ORDER OF THE PRESIDENT OF THE COURT
20 OCTOBER 1977 [1]

Nippon Seiko K.K. and Others
v Council and Commission of the European Communities

Case 119/77 R

In Case 119/77 R

(1) NIPPON SEIKO K.K., Tokyo,

(2) NSK BEARINGS EUROPE LTD., London,

(3) NSK KUGELLAGER GMBH, Ratingen,

(4) NSK FRANCE S.A., Clichy,

represented by Jeremy Lever, Queen's Counsel, of Gray's Inn, David Vaughan, Barrister, of the Inner Temple, London, and Messrs Coward Chance, Solicitors, London, with an address for service in Luxembourg at the Chambers of J. C. Wolter, 2, Rue Goethe,

applicants

v

COUNCIL OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Peter Brückner, with an address for service in Luxembourg at the office of Mr Van den Houten, European Investment Bank, Place de Metz,

and

COMMISSION OF THE EUROPEAN COMMUNITIES, represented by its Legal Adviser, Robert Casper Fischer, with an address for service in Luxembourg at the office of Mario Cervino, Commission of the European Communities, Jean Monnet Building,

defendants,

THE PRESIDENT OF THE COURT OF JUSTICE OF THE EUROPEAN COMMUNITIES

makes the following

1 — Language of the Case: English.

ORDER

Facts

1. Article 15 (1) (a) of Regulation (EEC) No 459/68 of the Council of 5 April 1968 on protection against dumping or the granting of bounties or subsidies by countries which are not members of the European Economic Community (OJ, English Special Edition 1968 (I), p. 80) provides as follows:

Where preliminary examination of the matter shows that there is dumping and there is sufficient evidence of injury and the interests of the Community call for immediate intervention, the Commission ... shall:

— ..., fix an amount to be secured by way of provisional anti-dumping duty, collection of which shall be determined by the subsequent decision of the Council under Article 17;

...

— stipulate that entry of such products for Community consumption shall be conditional upon the provision of security for the aforementioned amount.

Having regard in particular to the aforesaid article, the Commission of the European Communities, by Regulation (EEC) No 261/77 of 4 February 1977 (OJ L 34, 1977, p. 60):

— Imposed a provisional anti-dumping duty of 20 % on ball bearings, tapered roller bearings and parts of those two types of bearings, originating in Japan;

— Ordered that the entry of those products into free circulation should be conditional upon the deposit of security for the amount of the provisional duty.

By Council Regulation (EEC) No 944/77 of 3 May 1977 (OJ L 112, 1977, p. 1), the provisional duty was extended for a period not exceeding three months. The regulation was to apply 'until the entry into force of a Council act adopting definitive measures or, at the latest, until the expiry of a period of three months beginning on 5 May 1977'.

The definitive measures in question were adopted by Council Regulation (EEC) No 1778/77, of 26 July 1977 (OJ L 196, 1977, p. 1), which entered into force on 4 August 1977. This regulation:

— Imposed a definitive anti-dumping duty of 15 % on ball bearings and tapered roller bearings originating in Japan (Article 1 (1));

— Suspended, under given conditions, the application of this duty (Article 1 (2));

— Ordered that the amounts secured by way of provisional duty under the provisions of Regulations Nos 261/77 and 944/77, in respect of products manufactured and exported by — among others — Nippon Seiko K.K. (hereinafter referred to as 'NSK'), 'shall be definitively collected to the extent that they do not exceed the rate of duty fixed in this regulation', that is, 15 % (Article 3).

2. On 10 October 1977 NSK as well as its European subsidiaries NSK Bearings Europe Ltd., NSK Kugellager GmbH and NSK France S.A. (hereinafter collectively referred to as 'the subsidiaries') lodged an application against the Council and the Commission in which:

They stated, *inter alia*, that up to 2 October 1977, each of the subsidiaries had paid provisional duty totalling given sums and secured further payments up to given amounts by a 'bond' (NSK

Bearings Europe Ltd.), by 'bank guarantees' (NSK Kugellager GmbH) or a 'guarantee' the nature of which was not specified (NSK France S.A.); that by having to finance such payments or to give such guarantees they had suffered losses of which details were provided by the applicants;

They requested the Court, *inter alia:*

- To declare Regulation No 1778/77 void;
- Alternatively to declare it void in so far as it affects the applicants or any of them;
- In the further alternative to declare it void in so far as it purports to order that the amounts secured by way of provisional duty by the subsidiaries should be definitively collected;
- To order the Council and/or the Commission to instruct the relevant competent authorities in the United Kingdom, the Federal Republic of Germany and France to 'repay' to the subsidiaries the sums already paid to those authorities with interest thereon at such rate as may seem to the Court just and equitable, from the dates of actual payment of such sums by the subsidiaries to the dates of actual repayment to the subsidiaries;
- To order the Council and/or the Commission to make good the damage caused to the subsidiaries together with interest thereon at such rates and for such period as may seem just and equitable to the Court.

Also on 10 October 1977 NSK and the subsidiaries in addition applied to the Court in pursuance of Article 185 and 186 of the EEC Treaty, requesting it, pending the judgment in the main application:

- To suspend the application of Regulation No 1778/77 in so far as it purports to provide, by Article 3, for the definitive collection of anti-dumping duties from the subsidiaries;
- To order the necessary interim measures, and in particular to order the Council and/or the Commission to instruct the relevant competent authorities in the United Kingdom, the Federal Republic of Germany and France not to claim or demand payment from the subsidiaries of:
  - The still outstanding parts of the sums which are to be paid under Article 3 of Regulation No 1778/77, the details of these parts being given by the applicants;
  - Any further sum or sums which the said authorities may demand by way of provisional duty from the subsidiaries, pending the judgment in the main application;
- To order such other relief by way of suspensory order or interim measures as may be lawful or equitable in all the circumstances;
- To order the Council and/or the Commission to pay the applicants' costs.

In support of this application the applicants state essentially as follows:

Unless the present application is granted, the subsidiaries would suffer irrevocable damage. They then would have to pay in the near future the provisional duty still outstanding, or the security given for this duty would be enforced, or this duty would otherwise be collected by process of law in the three Member States concerned.

As appears from documents in the file, demands for payment have already been made on NSK Bearings Europe Ltd. and NSK Kugellager GmbH, and payment of the sums required cannot be deferred much longer. As for NSK France S.A., the French customs authorities informed Counsel for this company on 4 or 5 October 1977 that instructions to local customs offices to collect the provisional duty were going out very soon; it therefore is to be expected that the said authorities will press for payment during the course of the week commencing 10 October 1977.

If in the main application the Court should uphold the applicants' claim, while the subsidiaries are now required to pay the provisional duty still outstanding, they 'will have lost the use of their money, or will have had to borrow the money for the substantial period of time that will elapse between the payment ... and the final determination of the main application'.

As shown by figures quoted in the application, the provisional duty payable to the national customs authorities is in each case secured, and the guarantee fee payable is in each case considerably lower than the interest rate payable by the subsidiaries if they are forced to pay the outstanding amounts. The applicants provide details of the additional monthly expenditure which the subsidiaries would incur in this case.

If, on the other hand, the Court grants the present application but were to reject the main application, the subsidiaries would simply have to pay the provisional duty now outstanding, all of which is in any event secured.

There thus is 'a clear balance of convenience' in favour of making the interlocutory order asked for, 'so as to preserve the present *status quo*'.

The Council and the Commission contend that the application should be dismissed with costs for the following reasons:

As to the first and second requests, the rule established by Article 185 of the EEC Treaty is that actions brought before the Court shall not have suspensory effect. Pursuant to Article 83 of the Rules of Procedure of the Court of Justice, an exception is only justified if the applicant demonstrates the existence of factual and legal grounds establishing a *prima facie* case for the interim measures applied for.

The applicants have failed to meet these requirements. The collection of the provisional duty would cause them no injury, let alone a serious and irreparable injury. As appears from figures given by the Council and the Commission, the additional monthly expenditure indicated by the applicants represents only an extremely small proportion of the average monthly turnover of the subsidiaries.

Financial injury is always reparable, as is shown by the very requests of the applicants in the main case. The applicants have failed to demonstrate that, if they obtain favourable judgment in the main action, interest of the sums collected would not be granted or that the payment of such interest could not be secured by judicial remedies under the national law of the Member States concerned.

If a balance were to be made, it should weigh the financial burden imposed on the applicants against the necessity of ensuring the effective functioning of Community regulations, in particular in the field of commerce.

As to the third request, the applicants have not indicated any legal basis for it.

Decision

1 The Council and the Commission have not contested that the competent British, French and German customs authorities are insisting that the outstanding payments required under Article 3 of Regulation No 1778/77

shall be made forthwith. Nor have they contested that the subsidiaries will incur the additional charges referred to by the applicants in the event of the dismissal of the latter's application for the adoption of interim measures.

2 It has not been possible to establish conclusively within the context of the present proceedings, whether, in the event of the applicants' being successful in the main action, this expenditure would be wholly recouped.

3 Having regard to the probable duration of the procedure in the main action, charges at the rate quoted by the applicants cannot be regarded as negligible.

4 On the other hand the Council and the Commission have not been able to demonstrate that the adoption of the interim measures applied for would cause appreciable detriment to the European Economic Community if the subsidiaries were to maintain the existing security in the outstanding sums to be paid in accordance with Article 3 of Regulation No 1778/77 and if the applicants were to be unsuccessful in the main action.

5 The applicants have thus substantiated the circumstances giving rise to urgency and the factual and legal grounds establishing a *prima facie* case for the suspension of the application to the applicants of the abovementioned Article 3 (Article 83 (2) of the Rules of Procedure of the Court of Justice) as far as concerns the sums owed by the subsidiaries under Article 3 but not yet paid by them.

6 To that extent therefore the application to the applicants of the said article must be suspended until the final judgment in the case of *NSK and Others* v *Council and Commission* (Case 119/77) on condition that and for so long as the subsidiaries continue to provide security for the performance of their obligation in the outstanding amounts which they are required to pay in pursuance of Article 3 of Regulation No 1778/77.

7 The decision with regard to costs should be reserved for the final judgment in Case 119/77.

On those grounds,

The President,

as an interlocutory decision, hereby orders as follows:

1. **The application to Nippon Seiko K.K., NSK Bearings Europe Ltd., NSK Kugellager GmbH and NSK France S.A. of Article 3 of Council Regulation (EEC) No 1778/77 is suspended until the final judgment in the case of NSK and Others v Council and Commission (Case 119/77) as far as concerns the sums owed by the subsidiaries under the said article but not yet paid by them, on condition that and for so long as the subsidiaries continue to provide security for the performance of their obligation in the said amounts;**

2. **Costs are reserved for the final judgment in the case of NSK and Others v Council and Commission (Case 119/77).**

Luxembourg, 20 October 1977.

A. Van Houtte
Registrar

H. Kutscher
President