments do not bear scrutiny for the following reasons:

(a) conversion of average salaries in Eastern-European countries into convertible currencies at official rates of exchange is well known to be unrealistic;

(b) purchasing power cannot be related to wages alone, but must also take account of the cost of goods and services;

(c) a constructed value in Yugoslavia would have included production costs in Yugoslavia and a reasonable margin of profit in Yugoslavia. It would not use

production costs in the USSR or profit margins in the USSR, even if the allegations about those elements were correct.

In any case, even if the normal value in Yugoslavia had needed to be constructed because circumstances made it unreasonable to use domestic prices for determining the normal value, the result of the calculation would not differ significantly from the normal value based on the domestic price for sales in the ordinary course of trade. This is because the constructed normal value should be calculated with methods leading to results as close as possible to the normal value based on the domestic price.

3. The applicant distinguishes Article 2 (3) of Regulation No 2176/84 from Article 2 (5) in so far as the former contains a real hierarchy of possibilities for finding the normal value, whereas the latter contains two possibilities without stating which possibility should be used first. It therefore considers that it is not correct to say that the normal value under Article 2 (5) can only be constructed 'if there are circumstances which would make it unreasonable to use the domestic price of the Yugoslav market'. In its opinion, the Council can choose between the two possibilities laid down in the aforesaid article but must give reasons for its choice; however, no such reasons are given in Regulation No 29/87.

If the normal value of the product in Yugoslavia had been constructed, the Commission could have taken into account some of the specific characteristics of the Yugoslav market, for which allowances should have been made.

4. The Council rejects the applicant's contention that the Community authorities, when using evidence from a comparable country to calculate normal value under Article 2 (5), are required to say why they did not construct the normal value. Common sense and the drafting of Article 2 (5) indicate that an actual price should be used unless it is inappropriate for some specific reason. In any event, with regard to the only reason suggested by the applicant — some of the specific characteristics of the Yugoslav market, for which allowances should have been made — it is impossible to understand how or why the actual price on the Yugoslav market would not reflect those characteristics; the argument that allowances must be made for differences between the USSR and Yugoslavia has been refuted in the Council's defence.

D — *Infringement of Article 2 (9) and 10) of Council Regulation No 2176/84*

1. The applicant states first that the general purpose of Article 2 (9) and (10) of Regulation No 2176/84 is to place the export price and the normal value on the same footing in order to make a 'fair comparison' possible.

It states that this fair comparison should normally be possible after physical characteristics, quantities and conditions and terms

of sale have been made comparable through the use of allowances, established in accordance with the guidelines contained in Article 2 (10) of Regulation No 2176/84. If, after such allowances have been made, further differences subsist affecting price comparability, which make a fair comparison impossible, the applicant claims that the Commission and the Council have to make further allowances, even if they are not expressly provided for in the aforesaid article, since Article 2 (9) of Council Regulation No 2176/84 obliges the Commission to make a fair comparison in all the circumstances.

In this case, the abovementioned characteristics of the Yugoslav market affect price comparability. Consequently, by refusing to take into consideration the additional allowances suggested by the applicant in order to make a fair comparison possible, the Commission and the Council infringed Article 2 (9) and (10) of Regulation No 2176/84.

2. The Council refers both to its observations on the alleged characteristics of the Yugoslav market and also to Recital 14 of Regulation No 2800/86 and Recitals 8 and 9 of Regulation No 29/87, which answer the applicant's allegations.

In addition, it states that in so far as the applicant bases its complaint on Article 2 (9) and (10) of Regulation No 2176/84, it should be pointed out that those provisions cannot be interpreted by implication so as to contradict Article 2 (5), which requires that normal value shall be determined in an appropriate and not unreasonable manner. It would also defeat the whole purpose of Article 2 (5) to rely on conditions on the market of a non-market economy country so as to alter the normal value determined on the basis of prices in a comparable country.

3. The applicant reaffirms its position as regards the interpretation of Article 2 (9) and (10) of Regulation No 2176/84.

It also claims that Article 2 (9) and (10) and Article 2 (5) have two different functions. In its opinion, not only should normal value be determined in an appropriate and not unreasonable manner, but also the comparison between the normal value, so determined, and the export price has to be a fair comparison. Article 2 (9) thus further strengthens Article 2 (5), leading to a more appropriate and fair determination of the dumping margin.

4. In its rejoinder, the Council merely refers to the argument put forward in its defence.

E — *Infringement of Articles 4 (1) and 11 (1) of Regulation No 2176/84 and of Article 190 of the EEC Treaty.*

1. The applicant disputes the injury established by the Council and the Commission (in Recital 23 *et seq.* of Regulation No 2800/86 and in Recitals 11 *et seq.* of Regulation No 29/87).

It states first of all that the market in deep-freezers within the EEC consists of two distinct segments: the first, in which almost all the Community manufacturers are operative, is the upper segment of the market which contains the more sophisticated and more expensive freezers; the second, in which virtually only the Eastern European products are operative, together with a very small portion of Community industry, is the lower segment of the market and contains the simpler, cheaper freezers.

Referring to the minutes of the meeting of 22 October 1986, the applicant then states that the Commission compared 'products with similar characteristics, e.g. USSR models with the "bottom of the range" models of Zanussi, LEC and Philips. Comparisons have not been made with Bosch or AEG models'. The Commission therefore recognized that the market in freezers was divided into two types of product which did not compete with one another and that USSR models were in the lower segment and could therefore cause injury only to the Community production of cheap freezers.

The effect of imports on the entire Community production can *a fortiori* only be *de minimis* and therefore not material. Moreover, the applicant refers to the low number of units exported by Technointorg to the EEC (in 1985 approximately 20 000 units) and states that neither the Commission nor the Council has shown how the imports from Technointorg, considered separately from the other imports originating in non-member countries, could have caused any material injury to the Community industry. Nor have they given reasons for their finding of a 'cumulative' injury.

2. The Council first of all denies that the Commission accepted that the market in freezers consisted of two types of goods which did not compete with one another. It was recorded in the minutes to which the applicant refers that the price comparison in accordance with Article 4 (2) (b) was carried out by comparing the USSR freezers with the models that are most similar to them, that is to say the cheaper, 'bottom of the range' models of Zanussi, LEC and Philips. However, the fact that certain models were chosen for purposes of the comparison does not mean that other models, such as the models of Bosch and AEG, do not compete with the USSR freezers at all. In this connection the Council states that the models are similar from a technical and performance point of view, that all freezers do the same job and, moreover, that the bigger the price difference between expensive freezers and cheap freezers, the more tempting it is for a consumer to buy a cheap freezer.

Furthermore, the applicant has never provided any convincing evidence to show that its products and those of the Community industry, including Bosch and AEG, are not like products within the meaning of Article 2 (12) of Regulation No 2176/84. Consequently, in accordance with Article 4 (4) of the regulation, the effects of the imports are to be assessed in relation to all production of freezers in the Community.

As regards the fact that the applicant exported approximately 20 000 freezers to the EEC in 1985, the Council refers to Article 4 (2) and states that the volume of the imports is only one of the factors to be considered in determining injury. Moreover, where dumping takes place from several countries at the same time, it is usually necessary to examine the effects of the dumped imports together.

In determining whether to consider dumped exports from different countries separately, the Council and Commission in accordance with their usual practice took account of the comparability of the products imported in terms of physical characteristics, import volumes, the increase in those volumes by comparison with a reference period, the low price level of the products exported by all the exporters and the extent to which each imported product competed in the Community with the like product of the Community industry. The dumped goods all contributed similarly to the injury to the Community industry.

Faced with a series of exporters, it would be unrealistic to treat each exporter's exports separately since, where dumped imports originate from several different countries, their effects on Community industry are cumulative, and it is usually necessary to take action against all the exporters, even if each individual exporter's exports are relatively low. In any event, Technointorg's volume of exports was substantial and had increased substantially.

3. According to the applicant, the Council clearly considers that USSR freezers are not like products to the Bosch and AEG models, since it refers to Article 4 (2) (b) and states that, in accordance with that article, USSR freezers were compared only with the 'bottom of the range' models of Zanussi, LEC and Philips. The applicant has never pleaded that the USSR products are not like products. It maintains that they aim at a different public, they are cheaper, they are distributed through different channels and that to state that all freezers do the same job is over-simplifying the matter.

Thus, the applicant considers that competition between the two segments of the market will increase if price differences diminish, but the Eastern-European freezers will always remain considerably cheaper, which will prevent the advent of any real competition. In its opinion, an increase in the price of freezers from Eastern Europe will not result in an increased demand for European freezers, but will reduce demand for freezers from Eastern Europe. Not only will overall demand diminish without having a favourable effect on the European industry, but also demand will not move from Eastern European freezers to European freezers.

The imports can cause injury only to the 'bottom of the range' European production and, consequently, the injury to the entire European industry can *a fortiori* only be smaller.

4. The Council states that the contention that cheap imports can only cause injury to Community production of cheap freezers has been answered in the defence.

As regards the statement that 'competition between the two segments of the market will increase if price differences... diminish', the Council states that the reverse could be argued more plausibly. In its opinion, it is possible that consumers would buy cheaper Community freezers instead of buying no freezers at all, as the applicant maintains. If the applicant were correct, it would be impossible to protect the Community industry against dumping.

The Council recalls that it has already pointed out that freezers of all price ranges may be substituted for one another. Therefore, even if injury had occurred primarily in the 'bottom of the range' Community production, it must be regarded as affecting the Community production of freezers of all price ranges.

F — *Infringement of Article 10 (1) and (3) of Council Regulation No 2176/84 and of Article 190 of the EEC Treaty and breach of the principle of non-discrimination*

1. The applicant states that it offered two alternative undertakings to the Commission (the first on 22 October 1986, amended on 24 November 1986, and the second on 4 November 1986) and the Commission refused to accept these undertakings and would not even discuss their content with Technointorg. In the applicant's opinion, the Commission thus discriminated between exporters in Yugoslavia and the German Democratic Republic, with whom open negotiations took place concerning their offered undertakings, and Technointorg, which the Commission did not inform of the minimum requirements that it considered necessary for accepting an undertaking.

Although Article 10 of Regulation No 2176/84 leaves the Commission a wide discretion in accepting or refusing undertakings, the applicant nevertheless considers that it would be contrary to the spirit of Article 10 to consider that in the absence of cooperation — for which the company offering the undertaking is not responsible — the Commission may use this discretion without having regard to the specific use or abuse being made of its procedural powers.

Lastly, as regards the fact that the Commission did not receive its first undertaking in its amended form until after the deadline of 7 November 1986, the applicant states, firstly, that Article 10 (1) does not mention amendments to undertakings at all and, secondly, that that article allows undertakings to be offered after the deadline in exceptional circumstances. The circumstances in this case are sufficient to allow for such late undertakings.

2. The Council contends that the undertakings in question had the three following defects:

(a) the applicant proposed price increases far less than those needed to eliminate injury. Since the publication of the provisional duty regulation, Tech-

nointorg could have had no doubt about how much the Commission thought its prices should be increased;

(b) the applicant proposed price increases taking effect over a period of several years, and not reaching the full increase offered (which in any case was only 25%) until 1989/90;

(c) the full price increase of 25% in one of the undertakings proposed was to be conditional on a new factory going into production. In other words, Technointorg would have been in a position to control completely whether and when its undertaking would take effect. Indeed, it is not easy to see how the Commission could even have been sure of finding out whether the new factory was in production or not, if Technointorg had chosen not to inform the Commission about it.

Therefore the Commission was fully justified in rejecting the undertakings, and this rejection could not be considered to be an unreasonable exercise of the Commission's discretion.

3. The applicant considers that the Commission may not use its discretion in any arbitrary way. In the applicant's opinion what is at issue is not the fact that the Commission refused the undertakings but the way in which it did so.

It is true that the undertakings were offered after publication of the regulation imposing provisional duties, but to conclude from that that Technointorg 'could have had no doubt about how much the Commission thought its prices should be increased' is incorrect. Undertakings are often offered to avoid a higher duty imposed by regulation.

The applicant denies that the Commission would have had no way of verifying the fulfilment of the second undertaking. In a telex message sent to the Commission on 24 November 1986, Mr Efremov, Director-General of Technointorg, stated as regards the production of a new model: 'we would accept . . . all monitoring suggestions the Commission would make'.

The Commission clearly chose, in an arbitrary and discriminatory way, not to discuss the undertakings.

4. The Council sets out the position adopted by the Commission at various meetings and in various telex messages in order to establish that the Commission was always willing to consider undertakings in spite of the absence of the basic background information about Technointorg. It also reiterates that there was no discrimination against Technointorg at any stage in the procedure.

Lastly, the Council states that when undertakings are accepted it is not always possible to say what would otherwise have happened, but normally the price level in an undertaking is the same as that which would have resulted from the imposition of an anti-dumping duty.

5. The Commission stresses first that the Court has recently confirmed that the institutions have no duty to accept under-

takings which are offered (judgment of 7 May 1987 in Case 240/84 *NTN Toyo* v *Council* [1984] ECR 1809, paragraph 34).

The Commission sets out the considerations which it takes into account when considering offers of undertakings in the exercise of its discretion. The Commission must have a wide discretion in judging whether in all the circumstances an undertaking will operate satisfactorily and should be accepted. Undertakings have three advantages, namely that they enable the controversy to be terminated amicably, they save time and are flexible; however, the Commission must be fully informed about all the circumstances which might be relevant, particularly in view of the fact that monitoring an undertaking involves either a risk of circumvention or a substantial administrative burden, or both. Also, the exporters themselves have to give undertakings not only that they will not themselves export to the Community at prices below a specific level but that they will also take whatever measures are necessary to prevent the undertaking from being circumvented.

Thus the Commission is obliged, when deciding whether or not to accept undertakings, to balance the probable advantages against the probable disadvantages, in the light of its experience of the industry concerned. If experience has shown that the companies concerned are uncooperative, it is very much less likely that undertakings can be expected to work satisfactorily.

The Commission attaches, as Annex III, its correspondence with Technointorg concerning the undertakings which were offered and which have three obvious disadvantages already referred to by the Council.

The Commission therefore considers that Technointorg deliberately chose not to cooperate with the Commission by providing information and deliberately chose to offer undertakings which it should have known were fundamentally inadequate and unsatisfactory.

J. C. Moitinho de Almeida
Judge-Rapporteur