ORDER OF THE PRESIDENT OF THE COURT OF FIRST INSTANCE
27 February 2002 *

In Case T-132/01 R,

Euroalliages, established in Brussels (Belgium),

Péchiney électrométallurgie, established in Courbevoie (France),

Vargön Alloys AB, established in Vargön (Sweden),

Ferroatlántica, established in Madrid (Spain),

represented by D. Voillemot and O. Prost, lawyers,

applicants,

supported by

Kingdom of Spain, represented by L. Fraguas Gadea, acting as Agent, with an address for service in Luxembourg,

intervener,

* Language of the case: French.

Commission of the European Communities, represented by V. Kreuschitz and S. Meany, acting as Agents, and by A.P. Bentley, Barrister, with an address for service in Luxembourg,

defendant,

supported by

TNC Kazchrome, established in Almaty (Kazakhstan)

and by

Alloy 2000 SA, established in Luxembourg,

represented by J.E. Flynn, Barrister, J. Magnin and S. Mills, Solicitors,

interveners,

APPLICATION, primarily, for suspension of the operation of Commission Decision 2001/230/EC of 21 February 2001 (OJ 2001 L 84, p. 36) in so far as it terminates the anti-dumping proceeding concerning imports of ferro-silicon originating in the People's Republic of China, Kazakhstan, Russia and Ukraine and for an order that the Commission re-impose expired anti-dumping duties, alternatively, for an order that the Commission require importers of ferro-silicon originating in those four countries to provide security corresponding to the expired anti-dumping duties and to subject their imports to registration, or, in the further alternative, for an order that the Commission require the said importers to subject their imports to registration,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE
OF THE EUROPEAN COMMUNITIES

makes the following

Order

Legal background

1 Article 11(1) and (2) of Council Regulation (EC) No 384/96 of 22 December 1995 on protection against dumped imports from countries not members of the European Community (OJ 1996 L 56, p. 1, 'the basic regulation'), under the heading 'Duration, reviews and refunds', provides:

'1. An anti-dumping measure shall remain in force only as long as, and to the extent that, it is necessary to counteract the dumping which is causing injury.

2. A definitive anti-dumping measure shall expire five years from its imposition or five years from the date of the conclusion of the most recent review which has covered both dumping and injury, unless it is determined in a review that the expiry would be likely to lead to a continuation or recurrence of dumping and

injury. Such an expiry review shall be initiated on the initiative of the Commission, or upon request made by or on behalf of Community producers, and the measure shall remain in force pending the outcome of such review.

...'

2 Article 21(1) of the basic regulation, under the heading 'Community interest', provides as follows:

'A determination as to whether the Community interest calls for intervention shall be based on an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers; and a determination pursuant to this Article shall only be made where all parties have been given the opportunity to make their views known pursuant to paragraph 2. In such an examination, the need to eliminate the trade distorting effects of injurious dumping and to restore effective competition shall be given special consideration. Measures, as determined on the basis of the dumping and injury found, may not be applied where the authorities, on the basis of all the information submitted, can clearly conclude that it is not in the Community interest to apply such measures.'

Background to the dispute

3 Definitive anti-dumping measures were imposed on imports of ferro-silicon originating in a number of countries, first, by Council Regulation (EC) No 3359/93 of 2 December 1993 imposing amended anti-dumping measures on imports of ferro-silicon originating in Russia, Kazakhstan, Ukraine, Iceland,

Norway, Sweden, Venezuela and Brazil (OJ 1993 L 302, p. 1), and, second, by Council Regulation (EC) No 621/94 of 17 March 1994 imposing a definitive anti-dumping duty on imports of ferro-silicon originating in South Africa and in the People's Republic of China (OJ 1994 L 77, p. 48).

4 On 10 June 1998 the Commission published a notice of impending expiry of certain anti-dumping measures (OJ 1998 C 177, p. 4).

5 Following the publication of that notice Euroalliages, the Liaison Committee of the Ferro-alloy Industry, lodged an application pursuant to Article 11(2) of the basic regulation for an expiry review of measures concerning imports from Brazil, China, Kazakhstan, Russia, Ukraine and Venezuela.

6 Having determined, after consulting the Advisory Committee, that sufficient evidence existed for initiation of a review under Article 11(2) of the basic regulation, the Commission published a notice of initiation of that procedure in the *Official Journal of the European Communities* (OJ 1998 C 382, p. 9) and commenced an investigation. The investigation of dumping covered the period between 1 October 1997 and 30 September 1998. The examination of injury covered the period from 1994 to the end of the investigation period.

7 On 21 February 2001 the Commission adopted Decision 2001/230/EC terminating the anti-dumping proceeding concerning imports of ferro-silicon originating in Brazil, the People's Republic of China, Kazakhstan, Russia, Ukraine and Venezuela (OJ 2001 L 84, p. 36, 'the contested decision').

The contested decision

8 The contested decision states that the review led the Commission to conclude that, in respect of imports of ferro-silicon from China, Kazakhstan, Russia and Ukraine, the expiry of the measures would encourage the continuation or recurrence of dumping and injury.

9 Recital 129 in the preamble to the contested decision provides as follows:

'In the light of the findings of a likelihood of continuation and recurrence of dumping, and of the findings that dumped imports originating in China, Kazakhstan, Russia and Ukraine may significantly increase should measures be allowed to lapse, it is concluded that the situation of the Community industry would deteriorate. Even though the extent of this deterioration is difficult to evaluate, taking into account the declining trends in prices and profitability of this industry, it is none the less likely that injury will recur. In respect of Venezuela, should measures be allowed to lapse, there is unlikely to be any material injurious effect.'

10 The Commission then examined whether the maintenance of the anti-dumping measures was in the overall interest of the Community. In making that assessment it took account of several factors, namely, first, the fact that the Community industry had not been capable of benefiting sufficiently from the measures in place since 1987 nor, in terms of market share, from the demise of former Community producers (recital 151 in the preamble to the contested decision), and second, the fact that Community steel-producers had had to bear additional costs arising from the anti-dumping measures during the period of validity of those measures (recital 152).

11 In recitals 153 and 154 in the preamble to the contested decision the Commission concluded as follows:

> '153 Thus, while the precise impact of the expiry of measures on the Community industry is uncertain and while past experience shows that it is not guaranteed that maintaining measures will provide sizeable benefits to the Community industry; it is clear that the steel industry has experienced long-term cumulated negative effects which would be unduly prolonged if measures were maintained.
>
> 154 Therefore, after an appreciation of the impact of the continuation or expiry of the measures on the various interests involved, as required by Article 21 of the basic regulation, the Commission could clearly conclude that maintaining the existing measures would be contrary to the interests of the Community. The measures should, therefore, be allowed to expire.'

12 For those reasons the operative part of the contested decision terminated the anti-dumping proceeding in question and, consequently, brought about the expiry of measures affecting the imports under review.

Procedure

13 By application lodged at the Court Registry on 16 June 2001 Euroalliages, Péchiney électrométallurgie, Vargön Alloys AB and Ferroatlántica ('Euroalliages and Others' or 'the applicants') instituted proceedings under the fourth paragraph of Article 230 EC seeking annulment of the sole article of the contested decision.

14 By separate document lodged at the Court Registry on the same day, the applicants also applied, primarily, for an order suspending operation of the contested decision in so far as it terminates the anti-dumping proceeding concerning imports of ferro-silicon originating in China, Kazakhstan, Russia and Ukraine and for an order that the Commission reimpose the anti-dumping duties imposed by Regulations Nos 3359/93 and 621/94, alternatively, for an order that the Commission require the importers of ferro-silicon originating in those four countries to provide security corresponding to the anti-dumping duties imposed by Regulations Nos 3359/93 and 621/94 and that they register their imports, or, in the further alternative, for an order that the Commission require the said importers to register their imports.

15 The Commission submitted its written observations on the application for interim measures on 5 July 2001.

16 The Court heard the parties' oral submissions on 11 July 2001.

17 By order of 1 August 2001 in Case T-132/01 R *Euroalliages and Others* v *Commission* [2001] ECR II-2307 ('the order of 1 August 2001'), the President of the Court of First Instance ordered that imports of ferro-silicon from China, Kazakhstan, Russia and Ukraine be subject to a system of registration without provision of security by importers.

18 By several letters received at the Court Registry during August 2001 and, formally, by letter dated 30 August 2001, the applicants applied, on the basis of Article 108 of the Rules of Procedure of the Court of First Instance, for the operative part of the order of 1 August 2001 to be amended so as to clarify the legal situation as it should then, in their view, have stood.

19 After hearing the Commission on that point, the President of the Court of First Instance, by order of 12 September 2001 in Case T-132/01 R *Euroalliages and Others* v *Commission*, not published in the ECR, dismissed the application of 30 August 2001 and reserved the costs.

20 On appeal lodged by the Commission, the order of 1 August 2001 was set aside by order of the President of the Court of Justice of 14 December 2001 in Case C-404/01 P(R) *Commission* v *Euroalliages and Others* [2001] ECR I-10367 ('the order of 14 December 2001'). That order refers the case back to the Court of First Instance and reserves the costs.

21 Following the referral back to the Court of First Instance, Euroalliages and Others requested that certain data in the file be treated as confidential *vis-à-vis* the interveners in the proceedings before the President of the Court of Justice, namely the Kingdom of Spain, TNC Kazchrome ('Kazchrome') and Alloy 2000 SA ('Alloy 2000').

22 The applicants' request for confidential treatment was sent to the Commission on 14 January 2002.

23 Euroalliages and Others and the Commission lodged their written observations following referral of the case back to the Court of First Instance on 10 January 2002 and 25 January 2002 respectively.

24 The Kingdom of Spain, which is intervening in support of the form of order sought by the applicants, lodged its observations on 15 February 2002.

25 Kazchrome and Alloy 2000, which are intervening in support of the form of order sought by the Commission, lodged their observations on the same day.

Forms of order sought by the parties in the proceedings following referral

26 Euroalliages and Others claims that the President of the Court of First Instance should:

— order that imports of ferro-silicon originating in China, Kazakhstan, Russia and Ukraine be registered without provision of security by the importers;

— order the Commission to pay the costs.

27 The Kingdom of Spain claims that the President of the Court of First Instance should:

— order that imports of ferro-silicon originating in China, Kazakhstan, Russia and Ukraine be registered without provision of security by the importers;

— order the Commission to pay the costs.

28 The Commission contends that the President of the Court of First Instance should:

— dismiss the application for interim measures;

— order the applicants to pay the costs, including those relating to the earlier proceedings before the Court of First Instance and to the appeal proceedings before the President of the Court of Justice.

29 Kazchrome and Alloy 2000 contend that the President of the Court of First Instance should:

— dismiss the application for interim measures;

— order the applicants to pay the costs arising from the intervention of Kazchrome and Alloy 2000, including those relating to their intervention in the appeal proceedings before the President of the Court of Justice.

Law

30 Pursuant to the combined provisions of Articles 242 EC and 243 EC, and Article 4 of Council Decision 88/591/ECSC, EEC, Euratom of 24 October 1988 establishing a Court of First Instance of the European Communities (OJ 1988 L 319, p. 1), as amended by Council Decision 93/350/Euratom, ECSC, EEC of

8 June 1993 (OJ 1993 L 144, p. 21), the Court of First Instance may, if it considers that circumstances so require, order that application of the contested act be suspended or prescribe any necessary interim measures.

31 Article 104(2) of the Rules of Procedure provides that applications for the adoption of interim measures must state the circumstances giving rise to urgency and the pleas of fact and law establishing a prima facie case for the measures sought. Those conditions are cumulative, so that an application for interim measures must be dismissed if any one of them is absent (orders of the President of the Court of Justice in Case C-268/96 P(R) *SCK and FNK* v *Commission* [1996] ECR I-4971, paragraph 30, and of the President of the Court of First Instance in Case T-350/00 R *Free Trade Foods* v *Commission* [2001] ECR II-493, paragraph 32).

32 In light of the documents in the file the President of the Court of First Instance considers that he has all the material necessary to determine the present application without needing to hear further oral argument from the parties.

Observations of the parties following referral

33 Euroalliages and Others submit that the order of 14 December 2001 does not affect their entitlement to interim measures in the present case.

34 As is apparent from that order (paragraphs 68, 71 and 75), the error of law in the order of 1 August 2001 arises from the fact that the damage was found to be irreparable by considering 'exclusively' the uncertain outcome of a possible action for damages.

35 The applicants claim that the irreparable nature of the damage was not based solely on such uncertainty, but on three factors peculiar to the present case, of which that uncertainty is one, mentioned in paragraphs 71 to 74 of the order of 1 August 2001.

36 As regards, first, the imports concerned by the contested decision, the risk that the applicants would suffer serious damage if the anti-dumping measures expired was not questioned by the President of the Court of Justice. Since not every material injury within the meaning of Article 3 of the basic regulation necessarily constitutes serious damage (paragraph 59 of the order of 14 December 2001), the acknowledgment of serious damage singles out the applicants' situation and signifies that the injury is so serious that it is reparable only with difficulty. Furthermore, it is particularly unusual for the contested decision itself to acknowledge the seriousness of the injury.

37 Next, referring to paragraph 72 of the order of 1 August 2001 the applicants point out that the contested decision differs in fact from other decisions terminating review on the basis of the Community interest in that, as mentioned by the President of the Court of First Instance, it refers to the continuation of dumping. They add that the order of 1 August 2001 refers by implication to recital 129 in the preamble to the contested decision, which states that the risk of deterioration concerns the 'situation' of the Community industry as a whole. Furthermore, at recital 147 in the preamble to the contested decision, the Commission found that the expiry of measures would probably lead to a 15% fall in the price of ferro-silicon, that conclusion being one of the main features of the decision. The Commission's findings in relation to a significant growth in imports and fall in prices materialised. Indeed, according to data supplied by the Statistical Office of the European Communities (Eurostat) in relation to Kazakhstan, Russia and Ukraine, the volume of imports increased from 1 739 tonnes in the first quarter of 2001 to 9 354 tonnes in the second quarter of that year, and were estimated to be 18 469 tonnes in the third quarter. The average price of imports from those three countries was 28.14% lower than the average

intra-Community price and 23.7% lower than the average price of other imports from third countries for the second quarter of 2001. The damage suffered was therefore particularly serious and, accordingly, reparable only with difficulty.

38 Lastly, the fact that it was uncertain whether compensation could subsequently be obtained for the damage sustained in an action for damages, was not, in itself, questioned by the President of the Court of Justice. It was only questioned to the extent that it seemed to provide the 'exclusive' basis for the finding that the damage was irreparable, which the applicants dispute.

39 The Kingdom of Spain adopts most of the applicants' arguments. It considers that the order of 14 December 2001 does not affect their entitlement to interim measures. In particular, the serious and irreparable nature of the damage is demonstrated by reference, *inter alia*, to the figures put forward during the phase prior to the adoption of the contested decision and to the significant increase in the volume of imports to Spain of ferro-silicon from Kazakhstan following the adoption of that decision.

40 The Commission disputes the applicants' arguments.

41 In particular, it submits, first, that the applicants have not shown why the damage arising from a decision terminating a review adopted on the ground that the maintenance of anti-dumping measures is not in the Community interest does not constitute an effect inherent in that decision.

42 Second, it considers that the applicants have not shown why their pecuniary damage is irreparable or reparable only with difficulty on the basis of criteria other than that of the uncertainty of the prospect of success should an action for damages be brought, which was criticised by the President of the Court of Justice.

43 Kazchrome and Alloy 2000 adopt the Commission's analysis. They add that none of the applicants has adduced any new evidence, or any evidence at all, of the alleged damage so that they cannot claim that it will be serious and irreparable. More specifically, the Commission cannot be regarded as having recognised the seriousness of the damage in question in the contested decision. In the further alternative, they submit that grant of the interim measure sought would have definitive effects and would mean that the interests involved were not properly balanced against each other.

Findings of the President of the Court of First Instance

44 The urgency of an application for interim measures must be assessed in relation to the necessity for an order granting interim relief in order to prevent serious and irreparable damage to the party requesting the interim measure.

45 In his order of 1 August 2001 the President of the Court of First Instance held that the requirement of urgency was met. The grounds for that order as to the

requirement of urgency are set out in essence in paragraphs 26 to 28 of the order of 14 December 2001, to which reference should therefore be made. It should be emphasised, however, that it was found that the damage suffered by the applicants was irreparable in the light of three factors peculiar to the present case (paragraphs 70 and 75 of the order of 1 August 2001), namely, first, the Commission's acknowledgment in the contested decision of the risk that the applicants would suffer serious damage should the anti-dumping measures in question be allowed to lapse (paragraph 71 of the order of 1 August 2001); second, the Commission's finding in the contested decision of the likelihood of recurrence of injury should the measures be allowed to lapse, together with the likelihood of continuation or recurrence of dumping (paragraph 72 of the order of 1 August 2001) and third, the uncertainty, to say the least, of compensation for the damage, which might not disappear simply as a result of the Commission's compliance with a judgment annulling the contested decision, pursuant to Articles 235 EC and 288 EC (paragraphs 73 and 74 of the order of 1 August 2001).

46 The findings relating to two (paragraph 64 of the order of 14 December 2001) of those three factors were criticised by the President of the Court of Justice on the ground that they were vitiated by error of law.

47 He considered, first, that 'when a decision terminating a review of anti-dumping measures is adopted on the ground that it is not in the Community interest to maintain them, the resulting injury to the Community industry is an effect inherent in that decision' (paragraph 66).

48 He decided next that 'the uncertainty of obtaining compensation for pecuniary damage if an action for damages is brought cannot in itself be regarded as a factor capable of establishing that such damage is irreparable in the sense contemplated in the case-law of the Court' (paragraph 71).

49 Lastly, he concluded that 'by taking exclusively the uncertainty of success in any action for damages, in view of the nature of the contested decision, as a ground for finding that the damage is irreparable and thus for granting interim measures, the... order [of 1 August 2001] is vitiated by an error of law' (paragraph 75).

50 In the light of the findings of the President of the Court of Justice it is necessary to examine whether the pecuniary damage alleged by the applicants is irreparable.

51 It should be noted here that, prior to considering the three factors referred to above, the President of the Court of First Instance referred to the case-law to the effect that, save in exceptional circumstances, pecuniary damage cannot be regarded as irreparable or even as reparable only with difficulty since it may be the subject of subsequent financial compensation (see, in particular, the order of the President of the Court of Justice in Case C-471/00 P(R) *Commission* v *Cambridge Healthcare Supplies* [2001] ECR I-2865, paragraph 113). Such subsequent financial compensation results either from compliance by the institution concerned with the judgment delivered in the main proceedings declaring the act concerned to be void (order of the President of the Court of Justice in Joined Cases 113/77 R and 113/77 R-INT *NTN Toyo Bearing* v *Council* [1977] ECR 1721, paragraph 5) or, if that does not occur in whole or part, from compensation as a result of the remedies provided for under Articles 235 EC and 288 EC (order of the President of the Court of Justice in Case 229/88 R *Cargill and Others* v *Commission* [1988] ECR I-5183, paragraph 18). In the present case, having concluded that neither alternative was capable of providing effective compensation for the pecuniary damage, the President of the Court of First Instance held, in the light of the two other specific factors, that reparation for that damage after final judgment in the main proceedings was uncertain, to say the least.

52 None the less, it is apparent from paragraph 70 of the order of 14 December 2001 that, whilst the Court of Justice has sometimes noted in its orders for interim measures that pecuniary compensation might be obtained in an action for

damages brought by the applicant, it has, however, 'never examined the actual likelihood of success of an action for damages which might be brought in the event of the contested measure being annulled'. It follows from that paragraph that the mere possibility of bringing an action for damages is sufficient to show that pecuniary damage is in principle reparable. In the context of the present procedure for interim relief there is, therefore, no need to take account of the uncertainty as to whether a possible action for damages — which the applicants could bring if the contested measure were annulled — would succeed when determining whether the pecuniary loss that the applicants will suffer is reparable or not.

53 It follows, having regard to the applicants' allegations seeking to show urgency, that the damage in the present case is only irreparable if it appears that, in the absence of the interim measure sought after the referral, the existence of Euroalliages and Others would be jeopardised pending delivery of the final judgment in the main proceedings. Since the purpose of interlocutory proceedings is to 'guarantee the full effectiveness of the definitive future decision, in order to ensure that there is no lacuna in the legal protection provided by [the Community courts]' (order of 14 December 2001, paragraph 61), such full effectiveness must be regarded as guaranteed provided the applicants are able to bear the pecuniary damage until the date of the Court's decision in the main proceedings.

54 In the circumstances of the present case it is therefore necessary to ascertain whether the applicants have shown that their very existence is jeopardised, pending judgment in the main proceedings, if there is no order suspending operation of the contested decision.

55 It should be noted in this context that the applicants do not challenge the findings in paragraphs 67 and 69 of the order of 1 August 2001, which have not been found to be vitiated by an error of law.

56 Therefore once again in the present case the applicants have not succeeded in showing that the risk to their financial viability is such that rationalisation measures would not suffice to enable them to continue their business of ferro-silicon production until delivery of the final judgment in the main proceedings.

57 Furthermore, it is settled law that for the purposes of assessing the material circumstances of an applicant consideration may be given, in particular, to the characteristics of the group to which, by virtue of its shareholding structure, it forms part (order of the President of the Court of Justice in Case C-43/98 P(R) *Camar* v *Commission and Council* [1998] ECR I-1815, paragraph 36; order of the President of the Court of First Instance in Case T-13/99 R *Pfizer Animal Health* v *Council* [1999] ECR II-1961, paragraph 155).

58 In this regard, at the hearing on 11 July 2001 the applicants did not rebut the Commission's assertions that, first, they are each members of a significant group of companies and, second, their turnover corresponding to sales of ferro-silicon represent, on average, less than 20% of the overall turnover of the groups to which they belong. In those circumstances, the financial losses which would result for the applicants from implementation of the contested decision could probably be made up for within the group by profits generated from sales of other products (see, to that effect, order of the President of the Court of Justice in Case C-477/00 P(R) *Commission* v *Roussel and Roussel Diamant* [2001] ECR I-3037, paragraph 105) and are therefore not such as to jeopardise their very existence.

59 Since the requirement of urgency has not been made out, the present application must be rejected.

On those grounds,

THE PRESIDENT OF THE COURT OF FIRST INSTANCE

hereby orders:

1. **The application for interim measures is dismissed.**

2. **The costs are reserved.**

Luxembourg, 27 February 2002.

H. Jung — Registrar

B. Vesterdorf — President