OPINION OF MR ADVOCATE GENERAL DARMON
delivered on 5 December 1984 *

Mr President,
Members of the Court,

1. This action, based on the second paragraph of Article 173 of the EEC Treaty, has been brought by Timex Corporation against Article 1 of Council Regulation (EEC) No 1882/82 of 12 July 1982 by which the Council imposed

'a definitive anti-dumping duty on mechanical wrist-watches originating in the USSR'. [1]

Timex is the main Community manufacturer of mechanical wrist-watches and movements and the only manufacturer of those products in the United Kingdom. By its action it challenges the lawfulness of the application by the Council of Regulation No 3017/79 of 20 December 1979 on

'protection against dumped or subsidized imports from countries not members of the European Economic Community'. [2]

In order to grasp the relevant facts of the dispute it is necessary to recall briefly the circumstances in which it arose.

2. In April 1979 Timex, considering that its position on the market and its sales had suffered considerably from the dumping of mechanical *watches* and *movements* imported from the Soviet Union, lodged a complaint with the Commission of the European Communities. Its complaint was rejected because it came from only one manufacturer in the United Kingdom. The complaint was then renewed in June 1980 by the British Clock and Watch Manufacturers' Association Limited on behalf of British and French manufacturers producing most of the mechanical wrist-watches made in the Community.

The anti-dumping proceeding opened following receipt of that complaint led the Commission to adopt Regulation No 84/82 [3] imposing a *provisional* anti-dumping duty solely on mechanical wrist-watches originating in the USSR. The Commission did not in fact impose any duty on watch *movements*, considering that, whilst there were 'substantial margins of dumping, the low level of market penetration and the effect of quantitative restrictions in force in France [were] such that material injury [was] not being caused and there [was] no threat that it [would] be caused'. [4]

The period of application of that provisional duty was extended by Council Regulation (EEC) No 1072/82 of 4 May 1982. [5] Council Regulation No 1882/82 then imposed a *definitive* anti-dumping duty. Its rate is equal to the dumping margin established and is 12.6% for watches without gold plating or with gold plating of a thickness up to and including five microns

* Translated from the French.

1 — Official Journal, L 207 of 15 July 1982, p. 1.

2 — Official Journal, L 339 of 31 December 1979, p. 1.

3 — Official Journal, L 11 of 16 January 1982, p. 14.

4 — Regulation No 84/82, thirty-first recital of the preamble.

5 — Official Journal, L 125 of 7 May 1982, p. 1.

and 26.4% for watches with gold plating of a thickness exceeding five microns. [6]

3. The adoption of measures to protect Community industries against dumping is governed by Regulation No 3017/79 which lays down the conditions for and the rules governing the imposition of anti-dumping duties.

It provides in particular that:

'an anti-dumping duty may be applied to any dumped product whose entry for consumption in the Community causes injury'

and that 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'. [7]

It is the determination of the normal value 'in the case of imports from non-market economy countries' which is at the centre of this dispute. In such cases, Article 2 (5) of Regulation No 3017/79 provides that the normal value must be determined

'in an appropriate and not unreasonable manner on the basis of one of the following criteria:

(a) the price at which the like product of a market economy third country is actually sold:

(i) for consumption on the domestic market of that country,

or

(ii) to other countries, including the Community;

or

(b) the constructed value of the like product in a market economy third country;

or

(c) if neither price nor constructed value as established under (a) or (b) above provides an adequate basis, the price actually paid or payable in the Community for the like product, duly adjusted, if necessary, to include a reasonable profit margin'.

4. Timex considers that Council Regulation No 1882/82 was adopted in breach of certain procedural and substantive rules laid down by Regulation No 3017/79. It has therefore brought this action in which it asks the Court to annul Article 1 of Regulation No 1882/82 in so far as:

(a) the amount of definitive anti-dumping duty on watches is insufficient; and

(b) no anti-dumping duty is imposed on mechanical movements originating in the Soviet Union.

Before the submissions advanced by Timex in support of its action are examined it is first necessary to consider whether the objection of inadmissibility raised by the defendant institutions is well founded.

Admissibility

5. As the Council and the Commission point out, new light has been thrown on the question of admissibility, on which there has been extensive argument from the outset, by the judgments in the *FEDIOL* [8] and Allied Corporation [9] cases which the Court delivered during the proceedings in this

6 — Regulation No 1882/82, Article 1 (2).

7 — Article 2 A. (1) and (2).

8 — Judgment of 4 October 1983 in Case 191/82 *EEC Seed Crushers' and Oil Processors' Federation (FEDIOL)* v *Commission.*

9 — Judgment of 21 February 1984 in Joined Cases 239 and 275/82 *Allied Corporation and Others* v *Commission.*

case. The defendant institutions maintain their objection in the same form, however. The first task is therefore to consider the main points of law clarified by those two decisions and then draw from them the conclusions relevant to the question of admissibility in this case.

6. It may be deduced from the principles established in the *FEDIOL* judgment that, when Regulation No 3017/79 has been applied, complainants may apply to the Court for a review of the procedural guarantees laid down by that regulation and of the substantive question whether any manifest errors of assessment or misuse of power have been committed. [10] This is a principle derived from the scheme of Regulation No 3017/79 and from the general principles of the Treaty. As such, it applies to all measures adopted by the institutions in anti-dumping and anti-subsidy proceedings and, in particular, to the regulations imposing duties.

I must therefore conclude that the admissibility of the action brought by the applicant for the annulment of the Council regulation depends only on the satisfaction of the requirements laid down by the second and third paragraphs of Article 173 of the Treaty.

7. Since the time-limit requirement is not at issue, it remains to determine whether Council Regulation No 1882/82 constitutes a decision, adopted in the form of a regulation, which is of direct and individual concern to the applicant.

The Court has dealt with this question in an action brought by undertakings *subject* to an anti-dumping duty. Considering that anti-dumping duties 'may be imposed only on the basis of the findings resulting from investigations concerning the production prices and export prices of undertakings which have been individually identified', the Court held that, in order for the action of the undertakings subject to the duty to be admissible, it was sufficient for them 'to establish that they were identified in the measures adopted by the Commission or the Council or were concerned by the preliminary investigations carried out'. [11]

8. Can that approach be adopted towards the question of the admissibility of this action brought by Timex?

It must be observed in this regard that the situation of a complainant and the situation of an undertaking subject to duty are not the same. Whilst a regulation introducing an anti-dumping duty is directed against practices of undertakings which the regulation helps to identify, its purpose is to protect in an indeterminate way a Community industry in the interests of the Community. [12] In that sense such a regulation is intended to apply on the relevant Community market to 'objectively determined situations' and to entail legal effects for 'categories of persons regarded generally and in the abstract'. [13]

Yet that statement does not rule out the possibility that such a regulation may in fact constitute a decision of direct and individual concern to the complainant. That is precisely the case in this instance. That conclusion clearly follows from the preamble to Regulation No 84/82 and No 1882/82, which refers to the other, according to which the anti-dumping duty was established in view of the effect of the dumping *on the applicant.*

In Regulation No 84/82, the Commission states that it was compelled to concentrate its attention on the situation of that undertaking because it

10 — Case 191/82, *FEDIOL*, paragraphs 28 to 30.

11 — Joined Cases 239 and 275/82, paragraphs 11 and 12.

12 — Article 4 (1) and Article 11 (1) of Regulation No 3017/79.

13 — Case 307/81, *Alusuisse Italia SpA* v *Council and Commission* [1982] ECR 3463, paragraph 9 at p. 3472.

'accounts on its own for a major proportion of the total Community production of mechanical watches, and exports of the product under investigation to the Community are concentrated mainly in the United Kingdom market, where other Community producers sell only a very small part of their production . . . '. [14]

This is why the Council, taking account of 'the extent of injury caused to Timex by the dumped imports', [15] fixed the rate of duty definitively imposed at the level of the dumping margin established.

In actual fact, since the Community industry threatened by the dumping was, to all intents and purposes, Timex, the anti-dumping proceeding and its outcome were determined solely in the light of the applicant's situation. It appears to benefit directly from the regulation which was intended to put an end to the practice from which only it was suffering. Moreover, the regulation concerns it not because it belongs to the abstractly defined category of manufacturers of the relevant product but

'by reason of certain attributes which are peculiar to [it] or by reason of circumstances in which [it is] differentiated from all other persons and by virtue of these factors distinguishes [it] individually just as in the case of the person addressed'. [16]

Regulation No 1882/82 must therefore be regarded as a decision which is of direct and individual concern to the applicant and not as a measure of general scope. The applicant's action must therefore be declared admissible.

Substance

9. Timex requests the Court to annul Council Regulation No 1882/82 on the ground that the definitive anti-dumping duty which it fixes for imports of watches of Soviet origin is insufficient and on the ground that it imposes no duty at all on watch movements.

It is useful to point out in this regard that the discretion which the institutions enjoy when applying Regulation No 3017/79 relates in particular to determining, with regard to the interests of the Community, the rate of the countervailing or anti-subsidy duties necessary to deal with the injury suffered by a Community industry. Consequently, the Court has no jurisdiction to investigate the expediency of imposing anti-dumping or anti-subsidy duties or, *a fortiori*, the rates of such duties. However, since discretionary does not mean arbitrary it is within the Court's jurisdiction to declare, where appropriate, that the institutions have failed to respect the procedural guarantees laid down by the regulation or committed a manifest error in the assessment of the facts leading to the imposition of duties or exercised their powers for a purpose other than the public interest of the Community. [17]

That preliminary observation leads me to the conclusion that it is necessary to reclassify Timex's claim. Its application, which contains no allegation of misuse of powers, is based on two sets of submissions, one concerning the observance of certain procedural guarantees and the other dealing with the assessment of certain facts. For the

14 — Regulation No 84/82, twenty-second recital of the preamble, and Regulation No 1882/82, twelfth recital of the preamble.

15 — Regulation No 1882/82, final recital of the preamble.

16 — Case 25/62 *Plaumann & Co.* v *Commission* [1963] ECR 95, at p.107.

17 — Judgment in Case 191/82 *FEDIOL*, paragraphs 25 to 31.

sake of clearness, I shall, however, distinguish between watches and watch-movements.

A — *Watches*

10. In the first place, Timex alleges that the Commission acted in breach of its right to inspect information laid down in Article 7 (4) (a) of Regulation No 3017/79. Secondly, it challenges the assessment which led the institutions to choose Hong Kong as the market-economy country comparable to the Soviet Union for the purpose of determining the normal value of the like product (Article 2) (5).

1. Free access to information (breach of Article 7 (4) (a))

11. The applicant points out that the Commission refused to supply it with some of the information gathered from the Hong Kong undertakings selected as reference undertakings. The Commission thus acted in breach of its right to be heard during the course of the investigation which is guaranteed by Article 7 (4) (a). That provision provides that:

'The complainant . . . may inspect all information made available to the Commission by any party to an investigation . . . '.

It appears in fact from the documents before the Court that when the applicant asked the Commission for further particulars the Commission sent it, amongst the information obtained in Hong Kong from the reference undertakings (hereinafter referred to as 'the reference undertakings') for determining the constructed value of the like product, only the list of movements selected in France and considered comparable to the Soviet movements. It later sent Timex 'a scheme showing (without revealing any confidential details of prices and costs) how the normal value was constructed'. It is that information which is at issue in this dispute.

(a) Arguments of the parties

12. Timex contends that the Commission refused to supply it with information on, first, watch cases and dials made in Hong Kong and considered comparable to Soviet watches and, secondly, on the factors taken into account in the determination of the constructed value, more precisely the price of items assembled in Hong Kong.

On the question of watch *cases and dials*, Timex claims that the Commission did not send it samples whereas it was the external appearance of Hong Kong watches which made them similar to Soviet watches. The failure to supply any information on this matter made it impossible for the applicant to obtain useful samples itself.

The institutions point out that Article 7 (4) (a), which refers only to parties to an investigation, thereby excludes even undertakings in the analogue country. Moreover, that provision requires the Commission to supply only information and not samples. Finally, it compares the financial impact of those components on the total cost of the watch and the importance of its appearance in establishing the product's similarity.

On the question of the *price of items made and assembled* in Hong Kong, Timex claims that the Commission merely sent it a list without prices. It considers that Article 8, dealing with confidentiality, cannot be invoked against it because it is clear from that provision that the protection of business confidentiality should be limited to what is strictly necessary. Timex further argues that the information obtained from the Hong Kong undertakings could have been

disclosed to it in other ways without disclosing any confidential information.

The institutions observe that in order to secure the cooperation of undertakings in non-member countries it is necessary to respect business confidentiality or their sources of information will gradually dry up. Article 8 of Regulation No 3017/79, to which Article 7 (4) (a) expressly refers, guarantees that information obtained by the Commission will remain confidential. Whilst it attempts to reconcile the requirements of information and business confidentiality, it nevertheless requires strict observance of such confidentiality. As far as concerns the alternative methods suggested by Timex for supplying information, Timex made no request to that effect during the investigation. Moreover, the methods suggested are impracticable owing in particular to the the fact that the prices of the reference undertakings are similar.

(b) Consideration of the arguments

13. It is clear from those arguments of the parties that none of them disputes that the information 'used by the Commission in the investigation' is 'relevant to the defence of [the complainant's] interests'. [18]

Must one therefore assume, like the institutions, that the right to be heard laid down in Article 7 (4) (a) covers only information provided by the reference undertakings?

That interpretation, which is far too restrictive, cannot be accepted.

In the first place, it is contrary to the very purpose of Article 7 (4) (a). The provisions of Article 7, which deal with the initiation and subsequent conduct of the investigation,empower the Commission to carry out investigations directly or through Member States into undertakings in non-member countries, provided that they give their consent. [19] That information may be used by the Commission during the investigation and may determine its decision with regard to the anti-dumping duties. Therefore, it is difficult to see why it should not be made available to, and discussed by, the complainant as well as the person on whom levies may be imposed, who would be deprived in such a case of the opportunity to protect their interests [18] properly.

Secondly, that interpretation is hardly compatible with the very wording of Article 7. It may in fact be observed that it expressly restricts the number of parties concerned only in the later stages of the investigation. Thus, only the parties 'affected by the *result* of the proceeding . . .' may be heard and only the views of parties which are also '*directly* concerned' may be presented. [20] Moreover, I should point out that the views heard in this case included those of an officer of one of the Hong Kong undertakings besides those of representatives of Timex and the main importer of the product in question.

Must one therefore assume, like Timex, that the Commission failed in its duty under Article 7 (4) (a) to provide information and consequently initiated the lawfulness of the contested regulation?

In this regard it must be pointed out that it is an undisputed fact that *no* information on

18 — Article 7 (4) (a).

19 — Article 7 (2) (b) and (3) (a).

20 — Article 7 (5) and (6). My emphasis.

either watch cases and dials or the prices of the various wrist-watch components assembled in Hong Kong was supplied to the complainant.

As far as watch cases and dials are concerned, it need only be recalled that the institutions have admitted that the like product was chosen on the basis of the appearance of the different types of watches considered and that none of the parties, and not only Timex, had the opportunity to put forward their views on the choice made.

As regards the prices of components used in the manufacture of watches in Hong Kong, the argument based on confidentiality rests on a wrong interpretation of the scheme of Articles 7 and 8 of Regulation No 3017/79. The confidential *treatment* of information gathered by the Commission imposes a duty upon it to do its utmost ['obligation de moyen'] to reconcile the requirements associated with the right to information with those of business confidentiality. This clearly follows from the very structure of Article 8 which, whilst imposing a duty on the institutions and their servants in subparagraph 2 (a) to avoid injurious disclosures ['obligation de réserve'], makes it clear in subparagraph 2 (b) and paragraphs 3 and 4, that during the investigation the Commission must try to keep the confidential part to what is strictly necessary. Consequently, the rule of confidentiality covers only information whose 'disclosure is likely to have a significantly adverse effect upon the supplier or the source of such information'. [21] As regards the confidential treatment itself, it must be *requested, justified* and *accompanied* by 'a non-confidential summary of the information, or a statement of the reasons why the information is not susceptible of such summary'. [22] Moreover, if the Commission considers that the request for confidentiality is unwarranted, it may decide that 'the information in question may be disregarded'. [23]

Nobody denies that the voluntary cooperation of undertakings in non-member countries is indispensable for the conduct of an investigation since their consent is needed in order to obtain the information sought. Nevertheless, in securing such cooperation, the rules governing the right to be heard accorded to *all* the parties must be respected, otherwise the regulation would not have required them to request confidential treatment beforehand. Incidentally, Council Regulation No 2176/84, which replaced Regulation No 3017/79 as from 1 August 1984, rectified the wording of Article 8 (2) (a) on this point by mentioning that requirement *expressis verbis*. [24]

In the present case, therefore, the Commission was under the obligation to allow Timex to inspect the information gathered during the investigation, particularly from the Hong Kong undertakings, since those undertakings had not legitimately requested confidential treatment. The Commission could not simply decide *ex officio* that any particular information was confidential. That conclusion is made even more inescapable by the fact that it was a question of determining the normal value not on the basis of the market price in a non-member country but on the basis of the

21 — Article 8 (3).

22 — Article 8 (2) (b).

23 — Article 8 (4).

24 — Council Regulation (EEC) No 2176/84 of 23 July 1984 (Official Journal L 201 of 30 July 1984, p. 1).

constructed value in such a case, the necessity to reconcile transparency with business confidentiality bears even more heavily on the Commission, short of rendering the provisions of Articles 7 and 8 meaningless.

Consequently, Timex was not afforded the opportunity to protect its interests properly, since the Commission did not give it the means to put forward its views effectively on the similarity of the product and on the constructed value arrived at, which, together with the choice of the analogue country, formed the basic elements in the determination of the normal value in this case. Strict observance of that procedural guarantee is, however, the counterpart of the discretion accorded to the institutions in the application of Regulation No 3017/79. Failure to observe it therefore constitutes 'an infringement of an essential procedural requirement' within the meaning of the first paragraph of Article 173 and renders void Article 1 of the regulation which the Council adopted on the basis of the measures taken by the Commission and set forth in Commission Regulation No 84/82.

2. The choice of Hong Kong

14. By this second submission, the applicant seeks to demonstrate that the institutions committed a *manifest error of assessment* when determining the normal value of the product in question. In order to decide whether it is well founded, I shall first briefly examine the relevant provisions and then the essential facts of the dispute.

(a) The rules applicable

15. The dumping margin, on the basis of which anti-dumping duties are fixed, is generally the difference between the export price of the dumped product and the price of the like product as determined by the normal operation of the law of supply and demand in the country from which the dumped products are exported.

However, if that country is a State-trading country, it is not possible to refer to the price of the product on the internal market in so far as it is not determined by the 'ordinary course of trade' [25] but by a decision adopted by the State in the light of requirements which are not exclusively economic. Furthermore, the price is expressed in non-convertible currency.

In such a case, Article 2 (5) therefore provides that the Commission is to determine the normal value 'in an appropriate and not unreasonable manner' on the basis of the price at which the like product is sold in a *market-economy third country.* A reading of paragraph (5) shows that the Commission is required to take into consideration either the price at which the product 'is actually sold' in that country or, failing that, its 'constructed' value [26] or, in the last resort, 'the price actually paid or payable in the Community'.

That is the context in which the choice made by the Commission and challenged by Timex must be placed.

(b) Timex's arguments

16. As is clear from the preamble to Regulation No 84/82, [27] the Commission chose as the basis for determining the normal value the constructed value of wrist-watches manufactured in Hong Kong considered similar to the watches originating in the Soviet Union. That determination was made

25 — Article 2 (3) (b) (ii) of Regulation No 3017/79.

26 — The costs, in the ordinary course of trade, of materials and manufacture plus overheads and profit (see Article 2 (3) (b) (ii) of Regulation No 3017/79).

27 — Twelfth recital.

on the basis of the purchase price in Hong Kong of a selection of movements imported from France and the costs of assembling watches in Hong Kong to which it was necessary to add in particular the costs of the watch cases, dials and hands plus overheads and profit.

The point at issue between the parties is the choice of Hong Kong as the analogue country. The other reference country suggested by the complainant, Switzerland, was in fact rejected by the Commission on the ground that it was impossible to carry out an on-the-spot investigation.

Timex maintains that the institutions have always considered that the similarity of manufacturing processes and technology is the decisive element in determining the country comparable to the State-trading country. The choice of Hong Kong is contrary to that practice. Unlike the Soviet clock and watch industry, the Hong Kong industry does not have a complete cycle of production. The watch movements assembled there are imported from France. No country combines the advantages of advanced technology, as in France, and cheap labour, as in Hong Kong. If conditions in a single country are considered, the pay of skilled labour, needed to manufacture movements, inevitably has an effect on the level of wages paid to the non-skilled workers required to assemble them. The Commission thus reconstructed an artificial cycle of production which cannot exist in one and the same market-economy country. In short, the basis of determination chosen by the Commission results not in a normal value but in an 'optimal' value in so far as its level is determined by abnormally low costs. By determining the normal value on the basis of costs in two different countries, the Commission acted in breach of the provisions of Article 2 (5) which require costs to be calculated in a single country.

(c) Consideration of the arguments

17. I cannot agree with Timex's argument. It seems to me that the choice of Hong Kong is within the discretionary power of assessment accorded to the institutions by Regulation No 3017/79. I should point out in this regard that the Court exercises only limited review where the illegality alleged calls in question such a discretion. The only question which arises, therefore, is whether the institutions committed a manifest error of assessment in choosing Hong Kong as the reference country.

When applying Article 2 (5), the institutions have a wide discretion as regards the *characteristics* to be considered in determining the analogue country. In this regard they apply criteria based not only on the *similarity* of the product, an indispensable requirement, but also on the *level of development*, the *competitiveness of the market* and the *structure of the manufacturing process* in the country in question. That practice, which enables the analogy to be narrowed down, is in keeping with the aim of determining the normal value in an 'appropriate and not unreasonable' manner.

The characteristics which lead to the Commission's selection of the analogue country may therefore be multifarious; moreover, contrary to Timex's assertion, the criterion based on the comparability of the manufacturing structures is not necessarily determinative. Therefore the choice in this case of a country in which the production cycle combines the importation of certain components with their assembly there does not in itself constitute a manifest error of assessment.

To support that conclusion it may be added that economic reality is characterized by the increasing interdependence of national economies and by the search for the lowest costs, particularly labour costs, and that, moreover, it is not unknown for a degree of technological advance and cheap labour to coexist in the same market-economy country, as the example of Japan demonstrates.

Consequently, the applicant has not shown that, in choosing Hong Kong on the basis of its level of development and the competitiveness of its market, the Commission committed a manifest error of assessment.

B — *Watch movements*

18. The applicant's last submission concerns the fact that Council Regulation No 1882/82 fixed no anti-dumping duties at all on imports of watch movements originating in the Soviet Union.

In this regard it need only be stated that this submission, by which it is alleged that no adequate statement of reasons was provided, is misdirected. Once the Commission had rejected the imposition of a duty on movements, the investigation of this matter had to be regarded as at an end. The applicant may not legitimately raise against the Council regulation the objections which it ought to have duly raised against the regulation provisionally adopted by the Commission. This complaint, like the previous contention, cannot be accepted either.

The extent of annulment

19. In conclusion, even if it is not vitiated by manifest error, Article 1 of Council Regulation No 1882/82 must be struck down by the Court under the first paragraph of Article 173 of the Treaty for infringing essential procedural requirements.

In such an event, however, the simple annulment of the contested measure will not do. From the point of view of legal certainty, such a solution would not be in the interests of either the Community or the applicant. It would create a break in continuity which a new regulation could not fill since it could not have retroactive effect. [28]

The second paragraph of Article 174 of the Treaty provides the Court with the means of mitigating that adverse circumstance by stating 'which of the effects of the regulation which it has declared void shall be considered as definitive'. The application of that provision would enable the anti-dumping duty imposed by the annulled measure to be maintained pending the adoption, in accordance with the first paragraph of Article 176, by the institution whose measure was declared void of 'the necessary measures to comply with the judgment of the Court of Justice'.

20. Consequently, I suggest that the Court should:

(1) Declare Article 1 of Council Regulation No 1882/82 of 12 July 1982 void;

(2) Declare that it shall retain its effect until the competent institution adopts the measures necessary to comply with the judgment of the Court; and

(3) Order the institutions to pay the costs of these proceedings.

28 — Article 13 (4) (a) of Regulation No 3017/79.