OPINION OF MR ADVOCATE GENERAL VAN GERVEN
delivered on 26 September 1991 *

Mr President,
Members of the Court,

1. In July 1989, the Commission received a complaint lodged by three trade associations (Associazone Nazionale Industrie Elettrotechniche ed Elettroniche (ANIE), Italy; Groupement des Industries de Matériels d'Équipement Électrique et de l'Électronique Industrielle Associée (Gimelec), France; and Asociación Nacional de Fabricantes de Bienes de Equipo (Sercobe), Spain) representing Community producers of single-phase, two-speed electric motors used for the manufacture of low-speed washing machines (hereinafter referred to as 'electric motors'). [1] According to the complaint, imports of similar electric motors originating in Bulgaria, Romania and Czechoslovakia were leading to dumping practices and therefore causing injury to the Community industry. The Commission was of the opinion that the complaint was accompanied by sufficient evidence and decided to initiate an anti-dumping procedure. [2]

The Commission's investigation led it to the conclusion that imports of electric motors originating in Romania and Czechoslovakia had not caused significant injury to the Community industry. As regards Bulgaria, the Commission eliminated Bulgaria from its study since no exports from that country had been recorded in 1988 or during the investigation period, namely from 1 January to 30 September 1989. By Decision 90/399/EEC of 26 July 1990 [3] (hereinafter referred to as 'the contested decision'), the Commission terminated the anti-dumping proceeding.

2. Two of the three trade associations which lodged the complaint, namely Gimelec and Sercobe, and two Italian producers of electric motors, namely Sole SpA and Nuova IB-MEI SpA, brought a joint action for a declaration that the contested decision was void. In support of their claim the applicants put forward the two following submissions: the Commission was wrong in concluding that imports of electric motors originating in Romania and Czechoslovakia did not cause significant injury to the Community industry (point 17 of the contested decision); furthermore, the Commission was wrong in eliminating imports originating in Bulgaria from its study (point 7 of the contested decision).

* Original language: French.

1 — The electric motors concerned fall within CN Code 8501 40 90. It should be noted that these motors are used only in washing machines destined for markets in the south of the Community. As a result of the damper and less sunny climate in the northern part of the Community, washing machines are sold there with motors capable of spin-drying at a higher speed.

2 — Notice of initiation of an anti-dumping proceeding concerning imports of certain single-phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia (OJ 1989 C 286, p. 11).

3 — Decision terminating an anti-dumping proceeding concerning imports of certain single-phase, two-speed electric motors originating in Bulgaria, Romania and Czechoslovakia (OJ 1990 L 202, p. 47).

Admissibility

3. The applicants contend, and the Commission does not challenge this point, that it follows from the judgments in *Fediol* [4] and *Timex* [5] that they have a right to bring this action.

I share the view that the four applicants' action is admissible. The trade associations Gimelec and Sercobe, acting on behalf of a French and a Spanish producer respectively, are co-signatories of the anti-dumping complaint lodged in pursuance of Article 5(1) of Regulation (EEC) No 2423/88 (hereinafter referred to as 'the basic regulation'). [6] The companies Sole SpA and Nuova IB-MET SpA are Italian producers on whose behalf the trade association ANIE acted, together with Gimelec and Sercobe, in lodging that complaint.

As Mr Advocate General Jacobs stated in his Opinion in *Extramet Industrie*,[7] it is clear from the Court's case-law, in particular the judgments in *Fediol* and *Timex*, already cited, that:

'annulment proceedings may be brought either by the complainant or by an undertaking which, even though it could not lodge the complaint itself, played a leading role in the initiation of the complaint. Moreover, such proceedings may be brought either against a communication addressed to the applicant stating that no action is to be taken, or against a regulation imposing an anti-dumping duty' (paragraph 22 of the Opinion).

It seems to me that in the light of that case-law the application against the Commission decision is admissible.

The submission on the absence of injury resulting from imports originating in Romania and Czechoslovakia

4. In point 17 of the contested decision the Commission comes to the conclusion that 'imports of electric motors originating in Romania and Czechoslovakia have not caused significant injury to the Community industry in question'.

According to the applicants, that conclusion is based solely on the two following grounds: on the one hand, the reduction in the market share of the imports concerned; and on the other hand the fact that these imports had no effect on Community producers' prices.

5. Before I consider the arguments put forward by the applicants to show that those two grounds are mistaken, it should be pointed out that, according to Article 4(2) of the basic regulation, as was stated in the judgment in *Neotype Techmashexport* v *Commission and Council* [8] at paragraph 50,

4 — Case 191/82 [1983] ECR 2913.

5 — Case 264/82 [1985] ECR 849.

6 — Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the EEC (OJ 1988 L 209, p. 1).

7 — Opinion delivered on 21 March 1991 in Case C-358/89 [1991] ECR I-2501; see in particular paragraphs 18 to 22.

8 — Joined Cases C-305/86 and C-160/87 [1990] ECR I-2945.

the examination of injury must take account of a whole series of factors and no single factor can in itself be decisive. It may be seen from the recitals in the preamble to the contested decision that it is not exclusively based on the two grounds mentioned by the applicants. On the basis of the criteria laid down by Article 4(2), the Commission has taken account of a whole series of factors, namely: the volume of imports both in absolute terms and relative to consumption in the Community (points 8 and 9); the price of the imports (point 10); Community production (point 11); utilization of the industry's production capacity (point 12); the Community industry's sales and market share (points 13 and 14); Community producers' selling prices (point 15); and their profits (point 16).

However, as the Commission itself acknowledged in its rejoinder, a number of 'essential factors' led it to conclude that there was no injury, and two such factors coincide to a considerable extent with the grounds put forward by the applicants, namely the reduction in the market share of imports originating in Romania and Czechoslovakia and the increase in the Community producers' selling prices. As these are essential factors it is impossible to claim, as the Commission does in its defence, that even if the applicants' criticisms concerning the Commission's assessment of these two factors were justified, the contested decision is nevertheless valid as regards the other factors taken into account. In these circumstances the applicants' arguments regarding the two factors in question should be examined, without prejudice to the importance of the other factors.

The reduction in the market share of imports originating in Romania and Czechoslovakia

6. In the first place the applicants express reservations as to the reliability of the data used by the Commission to determine the volume of exports from Romania and Czechoslovakia, which are taken exclusively from the answers to the anti-dumping questionnaires supplied by the Romanian and Czechoslovak exporters, which were not checked in any way and do not correspond to data available to the applicants.

The Commission explains that its practice is to take as the basis for its findings the figures supplied in the answers to the questionnaires, corroborated where possible by Eurostat statistics. In this case those statistics, on which the figures used in the anti-dumping complaint were based, did not constitute evidence since they covered also products other than those concerned in the anti-dumping proceeding.

It follows that the Commission based its decision on the statistics reasonably available to it. Moreover the applicants have not supplied any evidence which might controvert these figures.

7. Next the applicants allege that the Commission was guided by the idea that Article 4(2)(a) of the basic regulation makes an increase in the market share of the imports at issue a condition *sine qua non* for a determination of injury within the meaning of that article. They think that by pursuing that idea the Commission arrived at an incorrect interpretation of that provision.

Article 4(2) of the basic regulation deals with the examination of injury and sets out the factors to be considered, 'no one or several of which can necessarily give decisive guidance'. It follows that an increase in the market share of the imports in question does not constitute a condition *sine qua non* for a determination of injury. However, a mere reading of the recitals to the contested decision makes it clear that the Commission did not find that there had been no injury on the basis solely of the reduction of the market share of the imports. As has already been indicated (paragraph 5), it took into account a whole series of factors set out in Article 4(2) of the basic regulation even though it regarded that reduction as an essential factor, as it is fully entitled to do within the scope of the discretion available to it.

8. The applicants also criticize the fact that the Commission did not analyse the injury in relation solely to the 'free market' for electric motors. They observe that when a part of Community production is sold within the 'captive market' of an integrated group, that part cannot be regarded as being the subject of normal trading transactions and so is not subject to the effects of the imports causing the undercutting. They consider that the Commission manifestly discriminated against them by refusing for no reason to follow in this case its consistent practice of taking account only of the 'free market' only, in a situation such as the one referred to. If the Commission had followed that practice, they claim, it would have been found that the imports in question represented not only a larger market share (39 to 40%, with over 50% on the Italian market), but also that that share had remained stable or had increased slightly between 1986 and 1989. Finally they observe that even if the market share of imports in relation to the 'whole market' could be taken into consideration, the level of that share — nearly 25% — was still significant.

9. In this connection it is appropriate to call to mind that, in accordance with Article 4(2) of the basic regulation, the examination of injury must involve: (a) the volume of imports; (b) the price of imports; and (c) the impact of the imports.

The applicants rightly point out that the *impact* of imports cannot (as a rule) be validly assessed except on the 'free market'. As they state in the application, 'prices applied within a group are "transfer prices" which do not necessarily reflect economic reality and are not therefore comparable to the prices obtained in normal commercial transactions with independent purchasers'. That is, moreover, the reason why, in the course of its examination of the effects of the imports on Community producers' prices and profits, the Commission referred

to the purchasing policy of the group to which one important Community producer belonged (see paragraph 14 below).

10. The actual prices and profits do not however play the same role when it is a question of assessing the *volume* of the imports referred to in Article 4(2)(a) of the basic regulation. Under that provision the volume of imports must be examined to ascertain:

'in particular [9] whether there has been a significant increase, either in absolute terms or relative to production or consumption in the Community'.

There are two conclusions to be drawn from the provision quoted. First, in stating the purpose of the examination of injury to be effected, the provision illustrates the special importance which the Community institutions may, or indeed must, attach to the *increase* in imports. As the applicants themselves state, the market share of the imports in question relative to the 'free market' alone did not increase between 1986 and 1989.

Next the article indicates that if the increase in imports is expressed in relative terms it must be measured relative to *production* or *consumption* in the Community. It follows that as a general rule Community production or consumption as a whole, that is, the 'whole market', must be taken as a reference point for measuring the *market share* of the imports.

11. It is true that in certain specific proceedings the Commission has referred solely to the 'free market' to express trends in the market share of the dumped imports. However, it cannot be said that the Commission's attitude in such proceedings represents a consistent practice. Thus the Commission emphasizes that in the anti-dumping proceeding concerning imports of multi-phase electric motors, [10] the Community institutions, as in this case, assessed the volume of imports in relation to the 'whole market'. Moreover it sets out several facts — not challenged by the applicants — leading it to the conclusion that the share of imports in the 'whole market' might in this case give a better picture of market trends because the two segments of the market are interconnected. Thus it observes that electric motors, whether imported or of Community origin, are sold on the same market and used for the same purpose, namely the manufacture of washing machines. Further, the producers of electric motors who are linked with washing-machine manufacturers (namely the French company Selni, linked to the Thomson group, and the Italian company Sole, at present linked to the Electrolux

9 — In German 'insbesondere'; in French 'notamment'; in Danish 'især'; in Spanish 'especialmente'; in Italian 'soprattutto'; in Greek 'ιδίως'; in Dutch 'in het bijzonder'; in Portuguese 'nomeadamente'.

10 — Council Regulation (EEC) No 864/87 of 23 March 1987 imposing a definitive anti-dumping duty on imports of standardized multi-phase electric motors having an output of more than 0.75 kW but not more than 75 kW, originating in Bulgaria, Czechoslovakia, the German Democratic Republic, Hungary, Poland and the USSR, and definitively collecting the amounts secured as provisional duties (OJ 1987 L 83, p. 1). The Court considered that regulation in the judgments delivered on 11 July 1990 in Joined Cases C-304/86 and C-185/87 *Enital* v *Commission and Council*, Joined Cases C-305/86 and C-160/87 *Neotype Techmashexport* v *Commission and Council*, previously cited, Joined Cases C-320/86 and C-188/87 *Stanko France* v *Commission and Council* [1990] ECR I-3013, Case C-157/87 *Electroimpex* v *Council* [1990] ECR I-3021 and Case C-323/88 *Sermes* v *Directeur des Services des Douanes de Strasbourg* [1990] ECR I-3027.

group) also sell to other washing-machine manufacturers and demonstrably charge the same prices on such sales as on sales to the washing-machine manufacturers to whom they are linked. Finally, the washing-machine manufacturers in question (that is, those of the Thomson and Electrolux groups) also buy imported electric motors as well as motors produced by the two so-called independent Community producers (namely the Spanish company IB-MEI and its Italian subsidiary Nuova IB-MEI).

The Commission also points out — still without challenge from the applicants — that the distinction between 'free market' and 'captive market' could only have been validly applied to a single company linked to a group, namely the French company Selni. In fact the Italian company Sole, which was transferred in October 1987 from the Zanussi group to the Electrolux group, supplied the Commission with no information from which it was possible to distinguish between free sales and linked sales for the years 1986, 1987 and 1988.

In these circumstances it seems to me that it was perfectly proper for the Commission to assess the trend of the market share of the imports on the basis of the 'whole market'.

12. At the hearing the applicants claimed that the situation in this case and that in the proceedings which led the Council to impose an anti-dumping duty with regard to imports of multi-phase electric motors by Regulation No 864/87 are identical.

It is true that in Regulation No 864/87 the Council concluded that injury was caused to the Community producers by the imports in question in spite of the reduction of their market share. However, the Commission has rightly pointed out that the situations are not comparable. As I stated in the Opinion (paragraph 34) which I delivered in the cases cited in note 10, the anti-dumping proceeding which led to the adoption of Regulation No 864/87 was opened in order to examine whether the undertakings to increase prices given by the multi-phase motor producers and accepted by the Council and the Commission were sufficient to eliminate the injurious effects found to exist in a previous proceeding. Apart from the conclusion that the previous measures had had no effect it was reasonable to find that there had been a reduction, though it was regarded as insufficient, in the market share of imports of multi-phase motors. In this case, however, it was a question of establishing not the disappearance but the existence of injury. In that context my view is that the Commission has not exceeded the limits of its discretion in regarding the reduction in the market share of the imports in question as an essential factor in concluding that there was no injury.

The effect of the imports on the prices charged by the Community producers

13. In points 15 and 16 of the contested decision, the Commission considers the selling prices and profits of the Community producers. In point 17 it draws the following conclusion:

'The producers were able to increase their prices considerably in spite of undercutting. It was not possible to verify satisfactorily arguments that these increases were inadequate, and these arguments seemed irrelevant in the case of two of the producers, whose prices are set by their washing-machine-making parent companies.

Consequently the Commission is unable to attribute any deterioration in financial results during the investigation period to the imports in question.'

14. The applicants claim first that that conclusion is based on a statement of reasons which does not comply with the requirements of Article 190 of the EEC Treaty in view of the fact that the identity of the Community producers is not mentioned and that the reasons given partially overlap.

As the Court pointed out in the judgment in Case C-69/89 *Nakajima All Precision* v *Council* [11] (at paragraph 14), the Court has consistently held 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'.

11 — [1991] ECR I-2069.

In my view the statement of reasons provided by the Commission in points 15, 16 and 17 of the contested decision satisfies the conditions laid down in the Court's case-law. It is true that the Community producers are not mentioned by name in the passages in question. However, the text makes it possible to identify, from the producers mentioned by name in point 5 of the contested decision, those to whom reference is made in these passages.

15. Next the applicants assert that the statement of reasons on which the conclusion set out in point 17 is based suffers from a basic inconsistency in the form of a systematic search for reasons other than the impact of the imports in question to explain 'any deterioration in financial results' of the Community producers. An analysis of the situation of each Community producer, it is claimed, shows this inconsistency. In this connection the applicants observe in particular that the Commission, whilst it had taken the 'whole market' as its reference in considering the volume of imports, was quick to attribute losses recorded by one producer to the group's purchasing policy. The applicants also claim that the Community producers' increase in selling prices during the investigation period cannot prove the absence of injury in so far as that increase (of some 3 or 4%) reflected the increase in production costs resulting from the increase in the world copper price in 1989 and that it did not therefore enable the Community producers to redress their financial situation.

16. In this respect it should be remembered that the Community institutions have a wide

discretion when evaluating complex economic situations (see in particular the judgment in *Nakajima All Precision* v *Council*, previously cited, at paragraph 86). That is especially the case as regards the choice and evaluation of the relevant economic factors for determining the impact of dumped imports on Community production. In this case the Commission attached great importance to the finding that the Community producers had been able to increase their selling prices during the period covered by the investigation. This economic factor is expressly mentioned in the indicative list [12] set out in Article 4(2)(c) of the basic regulation (sixth indent):

'— prices (i. e. depression of prices or prevention of price increases which otherwise would have occurred)'.

The applicants rightly observe that that provision makes a determination of injury possible even where there has been an increase in the selling prices of Community producers if it is established that the increase would have been even greater but for the imports alleged to have been dumped. Moreover, some Community producers claimed during the investigation that imports originating in Romania and Czechoslovakia had prevented them from increasing their prices in proportion to the increase in production costs. It may be seen from point 16 of the contested decision that the Commission put forward two grounds for rejecting that argument.

12 — See judgment in Joined Cases 273/85 and 107/86 *Silver Seiko* v *Council* [1988] ECR 5927 at paragraph 40.

17. The Commission first observed that it was not able to check that argument because two undertakings accounting for almost half the Community production (Sole and Nuova IB-MEI) had supplied no data making it possible to assess their financial situation in the years preceding the investigation period. That is an important observation. It may be seen from the actual wording of Article 4(2)(c) of the basic regulation that the impact of imports must be assessed in terms of *trends* in the relevant economic factors. Consequently valid conclusions on the impact of imports can be drawn only if the financial situation of the Community producers at the time of the investigation can be compared to that of previous years. Such a comparison was all the more necessary in this case because the volume of imports in question had not significantly increased between 1986 and 1989.

The Commission next observed that of the four Community producers two were showing a profit and two making losses. One of the two companies making losses (Nuova IB-MEI) was the subsidiary of an independent producer showing a profit (IB-MEI). The other company making a loss (Sole) was an integrated producer. The Commission found that the financial situation of the latter company was a consequence more of the group's purchasing policy than of the imports in question. That finding has not been challenged by the applicants, who merely stressed that the Commission was basing its argument on the producer's integration in a group although it had refused to take that fact into account in assessing the market share of imports. I do not see, however, how that makes the Commission's attitude contradictory. As I said in paragraph 9, the applicants themselves state that the *impact* of the imports cannot (as a general rule) be assessed except

on the 'free market' since sales within the group do not necessarily represent normal trading transactions and the results do not therefore necessarily reflect economic reality.

18. As regards the impact of the increase in the world price of copper on production costs, the Commission stated at the hearing that a check on the invoices paid during the investigation period did not make it possible to confirm such an impact for all the Community producers. In fact the Commission pointed out, and the applicants did not challenge the point, that the prices invoiced to some producers during that period did not reflect the increase in the world price of copper over that period. In these circumstances it seems to me that the Commission was justified in thinking that the increase in production costs during the investigation period resulting from the increase in the price of copper during that period had not been proved. Moreover the applicants have not provided any evidence capable of refuting the Commission's conclusion on this point.

19. In view of the foregoing considerations it seems to me that in concluding that the apparent deterioration in the Community producers' financial results could not be attributed to the imports in question, the Commission did not exceed the limits of its discretion.

The plea regarding imports originating in Bulgaria

20. In the anti-dumping complaint the trade associations drew the Commission's attention to the threat of injury arising from imports of electric motors originating in Bulgaria. It may be seen from an extract from that complaint, annexed to the application, that they did so in the following terms:

'The phenomenon of imports originating in Bulgaria is more recent and is for the moment confined to Spain. However, the complainants have every reason to believe that there is a risk that it will shortly reach the same proportions as the imports from Romania and Czechoslovakia. It seems, in fact, that motors of Bulgarian origin are now in the process of being approved by several large-scale washing-machine manufacturers in Spain, France and Italy. As soon as these procedures have been completed (which usually takes between one and two years), it is very likely that large numbers of such motors will be ordered from the importers. The first imports now being made in Spain may therefore be regarded as heralding a Bulgarian break-through on the Community market representing a real threat of injury for the Community producers'.

The complaint also included a table showing that 50 000 electric motors originating in Bulgaria had been imported into Spain in 1988.

In point 7 of the contested decision the Commission states that it eliminated Bulgaria from its study 'since no exports from this country had been recorded in 1988 or during the investigation period'.

21. The applicants consider that the elimination of exports from Bulgaria lacks any foundation and they claim a declaration that the decision is void.

The Commission points out that its decision to eliminate exports from Bulgaria was based on three sources of information. First, Eurostat figures did not mention any import of electric motors originating in Bulgaria. In addition, the Bulgarian exporter stated that it had effected no exports to the Community during 1988 and 1989. Finally, the Spanish customs administration had confirmed that there had been no imports of electric motors originating in Bulgaria during either 1988 or the period of the investigation.

The applicants put forward no evidence making it possible to establish that 50 000 electric motors originating in Bulgaria had been imported into Spain in 1988 as stated in the anti-dumping complaint. Moreover they do not challenge the Commission's statement that no exports of motors from Bulgaria were recorded during the investigation period.

In these circumstances the submission that the elimination of exports from Bulgaria lacks any foundation is unjustified.

22. The same is true of the argument put forward by the applicants in the reply, to the effect that the Commission ought to have checked not only with the Spanish customs but also with the French and Italian customs whether there had been any imports.

The Commission carried out an additional check with the Spanish customs administration in view of the fact that the Bulgarian exporter's statement and the Eurostat data both contradicted the statement of the trade associations that 50 000 electric motors had been imported into Spain in 1988. However, the file contained no indication of imports into Italy or France of electric motors originating in Bulgaria which might have justified an additional check. Any criticism of the Commission for failing to carry out such an additional check as regards imports into Italy and France is therefore unjustified.

Conclusion

23. I therefore propose that the Court should dismiss the application and order the applicants to pay the costs.