OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 29 April 1993 *

Mr President,
Members of the Court,

1. This case concerns proceedings brought by Matsushita Electric Industrial Co. Ltd, a company established in Osaka according to Japanese law (hereinafter 'MEI'), 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 ('CDPs') originating in Japan and the Republic of Korea and collecting definitively the provisional duty (hereinafter the 'contested regulation') [1] in so far as this regulation, which is addressed to various undertakings, concerns MEI. [2]

Facts and legislative background

2. MEI essentially raises one plea in law, namely that the Council infringed Article 2(3) and (7) of 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 (hereinafter the 'anti-dumping regulation') [3] by determining the normal value on the basis of prices charged by related distributors to independent purchasers on the domestic market. At all events the Council is alleged to have given an inadequate statement of the reasons underlying its decision, in contravention of Article 190 of the EEC Treaty.

3. MEI manufactures and sells consumer electronic and electrical products, industrial equipment and electronic components. It comprises more than 30 divisions each of which is responsible for the manufacture and sale of a particular category of products. CD players are manufactured and sold by the Hi-Fi Audio Division ('HAD').

The CDPs manufactured by HAD are sold in Japan under the 'Technics' brand to 79 companies which act as regional distributors and in their turn sell on to retailers. All but two of these distributors are affiliated with MEI. That is the result of a historical development: in the years following the Second World War MEI gave financial support to its distributors in order to allow them to adapt themselves to the strong expansion in the consumer electronics market. That gave rise to equity participation varying from

* Original language: Dutch.

1 — OJ 1990 L 13, p. 21. That regulation was preceded by Commission Regulation (EEC) No 2140/89 of 12 July 1989 imposing a provisional anti dumping duty on imports of certain compact disc players originating in Japan and South Korea, OJ 1989 L 205, p. 5.

2 — MEI is one of the nine Matsushita companies affected by the anti dumping procedure concerning CD players. The eight others are MET (see below at paragraph 5 of my Opinion) and seven associated importers within the Community

3 — OJ 1988 L 209, p. 1.

20 to 100%. The great majority of sales are effected through the intermediary of the 77 related distributors; the two independent distributors account for a small, almost insignificant share only. The selling and general expenses of related distributors, though not insignificant in themselves, constitute a significantly lower percentage of the sales price of CDPs sold by those distributors than the selling and administrative costs of MEI.

4. HAD, which is thus also responsible for the sale of CDPs, employs amongst others full-time salesmen for the promotion and sale of CDPs. They visit related and unrelated distributors and retailers, provide them with technical assistance, organize trade fairs and sales contests and take purchase orders from distributors (not from retailers or other resellers). In addition HAD, in collaboration with MEI's advertising division, arranges for advertising in all the media down to and including local level.

Furthermore MEI has 16 regional sales offices spread throughout Japan which implement marketing policy and within their territory collect payments for sales by HAD to related and unrelated distributors. From all the foregoing it is apparent that MEI itself does not sell, either via HAD or via its regional sales offices, directly to retailers, or to end-users.

5. Sales to the Community are not effected through the intermediary of HAD but via Matsushita Electric Trading Co. (MET) which sells CDPs to related and unrelated importers which in their turn sell to wholesalers and/or retailers within their territory in the Community. The majority of the sales functions described above (para. 4) for which HAD was responsible in Japan are carried out in the Community by importers (not by MET).

6. In calculating the amount of the provisional anti-dumping duty on the CDPs exported by MEI to the Community the Commission determined normal value on the basis of the prices charged by the related distributors on sales to Japanese purchasers on the ground that those distributors formed an economic entity with MEI itself. [4] Notwithstanding objections by MEI the Council in determining the definitive anti-dumping duty upheld this manner of proceeding and the reasoning given for it. [5] The dispute at present concerns the question whether in the present case the Institutions were entitled to regard MEI and its related distributors as an economic entity and therefore to determine normal value on the basis of the sales prices charged by those distributors or whether, as MEI submits, they ought to have gone by the sales prices between MEI and its related

4 — See Regulation (EEC) No 2140/89 (provisional anti-dumping duty), Recitals 36 to 45.

5 — See Recitals 30 and 31 of the contested regulation. The Institutions did, however, elaborate their calculation of the normal value taking into account only sales by related distributors to a specific category of buyers, namely buyers acting as wholesale distributors. This method is termed 'selective normal value'; see Recitals 24 to 28 of the contested decision.

distributors, or possibly by a constructed value. [6]

7. Article 2 of the anti-dumping regulation [7] provides for dumping to be established and the dumping margin to be calculated in three stages: first the normal value and then the export price are determined and, finally, a comparison is made between the normal value and the export price (Article 2(B), (C) and (D)).

8. Article 2(B) contains the basic rules for determining the *normal value*. Under subparagraph 3

'For the purposes of this Regulation, the normal value shall be:

(a) the comparable price actually paid or payable in the ordinary course of trade for the like product intended for consumption in the exporting country or country of origin. ...;

(b) when there are no sales of the like product in the ordinary course of trade on the domestic market of the exporting country or country of origin, or when such sales do not permit a proper comparison:

(i) the comparable price of the like product when exported to any third country, ..., or

(ii) the constructed value, determined by adding cost of production and a reasonable margin of profit. ...'

9. The manner in which 'in the course of ordinary trade' is to be interpreted may be inferred *a contrario* from subparagraphs 4, 5, 6 and 7 of Article 2 aforesaid, which sets out the circumstances in which prices actually paid or payable may be deemed not to satisfy that condition. Subparagraph 4 concerns the case of sales in the country of origin at less than the cost of production. Subparagraph 5 concerns non-market economy countries. Subparagraph 6 concerns the case of products not imported directly but exported to the Community from an intermediate country. Subparagraph 7 provides in general:

'For the purpose of determining normal value transactions between parties which appear to be associated or to have a compensatory arrangement with each other may be considered as not being in the ordinary course of trade unless the Community authorities are satisfied that the prices and costs involved are comparable to those involved in transactions between parties which have no such link.'

10. Article 2(C) contains the basic rules on the determination of the export price. Under subparagraph 8(a) the export price is in principle to be the price actually paid or payable

6 — MEI does not dispute that the Institutions had to determine normal value on the basis of sales to the two unrelated distributors (indeed, at the same prices as those charged to the related distributors). In the present case it accepts the practice of the Institutions to leave out of account on the ground of non representativity sales prices in the country of export involving a volume lower than 5% of export sales.

7 - See footnote 3 above.

by the importer to the exporter. Where there is no such reliable price, for example owing to an association between the exporter and the importer, the price at which the imported product is first resold to an independent buyer is taken, allowance being made for all costs incurred between importation and resale (paragraph 8(b)).

11. As to the comparison of the normal value with the export price, in order to establish whether dumping is taking place and the margin thereof, Article 2(9)(a) provides for a comparison as nearly as possible at the same time. Moreover, for the purpose of ensuring a fair comparison, due allowance is to be made for the differences affecting price comparability. One category of differences for which certain adjustments must then be made to the prices are differences in selling expenses resulting from the fact that sales are made at different levels of trade.

The judgment in Case C-175/87

12. The case before the Court today follows on from Case C-175/87 in which the Court gave judgment on 10 March 1992. [8] In that case, too, MEI was the applicant. The case concerned anti-dumping duty on photocopiers. MEI (that is OED, the office equipment division responsible for that product) sells those machines in Japan solely to distributors related to it. Placing reliance on that fact, the Commission and the Council determined the normal value of the machines on the basis of the price charged by such related distributors to independent buyers.

13. MEI challenged that approach on the basis of two arguments. [9] First, it submitted that it was not permissible, on the ground that the manufacturer and its sales companies formed an economic entity, to take the price charged by those companies to their buyers to be the normal value. The Community Institutions were obliged under Article 2(3) and (7) to calculate the constructed value under paragraph 3(b)(ii) whenever they formed the view under paragraph 7 that the manufacturer's sale price could not be taken on the ground that it was a price obtaining as between associated undertakings. Secondly, the Institutions were alleged to have erred in concluding that MEI and its related distributors formed an economic entity, since MEI and more specifically OED itself also performed a number of sales functions.

14. Both arguments were rejected by the Court. Owing to the importance of this judgment for the present case I cite below the relevant paragraphs 11 to 15 *in extenso*:

'As regards determination of the normal value on the basis of the prices of the related sales companies, it should be noted that, according to the documents before the Court, Matsushita has financial control of those companies which market its products in Japan and entrusts to them tasks which are

8 — Case C-175/87 *Matsushita* v *Council* [1992] ECR I-1409 (anti-dumping duty on imports of plain paper for photocopiers originating in Japan).

9 — Ibid., paragraph 10.

normally the responsibility of an internal sales department of the manufacturing organization.

As the Court has already held, in particular in its judgment in Case 250/85 *Brother* v *Council* [1988] ECR 5683, at paragraph 16, the division of production and sales activities within a group made up of legally distinct companies can in no way alter the fact that the group is a single economic entity which organizes in that way activities that, in other cases, are carried on by what is in legal terms as well a single entity.

Matsushita's arguments whereby it seeks to show that Matsushita and its related sales companies should not be treated as forming a single economic entity cannot be accepted.

The assessment which led the Institutions to find in this case that there was a single economic entity cannot be altered by the fact that a number of sales functions could have been carried out by the manufacturer itself. The Institutions are entitled to find that the manufacturer, together with one or more distribution companies which it controls, forms an economic entity even though it performs certain sales functions itself. Furthermore, it is clear from the documents before the Court that those functions, which were performed in this case principally by MEI's office equipment division (OED), are merely complementary to those performed by the related sales companies, since no sale to independent customers was made by MEI itself.

It follows from the foregoing that all those companies' expenses — and likewise MEI's — incurred in marketing PPCs on the domestic market, which would obviously be included in the selling price if the marketing was carried out by an internal sales department of the manufacturer, must be included in the normal value.' [10]

The remaining issue: the scope of the concept of 'economic entity'

15. In its Reply in the present case MEI expressly affirmed that it does not challenge the principles established in the judgment in Case C-175/87. It thus acknowledges that the anti-dumping regulation does allow the Community Institutions in specific cases to find that a manufacturer and its buyers do form an economic entity, and thus to take the normal value as being the price charged by that entity to the first independent buyer, in accordance with Article 2(3)(a).

However, MEI states that in the present case the conditions permitting the Institutions to follow this approach are not satisfied, or at least that no adequate statement of reasons was given for its application in this case.

16. According to MEI the Institutions have adopted too literal an interpretation of the judgment in Case C-175/87. The Institutions have adopted a practice whereby they invoke

10 Ibid., paragraphs 11 to 15

the existence of an economic entity once they establish that the manufacturer predominantly sells to related distributors — in the present case MEI does not dispute that the 77 distributors may be regarded as being associated with it. [11] This practice is said not to be in accordance with the Court's judgment which specifically stressed that economic reality is to take precedence over legal form, whilst the interpretation of the Institutions is a formal one. Moreover, that practice leads to absurd consequences in the case of complete vertical integration: in a sector where the manufacturers have vertically integrated operations down to and including the retail trade level, as for example in the fuel industry, the Institutions would on that basis be free to determine normal value on the basis of a retail price. That would lead to the retail price being used for purpose of comparison with the export price (ex-factory, or in the example ex-refinery), which inevitably would lead to a finding of (fictitious) dumping.

17. However, the Institutions refute that this is their practice. In its Rejoinder the Council expressly states that the fact that the manufacturer controls its distributors is not sufficient in order to conclude that there is a single economic entity. For there is a second condition:

'the single economic entity concept will only be applied by the Institutions if the functions carried out by the sales companies are more or less equivalent to functions of a normal sales department. If the sales companies carry out additional functions, as this might be the case in a vertically integrated industry, the single economic entity concept will not apply, or at least adjustments will be made. The question who is the first independent buyer is, thus, not the sole issue for limiting the extent of the application of the economic entity principle.' [12]

18. It seems to me that in the paragraphs of its judgment in Case C-175/87 cited above — and in the earlier judgments of 5 October 1988 [13] — the Court did in fact lay down a two-fold condition for there to be a finding of a single economic entity: the manufacturer must not only control the distributors but those distributors must also carry out functions which in the case of a manufacturer forming a single legal entity are normally carried out by the internal sales department of the manufacturer. In such a situation the distributors may, from an economic point of view and notwithstanding their legal autonomy, be treated as the internal sales department of an economically and legally fully integrated manufacturer.

19. Nevertheless, the question arises as to when the second condition may be regarded as satisfied. The guiding principle is that the

11 — The question is therefore not whether or under what conditions distributors may be regarded as related or associated. According to MEI, and not denied by the Council or the Commission, the practice of the Institutions is to regard an equity participation of 5% as significant enough. As to the 'predominant' nature of the sales to related distributors see footnote 6 above.

12 — Rejoinder of the Council, paragraph 15.

13 — Case 250/85 *Brother* v *Council* [1988] ECR 5683; in Joined Cases 277/85 and 300/85 *Canon* v *Council* [1988] ECR 5731; Joined Cases 260/85 and 106/86 *Tokyo Electric and Others* v *Council* [1988] ECR 5855, and in Joined Cases 273/85 and 107/86 *Silver Seiko and Others* v *Council* [1988] ECR 5297 (anti-dumping duty on electronic typewriters), in particular Case 250/85 *Brother* v *Council*, at paragraph 16, as reiterated in paragraph 12 of the judgment in Case C-175/87 cited in paragraph 14 above.

comparison in order to establish dumping to be made between the normal value, that is the comparable price in the country of origin, and the export price to the Community, must relate to the same level of trade. Article 2(6) of the GATT anti-dumping code [14] (pursuant to which the anti-dumping regulation was adopted, [15] and in the light of which that regulation must be interpreted [16]) expressly provides that:

'In order to effect a fair comparison between the export price and the domestic price in the exporting country (or the country or origin) or, if applicable, the price established ..., the two prices shall be compared at the same level of trade, normally at the ex-factory level ... .'

This provision states that the comparable level of trade is 'normally', thus not necessarily, the ex-factory level.

Article 2(9)(a) of the anti-dumping regulation, mentioned above at paragraph 11, which provides *inter alia* for certain adjustments to be made for the purpose of the prices to be compared in the event of differences in selling expenses resulting from the fact that sales are made at different levels of trade, is indeed an application of that same principle.

14 — Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade, OJ 1980 L 71, p. 90.

15 — See the Second Recital in the preamble to the anti dumping regulation.

16 — Case C-69/89 *Nakajima* v *Council* [1991] ECR I 2069, paragraphs 34 to 37 and Case C 105/90 *Goldstar* v *Council* [1991] ECR I 677, paragraph 33.

20. The second condition laid down in the Court's case-law, namely that, in order for there to be a single economic entity, the distributor controlled by the manufacturer must carry out tasks which are normally performed by a manufacturer's internal sales department, must be understood in the light of the principle of comparable prices at the same level of trade.

The point of departure here is the situation of a manufacturer who effects the first sale of products manufactured by him within the framework of an organization which from a legal point of view as well forms a single entity. That manufacturer sells his product, which from his point of view is a finished product and thus situated at the ex-factory level — to the level of trade immediately below him. If the product in question, as in the present case, is a fully finished product, that level is normally that of a reseller. Depending on the product and the extent and degree of the integration of the manufacturer it may be a wholesale or a retail distributor.

21. If on the other hand one is confronted with a situation, as in the present case, where the manufacturer's organization (regarded as responsible for production and the first sale of the manufactured product) encompasses various related companies which are economically integrated but legally separate, under the Court's case-law that is in itself no reason for treating the manufacturer's organization as operating on two different levels of trade, instead of on one level of trade.

In the *Canon* judgment [17] the Court expressed this in the following terms:

'Canon maintains, in the second place, that the Institutions also infringed Article 2(9) in so far as, contrary to the requirements of that provision, they did not make a comparison at the same level of trade, which should normally be the ex-factory level, but compared an ex-factory export price with a normal value determined in respect of sales by Canon's exclusive distributor in Japan.

It should be observed that, as is apparent from the documents before the Court, Canon markets its products in Japan through a distribution company which it controls financially and to which it entrusts tasks that are normally the responsibility of an internal sales department of the manufacturing organization.

The division of production and sales activities within a group made up of legally distinct companies can in no way alter the fact that the group is a single economic entity which organizes in that way activities that are normally carried out by what is in legal terms as well a single entity.

Accordingly, Canon's argument cannot be upheld, since it is precisely by taking account of the first sale to an independent purchaser that the normal value at the "ex-factory" level can be correctly established where there are production and sale arrangements of the kind set up by Canon on the Japanese market.'

The level of trade directly below the manufacturer is (or rather continues to be) in such a situation the level of trade directly below the related distributor, that is to say the first independent purchaser.

22. It would be otherwise — in other words the fact that the manufacturer's organization encompasses legally distinct but economically associated companies may entail recognition that the prices charged by a company to another company within the group (in this case a related distributor) are situated at a different level of trade — only if, as I understand the judgment in Case C-175/87, the related distributor also carries out significantly different sales functions from those normally performed by the internal sales department of a fully (economically and legally) integrated manufacturer. By 'other' sales functions must be understood, it seems to me, functions characteristic of a reseller, commonly — depending, as stated above (para. 20) on the nature of the product and the integration of the manufacturers — a wholesaler or retailer who sells the product in question to a remoter level of trade (for example to retailers or end-users as the case may be) than that on which the manufacturer (whether or not legally regarded as an entity) undertakes his sales activities. In other words the notion of 'economic entity' cannot extend so far as to include such 'other' functions.

17 — Cited at footnote 13 above.

That answers the problem to which counsel for MEI averted, namely that of vertically integrated operations down to and including the retailer (see paragraph 16 above): functions performed by an associated reseller of that kind, that is directly in contact with the consumer are not functions which would normally be carried out by the manufacturer's internal sales department.

23. In the judgment in Case C-175/87 the Court goes on to state that the fact that the (parent company of the) manufacturer itself carries out certain sales functions does not prevent the distributors related to the manufacturer from forming part of a single economic entity. According to the judgment, it was also clear from the documents before the Court that the functions carried out by the manufacturer were complementary to those performed by the distributors since the manufacturer itself effected no sales to independent customers (see passages cited at paragraph 14 above).

I understand this additional reasoning as follows: where the (parent company of the) manufacturer itself carries out essential sales functions, the question arises whether the related distributors still perform any sales function at the relevant level of trade, that is in favour of the first independent buyer; from that factor it may then be inferred, as it were by indications to the contrary, that the sales made by the distributors relate to a *different* level of trade than that on which a manufacturer (whether or not regarded as a legal entity) operates.

Application to the facts of the case

24. In the present case it has not been demonstrated that the sales functions performed by related distributors are different from those which in the case of a both economically and legally integrated manufacturer would be carried out by that manufacturer's internal sales department. More particularly it was not demonstrated or alleged that the distributors performed sales functions normally carried out by resellers and, in particular, by retailers at a lower level of trade, for example by way of direct sales to end-users.

Nevertheless MEI (as in Case C-175/87) does perform a number of sales-related functions through the intermediary of its own production and advertising departments as well as its regional sales offices. These functions carried out by the manufacturer itself are likewise purely complementary to or supportive of the sales function performed by the distributors. For MEI does not make direct sales of CD players to purchasers, wholesalers or retailers situated on a level of trade below that of distributors. This essential sales function is exercised solely by distributors (whether or not related). [18] Thus, there can be no question here of any indication to the contrary (see para. 23 above).

18 — It is clear from the description of MEI's sales organization given at paragraph 4 above that HAD accepts purchase orders only from distributors.

In these circumstances related distributors may, in accordance with the Court's case-law, be presumed to perform functions which in the case of an economically and legally integrated manufacturer would normally be carried out by the manufacturer's own sales department.

25. In view of the foregoing I thus consider that in the present case the Institutions were just as entitled to invoke the notion of economic entity as they were in Case C-175/87. The fact that in the present case, unlike in Case C-175/87, CD players are sold to retailers by two unrelated distributors as well, cannot alter that situation. Moreover, MEI is not claiming that the Institutions ought to have taken into account such sales to unrelated distributors in determining the normal value (see footnote 6 above): those sales are too insignificant in order to be representative.

26. The approach taken by the Institutions in not treating sales to related distributors as made in the ordinary course of trade for the purpose of determining normal value, does not moreover in the present case mean that different levels of trade were taken into consideration in the comparison of the normal value *with the export price*. MEI itself acknowledged that the prices taken into account by the Institutions for the purpose of determining the normal value, namely those charged by related distributors *to selected Japanese buyers* (see footnote 5 above) were the most comparable with the export prices invoiced by Matsushita's export company MET to importers in the Community. [19]

27. MEI further submits that the Council provided in the contested regulation an inadequate statement of the reasons on which its decision was based. In paragraph 31 of the preamble to the regulation the Council, with regard to the question of the economic entity, confirms the Commission's conclusions set out in Recitals 38 to 40 of the regulation imposing a provisional anti-dumping duty. From a reading of the recitals it appears that the Commission's arguments, thus also the Council's, closely accord with the abovementioned case-law of the Court. I therefore also consider the applicant's submission in this regard to be unfounded.

Conclusion

28. On the basis of the foregoing I propose that the Court should dismiss the application for annulment as unfounded and order the applicant to pay the costs including those of the second intervener.

19 — See the fax to the Commission dated 31 October 1989 contained in Annex 11 to MEI's application.