Case 273/85 R

Silver Seiko Limited and Others
v
Council of the European Communities

'Dumping'

Summary

Application for the adoption of interim measures — Suspension of the operation of a measure — Interim measures — Conditions for granting — Balancing of all the interests concerned (EEC Treaty, Arts 185 and 186; Rules of Procedure, Art. 83 (2))

ORDER OF THE PRESIDENT OF THE COURT
18 October 1985 *

In Case 273/85 R

Silver Seiko Limited, whose registered office is in Tokyo, Japan, **Silver Reed (UK) Limited**, whose registered office is in Watford, England, and **Silver Reed International GmbH**, whose registered office is in Kelsterbach, Federal Republic of Germany, all represented by Philippe de Smedt, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of Alex Schmidt,

applicants,

* Language of the Case: English.

Council of the European Communities, represented by its Agents, H.-J. Lambers, Director of its Legal Department, and E.-H. Stein, a Legal Adviser in that department, assisted by Francis Jacobs, Queen's Counsel, with an address for service in Luxembourg at the office of Jörg Käser, Director of the Legal Department of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendant,

supported by

Commission of the European Communities, represented by its Agent, J. Temple Lang, a member of its Legal Department, with an address for service in Luxembourg at the office of G. Kremlis, Jean Monnet Building, Kirchberg,

and

Committee of European Typewriter Manufacturers, hereinafter referred to as Cetma, whose registered office is in Cologne, Federal Republic of Germany, represented by Dr D. Ehle, U. Feldmann and Dr V. Schiller, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Harles, 34 Rue Philippe-II,

interveners,

APPLICATION, primarily, for an order suspending, as regards the applicants, the effect of Council Regulation No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 163, p. 1),

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By an application dated 6 September 1985, Silver Seiko Limited, Silver Reed (UK) Limited and Silver Reed International GmbH requested the Court, primarily, to suspend as regards them the effect of Council Regulation No 1698/85 of 19 June 1985 (Official Journal 1985, L 163, p. 1), imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan and ordering the definitive collection of the provisional anti-dumping duties imposed by Commission Regulation No 3643/84 of 20 December 1984 (Official Journal 1984, L 335, p. 43), until the Court has given judgment on the main application or, in the alternative, to order any other interim measure which the Court considers lawful and equitable under the circumstances.

2 That application, which was lodged at the Court Registry on 6 September 1985, was made under Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure.

3 The applicants refer to the application for the annulment of the aforesaid Regulation No 1698/85, which application they lodged at the Court Registry on 6 September 1985.

4 By an order dated 11 September 1985 the Commission was granted leave, under the first paragraph of Article 37 of the Statute of the Court of Justice of the EEC, to intervene in Case 273/85 R in support of the conclusions of the defendant. It submitted written observations on 16 September 1985.

5 By a telex message of 9 October 1985 the Court put questions to Cetma and the Commission. Cetma was requested to submit its replies in writing by 9.30 am on 14 October 1985, and the Commission was requested to reply at the hearing on the same date.

6 By an application lodged at the Court Registry on 19 September 1985, Cetma applied to intervene in Case 273/85 R in support of the conclusions of the defendant. In a telex message dated 27 September 1985 the applicants claimed that the Court should dismiss that application on the ground that Cetma's interests could be adequately represented by the Council and the Commission. In addition, they stated that certain documents before the Court in Case 273/85 were confidential and should not be disclosed to Cetma if it were allowed to intervene. By an order dated 2 October 1985 the President of the Court granted Cetma leave to intervene in Case 273/85 R in support of the conclusions of the defendant because it had an interest in the result of the case, within the meaning of the second paragraph of Article 37 of the Statute of the Court of Justice of the EEC, and ordered that it should receive from the Registry a copy of the application from which the confidential information referred to in the grounds of the order had been deleted.

7 The defendant submitted its written observations on 16 September 1985. The parties presented oral argument on 14 October 1985.

8 It is necessary to set out the stages which led up to the Council's adoption of Regulation No 1698/85. On 15 February 1984, a complaint was lodged with the Commission by Cetma alleging the dumping of typewriters originating in Japan, including those of the applicants. On the basis of the investigations conducted as a result of that complaint, the Commission adopted, on 20 December 1984, Regulation No 3643/84 (Official Journal 1984, L 335, p. 43). Article 1 (3) of that regulation imposed a provisional anti-dumping duty of 26.6% on typewriters exported by the applicants, a duty which is the subject of an application for annulment pending before the Court of Justice. On 19 June 1985 the Council adopted Regulation No 1698/85. Article 1 (4) of that regulation imposes a definitive anti-dumping duty of 21% on typewriters exported by the applicants and Article 2 provides for the definitive collection of the provisional anti-dumping duties which had been imposed by Regulation No 3643/84.

9 The applicants claim that, if they are not to suffer serious and irreparable damage, the effect of that regulation must be suspended as regards them until the Court has given judgment on the main application.

10 According to Article 185 of the EEC Treaty, actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that the circumstances so require, order that application of the contested act be suspended and prescribe any other interim measure pursuant to Articles 185 and 186 of the Treaty.

11 As a condition enabling such measures to be granted, Article 83 (2) of the Rules of Procedure provides that an application for interim measures must state the circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the interim measures applied for.

12 In that regard the applicants, referring to the grounds set out in support of their application for annulment, rely upon numerous grounds which, in their view, establish a *prima facie* case for the interim measures which they seek. They argue that the Community institutions infringed Article 2 (7) of Council Regulation No 2176/84 of 23 July 1984 (Official Journal 1984, L 201, p. 1), the basic regulation on dumping, by calculating the normal value on the basis of the domestic retail sales effected by their sales subsidiary and by carrying out all the remaining calculations on normal value on the same incorrect basis. The applicants also consider that the institutions did not comply with Article 2 (8) and (9) of Regulation No 2176/84 because they deducted from the applicants' export prices excessive amounts in respect of overheads and profits and did not compare the normal value and the export price at the same level of trade, which ought to have been the ex-factory level. Furthermore, according to the applicants, there has been a failure to comply in this case with the requirement laid down in Article 4 (5) of that regulation, which provides that those EEC producers who are themselves importers of the allegedly dumped electronic typewriters should be excluded from the analysis of alleged injury to the Community industry. The applicants also consider that they were discriminated against as compared with Nakajima All, the only Japanese company producing electronic typewriters on which no provisional or definitive anti-dumping duty was imposed, when there was no factor to justify a difference in treatment.

13 The Council and the Commission consider that the four grounds relied upon by the applicants clearly exceed the limits of an application for interim measures; they prejudge the substance of the case and not one of them is capable of establishing

the existence of a *prima facie* case. They also consider that the circumstances relied upon by the applicants to prove the existence of irreparable damage, such as a reduction in the volume of sales and in the applicants' market share and the damage to its distribution network, are inherent in the introduction of an anti-dumping duty and do not prove irreparable damage giving rise to urgency and thus establishing a case for the grant of the interim measures applied for. The Council and the Commission also argue that it is essential, as is clear from the cases decided by the Court, and in particular from the order of 17 December 1984 in Case 258/84 R, *Nippon Seiko KK* v *Council*, to balance the applicants' interests against the damage that would be caused to the European industry if the interim measures applied for were granted. They consider that the interests of the European industry would be seriously harmed if the interim measures requested by the applicants were granted.

14 In order to establish a *prima facie* case, the applicants refer in their application for interim measures to various factual and legal grounds which are also set out in their main application. Both the Council and the Commission state in their written observations that they do not consider it necessary in interim proceedings to set out their views on those grounds since that would entail adopting a position on the substance of the case. At the hearing on 14 October 1985 the two Community institutions, particularly the Commission, stressed that they did not consider that they had committed any error in calculating the dumping margin and assessing the damage caused to the European industry by Japanese imports and maintained that they had correctly applied the provisions of the regulation applicable in this case, Regulation No 2176/84.

15 In that regard, and in the light of the arguments put forward by the applicants, it may be accepted that the applicants have put forward pertinent arguments which it will be necessary to examine in greater detail in the proceedings relating to the main application and that the institutions have not, as a result of the position adopted by them, as mentioned above, attempted, or wished to make an attempt, to show that the grounds relied upon by the applicants are not pertinent. Subject to what is said below in paragraph 17, the grounds relied upon by the applicants may therefore be regarded as establishing a *prima facie* case for the interim measures applied for.

16 While the applicants in the present case may be considered to have put forward factual and legal grounds which may be regarded as establishing a *prima facie* case for suspending application of the regulation in dispute, the Court must also assess the urgency of the suspension requested and the need for it for the purposes of avoiding serious and irreparable damage to the applicants.

17 In that regard, the parties have taken opposing views and have submitted figures on the level of prices and market shares of the European industry and its Japanese competitors in support of their respective cases. The figures submitted by the Council, the Commission and Cetma do not correspond with those submitted by the applicants. In interim proceedings it is impossible for the President of the Court, without prejudging the substance of the case, to accept figures submitted by one party in preference to those submitted by the other, unless, as is not the case here, there are other factors weighing in favour of one party's view. He is, likewise, faced with the same impossibility when it comes to determining whether the export price and normal value were compared at the same level of trade.

18 Moreover, for the purposes of the application of Articles 185 and 186 of the EEC Treaty, it is necessary to balance all the different interests concerned. In that regard, the Community institutions and Cetma have argued that the damage suffered by the Community industry as a result of undercutting by the applicants in the price of their electronic typewriters was considerable, and that suspension of the definitive anti-dumping duties would undoubtedly bring about the destruction of part of the Community industry. In the absence of reliable and uncontested evidence to the contrary, it must be accepted that the adoption of the interim measures applied for could cause appreciable damage to the European industry.

19 From the circumstances set out above and on the basis of the principle that in case of doubt an applicant must prove that his allegations are well founded, it appears that the applicants have not adduced adequate evidence that they would suffer serious and irreparable damage establishing the urgency of the interim measures which they seek.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

(1) The application for the adoption of interim measures is dismissed;

(2) Costs are reserved.

Luxembourg, 18 October 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President