JUDGMENT OF THE COURT (Fifth Chamber)
5 October 1988 *

In Case 250/85

Brother Industries Ltd, whose registered office is in Nagoya (Japan), acting in its own name and on behalf of its subsidiaries in the Community:

Brother International (Belgium) SA, Zellik (Belgium),

Brother International Maskin A/S, Ishoj (Denmark),

Brother International GmbH, Bad Vilbel (Federal Republic of Germany),

Brother-Jones SMC Ltd, Manchester (United Kingdom),

Brother International Corporation (Irl.) Ltd, Dublin (Ireland),

Brother International (Nederland) BV, Badhoevedorp (Netherlands), and

Brother France SA, Aulnay-sous-Bois (France),

represented by P. Didier, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of L. Mosar, 8 rue Notre-Dame,

applicant,

v

Council of the European Communities, represented by the Director of its Legal Department, H. J. Lambers, and its Legal Adviser, E. H. Stein, acting as Agents, assisted by G. Vandersanden, of the Brussels Bar, with an address for service in

* Language of the Case: French.

Luxembourg at the office of J. Käser, Manager of the Legal Directorate of the European Investment Bank, 100, boulevard Konrad-Adenauer,

defendant,

supported by

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

and by

Committee of European Typewriter Manufacturers (Cetma), represented by D. Ehle, Rechtsanwalte of Cologne, with an address for service in Luxembourg at the Chambers of E. Arendt and G. Harles, 4, avenue Marie-Thérèse,

interveners,

APPLICATION for a declaration that Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 163, p. 1) is void is so far as it concerns the applicant,

THE COURT (Fifth Chamber)

composed of: G. Bosco, President of Chamber, J. C. Moitinho de Almeida, U. Everling, Y. Galmot and R. Joliet, Judges,

Advocate General: Sir Gordon Slynn
Registrar: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 22 September 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 March 1988,

gives the following

Judgment

1 By application lodged at the Court Registry on 12 August 1985, Brother Industries Ltd (hereinafter referred to as 'Brother'), whose registered office is in Nagoya, Japan, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Council Regulation No 1698/85 of 19 June 1985 (Official Journal 1985, L 163, p. 1) imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan was void in so far as it concerned the applicant, and for the award of damages against the Council and the Commission on account of a manifest infringement of the Community legislation on dumping and the general principles of Community law.

2 Brother is a company whose activities include, amongst other things, the manufacture of electronic typewriters which it sells mainly abroad. In 1984, together with other Japanese manufacturers, it was the subject of a complaint made to the Commission by an association of European manufacturers, the Committee of European Typewriter Manufacturers (Cetma), which accused it of selling its products in the Community at dumping prices.

3 The anti-dumping proceeding 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) led initially to the imposition upon Brother by Commission Regulation (EEC) No 3643/84 of 20 December 1984 (Official Journal 1984, L 335, p. 43) of a provisional anti-dumping duty of 43.7%. The Council, on a proposal from the Commission, then fixed the definitive anti-dumping duty at 21% by Regulation No 1698/85, against which Brother has brought the present action.

4 By a document lodged on 29 August 1985, Brother applied for interim measures suspending the operation, with respect to it, of Regulation No 1698/85 until the Court had given judgment. The application for interim measures was dismissed by an order of the President of the Court of 18 October 1985 in which the costs were reserved.

5 Cetma was granted leave to intervene in the proceedings in support of the defendant's conclusions. The Commission was also granted leave to intervene in support of the defendant's conclusions, after Brother had stated that it was waiving its claim for damages, which had been put forward in the same application as the claim for annulment, against both the Council and the Commission.

6 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 discussed hereinafter only in so far as is necessary for the reasoning of the Court.

7 Brother challenges the validity of Regulation No 1698/85 on the basis of the seven submissions set out below:

(i) errors in the calculation of the normal value;

(ii) infringement of Regulation No 2176/84 as regards the calculation of the export price;

(iii) infringement of Regulation No 2176/84 as regards the comparison between the normal value and the export price;

(iv) breach of the principle of legal certainty;

(v) infringement of Regulation No 2176/84 with regard to the determination of the injury suffered by Community manufacturers;

(vi) incorrect assessment of the Community's interests;

(vii) breach of the principles of equal treatment and non-discrimination.

Alleged errors in the calculation of the normal value

8 Brother claims in the first place that the structure of the market in Japan, where the use of electronic typewriters is not very widespread, cannot be properly compared with the structure of the Community market, and that Japanese prices are therefore not 'comparable' within the meaning of Regulation No 2176/84.

9 In that regard, it must be pointed out that, according to Article 2 (2) of Regulation No 2176/84, 'a product shall be considered to have been dumped if its export price to the Community is less than the normal value of the like product'. According to Article 2 (3) (a), the normal value is 'the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin'. Other criteria for determining the normal value are provided for where there are no sales of the like product in the ordinary course of trade in the exporting country or country of origin or where such sales do not permit a proper comparison to be made.

10 It must be acknowledged that, for reasons relating in particular to the specific features of written Japanese, typewriters are not used for business relations within Japan and are therefore marketed there in very small numbers compared with sales in the Community. Nevertheless there does exist in Japan, as is clear from the documents before the Court, a market in electronic typewriters involving some tens of thousands of machines each year which, as demonstrated *inter alia* by the presence of foreign manufacturers, is fairly competitive. In those circumstances, there is nothing to preclude the view being taken that the prices achieved on the Japanese market are comparable with those obtained on the Community market.

11 Brother maintains secondly that the prices charged on the Japanese market were not representative, having regard to the number of electronic typewriters which it sold on that market. Those sales did not exceed the threshold of 5% of exports

below which the Community institutions had decided to treat sales on the Japanese market as negligible. Brother also considers that the third recital in the preamble to Regulation No 2176/84 requires account to be taken of the practices of the major trading partners of the Community. That threshold of 5% should therefore have been calculated in accordance with the practice followed in the United States of America. Moreover, the attitude adopted in this case by the Community institutions constitutes, in Brother's view, a sudden change in the previous practice based on much higher 'thresholds of negligible sales'.

12 The documents before the Court do not support Brother's allegation that domestic sales, taken into consideration in order to determine the normal value of its products, did not exceed the threshold of negligible sales. That is true only if the threshold of negligible domestic sales were fixed at the figure advocated by Brother of 5% of total exports to all destinations taken together, but such an approach has never been adopted by the Community institutions, which in this case referred to 5% of total exports to the Community.

13 As regards the argument relating to reference to the United States practice in such matters, it should be noted that the attitude of one of its trading partners, even a major partner, does not suffice to oblige the Community to follow the same course.

14 Thirdly, Brother alleges that the Community institutions calculated the normal value of the majority of its models on the basis of the resale price of its related distributor in Japan, Brother Sales Ltd (hereinafter referred to as 'BSL'), whereas, if they were convinced that the prices charged by Brother to BSL were not prices established in the ordinary course of trade, they should have had recourse, in accordance with Article 2 (3) (b) of Regulation No 2176/84, either to the prices of the like products exported to non-member countries or to the constructed value.

15 It should be observed that the use of a related distributor's resale prices is justified since those prices can rightly be regarded as the prices of the first sale of the product in the ordinary course of trade. Brother markets its products on the domestic market through a distribution company which it controls financially and to which it entrusts tasks that are normally the responsibility of an internal sales department of the manufacturing organization.

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.

17 As for the models whose normal value was constructed, Brother contends that the administrative, general and other expenses should have been calculated on the assumption that the product was to be exported.

18 In that connection, it must be borne in mind that, according to the scheme of Regulation No 2176/84, the purpose of constructing the normal value is to determine the selling price of a product as it would be if that product were sold in its country of origin or in the exporting country. Consequently, it is the expenses relating to sales on the domestic market which must be taken into account.

19 It must also be emphasized that, although in the case of models sold in sufficient quantities on the domestic market it has been possible to calculate the real price, whereas in the case of models that are exclusively exported the normal value had to be constructed, the failure to take into consideration for the latter the same costs as those included in the real price of the models sold on the domestic market would lead to an unjustified difference in the treatment of manufacturers exporting electronic typewriters according to whether they are sold exclusively abroad or in their own country as well.

20 Fifthly, Brother complains that the profit margin used for the construction of the normal value of some of its models was miscalculated, inasmuch as BSL's general selling expenses in Japan were divided by the volume of Brother's sales worldwide which are wholly unconnected with BSL's sales, with the result that its profit was exaggerated and its general selling expenses were reduced.

21 In that regard, the Community institutions rightly emphasize that, even if the calculations had been carried out on the basis of the figures given by Brother, the result would have been the same since both the profit margin and the general

expenses used for the construction of the normal value are components of the domestic prices of Brother's products, so that neither of those two factors can diminish without the other increasing to the same extent.

22 In the light of those considerations, therefore, the submission that there were errors in the calculation of the normal value must be rejected.

Submission alleging infringement of Regulation No 2176/84 as regards the calculation of the export price

23 After the Community institutions corrected the error alleged in this submission, namely the taking account twice of the cost of credit to buyers, and reduced the dumping margin by 1.5%, Brother raised the question whether it was possible to prevent the new figures thus calculated from influencing the calculation of the anti-dumping duty as well.

24 In view of the fact that the anti-dumping duty was fixed by the Community institutions at the level of injury suffered by Community manufacturers, namely 21% of the price of the product, whereas the dumping margin found in the case of Brother was 33.6% of the price of the product, it must be stated that the Community institutions were manifestly entitled to take the view that a 1.5% reduction in the dumping margin would not have any impact on the rate of the anti-dumping duty.

Submission alleging an infringement of Regulation No 2176/84 as regards the comparison between the normal value and the export price

25 Brother maintains, in the first place, that the comparison between the normal value and the export price was incorrect in so far as export prices calculated at the manufacturer's 'ex-factory' level were compared with normal values determined at the 'ex-exclusive distributor' level.

26 This submission cannot be accepted on the ground that, in the light of the aforesaid considerations, Brother and its related distributor must be regarded as a single economic entity.

27 Since this submission must be rejected, it is superfluous to consider the submissions relating to the Community institutions' refusal in the applicant's case to make allowances within the meaning of Article 2 (10) of Regulation No 2176/84. Those are alternative submissions raised only in the event of its being established that the comparison between the normal value and the export price was made at different levels of trade.

Submission alleging a breach of the principle of legal certainty

28 Brother argues that since Regulation No 2176/84 does not lay down detailed practical rules regarding the calculation of the dumping margin, the contested regulation made a large number of new fundamental decisions. That method contravened the principle of legal certainty inasmuch as it prevented traders, even diligent and prudent ones, from taking appropriate action to avoid the imposition of an anti-dumping duty.

29 With regard to this submission, it must be pointed out that in several respects the rules laid down by Regulation No 2176/84 leave a measure of discretion to the Community institutions, in particular the Commission in an anti-dumping investigation, as regards fixing a provisional duty and proposing a definitive duty to the Council, and the fact that the Commission exercises that discretion without explaining in detail and in advance the criteria which it intends to apply in every specific situation does not constitute a breach of the principle of legal certainty.

30 The submission alleging a breach of the principle of legal certainty must therefore be rejected.

Submission alleging an infringement of Regulation No 2176/84 as regards determination of the injury suffered by Community manufacturers

31 In the first of the arguments which it puts forward in connexion with this submission, Brother claims that, pursuant to Article 4 (2) (b) of Regulation No 2176/84, examination of injury must include, amongst other things, consideration of 'the prices of dumped or subsidized imports, in particular where there has been

a significant price undercutting as compared with the price of a like product in the Community'. According to Brother, the comparison provided for in that article can only be a comparison between real prices, on condition that they are fair prices.

32 In order to establish to what extent that submission is well founded, it must be borne in mind that the Community institutions were unable to determine the injury until after the complaint was lodged by the Community manufacturers on 15 February 1984, whereas it is apparent from the documents before the Court that the Community industry had already some time before begun to feel the effects of the Japanese imports which were subsequently the subject of the anti-dumping proceeding. The prices of the Community products during 1984 could therefore no longer be used for determination of the injury within the meaning of Article 4 of Regulation No 2176/84, in so far as they had already been reduced for some time with a view to resisting the ever-growing pressure from Japanese imports.

33 In the light of the foregoing considerations, constructing the price which would have obtained within the Community if it had not been subject over a long period to downward pressure because of Japanese imports is the only way of ensuring that the comparison provided for in Article 4 (2) (b) of Regulation No 2176/84 is not rendered meaningless.

34 Brother's argument to the effect that it had no knowledge whatever of the manner in which the target prices were calculated cannot be accepted since the method of calculating target prices was communicated to the applicant, and the production costs of Community undertakings constitute confidential data which could not in any circumstances have been communicated to it.

35 Brother further claims that the adjustments between different models, which were necessary in order to enable prices to be compared, were made in an unreasonable manner.

36 It must be emphasized in that regard that, as Brother concedes, a direct comparison between the imported models and the most similar Community models was impossible because of the wide variety of models and their differing technical

features. Since it was therefore necessary to make an adjustment in order to take account of those differences, the Community institutions asked the Japanese exporters and the Community producers to appraise in good faith the commercial value of each model on the basis of its technical features and determined the average of the two valuations.

37 In view of the fact that a technical device of moderate production cost may be very attractive to a prospective purchaser, in that it enables the machine to be used in a particular way, it must be stated that the commercial value of a machine does not necessarily vary in accordance with the production cost of its components. In the absence of any objective method of assessing the commercial value of electronic typewriters, it must therefore be concluded that the method adopted by the Community institutions, based on the average of the various subjective appraisals, was reasonable.

38 Finally, Brother had claimed that certain models regarded as Community models had in fact been manufactured in non-member countries. The Council replied, and Brother conceded, that all those models had either been manufactured in the Community or had not been taken into consideration for the purposes of determination of the injury, except for two models in respect of which that error was corrected during the proceedings by Council Regulation (EEC) No 113/86 of 20 January 1986 (Official Journal 1986, L 17, p. 2). This submission has therefore become devoid of purpose.

39 The submissions concerning determination of the injury suffered by Community manufacturers must therefore be rejected.

Submissions alleging an incorrect assessment of the interests of the Community

40 Brother claims that the imposition on it of a definitive anti-dumping duty is not in conformity with Article 12 of Regulation No 2176/84, according to which such a measure may be adopted where it is clear, amongst other things, that 'the interests of the Community call for Community intervention'. In this case, the imposition of an anti-dumping duty on Brother does not serve the interests of the Community in any way, when other undertakings from outside the Community continue to sell their products on the Community market at prices that are equal to, or lower than, those of the applicant.

41 It should be noted, in that regard, that Brother is not asserting that the aforesaid undertakings sell their products on the Community market at dumping prices. In those circumstances it must be pointed out that the interests of the Community are effectively guaranteed by protective measures against dumped imports, even though an anti-dumping duty does not have the effect of shielding Community manufacturers against competition from products which originate in other non-member countries but are not being dumped.

42 Brother also claims that it is not in the interests of the Community to protect inefficient producers. As the Community institutions rightly pointed out, it is incumbent upon them, under Article 12 (1) of Regulation No 2176/84, to decide, where there is dumping and injury, whether 'the interests of the Community call for Community intervention'. The fact that a Community producer is facing difficulties attributable in part to causes other than dumping is not a reason for depriving that producer of all protection against the injury caused by the dumping.

43 Moreover, the protection afforded to Community producers, including even the less efficient ones, is not excessive since the target price was calculated by attributing to Community manufacturers a profit margin of 10%, whereas those manufacturers had argued on the basis of supporting evidence that a margin of 18 to 20% of turnover could be considered appropriate.

44 The submissions alleging an incorrect assessment of the interests of the Community must therefore be rejected.

45 In view of the conclusions reached by the Court with regard to the other submissions advanced by Brother, it would serve no purpose to consider the submission alleging an infringement of the principles of equal treatment and non-discrimination, which amounts in fact to the question whether the calculation criteria adopted by the Community institutions were correct.

46 In the light of the foregoing findings, the action in its entirety must be dismissed as unfounded.

Costs

47 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs. Since Brother has failed in its submissions, it must be ordered to pay the costs, both of the main proceedings and of the proceedings for the adoption of interim measures, including the costs of the interveners which asked for them.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the application.

(2) Orders the applicant to pay the costs, both of the main proceedings and of the proceedings for the adoption of interim measures, including the costs of the interveners which asked for them.

Bosco Moitinho de Almeida

Everling Galmot Joliet

Delivered in open court in Luxembourg on 5 October 1988.

J.-G. Giraud
Registrar

G. Bosco
President of the Fifth Chamber