JUDGMENT OF THE COURT (Sixth Chamber)
13 February 1992 *

In Case C-105/90,

Goldstar Co. Ltd, a company incorporated under Korean law, Seoul (South Korea), represented by Maurice Byrne, Solicitor, of Coudert Brothers, Brussels, with an address for service in Luxembourg at the Chambers of Messrs Arendt and Medernach, 4 Avenue Marie-Thérèse,

applicant,

v

Council of the European Communities, represented by Hans-Jürgen Lambers and Erich H. Stein, members of its Legal Service, acting as Agents, assisted by Hans-Jürgen Rabe, Rechtsanwalt, of Schön and Pflüger, Hamburg and Brussels, with an address for service at the office of Jörg 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 Eric White, a member of its Legal Service, acting as Agent, with an address for service in Luxembourg at the office of Roberto Hayder, a representative of its Legal Service, Wagner Centre, Kirchberg,

intervener,

* Language of the case: English.

and by

Committee of Mechoptronics Producers and Connected Technologies, an association governed by Netherlands law, Eindhoven (Netherlands), represented by Dietrich Ehle and Volker Schiller, Rechtsanwälte, Cologne, with an address for service in Luxembourg at the Chambers of Messrs Loesch and Wolter, 81 Rue Zithe,

intervener,

APPLICATION for the annulment of Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty (Official Journal 1990 L 13, p. 21),

THE COURT (Sixth Chamber),

composed of: F. A. Schockweiler, President of the Chamber, P. J. G. Kapteyn and G. F. Mancini, Judges,

Advocate General: W. Van Gerven,
Registrar: J. A. Pompe, Deputy Registrar,

having regard to the Report for the Hearing,

after hearing oral argument from the parties at the hearing on 25 September 1991,

after hearing the Opinion of the Advocate General at the sitting on 14 November 1991,

gives the following

Judgment

1 By application lodged at the Court Registry on 17 April 1990, Goldstar Co. Ltd, Seoul, brought an action under the second paragraph of Article 173 of the EEC Treaty for the annulment of Council Regulation No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty.

2 Goldstar is a member of the South Korean Lucky Goldstar group and manufactures electrical and electronic products for both the Korean and foreign markets. In June 1987 an association of European manufacturers of compact disc players, the Committee of Mechoptronics Producers and Connected Technologies ('Compact') lodged a complaint with the Commission accusing Goldstar of selling those products in the Community at dumping prices.

3 The anti-dumping proceeding initiated by the Commission pursuant to Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1988 L 209, p. 1, hereinafter 'the basic regulation') led initially to the imposition on Goldstar of a provisional anti-dumping duty of 32.5% of the net free-at-Community-frontier price before duty. The Council, on a proposal from the Commission, subsequently fixed the definitive anti-dumping duty at 26.1% by Regulation No 112/90, against which Goldstar has instituted these proceedings.

4 The investigation into dumping practices covered the period from 1 June 1986 to 31 May 1987 ('the reference period'), during which Goldstar sold five models of compact disc players in Korea and in the Community. The models in question were the GCD 613 and GCD 616, which Goldstar distributed in Korea under its own brand and sold in the Community both under its own brand and to Original Equipment Manufacturers ('OEMs'), and the GCD 603, GCD 605 and GCD 606, production of which ceased in 1985. All of those models, which were sold in the Community during the period covered by the investigation, had been exported before 1 June 1986.

5 The Commission and the Council determined the normal value of the five models by three methods. According to the first method, the normal value was established on the basis of the weighted average domestic prices of all sales to independent customers. That method was used for the GCD 603, GCD 605, GCD 606 and GCD 616 models, sales of which on the Korean market amounted to more than 5% of export sales of those models to the Community.

6 The second method was applied to the GCD 613 model, sales of which on the domestic market amounted to less than 5% of the corresponding sales to the Community. Under that method, the normal value was constructed in accordance with Article 2(3)(b)(ii) of the basic regulation. The amounts used in determining the constructed value were the weighted averages of the expenses incurred and the profits realized by Goldstar on sales in Korea of the GCD 603, GCD 605, GCD 606 and GCD 616 models.

7 The third method concerns the GCD 613 and GCD 616 models which Goldstar sold in the Community to OEMs. Their normal value was constructed, since no such sales were made on the Korean market. That constructed value was based on the same amounts as were used for the second method, except for the amounts relating to profits. Those were estimated for OEM sales at 30% of the profits realized on Goldstar's own-brand sales.

8 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 pleas in law and arguments of the parties, which are mentioned or discussed hereinafter only in so far as is necessary for the reasoning of the Court.

9 In support of its application Goldstar raises three pleas in law, each concerning one of the three methods adopted by the Council for the determination of the normal value.

The plea concerning sales made in the ordinary course of trade or which permit a proper comparison

10 Goldstar claims that the Council infringed Article 2(3)(b) of the basic regulation in so far as it considered that the GCD 603, GCD 605, GCD 606 and GCD 616 models were sold in Korea in the ordinary course of trade and that those sales permitted a proper comparison. Goldstar takes the view that the normal value of those models should have been based on a constructed value rather than on the prices charged on that market. In support of its assertions, Goldstar relies essentially on two arguments.

11 Goldstar maintains, first, that the ordinary course of trade and proper comparison are concepts which presuppose a sufficient volume of sales in absolute terms on a representative domestic market. In its view, the Council disregarded those requirements in two respects. It assessed the volume of those sales only in relative terms, applying the so-called '5% rule', which expresses the volume of sales on the domestic market as a percentage of exports to the Community. Furthermore, it failed to take into consideration the characteristics and size of the Korean market for compact disc players, which during the reference period amounted only to sales of 5 000 units.

12 In that regard, it must be stated first of all that according to the wording and scheme of Article 2(3)(a) of the basic regulation, in order to establish the normal

value regard must be had primarily to the price actually paid or payable in the ordinary course of trade (see the judgment of 5 October 1988 in Joined Cases 277 and 300/85 *Canon* v *Council* [1988] ECR 5731, at paragraph 11). It is apparent from Article 2(3)(b) of the basic regulation that that principle can be derogated from only when there are no sales of the like product in the ordinary course of trade or when such sales do not permit a proper comparison.

13 The ordinary course of trade is a concept which relates to the nature of sales themselves. It is designed to exclude, for the determination of the normal value, situations in which sales on the domestic market are not made under conditions corresponding to the ordinary course of trade, in particular where a product is sold at a price below production costs or where transactions take place between parties which are associated or have a compensatory arrangement with each other.

14 Goldstar has never stated that its sales of compact disc players on the domestic market during the reference period were made under conditions that did not correspond to the ordinary course of trade.

15 It is therefore necessary to consider whether the sales on the domestic market permitted a proper comparison. That requirement is concerned with the question whether those sales were sufficiently representative to serve as a basis for the determination of the normal value. That is to say, transactions on the domestic market must reflect normal behaviour on the part of purchasers and result from normal patterns of price formation.

16 The practice of the Council and the Commission is to consider that requirement to be satisfied where sales by the producer concerned on the domestic market exceed 5% of export sales to the Community. In this case, the Council considered that sales on the domestic market exceeded 5% of exports to the Community and that there was no reason to depart from the usual practice in that regard.

17 That practice offers the traders concerned a degree of legal certainty as regards the assessment made by the Community institutions of the question whether or not sales on the domestic market are representative. In the light of that guarantee the 5% criterion should be upheld, and may be departed from only in exceptional circumstances.

18 Such circumstances may arise where the total volume of sales on the domestic market is not sufficiently large for selling prices to be determined by supply and demand. Goldstar states in that regard that the volume of sales of compact disc players during the reference period amounted only to 5 000 units and that a volume of that order is not sufficiently large.

19 In order to assess that statement, it should be noted that markets in domestic electrical and electronic appliances generally develop in a number of stages, in the course of which there is a gradual increase in the volume of sales with a parallel downward trend in the level of prices. At each stage the interplay of supply and demand results in a different price level. Thus during the early stages a relatively low volume of sales generally leads to a relatively high price level.

20 During the reference period, the Korean market was characterized by a relatively small volume of sales and a relatively stable level of prices.

21 In the light of that observation, the Council was entitled to consider that a total sales volume of 5 000 units was sufficient to permit a normal pattern of price formation on the Korean market and that it was unnecessary to depart from the 5% practice. Furthermore, the figure of 5 000 units represents a considerable percentage of exports of Korean compact disc players to the Community during the reference period, namely 14%.

22 A further exceptional factor put forward by Goldstar as justifying a departure from the 5% practice was its very small volume of sales on the Korean market in absolute terms. With regard to that argument it should be observed that the volume of sales in absolute terms may vary from one sector of the economy to another. It is therefore impossible to fix an absolute minimum threshold of general application below which sales on the domestic market no longer permit a proper comparison. The volume of sales in absolute terms can therefore be assessed only by reference to the specific features of each individual case.

23 To accept a departure from the 5% practice on account of the specific features of each individual case would, however, have the effect of jeopardizing the legal certainty which that practice is designed to bring to the assessment of the question whether or not an exporter's sales on its domestic market are representative. Accordingly, a small volume of sales in absolute terms does not in itself constitute a factor permitting a departure from the 5% practice.

24 In addition, the share of the Korean market in compact disc players held by Goldstar during the reference period was far from insignificant. Its share exceeded 5% of total sales on that market.

25 The Council was therefore right to consider that in view of the number of compact disc players sold by Goldstar on the Korean market and the overall size of that market it was unable to depart from its normal 5% practice.

26 Secondly, Goldstar claims that it discontinued production of the GCD 603, GCD 605 and GCD 606 models in 1985, that is to say before the reference period. Accordingly, the price at which those outdated models were sold on the domestic market during that period does not permit a proper comparison.

27 In that regard, it is sufficient to observe that Article 2(3)(b) of the basic regulation refers only to sales. The date of production of the models sold does not as a rule have any bearing on the calculation of the normal value.

28 Goldstar has in no way demonstrated that the date of production had a bearing on the price at which the outdated models were sold on the Korean market.

29 It follows from all the foregoing considerations that the first pleas in law must be rejected.

The plea relating to the determination of the profit margin for the constructed value

30 Goldstar claims that the Council infringed Article 2(3)(b)(ii) of the basic regulation in determining the constructed value of the GCD 613 model by reference to the profit margins realized on sales on the Korean market of the GCD 603, GCD 605, GCD 606 and GCD 616 models, since those profits did not correspond to the profits normally realized on that market. Goldstar states in that regard that the Council should have referred to the profits made by other Korean producers, by interpreting the above provision in the light of Article 2(4) of the Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade (Official Journal 1980 L 71, p. 90, hereinafter 'the 1979 Anti-dumping Code').

31 Article 2(4) of the 1979 Anti-dumping Code provides as follows:

'When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like

product when exported to any third country which may be the highest such export price but should be a representative price, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and any other costs and for profits. As a general rule, the addition for profit shall not exceed the profit normally realized on sales of products of the same general category in the domestic market of the country of origin.'

32 That provision, which is couched in general terms, does not make clear whether the profit normally realized on sales of products of the same general category in the domestic market of the country of origin relates to the profits realized by the exporter concerned or the average profit realized by all producers on the domestic market.

33 As the Court held in its judgment in Case C-69/89 (*Nakajima All Precision* v *Council* [1991] ECR I-2069, at paragraph 37), Article 2(3)(b)(ii) of the basic regulation complies with Article 2(4) of the 1979 Anti-dumping Code inasmuch as it does not disregard the spirit of the latter provision but simply specifies, as regards the different situations which may arise in practice, the reasonable methods of calculating the constructed normal value.

34 Article 2(3)(b)(ii) is worded as follows:

'the constructed value, determined by adding cost of production and a reasonable margin of profit. The cost of production shall be computed on the basis of all costs, in the ordinary course of trade, both fixed and variable, in the country of origin, of materials and manufacture, plus a reasonable amount for selling, administrative and other general expenses. The amount for selling, general and administrative expenses and profit shall be calculated by reference to the expenses incurred and the profit realized by the producer or exporter on the profitable sales of like products on the domestic market. If such data is unavailable or unreliable or is not

suitable for use they shall be calculated by reference to the expenses incurred and profit realized by other producers or exporters in the country of origin or export on profitable sales of the like product. If neither of these two methods can be applied the expenses incurred and the profit realized shall be calculated by reference to the sales made by the exporter or other producers or exporters in the same business sector in the country of origin or export or on any other reasonable basis.'

35 In the judgment in Case C-69/89 it was held that the three methods of calculating the constructed normal value thus laid down in Article 2(3)(b)(ii) of the basic regulation should be considered in the order in which they are set out.

36 The profit margin must therefore be calculated primarily by reference to the profit realized by the producer on profitable sales of like products on the domestic market. Only if the data are unavailable, unreliable or not suitable for use is the profit margin to be calculated by reference to the profits realized by other producers on sales of the like product.

37 In giving priority in that way to the use of data relating to the individual producer concerned, Article 2(3)(b)(ii) of the basic regulation seeks to ensure that the constructed normal value corresponds as closely as possible to what the situation would have been if the producer had actually sold the product in question on the domestic market in sufficient quantities. That provision thus ensures that each undertaking is assessed by reference to its own specific characteristics.

38 Those characteristics must include the pricing policy pursued by the producer concerned on the domestic market. The data relating to the profits generated by a policy of that kind cannot be disregarded simply because the profit margin is particularly high in relation to that realized by other producers on that market.

39 Accordingly, the Council was required to calculate the profit margin for the constructed normal value of the GCD 613 model on the basis of the profits realized by Goldstar on sales of other models on the Korean market.

40 The second plea in law must therefore be rejected.

The plea concerning the calculation of the profit margin for the purpose of determining the constructed normal value of models sold to OEM purchasers in the Community

41 Goldstar claims that the Council infringed Article 2(3)(b)(ii) of the basic regulation in so far as in determining the constructed value of the GCD 613 and GCD 616 models sold to OEM purchasers in the Community it assessed the applicable profit margin as 30% of the profit margin on sales in Korea under Goldstar's own brand. In its view, that approach disregards the fact that there is no link between OEM sales and own-brand sales. Not only is it arbitrary, it is also contrary to the practice followed by the Community institutions in other cases, in which they used a standard rate of 5% for all the companies concerned. Finally, the Council contravened the principle of equal treatment by applying different profit rates to the Korean producers concerned even though they were all in the same situation, inasmuch as they had not made any OEM sales on the Korean market.

42 Before examining the significance of those assertions, it should be observed that during the reference period no Korean producer sold its products to OEMs on the Korean market and the Community institutions did not therefore have any information relating to sales of that kind on that market. Accordingly, those institutions constructed the normal value on the basis of data relating to own-brand sales. However, in order to take account of the differences between the prices of those

sales and the prices of sales to OEMs, they applied in respect of Goldstar a profit rate corresponding to 30% of that realized on own-brand sales.

43 It is therefore necessary to consider whether, in the light of Goldstar's complaints, that rate of 30% constitutes a reasonable amount for the purposes of the last sentence of Article 2(3)(b)(ii) of the basic regulation.

44 In that regard it must first be determined whether the Council took proper account of the differences between OEM sales and own-brand sales in determining the margin adopted for OEM sales by reference to the profits realized on own-brand sales.

45 The essential difference between the two types of sale is at the marketing stage. The two types of sale are aimed at different customers, who generally operate at different marketing stages, but the product sold to the final consumer by an OEM is similar to that sold under the manufacturer's brand. Production costs are therefore comparable for the two types of sale.

46 Accordingly, OEM sales and traditional sales are two possible ways in which a manufacturer can sell his products. The choice of one or other of those possibilities is made by reference to identical criteria of profitability specific to the undertaking concerned.

47 There is thus necessarily a link between OEM sales and own-brand sales, so that it was reasonable for the Council to determine the profit margin for OEM sales by reference to that obtained on own-brand sales.

48 It must next be determined whether the Council committed an error of assessment in fixing an individual profit margin for Goldstar's OEM sales when in previous cases it had used an identical average profit margin for all the producers concerned.

49 The purpose of constructing the normal value is to determine what the selling price of a product would be if that product were sold on the domestic market, and the use of data relating to the individual producer concerned is the approach most suited to that objective, in particular where those data differ considerably from those relating to other producers.

50 In constructing a profit margin for OEM sales, therefore, the application of a uniform margin to all the producers concerned is contrary to that objective where the profit margins realized on own-brand sales, taken as a basis for calculating the uniform margin, are substantially different. A higher average margin would be applied to a producer with only a small margin, whilst a producer with a high actual margin would benefit from a lower average margin.

51 In this case, Goldstar realized a particularly high actual profit margin on its own-brand sales on the Korean market. In the cases to which Goldstar refers and which are mentioned in paragraph 26 of the Advocate General's Opinion, on the other hand, the undertakings concerned had realized actual margins that were very close to one another.

52 In those circumstances, it must be concluded that the Council acted correctly in applying in respect of Goldstar an individual profit margin with respect to the GCD 613 and GCD 616 models which it sold to OEM purchasers in the Community.

53 Finally, it must be determined whether the Council acted arbitrarily in fixing that individual profit margin at 30% of Goldstar's margin on its own-brand sales, in view of the fact that it had used a standard margin of 5% in previous cases of dumping.

54 It should be pointed out first of all that the standard margin of 5% adopted by the Council in one of those cases corresponded to approximately one-third of the average profit margin realized by the producers concerned on their domestic sales, whilst in the other two the 5% margin amounted to more than one-third of that average profit margin.

55 Furthermore, during the administrative procedure Goldstar itself suggested a 30% ratio to the Community institutions, on the understanding, however, that that percentage was to be calculated on the basis of the average profits realized by all the producers.

56 The Council cannot therefore be held to have fixed the profit margin in question arbitrarily.

57 It follows from all the foregoing considerations that the Council did not infringe Article 2(3)(b)(ii) of the basic regulation when in determining the constructed value of the GCD 613 and GCD 616 models sold to OEM producers in the Community it assessed the profit margin at 30% of the profit margin on own-brand sales.

58 The third plea must also be rejected, therefore, and consequently the application must be dismissed in its entirety.

Costs

59 Under Article 69(2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs if they have been applied for. Since the applicant has been unsuccessful it must be ordered to bear its own costs and those of the defendant. The Commission and Compact, which intervened in support of the defendant, shall bear their own costs in accordance with Article 69(4) of the Rules of Procedure.

On those grounds,

THE COURT (Sixth Chamber)

hereby:

1. Dismisses the application;

2. Orders the applicant to pay the costs, except those of the interveners.

Schockweiler Kapteyn Mancini

Delivered in open court in Luxembourg on 13 February 1992.

J.-G. Giraud
Registrar

F. A. Schockweiler
President of the Sixth Chamber