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

In Joined Cases 294/86 and 77/87

Technointorg, established in Moscow, represented by Eduard Marissens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of L. Dupong, 14 A rue des Bains (Case 294/86),

applicant,

v

Commission of the European Communities, represented by its Agent, John Temple Lang, a Member of its Legal Department, 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,

defendant,

APPLICATION under Articles 173 and 174 of the EEC Treaty for a declaration that Commission Regulation No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on the imports of deep-freezers originating in the Soviet Union, accepting the undertakings given in the framework of the investigation concerning imports of certain deep-freezers originating in Yugoslavia and the German Democratic Republic, terminating the investigation and terminating the proceeding with regard to imports of certain deep-freezers (Official Journal 1986, L 259, p. 14), and in particular Article 1 thereof, is void,

and

Technointorg, established in Moscow, represented by Eduard Marissens, of the Brussels Bar, with an address for service in Luxembourg at the Chambers of L. Dupong, 14 A, rue des Bains (Case 77/87),

applicant,

* Language of the Case: English.

Council of the European Communities, represented by its Agents, H. -J. Lambers, Director of its Legal Department, and E. H. Stein, Legal Adviser in that department, assisted by Francis Jacobs, QC, with an address for service in Luxembourg 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 its Agent, John Temple Lang, a Member of its Legal Department, 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,

intervener,

APPLICATION under Articles 173 and 174 of the EEC Treaty for a declaration that Council Regulation No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep-freezers originating in the Soviet Union (Official Journal 1987, L 6, p. 1) is void,

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: J. A. Pompe, Deputy Registrar

having regard to the Report for the Hearing and further to the hearing on 1 June 1988,

after hearing the Opinion of the Advocate General delivered on 6 July 1988,

gives the following

Judgment

1 By applications lodged at the Court Registry on 26 November 1986 and 18 March 1987 respectively, Technointorg brought two actions under the second paragraph of Article 173 of the EEC Treaty: the first, in Case 294/86, for a declaration that Commission Regulation No 2800/86 of 9 September 1986 imposing a provisional anti-dumping duty on imports of certain deep-freezers originating in the USSR (Official Journal 1986, L 259, p. 14, hereinafter referred to as 'the provisional regulation'), and in particular Article 1 thereof, is void, and the second, in Case No 77/87, for a declaration that Council Regulation No 29/87 of 22 December 1986 imposing a definitive anti-dumping duty on imports of certain deep-freezers originating in the Soviet Union (Official Journal 1987, L 6, p. 1, hereinafter referred to as 'the definitive regulation') is void, in so far as those regulations apply to Technointorg.

2 By separate applications, also lodged on 26 November 1986 and 18 March 1987, Technointorg requested the Court to make two interim orders, the first suspending, as regards the applicant, the application of the provisional regulation and the second suspending, as regards the applicant, the application of the definitive regulation, until the Court had given judgment in the main proceedings.

3 By orders of 17 December 1986 and 9 April 1987 respectively, the applications for interim measures were dismissed and costs were reserved.

4 By order of 8 May 1987 the Court granted the Commission leave to intervene in Case 77/87 in support of the conclusions of the Council.

5 By order of 8 July 1987 Cases 294/86 and 77/87 were joined for the purposes of the procedure and the judgment.

6 Technointorg exports upright freezers originating in the Soviet Union (Nimexe Codes 84.15-41 and 84.15-46) to the Community. In September 1985 the

European Committee of Manufacturers of Electrical Domestic Equipment, on behalf of manufacturers accounting for practically all Community production of freezers, lodged a complaint with the Commission alleging that imports of certain freezers originating in the German Democratic Republic, the Soviet Union and Yugoslavia were being dumped and were causing injury to the Community industry.

7 In the course of the anti-dumping proceeding initiated on the basis of Council Regulation No 2176/84 of 23 July 1984 on protection against dumped or subsidized imports from countries not members of the European Economic Community (Official Journal 1984, L 201, p. 1), the Commission considered it necessary to distinguish between the two types of deep-freezer alleged to have been dumped, namely chest freezers (Nimexe Code 84.15-32) and upright freezers (Nimexe Codes 84.15-41 and 84.15-46), on the ground that those products did not constitute 'like products' within the meaning of the Community rules.

8 With regard to chest freezers the Commission decided by Article 4 of the provisional regulation to terminate the anti-dumping proceeding. With regard to upright freezers, on the other hand, the Commission first accepted the undertakings given by exporters from Yugoslavia and the German Democratic Republic and terminated the investigation with regard to them and secondly imposed by Article 1 of the regulation a provisional anti-dumping duty of 33% on deep-freezers originating in the Soviet Union.

9 According to the second paragraph of Article 6, in so far as the regulation imposed a provisional anti-dumping duty, it applied only for a period of four months or until the Council adopted definitive measures before the end of that period. In the course of the proceedings brought against that regulation it was replaced by the definitive regulation which formed the subject-matter of the second action brought by Technointorg on 18 March 1987.

10 In its telex message of 20 March 1987, the Commission contended that the application in Case 294/86 for a declaration that the provisional regulation was void had become devoid of purpose since that regulation was no longer in force. In its observations submitted on 6 April 1987, Technointorg claimed that the

Council, in deciding to collect the amounts secured by the provisional anti-dumping duty, merely implemented the regulation of the Commission and it would not itself be able to claim the repayment of those amounts unless the Court declared void the regulation by which they were imposed. It further claimed that it had an interest in challenging the provisional regulation in so far as it would be able to plead in support of a claim for damages any ground of illegality which the Court might find to be established.

11 It is therefore appropriate to examine *in limine* whether Technointorg retains an interest in challenging the provisional regulation even after it has been replaced by the definitive regulation.

12 In that regard it must be stated that, in view of the fact that the amounts secured by way of provisional anti-dumping duty have been collected, by virtue of Article 2 of the definitive regulation, at the rate of the duty definitively imposed, Technointorg cannot rely on any legal effect arising from the provisional regulation.

13 As regards the interest consisting of the possibility for Technointorg to obtain a declaration of the nullity of the provisional regulation with a view to claiming damages on the basis of such a declaration, it must be observed that Technointorg would be able to plead the illegality of the definitive regulation in support of a claim for compensation for any damage caused by the provisional regulation.

14 In those conditions it must be concluded that the application in Case 294/86 has become devoid of purpose and that there is therefore no need to give a decision in that case.

15 The Court should therefore confine itself to examining the submissions raised in Case 77/87.

16 Reference is made to the Report for the Hearing for the rules applicable and the facts of the case 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.

A — Breach of the general principle that the rights of the defence should be assured

17 Technointorg claims that the Commission and the Council did not take account of the proxy given to Mr Astakhov, its representative in the anti-dumping proceeding in question, and in particular that the Commission did not request Mr Astakhov for any information and did not send to him the questionnaire intended for exporters, contrary to Article 7 (1) (b) of Regulation No 2176/84. It therefore denies the allegation contained in Recitals 2 and 3 of the definitive regulation that it had refused to cooperate.

18 In that regard, it must be stated first of all that, as is shown by the documents before the Court, copies of the questionnaire intended for exporters and the notice of the opening of the investigation were sent by registered post to Technointorg at its address in Moscow. The acknowledgment of receipt issued by the post office and produced before the Court shows that that communication was sent on 17 December 1985 and in the telex message which Technointorg sent to the Commission on 18 February 1986 it acknowledged receipt of the questionnaire and requested an extension of the period prescribed for its reply. Moreover, the applicant admitted at the hearing that it had never completed the questionnaire.

19 In those circumstances, since Technointorg itself could have supplied the Commission with all the necessary information and failed to do so, the Community authorities were entitled to rely on the facts at their disposal, and it is unnecessary to decide whether or not Mr Astakhov was enabled by the Commission to take part in the proceeding.

20 The first submission must therefore be rejected.

B — Inadequacy of the statement of reasons contrary to Article 190 of the EEC Treaty

21 Technointorg considers that the reasons set out in Recitals 14, 17 and 18 of the definitive regulation concerning the determination of its market share, the concept of Community interest and the imposition of duty at the rate of 33% are inadequate.

22 As regards Technointorg's argument to the effect that the Council did not answer its claim that the fact that its market share in the United Kingdom and Belgium had increased did not mean that its share in the entire Community market had increased, it is sufficient to note that Recital 14 of the definitive regulation states that while consumption in the Community remained steady, imports from the Soviet Union increased by more than 20 000 units from 1981 to 1985. Furthermore, Recital 13 of the regulation refers to the Commission's detailed findings in that regard contained in the provisional regulation and in particular Recital 23.

23 As regards the refusal to accept the arguments put forward by Peja Import BV, one of the Community importers on whose premises the Commission gathered information and carried out checks, and in particular its argument that it was in the Community interest to allow imports into the Netherlands of deep-freezers originating in the Soviet Union to continue, in order to avoid retaliatory measures, Recital 17 of the definitive regulation adequately explains that the difficulties facing Community production and the economic and social importance of such production were the reasons which led the Council to conclude that the Community interest should prevail and required the imposition of a definitive anti-dumping duty.

24 Lastly, as regards the imposition of that duty at a rate of 33%, Recital 18 of the definitive regulation states that duty of 33%, which is less than the dumping margin established at 204%, is necessary to eliminate the injury caused to Community production, in view of the sale price necessary to provide efficient Community producers with a reasonable profit.

25 It follows from the foregoing that the submission that the statement of reasons is inadequate must be rejected.

C — Determination of the normal value on the basis of the price on the Yugoslav market

26 Technointorg claims that the Commission did not give adequate reasons for choosing Yugoslavia as an analogue country.

27 Technointorg's argument is unfounded. Recital 6 of the definitive regulation states with sufficient clarity the reasons for which the Commission did not accept Technointorg's argument in that regard.

28 Secondly, Technointorg disputes the determination of the normal value on the basis of the price on the Yugoslav market. It relies on the characteristics distinguishing the Yugoslav market from the market in the Soviet Union as regards income levels and the methods of producing deep-freezers, and considers that the normal value in Yugoslavia ought to have been constructed. It considers that by not accepting any of the allowances suggested by it in order to neutralize the aforementioned characteristics, the Commission and the Council determined the normal value in an unreasonable and inappropriate manner, contrary to Article 2 (5) of Regulation No 2176/84.

29 It should be stated in the first place that Article 2 (5) of Regulation No 2176/84 provides that, in the case of imports from non-market economy countries, the normal value is to be determined in an appropriate and not unreasonable manner on the basis of: (a) the price at which the like product of a market economy third country is actually sold, (b) the constructed value of the like product in a market economy third country or (c) if neither of those criteria 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. The aim of that provision is to prevent account from being taken of prices and costs in non-market economy countries which are not normally the result of market forces.

30 In the second place it should be stated that the function of the constructed value, under the general scheme of Article 2 (5) of Regulation No 2176/84, is to serve as a substitute for the sale price on the domestic market of the producing or

exporting country as a basis for determining the normal value. Therefore it is unnecessary to have recourse to the constructed value unless it would be unreasonable in the circumstances to use the domestic price. That value must be calculated in such a way that the results obtained are as close as possible to the normal value based on the domestic price. In that regard the institutions have a discretion and Technointorg has not established that, by choosing to base the normal value in this case on the prices on the Yugoslav domestic market, they have used it erroneously.

31 Technointorg's argument to the effect that the normal value ought to have been constructed in order to take account of the differences which it has referred to between Yugoslavia and the Soviet Union cannot be upheld. It is when the normal value and the export price are compared that the specific characteristics of the markets must be taken into consideration, under the conditions laid down in Article 2 (9) and (10) of Regulation No 2176/84. The institutions therefore did not act erroneously in determining the normal value on the basis of the price on the Yugoslav market.

32 This submission must therefore be rejected.

D — Comparison between the export price and the normal value

33 Technointorg claims that the Commission and the Council, by refusing to take into consideration the additional allowances concerning the alleged characteristics of the Yugoslav market, as regards in particular the income levels and production methods in the Soviet Union, infringed Article 2 (9) and (10) of Regulation No 2176/84. In its opinion the obligation to make a fair comparison imposed by that article requires further allowances to be made, even if they are not expressly provided for in Article 2 (10), which does not lay down an exhaustive list.

34 In that regard, it should be stated that, for the purpose of a fair comparison between the export price and the normal value after they have been calculated in accordance with the prescribed methods, Article 2 (9) and (10) provides for allowance to be made for differences affecting price comparability, relating to the physical characteristics of the product, quantities, conditions and terms of sale and

import charges and indirect taxes. As the Court held in its judgment of 7 May 1987 in Case 255/84 (*Nachi Fujikoshi Corporation* v *Council* [1987] ECR 1861), these allowances must be made solely by reason of differences concerning the abovementioned factors.

35 The differences alleged by Technointorg concern wage and salary levels and the high costs of components of deep-freezers and therefore do not fall within any of the categories referred to in Article 2 (9) and (10) of Regulation 2176/84.

36 Consequently, this submission must be rejected.

E — Determination of injury

37 Technointorg claims that the injury is less than that determined by the Council and the Commission. In that regard it claims essentially that the Community market in deep-freezers consists of two distinct segments: the first is the upper segment of the market, which is occupied by almost all the Community manufacturers and in which are to be found the most sophisticated and expensive freezers, and the second is the lower segment of the market, which is occupied by manufacturers from Eastern European countries and a very small proportion of the Community industry and in which are to be found the simpler, cheaper freezers. Since the freezers manufactured by Technointorg are cheap, they could cause injury only to the Community production in the lower segment of the market and consequently the effect of imports on the entire Community production could only be minimal.

38 In that regard, it should be stated that Technointorg has not adduced any evidence to show that all upright freezers should not be regarded as like products, in accordance with Article 4 (1) and (5) of Regulation No 2176/84.

39 Although the Community authorities compared Soviet freezers with the cheapest Community models in order to determine whether there was undercutting in the

price of the former freezers, pursuant to Article 4 (2) (b) of Regulation No 2176/84, that does not mean that other Community models do not compete with those freezers and that the whole of Community production is not affected by the imports of the products in question.

40 Technointorg also refers to the limited number of units which it exported to the Community — 20 000 units in 1985 — and states that neither the Commission nor the Council has shown how its imports, considered separately, could have caused injury to the Community industry.

41 As regards the number of units exported by Technointorg, it should be stated that according to Article 4 (2) of Regulation No 2176/84, the volume of imports is only one of the factors to be taken into consideration in order to determine injury. It should also be borne in mind that where, as in this case, the dumped products come from different countries, it is in principle necessary to assess the combined effects of such imports. It is consistent with the objectives of Regulation No 2176/84 that Community authorities should be able to examine the effect on Community industry of all such imports and consequently take appropriate action against all exporters, even if the volume of each individual exporter's exports is relatively small.

42 Technointorg also maintains that in determining injury the Community institutions did not give reasons for their conclusion that the dumped imports had a cumulative effect. That argument is unfounded. The reasons put forward in this regard in Recitals 11 to 15 of the definitive regulation, which confirm in particular the Commission's findings set out in Recital 24 of the provisional regulation, are sufficient to satisfy the requirement laid down by Article 190 of the Treaty.

43 Consequently, this submission must be rejected.

F — Refusal to accept the undertakings offered

44 According to Technointorg the Commission, by refusing to accept the undertakings offered or even to discuss their content, infringed Article 10 (1) and (3) of Regulation No 2176/84, Article 190 of the EEC Treaty and the principle of non-discrimination.

45 As regards the alleged infringement of Article 10 (1) and (3) of Regulation No 2176/84, it should be stated first of all that, as the Court has consistently held (in particular, in its judgment of 7 May 1987 in Case 255/84 *Nachi Fujikoshi Corporation* v *Council*, cited above), none of the provisions of Regulation No 2176/84 obliges the institutions to accept price undertakings that are offered. On the contrary, it follows from Article 10 of that regulation that it is for the institutions to assess whether undertakings offered are acceptable.

46 Furthermore, it is clear from the documents before the Court that although the Commission refused to meet Technointorg, it nevertheless examined Technointorg's proposals and asked for its comments on the criticisms which it had made of those proposals.

47 It is clear in particular from the telex messages sent by the Commission to Technointorg on 18 and 28 November 1986 and from its letter to Technointorg dated 11 December 1986 that the undertakings offered were not accepted for three reasons: (a) the price increases offered were far less than those needed to eliminate injury; (b) such price increases were to take effect over several years and the full increase would not be reached until 1989 to 1990 and (c) the full price increase of 25% was to be conditional on a new factory going into production and compliance with that condition could not be verified by the Commission. Technointorg has not challenged the validity of those reasons.

48 Lastly, it should be stated that, by refusing to accept the undertakings offered by Technointorg for the abovementioned reasons, which are adequate and which were made known to the applicant, the Commission did not exceed the limits of its discretion.

49 As regards the alleged breach of the principle of non-discrimination, it must be pointed out that the fact that the Commission refused to accept the undertakings offered by Technointorg although it did accept undertakings offered by exporters from the German Democratic Republic and Yugoslavia does not constitute arbitary discrimination. As is stated in Recital 34 of the provisional regulation, the undertakings offered by those exporters had the effect of raising prices by an amount sufficient to eliminate the injury, and it was possible to ensure that those undertakings were actually adhered to. By contrast, as has already been stated, the undertakings offered by Technointorg were manifestly inadequate and the conditions necessary to enable the Commission to verify whether they were adhered to were not satisfied in this case.

50 Consequently, the final submission put forward by Technointorg must also be rejected. It follows that the application in Case 77/87 must be dismissed in its entirety.

Costs

51 As regards Case 77/87, Article 69 (2) of the Rules of Procedure provides that the unsuccessful party is to be ordered to pay the costs. Since Technointorg has been unsuccessful, it must be ordered to pay the costs relating both to the main action and the application for interim measures and including those of the intervener, which asked for costs in its pleading.

52 As regards Case 294/86, Article 69 (5) of the Rules of Procedure provides that where a case does not proceed to judgment, the costs are to be in the discretion of the Court. Since Technointorg has been unsuccessful in its action challenging the definitive regulation, which replaced the provisional regulation, it should be ordered to pay the costs in Case 294/86, relating both to the main action and the application for interim measures.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Declares that there is no need to give a decision on the application in Case 294/86;

(2) Dismisses the application in Case 77/87;

(3) Orders the applicant to pay the costs in the two cases relating both to the main actions and the applications for interim measures and including those of the intervener.

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