JUDGMENT OF THE COURT (Fifth Chamber)
10 March 1992 *

In Case C-178/87,

Minolta Camera Co. Ltd, Osaka, Japan, represented by Christopher McGonigal and Simon Holmes, Solicitors, of Messrs Clifford Chance, London, with an address for service in Luxembourg at the Chambers of Jean-Claude Wolter, 8 Rue Zithe,

applicant,

v

Council of the European Communities, represented by Hans-Jürgen Lambers, Director in its Legal Service, and Erik Stein, Legal Adviser, acting as Agents, assisted by Hans-Jürgen Rabe and Michael Schütte, Rechtsanwälte, Hamburg and Brussels, with an address for service in Luxembourg at the office of Jörg Käser, Manager of the Legal Directorate of the European Investment Bank, 100 Boulevard Konrad Adenauer, Kirchberg,

defendant,

supported by

Commission of the European Communities, represented by its Legal Adviser John Temple Lang, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of the Commission's Legal Service, Wagner Centre, Kirchberg,

intervener,

and by

* Language of the case: English.

Committee of European Copier Manufacturers (CECOM), Cologne, represented by Dietrich Ehle and Volker Schiller, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Harles, 4 Avenue Marie-Thérèse,

intervener,

APPLICATION for the annulment of Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (Official Journal 1987 L 54, p. 12), in so far as it affects the applicant,

THE COURT (Fifth Chamber),

composed of: R. Joliet, President of the Chamber, Sir Gordon Slynn, F. Grévisse, J. C. Moitinho de Almeida and M. Zuleeg, Judges,

Advocate General: J. Mischo,
Registrar: D. Louterman, Principal Administrator,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 3 October 1990,

after hearing the Opinion of the Advocate General at the sitting on 13 December 1990,

gives the following

Judgment

1 By application lodged at the Court Registry on 9 June 1987, Minolta Camera Co. Ltd (hereinafter referred to as 'Minolta'), whose registered office is in Osaka, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Council Regulation (EEC) No 535/87 of 23 February 1987 imposing a definitive anti-dumping duty on imports of plain paper photocopiers originating in Japan (Official Journal 1987 L 54, p. 12), hereinafter referred to as 'the contested regulation', in so far as it affects the applicant.

2 The Minolta company manufactures plain paper photocopiers ('PPCs'). In the Community it sells its PPCs exclusively to Minolta Camera Handelsgesellschaft mbH (hereinafter referred to as 'Minolta Germany'), its distributor in Germany, which sells both to independent customers and to exclusive distributors in the other Member States. In Japan Minolta sells its PPCs through its subsidiary, Minolta Business Equipment Trading Co. Ltd (hereinafter referred to as 'MJS'), which has various branches in Japan and sells to both dealers and end-users.

3 In July 1985 Minolta, together with other Japanese manufacturers, was the subject of a complaint lodged with the Commission by the Committee of European Copier Manufacturers (CECOM), which accused it of dumping its products in the Community.

4 The anti-dumping procedure initiated by the Commission on the basis of Council Regulation (EEC) No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984 L 201, p. 1) resulted in the adoption of Commission Regulation (EEC) No 2640/86 of 21 August 1986 imposing a provisional anti-dumping duty on imports of plain paper photocopiers originating in Japan (Official Journal 1986 L 239, p. 5). The rate of the provisional anti-dumping duty was set at 15.8% of the net free-at-Community-frontier price in the case of imports of PPCs manufactured and exported by Minolta. By the contested regulation, adopted on a proposal from the Commission, the Council subsequently set the definitive anti-dumping duty at 20%.

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

6 In support of its action Minolta relies upon five pleas in law, alleging variously miscalculation of the constructed normal value, incorrect comparison of the normal value and the export price, incorrect recourse to the transaction-by-transaction method for the purposes of determining the export price, breach of the principle *audi alteram partem* and failure to fulfil the duty to state reasons.

The plea in law alleging miscalculation of the constructed normal value

7 Minolta claims that the Council infringed Article 2(3)(b)(ii) and (9) of Regulation No 2176/84 inasmuch as it included in the constructed normal value the selling, administrative and other general expenses of its sales subsidiaries, a profit margin of 14.6% and certain trade-in discounts granted by the Japanese subsidiaries to their customers.

8 With regard to the inclusion of the selling, administrative and other general expenses of its sales subsidiaries, Minolta claims that this resulted in the constructed normal value being determined at a stage beyond the ex-works level, namely the retail level, whereas the export price was established at the ex-works level. In this connection, it points out that the export price was constructed in accordance with Article 2(8) of Regulation No 2176/84 on the basis of the selling prices of its direct and indirect subsidiaries in the Community, from which the Council deducted all the expenses incurred by those subsidiaries in connection with the sales in question.

9 It should be noted first that, according to the documents before the Court, Minolta has financial control of its sales subsidiaries in Japan and entrusts to them tasks which are normally the responsibility of an internal sales department of the manufacturing organization.

10 As the Court has already held, in particular in its judgment in Case 250/85 *Brother* v *Council* [1988] ECR 5683, at paragraph 16, the division of production and sales activities within a group made up of legally distinct companies can in no way alter the fact that the group is a single economic entity which organizes in that way activities that, in other cases, are carried on by what is in legal terms as well a single entity.

11 Consequently, by including the selling, administrative and other general expenses of sales subsidiaries in the constructed normal value it is possible to avoid a situation where expenses necessarily included in the selling price of a product when it is sold by a sales department forming part of the manufacturer's organization are not included when that product is sold by a company which, although financially controlled by the manufacturer, is a legally distinct entity (judgment in Joined Cases 260/85 and 106/86 *TEC* v *Council* [1988] ECR 5855, at paragraph 29).

12 It should next be observed that, according to the Court's case-law (see *inter alia* the judgments in Case 240/84 *Toyo* v *Council* [1987] ECR 1809, at paragraph 13, Case 255/84 *Nachi Fujikoshi* v *Council* [1987] ECR 1861, at paragraph 14, Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, at paragraph 14, and Case 260/84 *Minebea* v *Council* [1987] ECR 1975, at paragraph 8), determination of the normal value and determination of the export price are governed by separate rules and therefore selling, general and administrative expenses need not necessarily be treated in the same way in both cases.

13 It should be added that the selling, administrative and other general expenses of the sales subsidiaries which, as indicated above, acted as a sales department of Minolta, are in reality only comparable to those of its export department, whose equivalent expenses were not deducted from the export price, not to those of its European subsidiaries. Any differences in the amount of those expenses could be taken into account under the allowances provided for in Article 2(10)(c) of Regulation No 2176/84.

14 Consequently, the argument based on the inclusion of selling, administrative and other general expenses in the normal value cannot be accepted.

15 Minolta considers that the profit margin of 14.6% included in the normal value is too high, because the Council did not take account either of the average profit on all relevant models sold on the Japanese market or of the turnover of the unprofitable models sold on the Japanese market, and did not calculate that margin at the ex-works level.

16 In this connection, it should be borne in mind that the normal value was constructed pursuant to Article 2(4) of Regulation No 2176/84 because all Minolta's PPC models exported to the Community were sold in Japan at prices that were on average lower than their production cost. As paragraph 10 of the preamble to the contested regulation indicates, in order to determine the profit margin the Council used the average profit realized by the other PPC exporters on those of their models which, during the reference period, were sold in Japan on average at above production cost. As the Council stated during the proceedings, in calculating that profit it took into account profit made on sales of a particular model even where some sales were made at a loss.

17 It must be emphasized in this connection that if, in order to determine average profit, the Council had to take into account sales of a given model even though overall no profit was made, the purpose of constructing the normal value would not be achieved. The aim of constructing the normal value is to establish a normal value which comes as close as possible to the selling price that the product in question would have if it were sold in the country of origin or exporting country in the ordinary course of trade. That is not the case when, *inter alia* for reasons of commercial strategy, no profit is made on sales of a given model.

18 To achieve that objective the institutions may take into consideration either the profit margin realized on sales of the same manufacturer's other models or the profit margin realized by another company (see the judgments in Joined Cases 277 and 300/85 *Canon* v *Council* [1988] ECR 5731, at paragraphs 21 and 22, and Case 301/85 *Sharp Corporation* v *Council* [1988] ECR 5813, at paragraph 8). Consequently, it must be held that the institutions may also have recourse to an average profit in accordance with the method set out in paragraph 16.

19 It should, in addition, be observed that in Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal L 209, p. 1), which repealed Regulation No 2176/84, the Council clearly took that view. Article 2(3)(b)(ii) of that regulation expressly provides that the profit to be included in the constructed normal value is to be calculated by reference to the profit realized on profitable sales of the like product, whether by the same producer or by other producers.

20 Minolta's argument that the Council ought, in any event, to have taken into consideration the turnover realized on all sales, including unprofitable sales, cannot be accepted either. If it had done so, the Council would in fact have established a normal value which did not correspond to the price obtained in the ordinary course of trade.

21 With regard to Minolta's argument that, in view of the fluctuations in the profitability of a model over time, the Council should have taken into consideration the profit realized over the entire period of a PPC model's life, it should be noted that Article 2(4) of Regulation No 2176/84 allows sales at a loss to be excluded provided that they have been made over an extended period of time. That condition was satisfied in this case because such sales were observed over the entire period of the investigation, which took place from January to July 1985.

22 Lastly, as far as the inclusion of the profit realized by the sales subsidiaries in Japan is concerned, it is sufficient to observe that the institutions are not under any obligation to choose as the reasonable margin of profit, within the meaning of Article 2(3)(b)(ii) of Regulation No 2176/84, the profit margin of the manufacturer rather than that of its sales subsidiary in the domestic market and they were fully entitled to adopt for that purpose the combined profit margins of the two companies in view of the fact that they constituted a single economic entity (judgment in Joined Cases 273/85 and 107/86 *Silver Seiko* v *Council* [1988] ECR 5927, at paragraph 17).

23 The Council must therefore be regarded as having determined the profit margin in this case in accordance with Article 2(3)(b)(ii) of Regulation No 2176/84.

24 As regards the inclusion in the normal value of certain trade-in discounts granted by the Japanese subsidiaries to their customers, Minolta claims that the discounts in question are normal discounts unconnected with trade-in transactions. Those discounts are granted automatically on a flat-rate basis to members of the Minolta Society, a club which confers various benefits on its members and is open to MJS dealers. Minolta adds that inasmuch as those discounts bear a direct relationship to the sales under consideration, within the meaning of Article 2(10)(c) of Regulation No 2176/84, the Council should not have included them in the normal value.

25 In this connection, it must be held that, according to paragraph 13 of the preamble to the contested regulation, trade-in discounts granted to buyers of new models when old models are traded in correspond to the benefit the producers obtain from the removal of the traded-in machines from the market and the lack of a second-hand market for PPCs in Japan. According to the Council, 'the demand for new machines is maintained at the highest possible level with prices consequently also being held at higher levels than would have been the case had a second-hand market existed' and 'this higher demand not only stimulates prices but also higher production levels which should normally result in increased economies of scale and commensurately higher profit levels'.

26 In those circumstances, the discounts in question, which correspond to the value which the manufacturer attributes to withdrawal of the used machines from the market, must be taken into account for the purposes of determining the normal value in accordance with Article 2(3) of Regulation No 2176/84.

27 That finding is not invalidated by Minolta's claim, that the discounts are granted on a flat-rate basis and do not vary from one transaction to another.

28 Accordingly, the Council constructed the normal value correctly by including in that value an amount corresponding to trade-in payments.

29 It follows from all the foregoing considerations that the plea in law alleging that the constructed normal value was miscalculated must be rejected in its entirety.

The plea in law alleging incorrect comparison of the normal value and the export price

30 Minolta maintains that the Council infringed Article 2(10)(c) of Regulation No 2176/84 on the ground that no allowance was made to take account of salesmen's salaries, certain transport expenses and certain other costs incurred by Minolta's manufacturing company in Japan (hereinafter referred to as 'MO') and by MJS, even though they are directly related to the sales under consideration within the meaning of that provision.

31 With regard, first of all, to the allowance claimed in respect of salesmen's salaries, it should be noted that the Council granted the allowance claimed but excluded from that allowance sales leaders' salaries. In this regard it must be observed that it was shown in the course of the investigation that the sales leaders' role consisted essentially in carrying out general functions in the sphere of management and direction, not in selling PPCs directly to buyers. Accordingly, the Council was right to regard the salaries paid to the sales leaders as not being directly related to the sales under consideration within the meaning of Article 2(10)(c) of Regulation No 2176/84.

32 Secondly, with regard to transport costs it must be held that the Council took the proper course when it granted an allowance of two-thirds of the costs relating to the use of salesmen's vehicles, taking the view that the remaining one-third pertaining to salesmen's ordinary transport costs was not directly related to sales. The same is true of the allowance granted in respect of salesmen's travelling expenses.

33 Thirdly, with regard to certain costs borne on the one hand by MO (warehousing, transport, insurance and credit costs) and, on the other hand, by MJS (transport, vehicles and credit costs), it is sufficient to observe that, as the Council contends, those costs were not directly related to sales.

34 Lastly, with regard to the allowances claimed on the ground that the normal value and the export price were established at different levels of trade, it must be pointed out that both were established on the basis of the price at which the product was sold for the first time to an independent purchaser.

35 It must further be emphasized that Minolta did not prove that the sales on the basis of which the normal value and the export price were determined concerned different categories of purchasers and were consequently at different levels of trade so as to justify the allowances claimed. Therefore the institutions were not bound to grant them.

36 In view of that finding there is no need to consider Minolta's claim that Article VI of the General Agreement on Tariffs and Trade (GATT) and Articles 1 and 2 of the Anti-Dumping Code were infringed in so far as the Council compared the normal value and the export price at different levels of trade.

37 It follows from the foregoing considerations that the plea in law alleging that the normal value and the export price were incorrectly compared must be rejected.

The plea in law alleging incorrect recourse to the transaction-by-transaction method for the purposes of determining the export price

38 Minolta claims that the application of the transaction-by-transaction method for the purposes of calculating the export price did not enable a fair comparison to be made between that price and the normal value in accordance with Article 2(2), (9) and (13)(b) of Regulation No 2176/84. It considers that since the normal values were calculated for each PPC model, the export prices should have been established by taking the weighted average price in order to enable such a comparison to be made.

39 On this point Minolta maintains that it follows from the judgment in Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, at paragraph 25, that the exporter must have acted wrongfully or intentionally with the aim of disguising dumping for the transaction-by-transaction method to be justified. In this case no such act was committed and accordingly there was no need to apply that method and depart from the method of weighted-average export prices.

40 First, it should be noted that Article 2(9) of Regulation No 2176/84 does not require the normal value and the export price to be calculated according to the same method. Article 2(13) merely states the various possibilities for calculating the dumping margin without imposing any requirement that the methods chosen for calculating the normal value and the export price should be similar or identical (see *inter alia* the judgment in Case 258/84 *Nippon Seiko* v *Council*, cited above, at paragraphs 15 and 18).

41 Secondly, it should be stressed that the freedom to choose one of the methods specified in Article 2(13)(b) of Regulation No 2176/89 is specifically intended to ensure the application of the method most appropriate to the purpose of the anti-dumping proceeding and that choice requires an appraisal of complex economic situations (see judgment in Case 258/84 *Nippon Seiko* v *Council*, cited above, at paragraphs 21 and 24). It appears neither from the documents before the Court nor from the argument at the hearing that the Council committed a manifest error when it elected to apply the transaction-by-transaction method.

42 Minolta's argument that application of the transaction-by-transaction method is justified only where the exporter has been guilty of manoeuvres aimed at disguising dumping cannot be accepted. Although that method is appropriate to deal with such manoeuvres, its adoption is by no means confined to cases in which such conduct has been observed by the institutions.

43 It follows from the foregoing that the plea in law alleging incorrect recourse to the transaction-by-transaction method for the purpose of establishing the export price must be rejected.

The plea in law alleging breach of the principle *audi alteram partem*

44 Minolta claims that if the Council considered that the spread of Minolta's prices constituted a manoeuvre aimed at disguising dumping and applied the transaction-by-transaction method on the basis of that assessment it was in breach of the principle *audi alteram partem* inasmuch as at no time did it give Minolta an opportunity to make its point of view known on that issue.

45 It is sufficient to observe that in so far as the Council applied that method, even in the absence of any manoeuvres aimed at disguising dumping, it was under no obligation to give Minolta a hearing on any relevant evidence which it might have had.

46 Accordingly, the plea in law alleging breach of the principle *audi alteram partem* must be rejected.

The plea in law alleging failure to fulfil the duty to state reasons

47 Minolta claims that the Council infringed Article 190 of the EEC Treaty inasmuch as it did not give sufficient reasons for its recourse to the transaction-by-transaction method for the purpose of establishing the dumping margin provided for in Article 2(13)(b) of Regulation No 2176/84.

48 On this point, it must be held that the method of calculating the dumping margin was indicated in paragraphs 6 and 29 of the preamble to the provisional regulation and confirmed in paragraphs 5 and 26 of the preamble to the contested regulation; moreover the transaction-by-transaction method is habitually used by the institutions, a fact of which interested parties cannot be unaware.

49 It follows that the plea in law alleging infringement of the duty to state reasons must be rejected, and consequently the application must be dismissed in its entirety.

Costs

50 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since the applicant has failed in its submissions, it must be ordered to pay the costs, including the costs of the intervener CECOM which has asked for them in its pleadings. The Commission shall bear its own costs in accordance with Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs, including those incurred by the intervener CECOM.

Joliet Slynn

Grévisse Moitinho de Almeida Zuleeg

Delivered in open court in Luxembourg on 10 March 1992.

J.-G. Giraud
Registrar

R. Joliet
President of the Fifth Chamber