Case 297/85 R

Towa Sankiden Corporation
v
Council of the European Communities

'Dumping'

Summary

Application for the adoption of interim measures — Suspension of the operation of a measure — Interim measures — Conditions for granting — Balancing of all the interests concerned (EEC Treaty, Arts 185 and 186; Rules of Procedure, Art. 83 (2))

ORDER OF THE PRESIDENT OF THE COURT
18 October 1985 *

In Case 297/85 R

Towa Sankiden Corporation, whose registered office is in Tokyo, Japan, represented by L. de Keyser and P. Bogaert, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of G. Harles, 34B Rue Philippe-II,

applicant,

* Language of the Case: English.

V

Council of the European Communities, represented by its Agents, H.-J. Lambers, Director of its Legal Department, and E.-H. Stein, a Legal Adviser in that department, assisted by Francis Jacobs, Queen's Counsel, with an address for service in Luxembourg at the office of Jörg Käser, Director of the Legal Department of the European Investment Bank, 100 Boulevard Konrad-Adenauer,

defendant,

supported by

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

intervener,

APPLICATION, primarily for an order suspending, as regards the applicant, the effect of Council Regulation 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),

THE PRESIDENT OF THE COURT OF JUSTICE
OF THE EUROPEAN COMMUNITIES

makes the following

ORDER

1 By an application dated 2 October 1985, Towa Sankiden Corporation requested the Court, primarily, to suspend, as regards it, the effect of 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 and ordering the definitive collection of the provisional anti-dumping duties imposed by Commission Regulation No 3643/84 of 20 December 1984 (Official

Journal 1984, L 335, p. 43), until the Court has given judgment on the main application or, in the alternative, to order any other interim measure which the Court considers lawful and equitable under the circumstances.

2 That application, which was lodged at the Court Registry on 3 October 1985, was made under Articles 185 and 186 of the EEC Treaty and Article 83 of the Rules of Procedure.

3 The applicant refers to the application for the annulment of the aforesaid Regulation No 1698/85, which application it lodged at the Court Registry on 1 October 1985.

4 By an order of 9 October 1985 the Commission was granted leave, under the first paragraph of Article 37 of the Statute of the Court of Justice of the EEC, to intervene in Case 297/85 R in support of the conclusions of the defendant.

5 The defendant submitted its written observations on 9 October 1985. The parties presented oral argument on 14 October 1985.

6 It is necessary to set out the stages which led up to the Council's adoption of Regulation No 1698/85. On 15 February 1984, a complaint was lodged with the Commission by the Committee of European Typewriter Manufacturers (Cetma), alleging the dumping of typewriters originating in Japan, including those of Towa Sankiden Corporation. On the basis of the investigations conducted as a result of that complaint, the Commission adopted, on 20 December 1984, Regulation No 3643/84 (Official Journal 1984, L 335, p. 43), Article 1 (3) of that regulation imposed a provisional anti-dumping duty of 20.2% on typewriters exported by the applicant, a duty which is the subject of an application for annulment pending before the Court of Justice. On 19 June 1985 the Council adopted Regulation No 1698/85. Article 1 (4) of that regulation imposes a definitive anti-dumping duty of 20% on typewriters exported by the applicant and Article 2 provides for the definitive collection of the provisional anti-dumping duties which had been imposed by Regulation No 3643/84.

7 The applicant claims that, if it is not to suffer serious and irreparable damage, the effect of that regulation must be suspended as regards it until the Court has given judgment on the main application.

8 According to Article 185 of the EEC Treaty, actions brought before the Court of Justice shall not have suspensory effect. The Court of Justice may, however, if it considers that the circumstances so require, order that application of the contested act be suspended and prescribe any other interim measure pursuant to Articles 185 and 186 of the Treaty.

9 As a condition enabling such measures to be granted, Article 83 (2) of the Rules of Procedure provides that an application for interim measures must state the circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the interim measures applied for.

10 In that regard the applicant refers to the grounds set out in support of its application for annulment. It relies in particular upon four grounds which, in its view, establish a *prima facie* case for the measures which it seeks. First, it argues that the Community institutions were not entitled to apply a fixed threshold of 5% to determine whether sales on the domestic market should be used for establishing the normal value and a reasonable margin of profit, and stresses that they infringed Article 2 (9) of Council Regulation No 2176/84 of 23 July 1984 (Official Journal 1984, L 201, p. 1), the basic regulation on dumping, by not comparing the normal value and the export price at the same level of trade. Furthermore, the applicant considers that the Community institutions ought to have taken account, in calculating the normal value, of the fact that at the time of the investigation it was commencing its production of electronic typewriters and that its actual costs were inevitably higher than in the ordinary course of trade. It should therefore have been permitted to make allowances for those actual costs. It also considers that it was discriminated against as compared with Nakijima All, which was the only Japanese company producing electronic typewriters on which no provisional or definitive anti-dumping duty was imposed, when there was no factor to justify the two companies' being treated differently.

11 The Council considers that the four grounds relied upon by the applicant clearly exceed the limits of an application for interim measures; they prejudge the substance of the case and not one of them is capable of establishing the existence of a *prima facie* case. It also considers that the circumstances relied upon by the applicant to prove the existence of irreparable damage, such as a reduction in the volume of sales and in market share and the damage to its distribution network, are inherent in the introduction of an anti-dumping duty and do not prove irreparable damage giving rise to urgency and thus establishing a case for the grant of the interim measures applied for. It stresses that the very fact that the applicant took three months to bring an application for interim measures is a further indication that there is no urgency within the meaning of Article 83 (2) of the Rules of Procedure. The Council also argues that it is essential, as is clear from the cases decided by the Court, and in particular from the order of 17 December 1984 in Case 258/84 R, *Nippon Seiko KK* v *Council*, to balance the applicant's interests against the damage that would be caused to the European industry if the interim measures applied for were granted. It considers that the interests of the European industry would be seriously harmed if the interim measures requested by the applicant were granted.

12 In order to establish a *prima facie* case, the applicant refers in its application for interim measures to various factual and legal grounds which are also set out in its main application. Both the Council and the Commission state in their written observations that they do not consider it necessary in interim proceedings to set out their views on those grounds since that would entail adopting a position on the substance of the case. At the hearing on 14 October 1985 the two Community institutions, particularly the Commission, stressed that they did not consider that they had committed any error in calculating the dumping margin and assessing the damage caused to the European industry by Japanese imports and maintained that they had correctly applied the provisions of the regulation applicable in this case, Regulation No 2176/84.

13 In that regard, and in the light of the arguments put forward by the applicant, it may be accepted that the applicant has put forward pertinent arguments which it will be necessary to examine in greater detail in the proceedings relating to the main application and that the institutions have not, as a result of the position adopted by them, as mentioned above, attempted, or wished to make an attempt, to show that the grounds relied upon by the applicant are not pertinent. Subject to what is said below in paragraph 17, the grounds relied upon by the applicant may therefore be regarded as establishing a *prima facie* case for the interim measures applied for.

14 While the applicant in the present case may be considered to have put forward factual and legal grounds which may be regarded as establishing a *prima facie* case for suspending application of the regulation in dispute, the Court must also assess the urgency of the suspension requested and the need for it for the purposes of avoiding serious and irreparable damage to the applicant.

15 In that regard, the parties have taken opposing views and have submitted figures on the level of prices and market shares of the European industry and its Japanese competitors in support of their respective cases. The figures submitted by the Council and the Commission do not correspond with those submitted by the applicant. In interim proceedings it is impossible for the President of the Court, without prejudging the substance of the case, to accept figures submitted by one party in preference to those submitted by the other, unless, as is not the case here, there are other factors weighing in favour of one party's view. He is, likewise, faced with the same impossibility when it comes to determining whether the export price and normal value were compared at the same level of trade.

16 Moreover, for the purposes of the application of Articles 185 and 186 of the EEC Treaty, it is necessary to balance all the different interests concerned. In that regard, the Community institutions have argued that the damage suffered by the Community industry as a result of undercutting by the applicant in the price of its electronic typewriters was considerable, and that suspension of the definitive anti-dumping duties would undoubtedly bring about the destruction of part of the Community industry. In the absence of reliable and uncontested evidence to the contrary, it must be accepted that the adoption of the interim measures applied for could to cause appreciable damage to the European industry.

17 From the circumstances set out above and on the basis of the principle that in case of doubt an applicant must prove that his allegations are well founded, it appears that the applicant has not adduced adequate evidence that it would suffer serious and irreparable damage establishing the urgency of the interim measures which it seeks.

On those grounds,

THE PRESIDENT,

by way of interim decision,

hereby orders as follows:

(1) The application for the adoption of interim measures is dismissed;

(2) Costs are reserved.

Luxembourg, 18 October 1985.

P. Heim
Registrar

A. J. Mackenzie Stuart
President