known to the manufacturer concerned are often necessary under the system laid down by Regulation No 2176/84 and the degree of unforeseeability resulting therefrom has to be accepted.

2. Under the procedure for calculating anti-dumping duties, the Community institutions are not mistaken in making, for the purpose of establishing the dumping margin, a comparison between export prices established at the manufacturer's 'ex-factory' level and a constructed normal value at the 'ex-exclusive distributor' level, where it is apparent that, in view of the particular commercial structure adopted by the manufacturers of the exporting country which consists in entrusting to an exclusive distributor tasks normally carried out by a sales department, only the price charged by that distributor can be regarded as the normal value of the product.

It is of little importance that the exclusive distributor does not sell the dumped products, since the normal value of those products must be constructed as if they had been sold on the domestic market.

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I — Facts and procedure

The age of electronic typewriters began in 1978 when the first model of an electronic typewriter manufactured by Olivetti was launched on the market. Until then, the market had been dominated by typewriters of the traditional variety, that is to say mechanical and later electromechanical typewriters.

The spectacular breakthrough achieved by the new product completely overturned the structure of the market in typewriters. Within a very short time sales of mechanical and electromechanical typewriters plunged to the lowest level ever recorded, whilst sales of electronic typewriters soared.

In 1982 European manufacturers of electronic typewriters (Olivetti, Olympia and Triumph-Adler) began to feel the ever-growing pressure exerted by Japanese competition which, in their view, was undercutting prices. According to the European manufacturers, Japanese companies were exporting ever-increasing quantities of electronic typewriters at dumping prices in order to take over the European market in that product and to drive out European undertakings.

In order to contend with what they call the Japanese 'dumping conspiracy', European manufacturers formed an association known as the 'Committee of European Typewriter Manufacturers' (hereinafter referred to as 'Cetma') which, on 15 February 1984, submitted a complaint to the Commission requesting the latter to initiate an anti-dumping proceeding against Japanese exporters.

The 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) culminated in the adoption by the Commission of Regulation (EEC) No 3643/84 of 20 December 1984 (Official Journal 1984, L 335, p. 43). That regulation imposed a provisional anti-dumping duty on imports of electronic typewriters manufactured by a number of companies including Brother Industries Ltd, Canon Inc., Sharp Corporation (hereinafter referred to as 'Sharp'), Silver Seiko Ltd, Tokyo Electric Company Ltd (TEC), Tokyo Juki Industrial Company Ltd and Towa Sankiden Corporation, and terminated the proceeding with regard to Nakajima All Co. Ltd on the ground that the dumping margin established for that company was negligible.

On 19 June 1985 the Council adopted Regulation (EEC) No 1698/85 imposing a definitive anti-dumping duty on imports of electronic typewriters originating in Japan (Official Journal 1985, L 163, p. 1), which imposed a definitive anti-dumping duty on all the undertakings that were already subject to provisional anti-dumping duty. That measure was contested by all the parties concerned.

By Regulation (EEC) No 113/86 of 20 January 1986 (Official Journal 1986, L 17, p. 2), the Council declared Regulation No 1698/85 inapplicable to Tokyo Juki as from the date of its entry into force.

Sharp, on which Regulation No 1698/85 had imposed a definitive anti-dumping duty of 32%, brought an action on 7 October 1985 for the annulment of that regulation at least in so far as Sharp was affected by it.

By order of 11 November 1985, the Commission of the European Communities was granted leave to intervene in this case in support of the defendant's conclusions.

By order of 29 April 1986, Cetma was also granted leave to intervene in this case in support of the defendant's conclusions.

On hearing the Report of the Judge-Rapporteur and the views of the Advocate General, the Court decided, in accordance with Article 95 (1) of the Rules of Procedure, to assign the case to the Fifth Chamber and to open the oral procedure without any preparatory inquiry. However, it asked the parties to supply it with certain information and to answer a number of questions before 10 April 1987.

II — Conclusions of the parties

Sharp claims that the Court should:

(1) declare Council Regulation (EEC) No 1698/85 void;

(2) alternatively, declare the said regulation void in so far as it affects the applicant;

(3) further or alternatively, declare the said regulation void:

(a) in so far as it purports to impose a definitive anti-dumping duty of 32% upon electronic typewriters originating in Japan and manufactured or exported by the applicant, or

(b) in so far as it purports to do so in respect of the period until, if ever, effective measures are taken by the institutions to bring to an end the discrimination against the applicant relative to Nakajima All Co. Ltd created by the contested regulation;

(4) further or in the further alternative, declare the said regulation void in so far as it purports to order that the amounts secured by way of provisional duties in respect of such electronic typewriters manufactured by the applicant and exported to the Community should be definitively collected

(a) at all, or

(b) to the extent that the amounts exceed duty calculated at a rate of 16.08%;

(5) in any event, order the Council to pay the applicant's costs;

(6) order the Commission to pay the applicant's costs occasioned by its intervention;

(7) order such other relief as may be lawful or equitable in all the circumstances.

The *Council* contends that the Court should:

(1) dismiss the application;

(2) order the applicant to pay the costs.

The *Commission of the European Communities* and *Cetma* support the Council's conclusions and contend that the applicant should also be ordered to pay the costs incurred by them in their capacity as interveners.

III — Submissions and arguments of the parties [1]

A — *Submissions and arguments specific to this case*

First submission: inclusion of an excessive profit margin in the normal value

In the absence of sufficient sales on the domestic market, the Community institutions constructed the normal value of Sharp's products in accordance with Article 2 (3) (b) (ii) of Regulation No 2176/84, by adding together the cost of production and a reasonable margin of profit, which was calculated by reference to the profit margins earned in Japan by Canon, Silver Seiko and Brother Industries, where their sales on the domestic market were greater than 5% of export sales to the Community. The lowest of those profit margins, that of Canon, was considered to be a 'reasonable margin of profit' for Sharp.

In its first submission, Sharp contends that that margin is excessive and unrealistic. That margin of 32.39% of the turnover, or 47.91% of the cost, would imply, having regard to the volume of the applicant's sales, that over a relatively short period the applicant's profits would exceed the total assets employed in the business.

Furthermore, since the costs and profitability of the exporters whose sales were taken into account for the calculation of that margin are, in view of their nature, highly confidential, the applicant never had any opportunity to comment on the manner in which that profit margin was calculated.

Sharp considers that it cannot be right, in the circumstances of the case, to attribute to it automatically, as the Commission did, the profit margin calculated for another exporter (Canon) for two of its models. To attribute the same profit margin to two exporters, one of whom sells none, or not enough, of its products on the domestic market, is to attribute to both of them the same production costs for the purpose of calculating the profit margin. In that case,

1 — As Sharp inserted in its reply certain observations which it drew up jointly with the applicants in Case 250/85, Joined Cases 260/85 and 106/86, Joined Cases 273/85 and 107/86 and Joined Cases 277 and 300/85, it is appropriate to summarize those observations under a separate heading which also includes the Council's response to those observations and the observations submitted by the Commission in so far as they deal with the problems raised in the joint observations. All those arguments will be set out in Section III B of this report.

fairness would require the Community institutions to attribute to the exporter the competitor's costs, if they are lower than those of the exporter, also for the purpose of constructing the normal value. To act otherwise would mean artificially inflating the normal value of the products of the undertaking concerned and thus its dumping margin.

It cannot really be denied that an undertaking with a profit margin of 61.27% on cost (the margin of Silver Seiko, which would have been used if Canon had not exceeded the 5% threshold on the domestic market) must have a vastly different cost structure from that of undertakings with profit margins of 10 or even 47.91% (Canon). The same reasoning applies to Canon and to the applicant. From a theoretical point of view, Sharp would have been unable to maintain its position on the domestic market and achieve the same profit, unless its costs were equal to or below those of Canon. Moreover, that consideration is purely theoretical. A profit margin of 47% is unrealistic, as is evidenced by the number of electronic typewriters returned by the distribution company (Sharp Business K, hereinafter referred to as 'SBK') to Sharp; such returns would have been unlikely on a market capable of guaranteeing profit margins of that magnitude.

Moreover, taking into account the production costs of another undertaking for the purpose of constructing the normal value is contrary to Article 2 (3) (b) (ii) of Regulation No 2176/84, which provides that for that purpose the costs of the undertaking concerned must be taken as a basis. It follows that the other undertaking's costs must also be excluded from the calculation of the profit margin.

Although it is clearly not for Sharp to suggest what profit figure the Commission should have taken, Sharp emphasizes that there were a number of possible alternatives, such as examining the profitability of domestic sales by the applicant of products that are nearest to electronic typewriters or the profits achieved by companies operating in the electronics sector; alternatively, the Commission could have followed its existing practice of imputing a profit margin of between 5 and 10% to the undertaking concerned.

Sharp considers that, by taking as its basis a profit margin of 32.39%, the Commission contravened the principle of legal certainty. Since the figures on which the Commission based its calculation were strictly confidential, Sharp was wholly unable to foresee, if it had wished to fix prices in such a way as to avoid the risk of anti-dumping proceedings being brought against it, that the Commission would adopt a percentage of that magnitude as a reasonable profit margin. It must therefore be held that the methodology used in the contested regulation creates total legal uncertainty for exporters.

In that regard the Council cannot rely in its defence on the argument that a degree of uncertainty is inherent in the anti-dumping legislation itself. The fact that a degree of uncertainty is inevitable does not authorize the Community institutions to make unrealistic calculations which cannot be verified and the use of which no exporter could have foreseen.

In its reply, Sharp develops certain arguments based on facts which, it claims, did not come to its knowledge until after it had instituted proceedings.

In the first place, Sharp points out that by attributing to it Canon's profit margin on the domestic market, the Commission used a figure which had been miscalculated, inasmuch as the very high advertising costs incurred by Canon in relation to its domestic sales of electronic typewriters were taken into account only to a very limited extent, corresponding to the average of the costs incurred by Canon in advertising all its products.

Lower profit margins should also have been fixed for the other producers selling sufficient quantities of electronic typewriters on the domestic market, namely Brother Industries, Silver Seiko and Tokyo Juki (to the latter of which the Commission, wrongly moreover, attributed a loss).

Finally, Sharp points out that the Commission applied a profit margin of 35.1% on the cost of production to a Japanese manufacturer of electronic typewriters such as Nakajima, whereas it applied to the applicant a profit margin of 47.91% on the costs of production and distribution incurred by its subsidiary, SBK. That shows that the margin is unreasonable even if the distribution costs were to be included in the normal value.

The Council, for its part, contends that the use of a particular profit margin does not imply that another exporter's costs are being attributed to the applicant, since any given level of profit may result from any one of many possible combinations of prices and costs. Moreover, it is unlikely that the costs of the producer whose profit margin was used were significantly lower than those of the applicant.

The methods suggested by the applicant for establishing the profit margin are either discriminatory, inasmuch as they would entail taking into consideration, in the case of the applicant alone, the profits made on the sale of products other than electronic typewriters, or in contradiction with the applicant's own suggestion that the profit margins earned by other exporters should not be applied to it.

The use of a lower margin for the applicant would, moreover, have discriminated against other exporters whose domestic sales are below the 5% threshold. It is not open to Sharp to complain that in view of the 32.39% margin on domestic sales, it would, in order to avoid dumping, have had to make a similar profit in the Community. The fact that a lower profit margin was calculated for the Community is favourable to the applicant, since a lower profit margin would result in a higher export price to be compared with the normal value. Moreover, there should be no cause for surprise if there are differences between the profit margins that can be realized in the Community and those that can be realized in an exporting country with a highly protected market.

With regard to the criticism to the effect that the method selected by the Commission contravenes the principle of legal certainty, the Council first of all emphasizes that both the General Agreement on Tariffs and Trade (GATT) and the Community legislation permit the use of values constructed on the basis of information not necessarily available to those concerned.

In addition, that legislation also makes provision for cases in which an undertaking cannot calculate the dumping margin beforehand. For instance, it would be almost impossible for an exporter in a

non-market-economy country to tell in advance which market-economy third country would be considered most similar and used as a basis for comparison.

Finally, Sharp goes too far in its argument, inasmuch as the three methods envisaged by Article 2 (3) of Regulation No 2176/84, namely the use of the domestic price, the third-country price or the constructed value, may yield somewhat different results. The use of each of those methods depends on the existence of circumstances which the undertaking concerned could not have foreseen, and it cannot be argued that the principle of legal certainty precludes the use of one or other of those methods if the relevant conditions are satisfied.

In response to the arguments put forward by Sharp in its reply, the Council points out that, for the purpose of calculating advertising costs, the Commission used the same figures as those which it had used for the purpose of determining the cost element of the constructed normal value and which were accepted by Canon during the investigation. Nor was any error detected with regard to the other exporters either. With regard to Nakajima, which was basically only a factory without any sales structure, the specific character of the undertaking precluded its profit margin from being applied to other exporters.

Finally, the Council observes that the number of electronic typewriters returned to Sharp by SBK was negligible, and that without evidence showing the reasons why specific typewriters were returned, it is impossible to draw any conclusion from that fact.

With regard to the alleged breach of the principle of legal certainty, the Council points out that the attribution of one company's profit margin to another is not contrary to that principle, as is evidenced by the fact that exporters from a non-market-economy country are always attributed the figures of an exporter from another country pursuant to Article 2 (5) of Regulation No 2176/84.

Furthermore, even if Sharp could not have known the profit margin made by Canon in Japan, it could have discovered what prices were charged by those of its competitors who did sell in Japan and taken those prices into account in determining its own export prices.

Cetma, intervening in support of the conclusions of the Council, maintains that for the assessment of a reasonable profit margin the Community institutions enjoy, in accordance with the case-law of the Court, a wide measure of discretion because the evaluation of that margin in Japan involves appraising a complex economic situation. The profit margin used, namely that of Canon, was only contested by Canon itself in very general terms.

The various options suggested by Sharp do not comply with Regulation No 2176/84, inasmuch as their effect is to establish a reasonable profit margin by reference to factors other than 'sales of products of the same general category on the domestic market of the country of origin'.

There is no general practice in the Community of fixing a profit margin somewhere between 5 and 10% on the cost of production. The Council should use a

profit margin which is normally realized on sales of products of the same general category in the country of origin, which in this case yielded the results contested by Sharp.

It is true that, in its complaint to the Commission, Cetma had assumed that the profit margin would be approximately 8%, but that assumption is not decisive since it is well known that profit margins on a protected and partly cartelized domestic market such as the Japanese market may be very high. Very high profits made on the domestic market may be part of a policy of dumping, inasmuch as they serve to finance, at least partly, a policy of undercutting prices aimed at penetrating foreign markets.

Second submission: unlawful inclusion of certain distribution costs and profits in the normal value

In constructing the normal value, the Community institutions sought to place Sharp, which does not sell its products on the domestic market, in the same position as undertakings which sell their products on that market through a distribution company.

In its second submission, Sharp maintains that the normal value of its products was incorrectly constructed, inasmuch as it was not calculated on the basis of the ex-factory price but was wrongly compared with the export price constructed on that basis. The method used for that purpose is incompatible with the provisions of Regulation No 2176/84 inasmuch as, although purporting to construct the normal value at the ex-factory level by reference to the applicant's costs plus a margin of profit, the Community institutions in fact included certain costs incurred in respect of the marketing, sale and distribution of the goods after they had left the factory.

That procedure is wrong for the following reasons. The Community institutions first established the selling prices and then netted them back, by deducting the profit margin and only part of the costs incurred in respect of the marketing, distribution and sale of the goods, to what they considered to be the normal value. However, if the normal value is constructed at the ex-factory level, there is absolutely no need to establish a selling price first and then to consider what deductions are necessary in order to net that price back to the ex-factory level. Secondly, even if domestic prices are used as a basis for establishing the normal value, overheads and general expenses may not be disregarded. Article 2 (10) (c) of Regulation No 2176/84 may preclude allowance being made for overheads and general expenses in the comparison of the home and export trades when making adjustments to put the export price and the normal value on to a comparable basis, but it does not require overheads or general expenses to be disregarded in order to establish the normal value. If there were a requirement to that effect, a comparison between export prices and normal value would not be at the same level and would therefore inevitably be unfair. Finally, the Commission wrongly included as overheads or general expenses, fuel costs, costs of communications and the cost of point-of-sale materials, which are directly connected with the sale of the products concerned. Further, the profit

margin was applied not only to the costs actually incurred up to the ex-factory level but to all the costs referred to above.

In response to the reason relied on by the Community institutions to justify the aforesaid procedure, namely that 'the composition of the categories of customers is similar for both domestic and export sales' and 'therefore no adjustments can be granted', it is sufficient to state that since SBK's sales on the domestic market were negligible, there were no similar categories of customers for domestic sales.

The failure to deduct the Japanese distributor's profit margin whilst the Community distributor's margin is deducted in full 'creates' dumping. Moreover, it leads to discrimination in favour of manufacturers with no affiliated distributors whose normal value is necessarily much lower. The decision concerning Nakajima provides striking evidence of such discrimination.

In its reply, Sharp challenges specifically the views of the Council and the Commission. Some of Sharp's own arguments are set out in the joint observations which are summarized elsewhere. In the individual part of its reply, Sharp considers a number of further points in detail.

Sharp considers that the Council's argument to the effect that no allowance may be made for general expenses, even if they are clearly identifiable with domestic sales, cannot be justified since it is flatly contrary to the principle of a fair comparison. The Commission itself acknowledges that such costs should be deducted if they can be established on the basis of clear and objective criteria and provided they are substantial. The Community institutions were therefore wrong: (a) to state that only costs that were directly related to sales could be deducted; (b) to refuse to treat costs as directly related to sales unless they were connected with a particular sale; and (c) to refuse to deduct costs incurred exclusively by the distributor on the domestic market.

In regard to the latter costs, Sharp points out that it objects not to the inclusion in the normal value of its own general and administrative expenses, which were not concerned exclusively with marketing and distribution on the domestic market, but to the failure to deduct expenses incurred by sales subsidiaries which were not directly related to a particular sale. The general expenses incurred by an organization responsible exclusively for the domestic market are connected with domestic sales even if that organization is not legally separate from the manufacturer.

With regard to the Commission's observations, Sharp challenges the notion that the normal value should also include general expenses and a profit margin which are clearly attributable to sales on the domestic market. The Commission accepts that even if, in principle, only expenses directly related to a particular sale may be deducted, a deduction may be made if: (a) the general expenses attributable exclusively to domestic sales can be established on the basis of clear and objective criteria; (b) they are substantial. With regard to (a), what more has to be established beyond the fact that certain expenses are exclusively attributable to domestic sales? With regard to (b), the impact of even a small difference of say 1% on the dumping margin and the definitive anti-dumping duty will, over the period in

which that duty is normally levied, give rise to a very considerable sum (1% of ECU 10 million will amount to ECU 500 000 over that period).

The Council specifies in the first place the 'rules' which the Community institutions apply for the purpose of determining the normal value. In general, no deduction should be made for selling, general and administrative expenses (Rule 1). The expenses of a sales subsidiary on the domestic market should be treated in the same way as the corresponding expenses of a sales department of the manufacturing company (Rule 2). The constructed normal value should be calculated on a basis as close as possible to a normal value based on the domestic price (Rule 3).

The Council next considers Sharp's arguments. It acknowledges that the constructed value of a manufacturer includes both the profit of the seller and the latter's selling, administrative and general expenses not directly related to the sales under consideration, which is wholly in conformity with the relevant Community legislation.

The Council goes on to state that, contrary to Sharp's contention, there should be a parallelism between the construction of the normal value and the calculation of that value on the basis of domestic prices. If it were otherwise, the two calculations would necessarily produce different results, which could not be correct. Moreover, the constructed price is clearly a subsidiary solution to the use of domestic prices. Further, Article 2 (3) (b) (ii) provides that the constructed normal value must include a reasonable amount for selling expenses, which must by definition be incurred after the goods leave the factory.

The Council contends that the applicant's argument is unclear. If Sharp is to be understood as saying that the two methods of calculation may very well lead to different results, it should be pointed out that such a solution would enable exporters to argue that the constructed price should always be applied, whilst the relevant provisions clearly indicate the legislature's preference for using the domestic price.

It is untrue that administrative and general expenses, which are included in the normal value based on domestic prices, are not included in the constructed normal value. In fact, some general expenses must always be included in a normal value based on the constructed price.

The meaning of the term 'differences' in Article 2 (10) (c) is that, even if the general expenses of a producer which are related to exports are not equal to the expenses related to domestic sales, no allowance needs to be made, either way, for whatever differences might be said to exist. However, that term could also mean that, even if the major part of the general expenses of a producer were concerned with exports, the difference could not be deducted from the selling price in the Community in order to arrive at the export price. In other words, the Community institutions do not need to inquire into questions concerning the allocation of general expenses, which are inherently extremely difficult, controversial and subjective.

Article 2 (3) (b) (ii) ensures, however, by taking a proportion of the general expenses into account, that the same principles are applied both to the normal value based on

domestic sales and to the constructed normal value.

The Council goes on to consider Sharp's argument to the effect that since the overheads and general expenses of its subsidiary in Japan were not deducted in order to calculate normal value, whereas those expenses of its subsidiary in the Community were deducted to calculate the export price, the comparison is unfair and not at the same level of trade. The Council rejects that argument and emphasizes that that difference in treatment stems from Regulation No 2176/84 and from the need to treat distribution establishments in the same manner irrespective of their formal legal status.

The Council further points out that, according to Article 2 (10), allowances for expenses directly related to sales are normally made after both the normal value and the export price have been calculated. Sharp cannot therefore argue that the profit margin referred to in Article 2 (3) (b) (ii) should not be applied to the whole 'cost of production' as defined in that provision.

In its rejoinder, the Council points out that, even if it could be shown unequivocally that a sales organization is 'factually' separate from a manufacturing company, which the applicant claims is the case with regard to its own sales organization, it would be extremely difficult to separate the overheads relating to the activities of that organization from those of its head office.

There might be circumstances in which the activities of an organization of that kind are quite clearly separate, but in that case such an organization has functions other than, or additional to, those of a traditional sales department. However, that is not so in the case of the applicant.

Cetma fully shares the opinion expressed by the Council and the Commission that the calculation of the normal value and the calculation of the export price are two separate exercises governed by different legal provisions which are based on different methodologies. That is not, contrary to the applicant's view, a new development in the Community's anti-dumping legislation, but a rule which has been in force for a very long time and which has been applied for more than 10 years without ever being challenged before the Court.

According to Cetma, the determination of the normal value, including the assessment of the relationship between manufacturing companies and sales companies in Japan, involves the evaluation of a complex economic situation, which made it necessary to confer on the Community institutions a broad margin of discretion. The applicant has failed to demonstrate that the Community institutions committed a manifest error, were guilty of an abuse of power or clearly exceeded the bounds of their discretion.

Manufacturing companies and their sales departments in Japan are treated in principle as a single economic entity in order to ensure effective protection against dumping. If it were otherwise, anti-dumping rules could be circumvented by means of a skilful manipulation of the corporate structure of the company.

In Cetma's experience, dumping has historically been practised by various groups

of Japanese companies guided by their trade associations and by the Ministry of International Trade and Industry (MITI). It is precisely in order to minimize accusations of dumping that electronic typewriter producers set up supposedly independent distribution companies on their domestic market. They expect the prices they charge on the domestic market to be accepted as a reflection of the normal value or, where the normal value is constructed, they expect all selling, administrative and general expenses incurred by the distribution companies to be excluded from the determination of the normal value of the manufacturing company.

There is a further point to which Cetma attaches a great deal of importance. In order to ensure that the application of the anti-dumping rules is practicable and in order to prevent the determination of dumping margins from being circumvented as a result of the corporate structure of Japanese companies, Cetma considers that two principles must be complied with:

(i) selling, general and administrative expenses incurred by sales companies should always be included in the normal value;

(ii) the prices charged by a parent company to a dependent company should not be assimilated to prices charged in the normal course of trade.

Those principles also apply where the product concerned is not sold by the sales company on the domestic market. That is clearly laid down in Article 2 (3) (b) (ii) of Regulation No 2176/84. If such a provision did not exist, Japanese manufacturers which do not sell on the domestic market a product which is dumped on foreign markets would receive preferential treatment with regard to the construction of the normal value.

Third submission: deduction from the export price of the value of credit granted on sales by the applicant's Community subsidiary

In its third submission, Sharp contends that the calculation of the export price is distorted by the fact that the Commission deducted from the price charged to customers by Sharp Electronics (Europe) GmbH (hereinafter referred to as 'SEEG'), the applicant's German subsidiary, not the cost to SEEG of giving credit to customers residing in other Member States on prices payable in German marks but the cost to those customers of borrowing in their own currency. The rates of interest taken into consideration at the time by the Commission were much higher in the other Member States than in Germany.

The method used by the Commission is incorrect, first of all because, in accordance with Article 2 (8) (b) of Regulation No 2176/84, it should have constructed the export price on the basis of the costs incurred by SEEG, that is to say by taking into account the cost to SEEG of borrowing in German marks.

Secondly, even if the Commission had been entitled to act as it did and had taken as a

basis the value to the customer of that credit, the value of credit in German marks can be no greater than what it would have cost the customer to borrow a sum in that currency.

Sharp considers that the cost of borrowing in German marks and the value of credit in that currency are the same, whatever the country in which the borrower or the person to whom the credit is given is located. According to the documents in the file, at the time of the administrative procedure the cost of borrowing German marks was effectively the same for a Dutch or Italian borrower.

The Council points out, in its defence, that credit to customers constitutes both a reduction in the effective price to the buyer and an expense to the seller. The cost of that reduction and the amount of that expense depends on the rate of interest, which may vary, and on the length of the period for repayment which represents a saving for the buyer for which the seller pays.

In its rejoinder, the Council points out that the crucial question is in reality the value of the credit to the buyer, because, according to Article 2 (8) (b), the price paid by the first independent buyer must be taken as a basis for constructing the export price. That price should, in the case of credit to customers, be calculated by reference to the interest which the buyer would have had to pay had he been obliged to obtain the same sum from other sources. Normally, the other sources of credit for a buyer are in the buyer's own country. Moreover, exchange control regulations may prohibit borrowing in one currency with a view to making a payment in that currency later. In the absence of any evidence that Sharp's customers did not follow the normal practice, it was appropriate to take account of the interest rates prevailing in the Member States in which those customers were established.

Fourth submission: discrimination against the applicant by comparison with Nakajima All Co. Ltd

In its fourth submission, Sharp contends that the imposition of a definitive anti-dumping duty is void on grounds of discrimination.

The applicant states that, in the proceeding which led to the imposition of provisional anti-dumping duties, the Commission had provisionally established for exporters whose normal value had been constructed and which included Nakajima, a profit margin of 10% on cost. On the basis of that figure, the Commission established that Nakajima's dumping margin was minimal and did not justify the adoption of anti-dumping measures. However, not long thereafter, the Commission revised its calculation of the constructed value and attributed to exporters a profit margin of 47.91% on costs. Admittedly, the Commission reopened the proceeding in respect of Nakajima and imposed on the latter a provisional anti-dumping duty of 28% which, however, did not have retroactive effect.

Sharp considers that the Community authorities acted in a discriminatory manner by deciding to impose definitive anti-dumping duties on the applicant and other exporters without at the same time imposing on

Nakajima — as they would have been entitled to by reopening the proceeding against the latter at the same time as the Commission altered its method of calculating the profit margin — at least a provisional duty based on the same new method of calculating the profit margin as was used to calculate the definitive anti-dumping duty imposed on the applicant.

The discrimination complained of by Sharp was seriously aggravated by the Commission's decision of 12 February 1986 terminating the anti-dumping proceeding against Nakajima. The dumping margin of 1.48% established in respect of Nakajima by that decision stems quite simply from the fact that a different profit margin was used and that the reference period taken into consideration is not the same as that which had been used for the purpose of imposing a definitive anti-dumping duty on the applicant and a provisional anti-dumping duty on Nakajima. The application of different criteria to different exporters is manifestly discriminatory. Moreover, the reference period chosen for Nakajima postdated the announcement of the initiation of the anti-dumping proceeding, and does not correspond to the Community institutions' practice which is intended to prevent exporters from manipulating prices after the initiation of the proceeding.

The Council emphasizes that the Community institutions were under no obligation to hold up the imposition of duties on the applicant until the proceeding reopened against Nakajima had been completed. Otherwise anti-dumping measures could be delayed indefinitely whenever a proceeding against one exporter revealed evidence of dumping by another. Next, the Council points out that the 28.8% dumping margin attributed to Nakajima by Commission Regulation No 2812/85 of 7 October 1985 (Official Journal 1985, L 266, p. 5) had been applied to that company provisionally, and before the special circumstances of Nakajima's operations had been taken into account. In view of those circumstances, moreover, the need to use the same reference period as that used for the other undertakings was very much less than it would otherwise have been. Furthermore, the use of a different reference period was dictated by the fact that any findings based on a reference period ending nearly two years before the decision was adopted would have been unsatisfactory. In any continuing long-term investigation, the need to have a reasonably recent reference period is of paramount importance. In any event, even if the reference period taken into consideration for the other exporters had been used, the application of the principles used for the definitive calculation would have resulted, in the case of Nakajima, in a minimal dumping margin.

Cetma, which endorses the arguments put forward by the Council, wishes to make two points. In the first place, Cetma stresses that it is incorrect to state that the Community industry derived advantages from the fact that no duties were imposed on Nakajima. Only Olympia purchased electronic typewriters from Nakajima, and contractual relations between those two undertakings were discontinued after the imposition of the anti-dumping duty. Moreover, Cetma's complaint was also directed against Nakajima. Secondly, Cetma emphasizes that the most important objective of an anti-dumping regulation is not to re-establish fair competition amongst exporters but to remove the injury occasioned by dumping.

In those circumstances, even on the assumption that discrimination in favour of Nakajima could be established, that could never lead to the annulment of the anti-dumping duty imposed on Sharp's exports.

The Council does not deny the existence of the error in question, but emphasizes that since the definitive findings relating to dumping justified the imposition on the applicant of a duty higher than the provisional duty, the Community authorities would not have been justified in collecting less than the provisional duty which was itself found to be too low.

Fifth submission: collection of the provisional anti-dumping duty of 21.1%

In its fifth submission, Sharp contends that Article 2 of Regulation No 1698/85 wrongly provides for the collection of a provisional anti-dumping duty of 21.1%, although the Commission itself acknowledged that that figure was calculated by reference to a provisional dumping margin based on an arithmetical error; after correction of that error the provisional dumping margin attributed to the applicant would have been reduced to 16.08%. As the Commission had acknowledged its error and undertaken to correct it, there was nothing in Community law which required the Council to collect the full amount of the duties imposed at the provisional stage, even if the error had not been corrected subsequently. The fact that the definitive anti-dumping duties were higher than the provisional duties does not justify the Council in disregarding an arithmetical error made in the calculation of provisional duty.

In actual fact, the Commission had informed the applicant that it did not intend to modify the provisional duty since the error in question was offset by other calculation discrepancies which came to light subsequently and which were disadvantageous to Sharp. The Commission's undertaking that the error would be taken into consideration at the definitive stage was honoured, and the fact that the error was corrected did not preclude a finding from being made in the final determination that the dumping margin was far higher than that established beforehand. Moreover, there is nothing to prevent an exporter from challenging the definitive collection of a provisional duty without first having to bring proceedings against the regulation imposing the provisional duty.

According to Sharp, it cannot be argued that, even though the Commission had given an undertaking to correct the error at the definitive stage, the applicant should none the less have brought proceedings in order to challenge that error. Such a solution does not accord with the principles of good administration. Moreover, the Commission's undertaking aroused a legitimate expectation which the Council ignored.

According to Cetma, the provisions of Regulation No 2176/84 show that the Council is always entitled to collect the provisional anti-dumping duty, at least up to the amount of the definitive anti-dumping duty finally established, where the latter amount is the same as or more than the amount of the provisional duty. That conclusion is also dictated by the need to prevent further injury as far as possible and thereby to protect the European industry in question.

B — *Arguments put forward in the observations common to the applicants in Case 250/85, Joined Cases 260/85 and 106/86, Joined Cases 273/85 and 107/86, Joined Cases 277 and 300/85, and Case 301/85, and in response to those observations*

1. *Observations common to the applicants*

The applicants in the aforesaid cases, including Sharp, have advanced in their replies a number of arguments common to all of them which highlight what they consider to be one of the most fundamental defects in the findings of the existence of dumping made by the Commission in this case, namely the fact that the export price and the normal value were not put on a comparable basis. According to the applicants, the high dumping margins attributed to them by the Community institutions are to a large extent the result of the unfair comparison between the export price and the normal value made by the Commission and are inconsistent with both Regulation No 2176/84 and the GATT Anti-Dumping Code on which that regulation is based.

The joint observations are divided into two parts; the first part describes the procedure followed by the Commission, and merely taken over by the Council, to calculate the dumping margin, whilst the second part seeks to show that the comparison made by the Commission is inconsistent with Regulation No 2176/84 and the GATT Anti-Dumping Code.

In their general description of the manner in which a finding of the existence of dumping is made, the applicants emphasize, in particular, the difference between the approach taken by the Community institutions, according to which the calculation of the normal value and of the export price are two separate exercises to which different methodologies should apply, and their own point of view, namely that the purpose of those two calculations is to arrive at two figures comparison of which must be fair according to Regulation No 2176/84.

Next, the applicants observe that the Commission followed a radically different approach according to whether it was calculating the export price or the normal value. In the first case, it took care to ensure that the export price did not include any expenses incurred in the Community and, in the case of imports made through related sales companies, it deducted all the costs incurred by those companies plus a profit margin. In the latter case, a substantial part of the expenses and an element for the profit related to distribution in Japan were included in the normal value.

In other words, the Commission did not exclude from the normal value any such distribution costs incurred in Japan which were of a kind corresponding to distribution costs incurred in Europe that were not included in the export price with which the normal value was generally compared.

That methodology necessarily yields a high apparent dumping margin even though the exporter sells his products, at the same level of trade, at a higher price in the Community than in Japan and makes the same profit on his export sales as on his domestic sales.

The applicants submit that in adopting that methodology the Community institutions infringed the fundamental requirement that the export price and normal value should be put on a comparable basis, contrary to the provisions of Article 2 of Regulation No 2176/84, which are based on those of Article VI of GATT and of the GATT 1979 Anti-Dumping Code to which the second recital in the preamble to that regulation expressly refers. That requirement is fundamental because it is obvious that a finding that the export price is less than the normal value is justified only if it is based on a fair comparison between the two.

Contrary to what is contended by the Community institutions, the unfair comparison between export prices and domestic market prices made in this case is neither required nor permitted by Article 2 (10) of Regulation No 2176/84.

That provision lays down that 'due allowance shall be made in each case, on its merits, for differences affecting price comparability' and indicates the 'guidelines' which are to be applied for the purpose of determining the necessary allowances.

It would appear from the wording of the provisions of Regulation No 2176/84, of GATT and of the GATT 1979 Anti-Dumping Code that the aforesaid provision is intended to ensure a fair comparison between the export price and the normal value.

To begin with, the Community institutions misinterpreted the expression 'conditions and terms of sale' in Article 2 (10) (c). The reference in that provision to 'commissions or salaries paid to salesmen' shows that the expression 'conditions and terms of sale' cannot be as limited in scope as the Council maintains and cannot refer only to the obligations which may be laid down in the contract of sale or in the general conditions of sale but must also cover the factual conditions of, and surrounding, the sale in question.

Hence the restrictions contained in the aforesaid provision were, according to the applicants, misinterpreted by the Community institutions.

The limitation of allowances to differences which bear a direct relationship to the sales under consideration and the exclusion of any allowances for differences in overheads and general expenses are designed to relieve the Commission, in general terms, of the burden of allocating between domestic trade and exports the general costs of a single organization that is concerned with both domestic and export trade. However, neither of those restrictions applies to a case such as this, where the dispute centres on the failure to allocate to domestic trade the 'indirect costs' of organizations, specifically the Japanese sales companies, that were concerned exclusively with domestic trade.

With regard to differences which bear a direct relationship to the sales under consideration, it should be emphasized that selling the products in Japan entails certain costs that are specifically attributable to the distribution of those products in that country.

Similar considerations apply in the case of overheads and general expenses. A differential allocation of common overheads is irrelevant in the present case.

Further, the expression 'differences in the level of trade' in Article 2 (10) (c) of Regulation No 2176/84 has been misinterpreted, inasmuch as all local marketing and distribution costs were excluded from the export price, whilst significant costs of that kind were included in the normal value. Accordingly, the export price and the normal value were not compared at the same level of trade.

The 'guidelines' should not be applied where their application would lead to an unfair comparison and the list set out therein is illustrative, not exhaustive. It is clear that the first two sentences of Article 2 (10), which require due allowance to be made in each case, on its merits, for differences affecting price comparability, are of a general nature, whereas the guidelines referred to in the third sentence can in no way be regarded as exhaustive. Admittedly, those guidelines apply prima facie, but if their application, on the facts of a particular case, would conflict with the basic principle of fair comparison, there is no doubt that it would be impossible to reject a claim solely on the ground that the case does not fall within one of those guidelines.

The Commission was also wrong in including in the constructed normal value an amount for selling expenses in connection with distribution by related sales companies in Japan.

If the Community institutions had not included in the cost of production the expenses incurred by the exporters' Japanese sales companies, the normal value and the export price would have been on a comparable basis and no question of allowances would have arisen.

The applicants' analysis has the advantage that the likelihood of an exporter being found guilty of dumping will not vary according to whether (i) the normal value is based on actual domestic prices or is constructed, or (ii) export prices are based on actual export prices or are constructed. The principle is always the same: so far as practicable, material elements that are not included or reflected in the export price should not be included or reflected in the normal value.

Moreover, the Community institutions erroneously inflated the constructed value with abnormally high profit margins. The profit margins which the Commission established for certain producers, and the loss established in respect of Tokyo Juki, are simply the result of the Commission's failure properly to allocate costs incurred in connection with the distribution of electronic typewriters.

In determining the profit margin for undertakings selling their products on the domestic market, the Commission took no account of the fact that the advertising costs incurred by those undertakings in connection with their sales of electronic typewriters in Japan were much higher than the advertising costs incurred in relation to their overall turnover.

The loss established for Tokyo Juki stems from the fact that the Commission has disregarded verified accounting data for

that company, which showed that Tokyo Juki's domestic sales were profitable. However, the Commission allocated to sales of electronic typewriters an unreasonable amount of Tokyo Juki's distribution expenses for unrelated products or product lines.

The profits used for the determination of the constructed value are thus based on gross errors in the allocation of the relevant costs.

In conclusion, the high dumping margins that have been established are to a large extent the result of an unfair and legally improper comparison rather than any objectively unfair trade practice which exporters may have engaged in.

2. *The Council's response*

Before replying to the joint observations of the applicants, the Council considers it appropriate to make two preliminary points.

In the first place the Council recalls that for each of the three main elements used for determining whether dumping is being practised (normal value, export price and a comparison between the two), there are precise, distinct and separate rules. It challenges the applicants' assertion that the GATT Anti-Dumping Code requires allowances to be made for *all* differences affecting price comparability. Apart from the fact that the code does not use the word 'all' as the applicants allege and that the provisions of GATT have never been regarded as directly applicable, as the Court has confirmed in its case-law, it is clear from the text of the code itself that the code represents a compromise, the result of which is a text which is deliberately imprecise and which leaves a considerable margin of discretion to the legislature of each contracting party to decide exactly what allowances should be made.

The second preliminary point concerns the hypothetical example given by the applicants to show that the methodology adopted by the Commission necessarily leads to the establishment of a dumping margin. According to the Council, that example has certain fundamental flaws which render it unusable. It is based on the internal transfer prices between the manufacturing company and its subsidiaries in Japan or the Community, which are inherently unreliable and always subject to manipulation. It omits completely both the expenses and profits of the corporate headquarters company. It considers the domestic sales company as a separate entity, whereas it was found to be an integral part of the corporate structure. It fails to deduct Common Customs Tariff duties. It is incorrectly based on the assumption that the sales price to independent purchasers in Japan is always below the price in the Community. Finally, it does not refer to the constructed normal value.

Next, the Council observes that the applicants' first argument seeks to show that the requirement of a comparable price or of

a fair comparison between the normal value and the export price is fundamental, and that the words in Article 2 (10) concerning a fair comparison should override the other conflicting words in that provision. That is contrary to two basic principles of interpretation, namely:

(i) two provisions in the same legislation should normally be reconciled if possible;

(ii) in the event of a conflict, *lex specialis* prevails unless the two conflicting provisions can be reconciled in some other way.

The Council observes that the phrase 'conditions and terms of sale' should be interpreted in the light of the rest of Article 2 (10) (c), which shows that that phrase applies only to differences in terms and conditions which are capable of bearing a direct relationship to specific sales. The only costs which may bear a direct relationship to a sale are those which may be mentioned specifically in a contract of sale and which are likely to influence the mind of the buyer. In a normal contract of sale, it would be unusual to find any clause concerning 'overheads and general expenses', but not for there to be a clause concerning, for instance, credit and delivery terms.

The price charged in the exporting country and the export price may have different payment, credit, delivery and guarantee terms attached to them. Those prices should be brought on to a comparable footing by means of the operation described in Article 2 (10). That operation is designed not to compare costs, but to compare prices, and the cost element is used only when it is necessary to iron out different conditions attached to prevailing prices. However, even if there were no specific reference to overheads and general expenses, it is clear that such expenses would not 'bear a direct relationship' to specific sales. That interpretation is confirmed by the last clause in Article 2 (10) (c) which is worded as follows: 'the amount of these allowances shall normally be determined by the cost of such differences to the seller, though consideration may also be given to their effect on the value of the product'; that shows that Article 2 (10) (c) is concerned only with costs to the seller which are likely to affect the price of the product on the open market, or with advantages to the buyer which may vary for different purchases of the same type of goods.

The applicants rely more specifically on the expression 'commissions or salaries paid to salesmen'. According to the Council, commissions are clearly expenses directly related to sales. The legislature has added salaries paid to salesmen simply in order to avoid different treatment depending solely on the legal form of the relationship between the manufacturer and the sales staff. Therefore that derogation, made for a very specific and legitimate reason, does not justify the general conclusions which the applicants seek to derive from it.

According to the Council, the applicants' second argument is based on two clauses in Article 2 (10) (c) which they do not contest but which, in their view, are intended only to make it unnecessary to allocate, as between domestic trade and exports, overheads and general expenses of a company's headquarters. The clauses in question read as follows:

'Allowances shall be limited to those differences which bear a direct relationship to the sales under consideration and include, for example, differences in credit terms, guarantees, warranties, technical assistance, servicing, commissions or salaries paid to salesmen, packing, transport, insurance, handling, loading and ancillary costs and, in so far as no account has been taken of them otherwise, differences in the level of trade;

allowances generally will not be made for differences in overheads and general expenses, including research and development or advertising costs.'

According to the Council, those clauses do not have the meaning attributed to them by the applicants. The Commission has already explained in its intervention the reasons why it is often inappropriate or impossible to attempt to allocate overheads as between domestic sales and export sales.

With regard to the statement that the general expenses of a domestic sales company can never be included, even partly, in the general expenses allowed for in the normal value, the Council makes the following comments on the points raised by the applicants in their joint observations:

(i) there is nothing in the two clauses in question to suggest that the overheads and general expenses of a domestic sales company should be treated differently from those of a domestic sales department of a company which also has an export department;

(ii) the purely formal legal distinctions between parent company and subsidiaries, on which the applicants rely, are inappropriate in anti-dumping law, which should take account of the economic reality and not the legal form;

(iii) the wording of the two clauses quoted by the applicants militates against their arguments. The applicants' opinion that general expenses should always be the subject of an allowance is directly contrary to the phrase stating that allowances generally will not be made for general expenses;

(iv) if the applicants' theory were correct, sales companies could be set up for the purpose of enabling exporters to claim that all or most of the overheads and general expenses incurred on their domestic markets should be deducted from domestic sales prices, which would be contrary to Article 2 (10) (c), Article 2 (3) (a) and Article 2 (3) (b) (ii).

On the question of the level of trade, the applicants have contended that 'significant local marketing and distribution costs' were included in the normal value and that 'the resulting level of trade was therefore not before any local marketing and distribution' as it was in the case of the export price. The Council observes that the applicants give no reason for the suggestion that the phrase in

Article 2 (9) which lays down the principle of comparison at the same level of trade should override Article 2 (10), which provides that no allowances are normally made for overheads and general expenses. Moreover, the applicants' argument rests on a misunderstanding of the expression 'level of trade'. Where two companies sell to both wholesalers and end-users, they should be regarded, unless each category represents very different proportions of the total sales of the two companies, as selling at the same level of trade.

The Council observes that the general principle of a fair comparison may not be relied upon in order to override the specific terms of Article 2 (10) (c), especially because those terms are the result not of imprecise drafting but of a carefully considered policy for dealing with an inherently difficult problem. Moreover, the applicants do not suggest that these cases are in any way special or unusual. They take the view that their arguments should apply in every case in which the domestic sales were made by a separate company.

The applicants' argument that the Community institutions should have taken into consideration overheads and general expenses not directly related to sales solely on the ground that the Japanese sales were made by separate sales companies cannot be accepted. It is quite clear that, if the same sales had been made by sales departments, the applicants' argument would be contrary to Article 2 (10) (c) and the important findings that the sales companies formed integral parts of the same economic units or enterprises as their parent companies, and that their functions were similar to those of sales departments, have not been challenged by the applicants.

Contrary to the applicants' contention, the difference between the ways in which the export price and the normal value are calculated is the natural and intended result of the express wording of Regulation No 2176/84 and does not inherently have any necessarily protectionist effect.

Next, the Council challenges the applicants' contention that 'in order to reject a claim, either the institutions must be satisfied that allowance of the claim is not necessary to enable a fair comparison to be made or they must point to something in the regulation which specifically permits them to reject the claim even though it is or may be so necessary'.

The applicants' argument to the effect that Article 2 (10) (c) is not applicable to a constructed normal value is incorrect for several reasons. In the first place, a comparison always has to be made in any anti-dumping case between normal value, however arrived at, and export price and in making such a comparison it is always necessary to decide whether allowances need to be made. The applicants' argument is wrong also because it may be necessary to calculate the reasonable amount for selling, administrative and other general expenses on the basis of the real costs of a sales department or sales company selling the

same or a similar product in the exporting country at a price containing allowable and non-allowable cost elements. If Article 2 (10) were not applicable, no allowances at all would be possible, and that clearly runs counter to the applicants' argument.

Finally, the constructed normal value would be unaffected by any change in the relative proportions of costs and profit in Japan since the total of the two elements is included in the constructed normal value. The applicants complain about the use of the lower figure for costs only in the calculation of the profit to be used in constructing the normal value. Even if they were right, their argument would lead to an increase in the costs which would be precisely equivalent to the reduction in the profit based on those costs.

3. *The Commission's observations*[2]

The Commission observes that, under the rules in force, the normal value includes selling expenses in addition to an element for general expenses, that is to say, expenses which do not bear a direct relationship to sales of the product in question. That rule can be justified by arguments of a general nature, including the fact that any effort to relate general expenses to particular sales is likely to be arbitrary.

In the special context of dumping investigations, a further point to be made is that all enquiries by the Commission outside the Community depend on the voluntary cooperation of the companies concerned and that if it were necessary to allocate overheads and general expenses within the headquarters of an exporting company in a non-member country that would probably raise great difficulties even if adequate information were made available by the exporter to the anti-dumping authority.

An allocation of overheads in proportion to current sales would require the manufacturer's cooperation and might, moreover, be inappropriate as there is not necessarily a relationship between the proportion of research and development spending or advertising costs and current sales on different markets. No solution has been found so far in the discussions which took place within GATT, both because it was impossible to reach agreement on certain principles and because any rule must, in many situations, inevitably rest on subjective considerations.

Following those preliminary considerations, the Commission considers the treatment of the general expenses of a manufacturing company when the normal value is based on the domestic price. It points out in the first place that, in the case of a manufacturing company which sells on its domestic market only to independent buyers, the normal value is based on the domestic price, with the result that the normal value generally includes overheads and general expenses since Article 2 (10) (c) provides that no allowance will be made for overheads,

2 — The Commission's observations are summarized here in so far as they refer to the submissions and arguments set out in the observations common to the applicants. The section concerning the determination of the injury has been omitted since none of the submissions put forward by Sharp relates to that point.

research and development costs or advertising costs attributable to domestic sales even if they are higher than those attributable to export sales to the Community. The principle that general expenses are not allocated was adopted on practical grounds in view of the huge difficulties involved in allocating overheads satisfactorily.

The problem which arises in this case is how to deal with the companies which sell on their domestic market only through a related sales company (not necessarily a wholly owned subsidiary), in view of the fact that, in the Commission's view, transfer prices between a company and its subsidiary cannot be regarded as being 'in the ordinary course of trade'.

There is nothing in Regulation No 2176/84 which suggests that the prices charged by a sales company cannot be used at all as a basis for determining the normal value. If it is decided that a proper comparison is possible, the domestic price in the exporting country should be used in preference to either of the alternatives provided for in Article 2 (3) (b). Regulation No 2176/84 gives priority to that criterion, provided that it permits a proper comparison to be made, regardless of whether that comparison is perfect or easier to make than a comparison based on other criteria.

Once it has been established that domestic prices may be used as a basis for calculating the normal value, the question arises of what deductions should be made from the prices charged by the Japanese sales companies.

According to the Commission, the general expenses of a sales company in the exporting country should be treated as far as possible in the same way as the general expenses of a manufacturing company which has a sales department. The formal difference in the corporate structure should not affect the result, if the sales company is effectively controlled by the manufacturing company and if it is fulfilling essentially the same function as a sales department. The Commission established that the Japanese sales companies formed integral parts of the same economic units as the manufacturing companies and that their functions were similar to those of sales departments. On the basis of those findings the Commission concluded that the general expenses of such companies should also be treated in the same manner as those of a sales department. That does not rule out the possibility that in certain cases a sales company might have functions different from those of a sales department. In those circumstances, for instance, many of the expenses would probably be directly related to sales and consequently they would be allowable. In any event, every situation should be dealt with on its own facts.

The Commission considers that similar considerations apply with regard to the profits of sales companies. It would be intolerable if a manufacturing company which exports its products could effectively reduce the 'normal value' which the Community institutions could arrive at under Regulation No 2176/84 merely by having its sales to independent buyers handled by a sales company rather than a sales department.

Admittedly, if a sales company also sold goods produced by other manufacturing companies or if it handled distribution down to and including the operation of retail outlets, it would be necessary to apportion its profits. In order to do so, however, reliable information would have to be made available by other companies in the same industry showing the profit margins made by distributors from sales to independent buyers on the domestic market.

In conclusion, the Commission considers that when the normal value is based on the prices of domestic sales companies, it must include both an element of general expenses and an element of profit, just as it would where it is based on the domestic prices of a manufacturing company's sales department. There is nothing in that approach which necessarily leads to a normal value which is higher for producers distributing their products through related companies than it is for those marketing their products through a sales department.

The Commission then deals with the problem of ascertaining what profit margin is 'reasonable' when the normal value is constructed in accordance with Article 2 (3) (b) (ii).

The Commission considers that when interpreting and applying that provision no rule should be adopted which would be likely to lead to the calculation of normal values different from those which would be arrived at by using domestic prices. The word 'reasonable' does not have a fixed meaning, nor does it refer to a percentage which should always be the same; instead, it is necessary to consider the circumstances of the market. More particularly, it is necessary to take into account any findings which the Community institutions have made in connection with domestic prices.

The desirability of ensuring that the two methods of calculating the normal value lead to parallel results makes it permissible, and even necessary, to use any findings concerning general expenses and profit on the domestic market for the purpose of interpreting and applying the term 'reasonable' when constructing the normal value. It would be not only undesirable but also wrong in principle if the establishment of a dumping margin were to depend on which method of calculating the normal value was chosen.

The Commission goes on to consider the applicants' argument to the effect that the Community institutions have contravened the principle of legal certainty by applying Regulation No 2176/84 in a manner which is unforeseeable and which prevents the undertakings concerned from ascertaining what export price needs to be fixed in order to avoid dumping.

The Commission points out, in the first place, that an exporter cannot in any case expect to know 'with confidence' whether dumping will cause injury to Community industry or whether the Community institutions will conclude that it is in the interest of the Community to impose an anti-dumping duty; no objection can be made on grounds of legal certainty. Nor can the exporter rely on that principle with

regard to the methods of calculating the normal value or the export price. The basic anti-dumping regulation confers on the Community institutions a considerable discretion with regard to the application of the rules which it lays down in particular situations which, as is the nature of things, cannot all be foreseen precisely.

Next, the Commission considers the argument that it is contrary to the principle of legal certainty for the constructed normal value to include an element of profit or of the general expenses which is not based on the individual exporter's own activities because that element cannot be predicted or anticipated by the exporter. According to the Commission, that argument amounts to a denial of the right of the Community institutions to use accurate confidential information available to them and, in practice, a denial of their power to determine what is reasonable in the light of the circumstances of the industry concerned and to use anything other than a standard low rate of profit unless, by coincidence, suitable information is published.

The Commission goes on to consider the problem of the reasonable profit margin to be attributed to a related sales company in the Community under Article 2 (8) (b) of Regulation No 2176/84.

The first question which arises is whether any profit margin should be attributed to a sales company in the Community. The answer to that question should be in the affirmative. The profit margin referred to in the aforesaid provision cannot be that of the exporter because it would not be appropriate to deduct it in order to calculate the export price; nor can it be the independent buyer's profit margin, which would not affect the price to that buyer. The next question is how the Community institutions should decide what constitutes a reasonable profit margin. According to the Commission, the term 'reasonable' does not refer to a profit margin which is fixed and unchanging irrespective of the circumstances, but rather to one which is appropriate to the circumstances of the industry and the market.

The purpose of deducting a profit margin is to reduce the price charged by a related sales company to a level at which it is equivalent to the price which would be charged to independent importers. That is the only correct solution.

To that end, therefore, it is necessary to examine the profit margins of independent importers, if there are any. There is no authority for the view that the maximum profit margin to be attributed to the related sales company is the profit margin based on the transfer price to that company. If independent importers make a large profit margin in the Community, there would be no justification for attributing a small margin to a related sales company merely because its manufacturing parent company had chosen to absorb a large proportion of the profit made by the group in the exporting country.

With regard to the arguments put forward by the applicants in connection with the level of trade, the Commission observes that these cases actually raise three issues:

(i) It is first necessary to ascertain whether the prices of the Japanese sales companies were at the same level of trade as those of the related sales companies in the Community.

(ii) If not, what allowances were needed in order to take account of the differences in the level of trade?

(iii) What other allowances were needed for reasons other than differences in the level of trade?

Unfortunately, the activities of companies do not fall into clearly defined levels of trade. Some companies sell both to wholesalers and to end-users. In that case, unless each category of customer accounts for very different proportions of the total sales of two companies, they should be regarded as being at the same level of trade. The fact that the applicants have not seriously argued that specific allowances should be made may mean that the slight differences between the different categories of customers did not justify any significant allowance.

IV — Answers given by the parties to questions put to them by the Court

In its answer of 7 April 1987, the Council indicated the dumping margin and the precise level of injury established in relation to the applicant.

In its answer lodged on 4 April 1987, Sharp amongst other things denied being a party to any agreement or concerted practice between Japanese manufacturers or following the directions of the Japanese Ministry of International Trade and Industry with a view to penetrating the Community market.

G. Bosco
Judge-Rapporteur