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

In Case 301/85

Sharp Corporation, whose registered office is in Osaka, Japan, represented by J. Lever, QC, Christopher Vajda, barrister-at-law, and R. Griffith, solicitor, of Messrs Coward Chance, with an address for service in Luxembourg at the Chambers of J. C. Wolter, 8 rue Zithe,

applicant,

v

Council of the European Communities, represented by the Director in its Legal Department, H. J. Lambers, and its Legal Adviser, E. H. Stein, acting as Agents, assisted by F. G. Jacobs, QC, with an address for service in Luxembourg at the office of J. 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 Legal Adviser, J. Temple Lang, acting as Agent, 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,

and by

Committee of European Typewriter Manufacturers (Cetma), represented by D. Ehle, Rechtsanwalt of Cologne, with an address for service in Luxembourg at the Chambers of E. Arendt and G. Harles, 4 avenue Marie-Thérèse,

interveners,

APPLICATION for a declaration that Council Regulation (EEC) No 1698/85 of 19 June 1985 imposing a definitive duty on imports of electronic typewriters orig-

* Language of the Case: English.

inating in Japan (Official Journal 1985, L 163, p. 1) is void or, in the alternative, for a declaration that that regulation is void in so far as it affects the applicant,

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: B. Pastor, Administrator

having regard to the Report for the Hearing and further to the hearing on 22 September 1987,

after hearing the Opinion of the Advocate General delivered at the sitting on 8 March 1988,

gives the following

Judgment

1 By an application lodged at the Court Registry on 7 October 1985, the company Sharp Corporation (hereinafter referred to as 'Sharp'), whose registered office is in Osaka, Japan, brought an action under the second paragraph of Article 173 of the EEC Treaty for a declaration that Council Regulation (EEC) 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) was void in its entirety or at least in so far as it affected the applicant. In particular, Sharp seeks the annulment of the provisions of that regulation which impose a definitive anti-dumping duty of 32% on electronic typewriters originating in Japan and exported by the applicant to the Community and of the provisions to the effect that the provisional anti-dumping duties imposed by Commission Regulation (EEC) No 3643/84 of 20 December 1984 imposing a provisional anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1984, L 335, p. 43) should be definitively collected, at least to the extent to which the amounts exceed the rate of 16.08%.

2 In 1982 Sharp started its production of electronic typewriters which have always been intended exclusively for exportation. In 1984, together with other Japanese manufacturers, it was the subject of a complaint made to the Commission by an association of European manufacturers, the Committee of European Typewriter Manufacturers (Cetma), which accused it of selling its products in the Community at dumping prices.

3 The anti-dumping proceeding initiated by the Commission on the basis of Council Regulation (EEC) 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) led initially to the imposition upon Sharp of a provisional anti-dumping duty of 21.1%. The Council, on a proposal from the Commission, then fixed the definitive anti-dumping duty at 32% by Council Regulation No 1698/85, against which Sharp has brought the present action.

4 The Commission and Cetma were given leave to intervene in support of the defendant's submissions.

5 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 submissions and arguments of the parties, which are mentioned or referred to hereinafter only in so far as is necessary for the reasoning of the Court.

6 Sharp relies upon the following five submissions in support of its action:

(i) inclusion of an excessive profit margin in the calculation of the normal value;

(ii) comparison of the normal value and the export price at different levels of trade;

(iii) wrongful deduction of credit granted to purchasers in the calculation of the export price;

(iv) discrimination in relation to other undertakings;

(v) unlawful collection of the provisional duty at the full rate.

The submission concerning inclusion of an excessive profit margin in the calculation of the normal value

7 Sharp claims that the profit margin corresponding to the profit made by the Canon company on sales of electronic typewriters on the Japanese market, which, in the absence of domestic sales, was attributed to it in order to construct the normal value of its products, cannot be regarded as a 'reasonable margin of profit' within the meaning of Article 2 (3) (b) (ii) of Regulation No 2176/84. The profit margin earned by another manufacturer may not be combined with the production costs of the manufacturer concerned in order to construct the normal value of the latter's products. Furthermore, the use of such a margin is contrary to the principle of legal certainty in so far as it prevents the manufacturer concerned, which cannot know the profit margins of its competitors, from taking the necessary steps to avoid action constituting dumping.

8 It must be pointed out in the first place that, under Article 2 (3) (b) (ii) of Regulation No 2176/84, in constructing the normal value the addition for profit should 'as a general rule, and provided that a profit is normally realized on sales of products of the same general category on the domestic market of the country of origin . . . not exceed such normal profit'. Nothing in that provision precludes the use of the profit normally realized by a company other than the one to which the anti-dumping investigation relates as the 'reasonable margin of profit'.

9 As regards the argument that the method adopted by the institutions leads to results which are unforeseeable because the manufacturer concerned cannot know the profit margins of its competitors, it must be observed that references to factors not known to the manufacturer concerned often prove necessary under the system laid down by Regulation No 2176/84 where, as in the present case, it is not possible to take real prices as a basis, and a certain degree of unforeseeability does not therefore constitute an infringement of the principle of legal certainty.

10 It must also be emphasized that if, in the case of manufacturers not operating on the domestic market, the normal value could be constructed only on the basis of a hypothetical profit, there would be a risk of discrimination against the other manufacturers whose profit margin on the models which they sell in Japan is used in constructing the normal value of their other models. A solution such as that adopted by the institutions, which enables the principle of legal certainty to be safeguarded as far as possible without however infringing the principle of equality of treatment, therefore appears to be consonant with the scheme of Regulation No 2176/84. Moreover, in this instance all danger of arbitrary treatment was removed since the institutions applied to Sharp the profit made by Canon which was the lowest profit of all the companies marketing their products in Japan.

11 In view of the foregoing considerations, the first submission must be rejected.

The submission concerning comparison of the normal value and the export price at different levels of trade

12 Sharp maintains that the comparison between the normal value and the export price was incorrect in so far as export prices established at the manufacturer's 'ex-factory' level were compared with constructed normal values at the 'ex-exclusive distributor' level.

13 Even if Sharp does not sell electronic typewriters in Japan and its exclusive sales subsidiary in Japan only sells other products, the normal value of its electronic typewriters must be constructed for the purposes of the anti-dumping investigation as if they were sold on the domestic market. The particular organizational structure of the Japanese electronic typewriter manufacturers involved in the anti-dumping investigation, which market their products through an associated distributor and do not have their own internal sales departments — a structure which has been adopted by Sharp for the products which it does sell on the domestic market and would also be used for electronic typewriters if they were sold on the Japanese market — is such that the prices charged by the parent company cannot be regarded as the normal value and therefore the prices of the exclusive sales subsidiary must be taken into account.

14 In view of the foregoing, it is apparent that the manner in which the institutions made the comparison between the normal value and the export price was not incorrect. The submission must therefore be rejected.

The submission concerning the wrongful deduction of credit granted to purchasers in the calculation of the export price

15 Sharp maintains that the calculation of the export price was distorted by the fact that the credit granted on sales by its German subsidiary, SEEG, was wrongly deducted on the basis of its value in the national currencies of customers established in other Member States, and not on the basis of the cost of borrowing the same amount in German marks.

16 It should be pointed out, with regard to that submission, that by virtue of Article 2 (8) (b) 'the export price may be constructed on the basis of the price at which the imported product is first resold to an independent buyer'. In order to determine the actual selling price, it would appear appropriate in the circumstances of the case not to refer to the cost of the credit to the seller but to take into account the value which that credit represents to an independent buyer.

17 That is all the more necessary in view of the fact that purchasers established in Member States other than the Federal Republic of Germany normally obtain credit in their own country and might even be prevented by national exchange control legislation from seeking credit abroad. It follows that the institutions were not wrong in holding that the value of the credit granted on sales to be taken into account was the value expressed in the national currency of the customers.

18 The submission must therefore be rejected.

The submission concerning discrimination in relation to other undertakings

19 Sharp claims that the imposition upon it of a definitive anti-dumping duty must be regarded as void on grounds of discrimination since the institutions imposed that duty on it without at the same time imposing at least a provisional anti-dumping duty on Nakajima All Precision Co. Ltd whose circumstances were the same and because, at a later stage, the Commission terminated the proceedings against Nakajima on the basis of findings which it made using a profit margin and a reference period different from those used for the applicant.

20 It must be observed that after the adoption of Regulation No 3643/84, cited above, the Commission found that it had made a mistake in the calculations which had led it to consider Nakajima's dumping margin to be *de minimis*. The Commission very quickly decided that the proceedings against Nakajima should be reopened but it was not possible at the same time to suspend the operation of Regulation No 3643/84 with regard to those undertakings in respect of which the existence of a substantial dumping margin had been established without the risk of irreparable damage to the Community industry which that regulation was intended to protect.

21 The anti-dumping proceeding concerning the importation of electronic typewriters manufactured by Nakajima subsequently led to the adoption of Commission Decision 86/34/EEC of 12 February 1986 (Official Journal 1986, L 40, p. 29) which established that Nakajima's dumping margin was to be regrded as insignificant.

22 Since Nakajima's exclusion from the number of companies subject to a definitive anti-dumping duty stems from that decision, discrimination in favour of Nakajima could not, even if it were established, lead to the annulment of the regulation imposing a definitive anti-dumping duty on Sharp, which was adopted on the basis of findings correctly made in the course of the anti-dumping investigation and in accordance with the rules laid down by Regulation No 2176/84. The submission as to discrimination must therefore be rejected.

The submission concerning the unlawfulness of the collection of the provisional duty at the full rate

23 Sharp claims that the Council should, by its Regulation No 1698/85, have collected only a reduced provisional duty of 16.08% arrived at by correcting an arithmetical error admitted by the Commission after the adoption of Regulation No 3643/84.

24 It is apparent, however, from a letter from the Commission of 7 February 1985 that the Commission had itself detected two inaccuracies having the opposite effect to the previous error and that it intended to take account of all of those errors in the proposals which it was to submit to the Council on the fixing of the definitive anti-dumping duty.

25 The Council, for its part, has stated, without being contradicted, that it took account of those two groups of errors.

26 In the light of the foregoing, it must be concluded that the inaccuracies unfavourable to Sharp were offset by those in its favour and that the Council acted correctly in collecting the provisional duty at the initial rate.

27 Sharp's fifth submission must therefore be rejected.

28 In view of the foregoing findings, the action in its entirety must be dismissed as unfounded.

Costs

29 Under Article 69 (2) of the Rules of Procedure, the unsuccessful party is to be ordered to pay the costs, if such an order has been asked for. Since Sharp has failed in its submissions, it must be ordered to pay the costs, including those of the interveners which asked for them.

On those grounds,

THE COURT (Fifth Chamber)

hereby:

(1) Dismisses the application.

(2) Orders the applicant to pay the costs, including those of the interveners.

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