REPORT FOR THE HEARING
in Case C-179/87 *

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* Language of the case: English.

I — Facts and procedure

A — *The facts*

In July 1985, the Committee of European Copier Manufacturers (CECOM) lodged a complaint with the Commission that imports of certain plain paper photocopiers (PPCs) from Japan were being dumped and were causing injury to the Community industry.

The anti-dumping procedure initiated by the Commission on the basis of Council Regulation 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) led to the imposition by Commission Regulation No 2640/86 of 21 August 1986 (Official Journal 1986 L 239, p. 5) of a provisional anti-dumping duty of 15.8% on Sharp PPC imports.

On 23 February 1987 the Council, on a proposal from the Commission, adopted Regulation No 535/87 imposing a definitive anti-dumping duty of 20% on imports of PPCs manufactured by Sharp (hereinafter referred to as 'the contested regulation') and providing for collection of the provisional duty imposed by Regulation No 2640/86.

B — *Written procedure and conclusions of the parties*

Sharp's application was received at the Court Registry on 10 June 1987.

By orders of 3 February 1988 the Court granted leave to the Commission and CECOM to intervene in support of the defendant's conclusions.

The written procedure followed the normal course. Upon hearing the report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, pursuant to Article 95(1) of the Rules of Procedure, to assign the case to the Fifth Chamber and to open the oral procedure without any preparatory inquiry.

The *applicant* claims that the Court should:

(i) declare Regulation No 535/87 void in so far as it applies to the applicant;

(ii) further or alternatively, declare the said regulation void: -

(a) in so far as it purports to impose a definitive anti-dumping duty of 20% upon PPCs originating in Japan and manufactured or exported by the applicant;

(b) in so far as it purports to order that the amounts secured by way of provisional duties in respect of such PPCs manufactured by the applicant and exported to the Community should be definitively collected;

(iii) in any event, order the Council to pay the applicant's costs;

(iv) order such other relief as may be lawful or equitable in all the circumstances;

(v) order the Commission and CECOM each to bear the costs of its intervention.

The *Council* contends that the Court should:

(i) dismiss the application;

(ii) order the applicant to pay the costs.

CECOM, intervening, claims that the Court should:

(i) dismiss the application;

(ii) order Sharp to pay the costs, including those of CECOM as intervener.

II — Submissions and arguments of the parties

II.1 — *Admissibility*

Sharp claims that, as is apparent from established case-law of the Court, the contested provisions of Regulation No 535/87 are of direct and individual concern to it and the application is therefore admissible.

The *Council* makes no observations concerning the admissibility of the application.

II.2 — *The substance*

A — *Determination of the normal value*

Sharp claims that the Council did not determine the normal value correctly. In so far as the Council considered that it did not have to take account of the prices charged by Sharp to its sales subsidiary in Japan, Sharp Business KK (SBK), in determining the normal value, it should have applied Article 2(7) and determined the normal value in accordance with Article 2(3)(b)(i) of Regulation No 2176/84 (comparable price of the like product when exported to a third country) or Article 2(3)(b)(ii) of that regulation (constructed value determined on a cost-plus-profit basis).

In the case of seven models, the institutions treated SBK's resale prices as the normal value as if they were Sharp's domestic selling prices, thereafter making inadequate deductions and purporting to arrive at a normal value at the ex-factory level. In the case of the eighth model, the institutions

constructed the normal value but included therein a large element of SBK's costs. According to Sharp, all SBK's costs should have been deducted in the first case but not included in the second case since they were associated solely with domestic sales. They are communication costs, in so far as SBK is responsible only for domestic sales, which could be precisely identified, as well as the following costs: parking rent for salesmen's cars; warehouse rent; rental charge for salesmen's cars; leasing cost of office equipment; petrol for delivery of merchandise; repayment of salesmen's relocation costs; cost of visiting dealers of Sharp and customers of dealers; reimbursement to dealers for visiting Sharp for service instruction; repayment of relocation costs of salesmen (personal travel); subscription to local trade associations; dealers' sales target incentive; service expenses; other costs (namely, advertising, administrative, marketing and machinery costs); and profits. Sharp proposes to offer further proof of the costs by means of a report by an independent accountant.

According to Sharp, in calculating the dumping margin the institutions should also have taken account of SBK's profits on distribution, which were not calculated even though in the construction of the export price a profit of 5% was deducted from the prices of the applicant's European subsidiaries.

Sharp claims that the methodology used by the institutions in determining the normal value was inconsistent. It cannot be right that the normal value of sales to a sales company can be established at a much higher level than the normal value of sales to a wholesaler, simply because the former includes many distribution costs and a distribution profit, whereas the latter does not include any such costs and profits and is truly closer to sales at the ex-factory level.

Sharp also claims that the institutions' treatment of it was different from that which it accorded to Nakajima, a Japanese exporter, in the Electronic Typewriters Case (Case 301/85 *Sharp Corporation* v *Council*) since in that case none of the distribution costs and none of the profits were included in the calculation of normal value.

In Sharp's view, Article 2(7) of Regulation No 2176/84 does not permit the calculation by the institutions, in the case of an exporter with a related sales company, of a normal value which is not at the ex-factory level while an exporter without such a related sales company, such as Nakajima, has a normal value calculated on an ex-factory basis.

According to Sharp, the methodology used by the Community institutions had the result that Sharp was found to be dumping even when the resale prices of the Sharp European subsidiaries were very considerably higher than the aggregate of the normal value and the export costs of

shipping the products to the Community and the cost of Community customs duty, as can be seen from Table A in the applicant's reply.

The *Council* states that in determining the normal value it took account of the price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country, as is provided in Article 2(3)(a) of Regulation No 2176/84 (recital 5 et seq. of the contested regulation and 6 et seq. of Regulation No 2640/86).

It did not consider it appropriate to take account of internal transfer prices between different parts of the same group of companies because the transfer of goods within a group of companies, made up of different legal entities but under common control and forming one economic unit, does not constitute sales in the ordinary course of trade within the meaning of Article 2(3). Where such a group of companies is found to form one economic unit, as in the present case, the first sale in the ordinary course of trade only takes place where the goods are sold for the first time to an independent buyer who is unrelated to the economic unit.

The Commission determined that certain functions of Sharp, in particular the function of its sales department which is necessary to effect sales on the domestic market, were performed not only by Sharp itself but also to a significant extent by its sales subsidiary SBK. That function, and the costs relating thereto, are therefore shifted from Sharp to SBK, which is a different part of the same economic unit.

The Council submits that even if Article 2(7) of Regulation No 2176/84 were applied to internal transfers in the present case, that would not prevent the institutions from determining normal value on the basis of Article 2(3)(a), the price actually paid or payable in the ordinary course of trade being that paid by the first independent buyer to SBK. All that Article 2(7) provides is that certain transactions 'may be considered as not being in the ordinary course of trade'. It does not provide that in such cases normal value can be established only on the basis of Article 2(3)(b). Moreover, there is nothing in Article 2(3) which would leave the institutions no choice but to apply Article 2(3)(b) in all cases in which Article 2(7) applies.

Consequently, as long as there are some sales in the ordinary course of trade on the domestic market and those sales (after the appropriate adjustments, if required) permit a proper comparison, Article 2(3)(a) may be applied.

The Council was therefore entitled to determine the normal value on the basis of the prices charged by SBK to independent

buyers in the ordinary course of trade in the domestic market.

As regards the question whether or not SBK's sales allowed a proper comparison, the Council contends that it is a question of fact to be decided in the light of all the circumstances. The Council observes that it is the sales which must permit the comparison and that adjustments can be made to the prices to enable the adjusted prices to be compared directly. It is also clear that the sales to be used need not necessarily be at the same level of trade, since Article 2(9) provides that the comparisons are *normally* to be made at the same level of trade and, to the extent to which the difference still affects price comparability after the other adjustments under Article 2(9) and (10) have been made, it may be subject to an allowance.

In any event, sales by SBK in Japan and those by Sharp's subsidiaries in the Community were to the same types of customers and were thus at the same level of trade. Moreover, they were comparable, subject to the adjustments to be made in accordance with Article 2(9) and (10) of Regulation No 2176/84.

As regards construction of the normal value pursuant to Article 2(3)(b)(ii) of Regulation No 2176/84, the Council states that it included in that value the sales, general and administrative ('SGA') expenses incurred by SBK in making PPC sales on the domestic market because SBK had the functions of the producer's sales department. It would thus be wrong not to include a reasonable amount of such SGA expenses, which were actually incurred by SBK, in the construction of the normal value. The constructed normal value must be as close as possible to the price charged on the domestic market.

With respect to the question whether the inclusion of SBK's SGA expenses in the construction of the normal value would lead to that value being determined at a different level of trade, the Council states that if that were the case the question would arise, in the context of a comparison between the normal value and the export price, whether that difference would affect price comparability and whether after all other adjustments which were made an additional adjustment for level of trade would have been justified.

The Council observes that the example given by Sharp concerning its situation and that of Nakajima in the Electronic Typewriters Case is based on assumptions that are not comparable. A sales company (SBK) which performs the functions of a sales department must be treated in the same way that such a department would be treated if it were not a distinct commercial company. Its costs and profit must also be treated as if they had been realized by the sales department and consequently as if they were costs and profit of Sharp itself, realized on selling its goods directly to independent customers. Nakajima sold to only one independent customers on the domestic market and therefore the amount of SGA expenses may be different from those incurred in Sharp's case.

Finally, with regard to the method proposed by Sharp according to which no dumping should be found if the price to an independent purchaser in the Community is higher than the price to the first independent purchaser in Japan, plus transport costs and duty, the consequence would be, in the Council's view, that the costs of importation into the Community and the profit normally made by an importer would not be taken into account.

By failing to make the requested deductions for the costs of marketing to end users in Japan in order to calculate the domestic ex-factory price on which the normal value is based, whereas all the corresponding costs incurred by Sharp's European sales subsidiaries were deducted in arriving at the ex-factory export price, the institutions determined a normal value which does not allow a proper comparison with the export price.

B — *The comparison*

Sharp claims that in determining the normal value the Commission relied, in the case of six of the models manufactured by Sharp, on the 'price actually paid or payable' in accordance with Article 2(3)(a) of Regulation No 2176/84 and in the case of a seventh model it adjusted the sub-production-cost price in order to eliminate loss and provide a reasonable profit in accordance with Article 2(4) of that regulation. According to Sharp, in the above cases the Commission should, assuming it was entitled to establish normal value by reference to the SBK sale price, have made full deductions for all the costs of SBK, being costs that related exclusively to domestic sales.

It is apparent from the table given by Sharp in its application that certain costs incurred by SBK in selling PPCs on the Japanese market were deducted (in the case of the normal value based on SBK's sale prices) or were not included (in the case of the constructed normal value): freight charges paid to independent freight carriers for delivery of merchandise; air-freight charges for delivery of merchandise; expenses of emergency transportation of merchandise by rental trucks; and insurance on the distribution of the product. None of the other costs incurred by SBK were deducted from the normal value, and the corresponding costs incurred by Sharp's European sales subsidiaries were not taken into account in determining the export price.

Likewise, in constructing the normal value in accordance with Article 2(3)(b)(ii) of Regulation No 2176/84, for the eighth model, in which the Commission included an amount for SBK's costs, Sharp considers that the Commission should have made full allowance for all of the costs of SBK, since they related exclusively to domestic sales.

According to Sharp, the granting of the requested deductions would have reduced its dumping margin from 24.8% to 13.1% — as calculated on the basis of the Commission's own figures and the methods adopted by the Commission's officials in allocating SBK's costs to the calculation of the normal value and consequent adjustments to its dumping margin. Moreover, that margin would have been

reduced further if the calculation had taken account of SBK's profit on distribution — in the construction of the export price a profit of 5% was deducted from the prices of Sharp's European subsidiaries.

Finally, Sharp claims that Regulation No 2176/84 must be interpreted in conformity with the GATT and the 1979 Anti-Dumping Code, which require that a fair comparison should be made in order to establish the existence or otherwise of dumping.

The *Council* states that in its judgments of 7 May 1987 (Case 240/84 *NTN Toyo Bearing Company Limited* v *Council* [1987] ECR 1849; Case 255/84 *Nachi Fujikoshi Corporation* v *Council* [1987] ECR 1884; Case 256/84 *Koyo Seiko Company Limited* v *Council* [1987] ECR 1912; Case 260/84 *Minebea Company Limited* v *Council* [1987] ECR 2000; cf Case 258/84 *Nippon Seiko* v *Council* [1987] ECR 1923, at paragraph 43 et seq.) the Court made it clear that the costs which are deducted from the export price when that price is constructed under Article 2(8)(b) of Regulation No 2176/84 are different from the allowances to be made under Article 2(10) if the normal value and export price are not on a comparable basis with regard to the factors listed in Article 2(9).

It also states that the requirement of a 'fair comparison' is satisfied provided that the adjustments under Article 2(9) and (10) have been made.

It also states that the costs in question are overheads and general expenses and even if they related to domestic sales Article 2(10)(c) would still establish that, as a rule, differences in such costs are not allowable.

The Council also states that only the overheads and general expenses of the European subsidiary were deducted in applying Article 2(8)(b), not those of Sharp's export department. Similarly, in calculating the normal value, no overheads and general expenses of Sharp's domestic sales department were deducted. Since SBK was under the same control as Sharp and performed the functions of a sales department, it could not be treated differently.

The Council considers that the list of different cost given by Sharp in its application distorts the picture, as the two columns which are compared are not comparable. Since SBK performed the functions of a sales department, its costs and the items allowed could only be compared with those of Sharp's export department, whose functions are performed by Sharp itself and not by its European subsidiary as Sharp claims.

Finally, the Council contends that its interpretation of Article 2(10)(c) is in accordance with the provisions of GATT and the Anti-Dumping Code. Neither GATT nor the Anti-Dumping Code requires allowances for all differences affecting price comparability. Each party to the Code has a considerable margin of discretion in deciding precisely what adjustments should be made. The result is that the allowances which are given

in the Community, the United States and Canada are quite different. It cannot be claimed that there is a single 'correct' interpretation of the code.

C — *The injury*

1. The concept of Community industry

Sharp states that, in view of the numerous imports from Japan by the three principal complainants (Rank Xerox, Océ and Olivetti), the latter come within the scope of Article 4(5) and Article 5(1) of Regulation No 2176/84, the purpose of which is, *inter alia*, to prevent European undertakings from seeking the adoption of anti-dumping measures relating to exports which they themselves have encouraged or required from their suppliers. Sharp also states that general considerations of fairness preclude undertakings which have benefited for a considerable period from Japanese exports from declaring that they are victims of such exports. Rank Xerox cannot be permitted both to depend on exports from Japan and at the same time to complain about them. Similar reasoning applies also to Océ and Olivetti in so far as they imported from Japan, albeit from unrelated suppliers, finished copiers which they resold profitably under their own brand name.

According to Sharp, another purpose of Article 4(5) is to ensure that the examination of the alleged injury is not distorted by the inclusion, in the category of Community producers, of importers of allegedly dumped products. The exclusion of a related firm might be motivated either by a concern that its relationship puts it in a better position than its unrelated competitors or by a concern that disentangling whether it had benefited or been damaged by imports in question was hopelessly difficult and should not be pursued.

Sharp considers that the Commission should have followed its approach in the 'Figure-skating boots' case (Commission Decision 85/143 of 18 February 1985, Official Journal 1985 L 52, p. 48), in which it excluded the complainant from the Community industry because it was the main importer in a Member State of products from a given country, it purchased them at the lowest prices and its imports were increasing continuously.

Sharp does not claim that there is no European production of photocopiers. It observes, however, that there was only Community production in the market for large machines and that Community production of small machines was small or non-existent and, in any event, the companies that claimed to engage in it were estopped from complaining about Japanese exports of small machines because they were linked to the exporters and profited from the exports. That is why, in Sharp's opinion,

there was no Community industry eligible to complain about injury in respect of imports of small photocopiers from Japan.

It is inappropriate to minimize the extent of Rank Xerox's links with Japan, contrary to the contentions of the Council and CECOM. Rank Xerox, 51% of whose shares belong to Rank Xerox Corporation, owns 50% of the shares in Fuji Xerox, which it regards as its 'principal associated company' (see page 15 of its 1985 Annual Report). It was from Fuji Xerox that Rank Xerox procured large quantities of products in the form of finished PPCs bearing the Rank Xerox label ('OEM supplies'), 'kits' and components, as well as technical and design assistance.

According to Sharp, in view of the link between Fuji Xerox and Rank Xerox and the latter's financial interest in the subsidiary whose products it purchases, the Commission should have realized that it was impossible to make a reliable assessment of the injury, having regard to the uncertainty surrounding the effect on Rank Xerox of imports from Japan. If it bought from Fuji Xerox, it made a profit as a 50% shareholder and it could influence the transfer price to itself for the finished copiers and for components. It is unclear whether the Commission tried to examine whether the supposedly low profits of Rank Xerox on sales of photocopiers which it made were influenced by the prices charged for technical assistance and components by its affiliates in other countries.

As to the price of components, Rank Xerox had an interest, as an assembler and reseller, in low prices, but also an interest, as a shareholder, in high prices. If Rank Xerox paid a low price to Fuji Xerox for finished copiers bearing the Rank Xerox label, it could sell them in Europe with opportunities for greater profits.

Sharp then states that in earlier decisions the institutions did not act in the same way as in the present case (Commission Regulation No 757/84 of 22 March 1984, 'Electronic Weighing Scales', Official Journal 1984 L 80, p. 9; Commission Regulation No 163/83 of 21 January 1983, Official Journal 1983 L 23, p. 9; Commission Decision No 83/428 of 26 August 1983, 'Camping Caravans', Official Journal 1983 L 240, p. 12; Commission Regulation No 2684/88 of 26 August 1988, 'Video Cassette Recorders from Japan and Korea', Official Journal 1988 L 240, p. 5; Commission Regulation No 1500/83 of 9 June 1983, 'Outboard Motors', Official Journal 1983 L 152, p. 18; Commission Decision No 85/143 of 18 February 1985, 'Figure-Skating Boots', Official Journal 1985 L 52, p. 48; Commission Regulation No 2936/82 of 28 October 1982, 'Copper Sulphate from Yugoslavia', Official Journal 1982 L 308, p. 7; Council Regulation No 3339/87 of 4 November 1987, 'Urea from Libya and Saudi Arabia and other countries', Official Journal 1987 L 317, p. 1; Commission Regulation No 997/85 of 18 April 1985, 'Glycine from Japan', Official Journal 1985 L 107, p. 8).

It also compares the institutions' treatment of certain Rank Xerox production facilities with the treatment of other factories dependent on components from Japan,

referring to Article 13(10) of Regulation No 2176/84, the 'anti-circumvention provision' of the anti-dumping regulation which provides for the imposition of duties on products made in European 'screwdriver' factories. In determining whether circumvention has occurred, the Commission pays attention to the relative values of the components entering the factory and determines that circumvention has occurred if the value of the parts from the country of exportation exceeds 50% of the value of all parts. Sharp considers it highly likely that, on the basis of the added value numbers given by the institutions, the low-volume operations of Rank Xerox would have been deemed an unfair means of circumventing anti-dumping duty.

Thus, where Rank Xerox imports the majority of its components of a particular copier from Japan, but has 'concrete plans' for increasing its European content, this entitles it to be counted as part of the Community industry and, as such, to be protected against imports from Japan. But when a Japanese-owned factory does the same thing, its operations are said to be a circumvention of Community policy.

Having regard to the foregoing, Sharp observes that Rank Xerox should have been excluded from the Community industry. Océ and Olivetti, which were also importers of Japanese PPCs and whose imports represented 35 to 40% of their sales and rentals of new machines, should also have been properly excluded from the definition of Community industry.

The *Council* states that the concept of Community industry involves two distinct issues: whether the complaint was admissible on the ground that it was supported by a major proportion of Community industry and whether the established Community industry was correctly defined for the purpose of determining the injury. The Council points out that the purpose of defining Community industry in Article 4 of Regulation No 2176/86 is to determine clearly what companies may complain about unfairly priced imports and in respect of what companies injury must be determined. Whilst it may be appropriate to accept a complaint which is also supported by a producer having links with the dumping exporters, it may be necessary to exclude that producer from the Community industry in the assessment of injury if it has inflicted injury upon itself.

With respect to the admissibility of the complaint, the Council submits that if Rank Xerox were to be excluded, Océ, Olivetti and Tetras, which held only small market shares, would still constitute a major proportion of Community production and would therefore be taken into consideration in determining the admissibility of the complaint.

As to whether the established Community industry was correctly defined for the purposes of determining injury, the Council states in the first place that Sharp misrepresents the previous practice of the institutions in that field. In particular, the facts of the case now before the Court differ considerably from those of the 'Ice Skates' case referred to by Sharp.

According to the Council, the 'Ice Skates' case refers to specific circumstances, which were that the complainant was the largest importer of the goods from one country into one Member State, it was buying at the lowest prices and its imports were continually increasing. It was therefore excluded from the 'Community industry'. By contrast, in the present case imports by Community producers were generally small in volume and value and, with regard to components, were decreasing rather than increasing (recitals 55, 57, 58, 66 and 71 of the contested regulation).

In 'Electronic Weighing Scales' (Commission Regulation No 757/84, Official Journal 1984 L 80, p. 9), the Commission excluded two Community producers from the complaining Community industry because of technical cooperation links which those companies had with Japanese importers. That decision did not, however, affect the outcome since the remaining producers still represented 72% of Community production. The situation in that case was different from that in the present case.

In 'Copper Sulphate from Yugoslavia' (Commission Regulation No 2936/82, Official Journal 1982 L 308, p. 7), a producer which also imported the dumped product was not excluded from the Community industry since its primary interest lay in domestic production and it had been forced to import the unfairly priced products in order to maintain its market share. The facts are substantially similar to those of the photocopier cases.

The Council states that the various aspects which led it to conclude that each of the Community producers which supported the complaint should be considered as part of the Community industry are set out in recitals 55 to 77 of the contested regulation and none of the arguments submitted by Sharp would suffice to reach a different conclusion.

The Council observes that Article 4(5) of Regulation No 2176/84 empowers the institutions to decide whether or not a company should be excluded and that Community producers must, in general, be treated as part of the Community industry unless there is a reason to exclude a particular producer.

The Council states in the first place that the company in question considers itself entitled to protection under Regulation No 2176/84 and that it applied for action by the institutions. The institutions must therefore have good reasons to show that, despite the exercise of the procedural right, the 'relation' necessitates an exclusion.

The Council then observes that when determining whether to exclude Rank Xerox, which had made use of the procedural right conferred on it by Article 5(1) of Regulation No 2176/84, from the Community industry, the institutions applied the 'self-inflicted injury test'. It is the position of the institutions that a Community producer related to an exporter which considers itself

injured and supports a complaint against dumped imports will be excluded from the Community industry if the producer has caused injury to itself, since no protection against 'self-inflicted injury' should be granted under Regulation No 2176/84.

In that connection, the Council contends in the first place that it is necessary to look at the companies' operations globally. In doing so, the smallness of the Rank Xerox-Fuji Xerox link becomes apparent, relative to the overall size of Rank Xerox's European operations. Transfer sales between Rank Xerox and Fuji Xerox comprised only 7% in volume of Rank Xerox's total sales between 1981 and 1985. The Council then submits that Rank Xerox's corporate relationship with Fuji Xerox did not have an impact on the commercial link between the two companies sufficient to justify the exclusion of Rank Xerox and that the benefits Rank Xerox derived from its corporate relationship with Fuji Xerox, for example dividends, are insignificant when assessed against the injury caused to Rank Xerox by dumping by other producers (recitals 61 to 67 of the contested regulation).

With respect to the previous decisions cited by Sharp, the Council considers that they do not support its argument that Rank Xerox should be excluded from the Community industry. None of the cases indicates at what point a structural or commercial link between a Japanese and a European company is so strong that the institutions are compelled to exclude the European company from being part of the Community industry. The issue here is what maximum criteria are admissible for a company still to be considered as part of the Community industry even if there is a direct relationship between the two companies and if certain products and components were imported.

A clear distinction should be made between Japanese companies owning subsidiaries in Europe and the present case, where a European company owns a substantial part of a Japanese company. Such ownership may facilitate supply with Japanese components or equipment but it does not mean that the European parent company can no longer be considered as part of the Community industry. Rank Xerox is a long-standing producer in the Community, with a long-term commitment to investment and employment within the Community.

According to the Council, it is improper to compare the proportion of components required for individual products to be European with the maximum degree of 'links' permitted to still include its producer within the Community industry. The Council also observes that assembly operations by Japanese exporters in the Community were started or substantially increased after the opening of the anti-dumping investigation; Rank Xerox's plant in the United Kingdom was operational over a long period before the investigation and its use of European-sourced parts increased, whereas the assembly of Fuji Xerox components had not significantly increased since the opening of the anti-dumping investigation.

Finally, the Council maintains that there is no indication in the institutions' decision of any manifest error of appraisal or misuse of powers.

CECOM states that none of its members may be excluded from the Community industry as being a producer 'related to the exporters of the dumped products' (Article 4(5) of Regulation No 2176/84). Under the definition of the word 'related' it is understood that a domestic producer is considered to be related to an exporter or importer only 'if one of them controls the other, or if they jointly control or are controlled by a third person, and there are grounds for believing that the effect of the relationship is such as to cause the domestic producer to behave differently from those domestic producers who are not related'. According to CECOM, Rank Xerox and Fuji Xerox are not related companies within that definition. Rank Xerox does not control Fuji Xerox, in which it has a 50% shareholding equivalent to that of its joint venture partner Fuji Photo Film Co. Ltd, and management control of the joint venture is vested in Fuji Photo. Moreover, the other European copier manufacturers forming CECOM are not controlled by Japanese companies either in such a way as to behave differently from unrelated domestic copier manufacturers.

CECOM considers that there is no reason to exclude European manufacturers of PPCs from the Community industry on the ground that they have imported and still import PPCs from Japan.

Therefore, in CECOM's view, the partial dependence of European photocopier manufacturers on a Japanese supply for small copiers was a last resort, a self-defence measure in the face of massive dumping from Japan and by no means an autonomous choice of the European industry. In consequence of such dumping and displacing strategy by the Japanese companies, CECOM members were not able to attain the prices they had calculated for low-volume and medium-volume copiers of their own production and the feasible prices would not achieve the return on investments required. The investments of European copier manufacturers have therefore mainly been concentrated on higher-volume models which still yield a minimum profit. In order to offer a full line of PPCs on the market, those manufacturers were obliged to continue and partially even enlarge supplies of lower-volume models from Japan.

CECOM states that none of its members inflicted injury upon itself by importing dumped Japanese copiers, since they all sold the imported models at prices corresponding to their own prices and therefore did not benefit from such imports. The injury suffered by the European PPC manufacturers was inflicted by Japanese imports at dumped prices.

CECOM then analyses the situation of each of the four European photocopier manufacturers.

It maintains in the first place that Rank Xerox purchased from Fuji Xerox and imported PPCs and copier components originating in Japan in order to complete the range of models offered in the Community market and thus acted with a view to self-protection. Rank Xerox's decision to buy low-end copiers from Fuji Xerox in Japan was primarily a question not of 'quickness on the market' (recital 65 to the contested regulation) but of lack of profitability in the case of an own production in the Community. It also considers that the imports of a Fuji Xerox model by Rank Xerox did not cause injury to Rank Xerox or indeed to other Community manufacturers because the market price was set by the flood of other earlier Japanese imports. Thus, when Rank Xerox sold copiers of a model sourced from Fuji Xerox and also produced by Rank Xerox in the Community the prices were the same for both and were calculated to make profit. This demonstrates that the injury suffered by Rank Xerox as a member of the Community industry was inflicted upon that company by the Japanese dumping practices, without enabling Rank Xerox to benefit from the sale of dumped Fuji Xerox copiers in the Common Market.

In the case of Océ and Olivetti, CECOM states that those two companies purchased certain copier models in Japan primarily or exclusively in order to offer a full range of models to their customers. They did not succeed in developing and marketing a fuller range of their own manufactured models owing to the depressed prices in the European copier market set by Japanese exports at dumped prices. The Community authorities concluded that Océ and Olivetti had not inflicted injury on themselves through their pricing policy (recital 71 to the contested regulation) and, according to CECOM, although they had to follow the low prices set by the Japanese exporters, their limited imports from Japan did not have detrimental effects on the prices of their own and other Community producers' PPCs.

Finally, with regard to Tetras, CECOM states that when that European photocopier manufacturer was about to introduce a personal photocopier known as Attaché I, Canon started a very aggressive price undercutting campaign in France for its PC10 and PC20 models. This confirms that the Japanese competitors reacted with substantial price undercutting when European manufacturers started to develop, produce and market PPCs in the low end of the copier market.

CECOM concludes that the foregoing arguments show that the Council's decision to regard Rank Xerox, Olivetti, Océ and Tetras as the Community industry within the meaning of Article 4(5) of Regulation No 2176/84 is lawful and was the only possible decision in the exercise of its discretionary power. The members of CECOM represent more than 80% of total Community copier production and they are primarily in the position of producers, having financed research and development

in the Community. Their share of imports in relation to own production is low and the dumped imports were mainly due to unfair Japanese trading practices.

2. The concept of like product

With respect to the definition of what must be regarded as like products, *Sharp* states, referring to recital 31 to the contested regulation, that the physical differences and the 'unlikeness' between photocopiers in adjoining segments are particularly striking if personal copiers and copiers in segment 1a are considered. It states in particular that the price per copy and the relative utility of a personal copier diminish as copy volume increases, so that a buyer of a segment 1 copier is unlikely to buy a personal copier even though the initial investment may be lower.

Sharp also states that the Commission Directorate General for Competition, in its decision of 22 December 1987 concerning the Canon/Olivetti joint venture (Official Journal 1988 L 52, p. 51), defined three relevant markets: low-volume copiers (personal photocopiers up to Dataquest segment 2), mid-volume copiers (segments 3 and 4) and high-end copiers (segments 4 to 6). The Directorate stated that each of the markets embraced interchangeable copiers in terms of their characteristics, use and price and that the definition did not preclude a certain interchangeability between the three markets.

According to Sharp, each of the categories defined above constitutes a group of like products. In its view it cannot be contended that all photocopiers are like products by virtue of the fact that consumers have a choice between a centralized system and a decentralized system. In Sharp's view, the degree of substitution — and thus the competition — between different market segments is less than that within individual segments, which shows that there is real segmentation and that it is not possible to treat all the combined segments as a single market and all products as like products.

The *Council* observes that in considering what should be treated as 'the like product' within the meaning of Article 2(12) of Regulation No 2176/84, the institutions had found that all PPCs, in adjoining segments at least, from the smallest personal photocopier to segment 5 of the Dataquest classification, should be considered like products (recital 28 et seq. of the contested regulation).

According to the Council, all the surveys (for example that of Dataquest and the Info-Markt survey, the latter having been carried out at the Commission's request to determine which PPCs compete in the Community market and to facilitate comparison between the various models) recognize overlaps between adjoining segments. Furthermore, the Commission was supplied during the course of the investigation with evidence demonstrating that machines in different segments competed with each other (offers for contracts showing that suppliers were offering models in different Dataquest segments to satisfy

specified customer demands) and the Info-Markt survey confirms that customers have a real choice between centralized facilities (large photocopiers) and decentralized facilities (smaller copiers down to personal copiers). According to the Council, there is also evidence that certain Japanese exporters market and promote their products in such a way as to encourage the impression that they compete with larger models.

Finally, the Council observes that the findings of Directorate General IV cited by Sharp do not contradict the Council's position since DG IV states that each of the relevant markets embraced substantially interchangeable photocopiers and adds that market definition and the definition of the like product are two separate issues.

With respect to personal photocopiers, the institutions acknowledged that their development helped expand the market for PPCs but also that it increased competition at the bottom end of the market. The fact that there is competition is witnessed by the evidence on cross-segment competition and the Info-Markt survey and the overlap in copy volume and speed classification is also shown in the Dataquest classification for those products. According to the Council, the difference regarding maintenance (disposable cartridges for certain components of personal photocopiers and servicing of segment 1 copiers by technicians) and the fact that costs vary and the price per copy may be different from one model of PPC to another does not mean that those products cannot be regarded as like products.

The Council considers that the fact that there is allegedly a limited number of small PPCs produced in the Community is irrelevant. The table in Annex 1 to its defence shows that Community-produced models existed in all segments in the reference period and the marginal distinguishing characteristics between Community-produced and Japanese models with regard to certain precise technical features do not affect the 'like product' question.

Finally, in response to Sharp's argument that the PPCs developed by Japanese manufacturers were entirely novel in concept, design and engineering and that they offered improved reliability, in so far as it is a like product argument, the Council observes that Community producers manufacture products which are broadly as advanced as any on the market and have the same basic physical characteristics and functions as the Japanese-made competing products.

The Council therefore concludes that the like product was correctly determined and that Sharp's arguments are without merit.

According to *CECOM*, all copiers within the total range of PPCs must be regarded as like products, in particular personal photo-

copiers and copiers in segment 1a, specifically mentioned by the applicant. It adds that all PPCs belong to the total market, even those with a speed range exceeding 75 copies per minute. Moreover, the Council decision that definitive anti-dumping duties could not apply to machines classified in Dataquest segments 5 and 6 is not in conformity with the position taken by CECOM in the administrative procedure.

In CECOM's view, even if, in terms of size and function, the machines are not alike in all respects, all the PPCs have the same characteristics and functions and technical performances which are more or less on the same level. In that connexion CECOM cites Joined Cases 260 and 106/86, *Tokyo Electric Company* v *Council*, concerning anti-dumping duties on electronic typewriters and in particular the Opinion of the Advocate General of 8 March 1988 to the effect that the existence of separate markets for 'compact' and 'professional' machines was not self-evident and that, whilst weight was a factor which might allow a distinction to be drawn, the functions performed by the machines must also be at least as important a factor. In those cases, the applicant had not shown that there would be any substantial difference between the functions of compact and professional typewriters. In CECOM's view the same appraisal is valid for the single market of copiers.

Regarding the existence of Community production of small copiers, CECOM states that during the reference period Community producers also manufactured and sold small copiers (Rank Xerox and Olivetti) and that the low share of CECOM's members in the lower end of the market was due to the displacing competition of Japanese photocopier manufacturers.

3. The injury elements

Sharp contests the Commission's determination of the injury on the basis of the following factors: low profitability, inability to attain economies of scale, price undercutting, increase in volume of Japanese exports and increase in the market share held by the Japanese exporters.

— Low profitability

Sharp states that the Commission was wrong to rely exclusively, in considering the profitability of the complainants' activities, on their sales of small and medium-sized photocopiers of their own manufacture. According to Sharp, it should have taken account of (a) profits which the complainants obtained from photocopiers imported by them from Japan, (b) the high profits obtained from the sale of related products and other items, which brings all suppliers of photocopiers, especially small photocopiers, similar or higher profits than those from the sale of machines, and (c) the profitability of the complainants' activities in relation to all photocopiers, not merely small ones.

Sharp considers that the profitability was thus artificially lowered and that the statement contained in recital 82 to the contested regulation does not validly apply to Rank Xerox, Océ and Olivetti. Those companies have more than sufficient income to finance the development of new products.

— Inability to attain economies of scale

Sharp claims that the complainants' limited economies of scale were due to their quite late commencement of manufacturing. They had financial resources which would have been sufficient to enable them to penetrate that market if they had had the technical capacity, and they were not prevented from doing so by financial difficulties attributable to Japanese exports.

— Price undercutting

Sharp states that the allegedly low profitability and other difficulties suffered by the complainants were attributed to the low prices of Japanese products. It refers to recitals 48 and 49 to the contested regulation in support of its view that those products were not less expensive than those sold by the complainants, but that they were technically superior.

The study by Info-Markt, an independent market research company commissioned to prepare a survey of competitive models in the German marketplace, suggests that the price of Community models should have generally been higher than that of comparable Japanese models because Community models are often designed for the rental market and consequently generally have a longer life cycle. Sharp observes in that connexion that the Commission compared longer-lasting Community models against otherwise comparable Japanese models and still found little price difference. If there was any price undercutting, it was on the part of Community manufacturers.

According to Sharp, the institutions' argument seems to confirm that the success of the Japanese models depended on developing and manufacturing attractive models at competitive prices. It is stated in recital 86 to the contested regulation that the success of the Japanese small copiers was not demonstrably due to their quality 'except in respect of multiple features'. The Japanese photocopiers were not more expensive but were technically superior and therefore more attractive in the marketplace. Thus, there was competition, not undercutting.

Sharp also states that it is apparent from the table prepared by Office Technology Research that the prices of PPCs in the Community have been relatively stable for about ten years by comparison with other electronic office products whose prices have fallen much more sharply, which contradicts the view that the prices of small PPCs could have been kept low in the 1970s — the

reason for which Océ decided not to develop its own model.

to Community production of the like product, not on other products or operations as a whole, and therefore it is unnecessary to take account of other factors that do not concern the like product.

— Increase in the volume of Japanese exports

Sharp claims that the expansion in the volume of Japanese exports did not constitute injury because it was largely co-extensive with the expansion of the new market for small photocopiers and that that very expansion offered an opportunity for profitable sales to European producers which they would not otherwise have had.

With regard to the prices of dumped imports, the institutions had found that there was *price undercutting* which had caused injury (recitals 41 to 49 to the contested regulation) but that the undercutting could not be sufficiently quantified to be taken into account in calculating the duty necessary to remove the injury (recital 110 to the contested regulation). The Council had stated clearly that price undercutting was widespread and practised by all exporters without exception (recitals 47 and 49 to the contested regulation). It was also generally transient in nature, not because the Japanese-made models were sold at higher prices but because prices for Community-made models were lowered to compete with Japanese-made models. Finally, price undercutting was generally not greater than 10%, but the Council notes that continuous and widespread undercutting of prices inevitably has as its consequence a depression of prices and makes it impossible for the competitor to maintain the price level that would otherwise have existed.

— Increase in the market share held by Japanese exporters

As regards the increase in the market share held by Japanese exporters, Sharp considers that it reflects their continued success in the market for small photocopiers, which was a function of quality and not of price.

The *Council* contends in the first place, on the question of the Community producers' *profitability*, that what is relevant is the profits or losses on their production and sale of PPCs and not their overall situation as a result of their production and sales of other products. The Basic Regulation requires the effects of dumping to be assessed in relation

The Council considers that the charging of a price for a technically superior product or a more richly featured model which is the same price at which a less-featured but otherwise comparable model is being sold constitutes price undercutting within the meaning of Regulation No 2176/84. If the initial list prices of two products are the

same, that is not conclusive evidence that there is no price undercutting — the two models would have to be comparable in all respects in order to allow such a conclusion. In the Council's view, where the practice of charging a lower price for the same model or the same price for a better model is a consequence of dumped imports, it is considered as unfair competition, the effects of which must be evaluated in determining the elements of injury under Regulation No 2176/84.

The Council observes that Sharp does not dispute that there was *an increase of market share* for Japanese-made PPCs and that that increase coincided with a decrease in the market share of European-made PPCs, despite growth in demand.

The Council then contests Sharp's assertion that Japanese exporters helped create the market for low-volume PPCs, which would otherwise not have existed. According to the Council, Rank Xerox produced for a long time a low-volume segment 1 photocopier, the 660 model, and other Community producers have also produced and supplied the market with low-volume PPCs (Tetras from 1985, Olivetti from 1979/80 and Develop from 1980/81).

With regard to the smallest models, or personal photocopiers, the Commission had acknowledged that they had developed a new market but also that they increased competition at the low end of the market. Even if the institutions had treated the personal photocopier as a separate like product, the fact would nevertheless remain that there was still Community production. Tetras, a Community producer, developed a personal photocopier in 1984/85 to compete with Canon machines.

CECOM considers that the European production of photocopiers, representing a strategic product in the field of office automation, was targeted by several Japanese photocopier manufacturers and therefore that all the other factors outlined in Article 4 of Regulation No 2176/84 for the evaluation of injury are of minor importance.

With respect to price undercutting, CECOM considers that owing to the large-scale dumping over a long period and a Japanese market share of about 85%, the Japanese competitors could easily apply the method of selective price undercutting, enabling certain special models of certain competitors to be attacked in specific markets.

According to CECOM, no evidence has been given for an allegedly better technology or higher effectiveness of Japanese photocopiers. It is also incorrect to claim that Community-produced models have a longer life and are designed for the rental market. Finally, a price comparison between European and Japanese-made photocopiers,

taking into account feature-related price undercutting, would have shown substantial undercutting margins despite the existence of price depression.

CECOM claims that dumping, by definition, relates to machine sale prices and that profitability therefore has to be assessed in relation to the Community production of the like product, in conformity with Article 4(4) of Regulation No 2176/84, not in relation to business as a whole. Dumping impairs the profitability of Community producers either by preventing a sale completely or by rendering sales possible only at unfairly reduced returns. Profits made on after-sales business are a separate matter and rental profitability was taken into account in the Commission's calculations.

Finally, one of the main effects of the low profitability of Community photocopier manufacturers was the inability to benefit from increased economies of scale (recital 83 to the contested regulation), which was caused by dumping on the part of Japanese manufacturers not by the late commencement of Community production — the latter in fact commenced before Japanese manufacture.

4. The causal link between the injury and the dumped imports

Sharp claims in the first place that the development of the European photocopier market shows clearly that the principal cause of the modest level of activity of the three complainants in manufacturing small photocopiers was their decision not to commence manufacture. Sharp states that in the 1960s and 1970s the Xerox Corporation and its European affiliate Rank Xerox, which were leaders in the market for office photocopiers, and likewise other manufacturers established in Europe concentrated on making larger and faster photocopying machines in the belief that market demand would be concentrated on that sector and that there would be little demand for small PPCs suitable for small offices or decentralized large offices. In the late 1970s and early 1980s, however, a new market emerged for small PPCs, whilst the market for large machines remained strong.

In response to Japanese business needs in the 1970s, in particular the need for communications in the form of physical reproductions of manuscript originals, the Japanese manufacturers developed an entirely new generation of small PPCs of exceptional quality and reliability, which had no counterpart made in the Community. By offering those technical innovations in an attractive way, they largely created a market in the Community for smaller PPCs.

Until the emergence of the new generation of copiers in Japan, European customers

had to choose between a large, fast PPC, a small, inferior, coated-paper copier or a slow PPC like the Rank Xerox 660 which gave poor quality copies but did use plain paper and had an extensive service network to back it up.

In those circumstances, there was a ready demand in the Community in so far as European companies considered it necessary to have a number of low-volume copiers offering good-quality reproduction, which did not need regular maintenance and were offered for sale on more favourable terms that the leasing conditions applied by Rank Xerox.

The low level of activity of European producers in bringing out new models of small copiers from 1968 to 1978 and the fact that Japanese manufacturers launched about 15 models from 1975 to 1978 are apparent from Table A (annexed).

During the reference period (according to the Dataquest classification) there was virtually no Community production of photocopiers in segment 2 and below. In segment 3 Japanese suppliers were dominant, although there was some European production in the larger range in that segment. In segment 4 there was limited Japanese competition, and there was none in segment 5. There was no Community production in segment 6.

The expansion of the market for photocopiers between 1970 and 1980 was overwhelmingly due to enhanced demand in the small copier sectors, following the emergence of the new Japanese photocopiers. This is shown in particular by the following table, which shows changes in the 'population' of PPCs (number of machines installed at users' premises) in Germany:

Table A: Plain-paper copiers year-end populations in Germany

(in thousands)

	1976	1977	1978	1979	1980	1981
Segment 1	43	61	87	126	183	246
Segment 2	29	40	53	70	83	99
Segment 3	15	17	19	23	29	36
Segment 4	11	10	11	11	11	13
Segment 5	—	—	—	—	—	1
Segment 6	—	1	1	2	2	3
All segments	98	129	171	232	308	398
Segments 1, 2, 3	87	118	159	219	295	381
Segments 4, 5, 6	11	11	12	13	13	17

Source: Dataquest

The total population of all PPCs in Europe rose from about 1 000 000 in 1979 to about 2 978 000 in 1984.

If the criterion is adopted of new placements of machines (calculated by adding net sales and rentals), it will be seen that they have increased each year, going from about 450 000 in 1981 to about 800 000 in 1984, the increase consisting essentially of small Japanese-made photocopiers.

In the case of personal photocopiers which, according to Sharp, provide an example of the market's readiness for small machines and Japanese technological leadership, the following table gives figures for placements, the total population and the Japanese share:

Table B: Personal photocopiers (Western Europe)

	1982	1983	1984	1985
Total placements	—	95 000	128 000	166 000
Japanese share	—	100%	99,2%	98,8%
Total population	—	95 000	223 000	389 000
Japanese share	—	100%	99,6%	99,2%

Finally, to demonstrate Japanese domination in the field of small models during the reference period, Sharp also provides the following table of figures for sales of new machines in the German market:

Table C

	Japanese Models	EEC	Models Fuji / Rank Xeroxjoint effort
Personal photocopiers	8	1*	0
Segment 1a	17	1	4
Segment 1b	18	0	0
Segment 2	21	0	1
Segment 3	15	4	0
Segment 4	8	3	0

* Tetras models, made in tiny volumes owing to technical difficulties

The Community producers of large photocopiers reacted to those market developments by making purchases from Japanese manufacturers. Thus, Rank Xerox, while continuing to concentrate on larger copiers, decided that it should also offer for sale in the Community small copiers of the requisite quality and it chose to do so by buying from its affiliated company in Japan, Fuji Xerox, either finished OEM models or sets of components to be assembled in the Community. Océ and Olivetti bought and resold OEM models procured from unrelated Japanese suppliers. According to Sharp, reliance on imported OEM models was a profitable, sensible, commercial strategy and those imports avoided the cost and technological difficulty of developing new models independently. Commercial and technical reasons and not low prices were therefore the main causes of the limited manufacturing activity of Rank Xerox and the other companies in the field of small photocopiers. The complainants' situation during the reference period was a direct

consequence of the decisions taken with respect to the manufacture of the machines in question.

The *Council* states that the institutions analysed with great care the impact of the dumped imports on the Community industry and the other possible causes for the injury elements determined (recital 81 et seq. to the contested regulation). In particular it analysed the difficulties encountered by Rank Xerox in launching a new low-volume product on to the market and concluded that those difficulties, due at least in part to problems internal to the Xerox group, had been resolved by a number of changes made in management and product lines and thus could no longer be relied on in determining the injury caused to the company.

The Council observes in the first place that the institutions found a constant pressure on prices resulting from price undercutting by Japanese exporters. Price depression led to a drop in the profitability of Community companies and coincided with an increase in the Japanese market share. In those circumstances, it is not wrong to conclude that the depressed prices had as their consequence an increase in sales and an increase in the market share of Japanese-made products — an increase which coincided with a decrease in the Community producers' market share. Therefore, the dumped imports should be regarded as a cause of the injury elements found.

As regards the other factors mentioned by Sharp as a cause of the injury elements, the Council rejects the argument that the Community industry neglected the low-volume copier market in the 1970s and thus experienced problems arising from its decision not to manufacture copiers of that type. Rank Xerox continued to produce a low-volume copier (its 660 model) in the Community until 1978 and the fact that subsequently low-volume machines were supplied by Fuji Xerox or manufactured by Rank Xerox on the basis of parts from Fuji Xerox is indicative of the fact that Rank Xerox did not in any sense abandon its interest in the low-volume market. Olivetti developed a low-volume model in 1978 and Océ made major efforts to do so but abandoned them, citing depressed prices as the main reason for its decision.

The Council also rejects the view that Japanese low-volume copiers created a new market; although Japanese marketing concepts helped expand the market, that does not show that imports of such low-volume copiers at low, dumped prices were not a cause of the injury suffered by the Community industry.

As regards the arguments concerning alleged technological superiority, Japanese technical leadership in innovations and reliability, the Council observes that all Community producers were producing PPCs which were broadly as advanced as any on the market. Moreover, the list of

alleged innovations by Japanese manufacturers is no proof that the injury caused by the low-priced imports is attributable to other causes. Finally, with regard to the reliability of Japanese PPCs as compared with Community-made PPCs, there is no evidence that Community-made PPCs are inferior in quality or require more servicing. The appraisal of all the elements and possible causes of injury led to the conclusion that low-priced dumped imports were in fact a cause of injury.

With respect to the entirely new generation of photocopiers claimed by Sharp to have been developed by Japanese manufacturers, *CECOM* observes that the basic technologies of PPCs were invented in the United States of America and in Europe and that all the European copier manufacturers either had their own development of small PPCs or were able to manufacture that product. They were discouraged from manufacturing them because in the long run there was no prospect of covering their costs and gaining a reasonable profit.

There is no proof that the European manufacturers faced technical and technological barriers in the manufacture of PPCs and that the success of the new generation of small Japanese photocopiers was due primarily to their quality. On the contrary, the European producers have manufactured and are able to manufacture all models within the total range of PPCs at least of the same quality as Japanese-made photocopiers.

The only barrier which exists is the lack of profitability owing to large-scale dumping on the part of numerous Japanese manufacturers.

D — *The Community interest*

Sharp concedes that the institutions enjoy a wide margin of discretion in deciding whether photocopiers in adjoining segments may be regarded as 'like products' and whether products compete with each other but it claims that the institutions cannot deny that there is very limited Community production of small photocopiers and that the range of products offered in the field of small photocopiers is very narrow.

It claims that only Tetras produced personal copiers — and then very few — during the reference period, holding about 1% of that market. Moreover, in the next three smallest segments, disregarding Rank Xerox assembly operations, only one model was offered on the German market, the Olivetti Copia 1050, which had about 2% of the relevant Western European market.

In those circumstances, even assuming that the 'like product' criterion was satisfied, Sharp considers that the Commission's conclusions as to the Community interest are incorrect in so far as it did not take account of the burden imposed on buyers of many products in order to protect the makers of a very few products.

Sharp then asserts that the appraisal of the Community interest in the present case was vitiated by the inclusion in the Community industry of the three principal complainants which were dependent on and benefited from Japanese imports.

In its opinion, Rank Xerox should certainly have been excluded and it would have been impossible for the Council to contend that the anti-dumping measures were in conformity with the Community interest. Océ and Olivetti, whose imports accounted for 35 to 40% of their sales and rentals of machines, should also have been excluded from the Community industry. And even if they were to be regarded as part of the Community industry, the Council should have set their interest against that of the OEM importers such as Gestetner, Agfa-Gevaert and others. Although they held only a very small share of the Community market in small photocopiers (not above 3% in 1985 even if Tetras were to be regarded as a Community manufacturer) the abovementioned OEM importers employed a very large number of people and were very active in the field of small photocopiers.

The *Council* observes that if only a relatively small proportion of the total industry within the Community were considered as Community industry after applying the test of Article 4(5) of Regulation No2176/84, the institutions would have to consider very carefully whether the adoption of anti-dumping measures would be in the interest of the Community. The need to take account of that interest does not however imply that if Rank Xerox were excluded from the Community industry the interests of OEMs would have to be given priority over the interests of the remaining Community producers. In the Council's view, it would be in the interest of the Community to protect a small, weak Community industry in order to avoid total dependence on foreign imports.

E — *The calculation of the anti-dumping duty*

Sharp claims that the duty level of 20% violated Article 13(3) of Regulation No 2176/84, according to which the amount of any anti-dumping duty may not be higher than what is necessary to eliminate the injury. Sharp is of the opinion that the 12% margin considered necessary to ensure a reasonable profit or return on the sale of photocopiers is excessive. Small photocopiers are always sold at a lower level of profit than total photocopier operations and the Commission was therefore mistaken when it tried to make photocopier sales profitable to an extremely generous degree. Sharp then observes that the duty was calculated on the basis of how much of a price increase would be necessary to eliminate the supposed undercutting. For the reasons already stated, there was no undercutting. Finally, Sharp considers that the precise description of how the duty was calculated contained in recital 107 to the contested regulation is incomprehensible. The Commission should have set forth the methodology chosen for calculation of the

duty in a clear way so that the Court can exercise appropriate judicial supervision.

The *Council* states first of all, with respect to the question whether the 12% profit margin considered necessary for Community producers was too high, as contended by Sharp, that it confirms the viewpoint taken by the Commission that if PPCs were sold at low rates of profit, or even at a loss, with a positive return being achieved only through subsequent sales of supplies, there would be little or no incentive to manufacture photocopiers. In recitals 101 to 106 to the contested regulation the detailed reasoning is set out as to why the Community institutions accepted the Community producers' arguments with regard to the need for profitability of PPC machine sales and it maintains that for Community producers to be able to continue production of machines it is essential for them to have an appropriate rate of return on investment.

The profit rate chosen by the Commission, which was heavily contested both by Japanese producers, which submitted that it was too high, and by Community producers, which submitted that it was too low, was regarded as a reasonable compromise.

With regard to the level of duty, Sharp's argument that there was no price undercutting is contradicted by recitals 108 and 110 to the contested regulation.

Finally, in response to Sharp's argument that the method of calculation is incomprehensible, the Council observes that comprehensive details of the method of calculation were supplied to all parties to the proceeding on 2 December 1986 and an opportunity to comment on them was given. Moreover, the contested regulation states all the elements on which the calculation was based, which allowed Sharp to defend its rights and the reasons given are sufficiently precise to allow the Court to review the legality of the calculation.

CECOM claims that Sharp's argument does not show that the Community institutions obviously violated the broad margin of discretion which they have in assessing the injury threshold. It also observes that in the anti-dumping proceedings concerning electronic typewriters the Advocate General refuted Canon's argument (page 53 of the Opinion of 8 March 1988, Joined Cases 277/85 and 300/85 *Canon* v *Council*) that the level of profit margin used in calculating the target price was excessive due to lack of substantiation.

J. C. Moitinho de Almeida

Judge-Rapporteur

Table A:

Chronology of small PPC introductions

	1968	1969	1970	1971	1972	1973	1974	1975	1976	977	1978
EEC Manufacture											
Rank Xerox	660										2202
Agfa-Gevaert				X-10		X-11					
Develop											
Rex Rotary					5000						
Herstellung Japan											
Canon						NP-70			NP-75 NP-76	NP-50	
Sharp								SF-710	SF-720 SF-721 SF-730		
Toshiba							BD 702		BD 702A	BD 601	BD 704 BD 727
Konishiroku								Mark 3		100	

Source: Dataquest.