OPINION OF ADVOCATE GENERAL VAN GERVEN
delivered on 2 July 1992 *

Mr President,
Members of the Court,

1. The point at issue in this case is a very precise one, namely the interpretation of a table in Article 1(3) of Council Regulation (EEC) No 374/87 of 5 February 1987, [1] imposing a definitive anti-dumping duty on imports of housed bearing units (hereinafter 'bearing units') originating in Japan. [2]

The problem arose in the course of a dispute between the German company Findling Wälzlager Handelsgesellschaft mbH (hereinafter 'Findling') and the Hauptzollamt Karlsruhe (hereinafter 'the Hauptzollamt').

Facts and legal background

2. By Regulation (EEC) No 2516/86 of 4 August 1986 [3] the Commission imposed a provisional anti-dumping duty on imports of bearing units originating in Japan. That regulation was confirmed by the Council by Regulation No 374/87, Article 1(3) of which reads as follows:

'The rate of the anti-dumping duty shall be as set out below, expressed as a percentage of the net, free-at-Community frontier price before duty.

Exporters	Products manufactured by	Manufacturer or trademark	Rate %
1. Asahi Seiko Co. Ltd	Asahi Seiko Co. Ltd	ASAHI	4.58
2. Koyo Seiko Co.	Nippon Pillow Block Manufacturing Co.	KOYO	7.33
3. Nachi Fujikoshi Corp.	Asahi Seiko Co. Ltd	NACHI	2.24
4. Nippon Pillow Block Sales Co. Ltd	Nippon Pillow Block Manufacturing Co.	FYH	3.77
5. Nippon Seiko KK	Nippon Seiko KK	NSK	13.39

* Original language: Dutch.

1 — Council Regulation (EEC) No 374/87 of 5 February 1987 definitively collecting the provisional anti-dumping duty and imposing a definitive anti-dumping duty on imports of housed bearing units originating in Japan (OJ 1987 L 35, p. 32).

2 — According to Article 1(2) of Regulation No 374/87, these bearing units are 'cast or pressed steel housings fitted with ball bearings'.

3 — OJ 1986 L 221, p. 16.

Exporters	Products manufactured by	Manufacturer or trademark	Rate %
6. NTN Toyo Bearing Ltd	NTN Toyo Bearing Ltd	NTN	11.22
7. Showa Pillow Block Mfg. Co. Ltd	Showa Pillow Block Mfg. Co. Ltd	NBR	3.99
8. Other	—	—	13.39

3. Findling has been importing ball bearings from Japan since 1963. On 28 March 1988 it lodged the necessary customs documents with a view to the importation of bearing units bearing the mark NACHI, manufactured by the Japanese company Asahi Seiko Ltd (hereinafter 'Asahi') to the order of another Japanese company, Nachi Fujikoshi Corp. (hereinafter 'Nachi'). The bearing units were sold to it by the Japanese companies Gloria International Corp. (hereinafter 'Gloria') and Ehara Industries Ltd (hereinafter 'Ehara'). An anti-dumping duty of 13.39% amounting to a total of DM 6 789.58 was charged, *inter alia*, for those imports.

After an unsuccessful objection Findling brought an action against the Hauptzollamt's decision before the Finanzgericht Baden-Württemberg (hereinafter 'the court of reference'). Its claim is that the levying of anti-dumping duties — based on Regulation No 374/87 — was illegal. It is true that the exporters Gloria and Ehara are, according to the wording of the table in Article 1(3) of Regulation No 374/87, 'Other' exporters. However, the resulting application of an anti-dumping duty of 13.39% is an unjustified discrimination against Findling, since where Nachi itself exports NACHI bearing units, an anti-dumping duty of only 2.24% is applied (see item 3 of the table). Regulation No 374/87 concerns only the exports of producer-exporters or — as in the case of Nachi — exporters who produce other ball bearings but not bearing units, which they order from other manufacturers to complete their range. The exporters Gloria and Ehara manufacture neither ball bearings nor bearing units and actually bought the bearing units in question on the Japanese domestic market at market prices in order to resell them to Findling at a profit. According to Findling, for the application of the 2.24% anti-dumping duty applicable to Nachi it is enough to show that the bearing units were manufactured *by or for* Nachi.

The Hauptzollamt on the other hand insists on a literal reading of the table in Article 1(3) of Regulation No 374/87, the wording of

which requires the application of an anti-dumping duty of 13.39%.

4. In the order for reference it is also stated that initially the Commission — as appears from a telex message of 16 September 1988 to the Federal Ministry of Economic Affairs and also, it seems, from a letter of 18 October 1988 to Findling, although in that case with reference to another regulation — shared the Hauptzollamt's view. However, in letters to the court of reference of 12 March and 29 October 1990 and to the Federal Ministry of Economic Affairs of 13 March 1990, the Commission stated that the exporters Gloria and Ehara were mere 'intermediary companies' (middlemen or trading houses) who were not subject to a special anti-dumping duty. In the absence of such a special anti-dumping rate the anti-dumping duty to be applied was that provided for the producer or the producer-exporter of bearing units. The purpose of the table in Article 1(3) of Regulation No 374/87, the Commission added in that correspondence, was to lay down specific rates not for exporters but for producer-exporters.

Finally the court of reference refers to a letter of 15 April 1991 to the Federal Ministry of Economic Affairs in which the Commission considers this case in the whole context of the rules in other anti-dumping regulations regarding the importation of bearings of various kinds. The Commission and the Council, the letter states, in principle took the view, in all anti-dumping proceedings on this subject, that trading houses (intermediary companies or middlemen) were not to be regarded as independent exporters. In addition, according to the Commission, Council Regulation (EEC) No 1739/85 of 24 July 1985 (anti-dumping duty on imports of certain ball bearings and tapered roller bearings originating in Japan) [4] took account of the difficulties encountered in the application of Council Regulation (EEC) No 2089/84 of 19 July 1984 (anti-dumping duty on imports of certain ball bearings originating in Japan and Singapore). [5] For this purpose Article 1 of Regulation No 1739/85 takes account, for the application of an individual anti-dumping rate, of the manufacture of the goods imported. That means that where the importer can show that ball bearings or bearing units imported from Japan were manufactured by a Japanese producer specifically named in the relevant anti-dumping regulations, the specific anti-dumping rate laid down for the products of that manufacturer must be applied.

5. The court of reference took the view that the case raised a problem of the interpretation of Community law and by order of 7 May 1991 referred the following two questions to the Court of Justice for a preliminary ruling:

'(1) Is the table set out in Article 1(3) of Regulation (EEC) No 374/87 to be interpreted as meaning that it is sufficient for the application of the individual rates of anti-dumping duty assigned to products appearing against numbers 1 to 7 in Column 3 that the housed bearing units can be proved to have been manufactured by or for the corresponding undertaking (named in the column headed "Exporters")?

4 — OJ 1985 L 167, p. 3.
5 — OJ 1984 L 193, p. 1.

(2) If Question (1) is answered in the negative:

Is the last line of the table in Article 1(3) of Regulation (EEC) No 374/87 ("8. Other; Products manufactured by: —; Manufacturer or trade-mark: —; Rate %: 13.39") to be interpreted as relating to the exportation by exporters other than those listed against numbers 1 to 7 of housed bearing units of any Japanese manufacturer with any or no manufacturer's brand or trade-mark?'

anti-dumping rate prescribed for the Japanese producer concerned, Asahi, by Regulation No 374/87 should be applied, irrespective of which Japanese wholesaler has purchased and resold to Findling the products manufactured by Asahi. Only thus can account be taken of the principle of effectiveness according to which Findling must not be treated better or worse than if it had obtained deliveries direct from the Japanese producer named in the regulation.

Literal or teleological application of Regulation No 374/87?

6. With its first question the court of reference is essentially asking whether the system introduced by Regulation No 374/87 must be interpreted literally or teleologically.

According to Findling the teleological approach must be applied. The spirit and purpose of the regulation are to bring the prices of products imported from Japan to the level of prices on the European market, but not in such a way that the application of the anti-dumping duties applied lead to prices which actually exceed the normal European market prices. These anti-dumping levies must be restrictively applied and must not involve any higher charges for importers than if they had purchased direct from the Japanese producer. Accordingly only the

7. On the other hand the Commission now takes the view, contrary to that expressed in the aforesaid correspondence, that the regulation must be applied in accordance with its wording. In support of its view it outlines the background to this problem of interpretation. At the time of the investigation which preceded the adoption of Regulation No 2516/86 it had established that there were three groups of traders in Japan. A *first category* produced and exported bearing units themselves; they were therefore producers and exporters. A *second group* produced the housings themselves but purchased the bearings from other producers so as to sell them and export them subsequently under their own mark (Nachi and Koyo); consequently they were not producers but exporters within the meaning of the anti-dumping legislation. For that group an individual anti-dumping rate was therefore prescribed as indicated in Recital 14 to Regulation No 2516/86. The *third category* was that of the 'pure' business houses whose operations consisted entirely in purchasing products

from the most varied producers in order to resell them under their original trade-mark.

For that third group, according to the Commission, it was impossible to lay down an individual anti-dumping rate. It did not seem possible to grant them a special status as exporters for the application of the anti-dumping duty, either because they were so closely linked to the producers that in fact they were simply a sales office or — in so far as they were independent — they did not, to the Commission's knowledge, export to the Community at the time of the investigation. Gloria and Ehara stated in their answers to the Commission's questionnaire that they did not export to the Community but to Switzerland. Finally this group was not granted the status of exporter because the large number of products sold by them made it practically impossible to lay down individual anti-dumping rates. As a result there were countless opportunities for infringement.

The Commission adds that in view of the specific importance of this third category of traders, it subsequently decided to insert in the anti-dumping regulations an express exception to the residual rate to the effect that the individual rate is applicable when it is possible to produce proof of the origin of the products and where there is an individual duty for the producers. [6]

6 — In this connection the Commission refers to Council Regulation (EEC) No 112/90 of 16 January 1990 imposing a definitive anti-dumping duty on imports of certain compact disc players originating in Japan and the Republic of Korea and collecting definitively the provisional duty, OJ 1990 L 13, p. 21.

8. As regards specifically the question of the interpretation of Regulation No 374/87, the Commission acknowledges that a literal interpretation in this case entails consequences which had clearly not been intended concerning the anti-dumping duty. To rectify this its officers opted, after a first investigation, for a broad interpretation of Regulation No 374/87. As, however, it is doubtful whether the clear wording of the regulation leaves room for interpretation of any kind, the Commission came to the conclusion, after a thorough investigation and evaluation of the various legal consequences, that the principles of legal certainty and clarity of the law must prevail, in particular so as to guarantee a uniform application of the various features of customs legislation within the Community.

In answer to a request from the Court for some clarification of that statement, the Commission answered by letter of 30 April 1992 that in principle it was not opposed to a teleological interpretation of anti-dumping regulations. However, such an interpretation is possible only in exceptional cases and not when the provision in question is clear and unequivocal as in this case. Moreover, according to the Commission even a teleological interpretation of the residual anti-dumping rate would militate in favour of its (present) approach: the aim of that rate is precisely to act as a safety net for all cases not provided for or unforeseen. The Commission explains in conclusion that the Community customs regulations need to be applied uniformly by numerous customs officials in the various Member States. Any need for a provision to be interpreted would

pose a threat to a uniform application of the Common Customs Tariff.

9. The court of reference thinks that a teleological interpretation is tenable. The logical conclusion of the idea advocated by Findling, and — at least at that time — by the Commission, of the aim of Regulation No 374/87 is that, for the application of the individual anti-dumping rates set out in relation to the manufacturer's brand or trade-mark in items 1 to 7 inclusive of the table, it is enough to show that the bearing units were manufactured *by or for* the corresponding undertaking (listed in the column headed 'Exporters'). The residual anti-dumping duty of 13.39% provided for 'Other' exporters in item 8 of the table should therefore be applied only where that is not shown. The actual result in this case would thus be that Findling should pay only the anti-dumping duty of 2.24% due according to item 3 of the table.

However, the court of reference hesitates for three reasons. In its view an interpretation contrary to the wording of the regulation in question can be considered only by way of exception. The aim of Regulation No 374/87 as advocated by Findling, and — at least at that time — by the Commission, nowhere appears in the preamble to the regulation, in contrast for example to the position in Regulation No 1739/85 and in Regulation No 2516/86 (where it occurs in abbreviated form). Finally the court of reference has doubts because Article 1 of Regulation (EEC) No 2685/90, [7] without any explanation in the preamble, just like Article 1 of Regulation (EEC) No 2089/84, refers again to 'manufacturers/exporters' (that is, manufacturers *or* exporters). That would include exporters such as, in this case, Gloria and Ehara although according to the Commission's letter of 15 April 1991 (see section 4 above) Article 1 of Regulation No 1739/85 was differently worded (using only the expression 'manufactured by'), precisely with a view to avoiding the difficulties which had arisen in the application of Regulation No 2089/84.

Proposed interpretation

10. It seems to me that, to begin with, for the question whether a literal or a teleological interpretation is to be preferred, it is necessary to apply the Court's consistent case-law according to which:

'in interpreting a provision of Community law it is necessary to consider not only its wording but also the context in which it occurs and the objects of the rules of which it is part'. [8]

Community law must therefore always be *functionally* applied and interpreted: the position is that Community rules, regarded in

7 — OJ 1990 L 256, p. 1.

8 — Judgment in Case 292/82 *Merck* v *Hauptzollamt Hamburg-Jonas* [1983] ECR 3781, paragraph 12; see also judgment in Case 337/82 *St Nikolaus Brennerei* v *Hauptzollamt Krefeld* [1984] ECR 1051, paragraph 10.

the context of the specific legislative system of which they form part and of the aim pursued by that system, must be effective *and* fair.

In other words an interpretation based on the context and the objective is always essential, in particular when the wording of a Community rule is not unambiguous. However, in this case I am by no means convinced that, as the Commission asserts, the table in Article 1(3) of Regulation No 374/87 is clear and unambiguous. Thus it is not immediately clear what exactly is to be understood by '8. Other' — all categories of 'exporters' or exclusively 'producers/exporters', that is, producers who export. Doubt arises in particular because all the undertakings listed in items 1 to 7 in the first column are exporters *and*, at least as regards certain components, producers who export (see section 7 above) and the premable to Regulation No 374/87 refers to such undertakings systematically as 'producers/exporters'. Moreover the undertakings mentioned in item 8 of the table are expressly referred to as 'producers/exporters' both in heading III and in Recitals 21 and 22 of the preamble as 'producers/exporters'.

The problematical nature of this text is also confirmed by the position taken by the Commission, which, after initially advocating a literal interpretation, recommended a teleological interpretation during the main proceedings and finally changed its view entirely once more and again advocated a literal interpretation.

There can therefore be no doubt that the table must be interpreted in the context of the system of Community anti-dumping rules and the purpose which they seek to achieve.

11. In brief, the *purpose* of Community anti-dumping measures is to offset the harmful consequences arising from exportation of products to the Community at a price below the normal value of similar products in the country of origin or export. One of the fundamental rules of the anti-dumping system which the Community has established — in accordance with its international commitments, in particular those resulting from the GATT Anti-Dumping Code [9] — is that anti-dumping duties must be no higher than the dumping margin (provisionally estimated or definitively established) and that they must be lower where lesser duties would be adequate to remove the injury. [10] In other words they must be *necessary* in order to remove

9 — Agreement on implementation of Article VI of the General Agreement on Tariffs and Trade; the text is published in OJ 1980 L 71, p. 90.

10 — Article 13(3) of Council Regulation (EEC) No 2423/88 of 11 July 1988 on protection against dumped or subsidized imports from countries not members of the European Economic Community, OJ 1988 L 209, p. 1. The same provision appeared in the previous basic regulation, Council Regulation (EEC) No 2176/84 of 23 July 1984, OJ 1984 L 201, p. 1, on the basis of which Regulation No 374/87 was adopted. It implements Article 8(3) of the GATT Anti-Dumping Code.

the injury caused by the dumping. [11] It is precisely for that purpose — and this too is a requirement under the GATT code [12] — that Article 16 of the basic regulation provides for a right to reimbursement for an importer who proves that the duty charged amounts to more than the actual dumping margin.

I should like to add that since the judgment in Case C-69/89 *Nakajima* v *Council* [13] the Court has accepted in principle that a Community anti-dumping rule implementing the GATT Anti-Dumping Code may be tested as regards both its validity and its interpretation against the relevant provisions of the GATT code. In this respect the Community rule in question must be interpreted reasonably and with due regard to the spirit of the GATT provisions. [14]

12. To return to the details of this case, it is clear — and the Commission expressly admits it (see section 8 above) — that a literal application of the table leads to the charging of an anti-dumping duty which is quite out of proportion to the aim pursued by Regulation No 374/87 — and, one might add, by the Community and GATT anti-dumping rules in general. It is impossible to claim that the duty thus levied is necessary to offset the injury caused by dumping.

An uncompromising literal application of the table is therefore manifestly contrary to one of the basic principles of Community (and international) anti-dumping law, namely the necessity for the levy. The table must therefore be interpreted teleologically, which is the only way to interpret it reasonably and in as close conformity as possible with the object of the anti-dumping system.

The interpretation to be chosen is therefore that which is also put forward by the court of reference and which in this case amounts to applying the rate applicable to the *producers/exporters* mentioned in the first column of the table, that is, the undertakings which, following manufacture of the bearing units (by themselves or by a company belonging to the same group) or of components for the bearings (housings) (in the case of Koyo and Nachi), put these bearing units on the market under their own mark. For the anti-dumping rate applicable to Nachi (item 3 of the table) to be applied to the bearing units bearing the NACHI mark, Findling must naturally show that Gloria and Ehara purchased from Nachi the bearing units manufactured by Asahi.

13. A convincing argument that the approach mentioned above is in conformity with the object of the Community legislature was put forward by the Commission itself at the time (see section 4), namely that the Council in Regulation No 1739/85 expressly adopted this procedure:

11 — That is exactly what the Council is required to ascertain when it adopts an anti-dumping regulation: judgment in Case 53/83 *Allied Corporation* v *Council* [1985] ECR 1621, paragraph 18.

12 — Article 8(3), second sentence.

13 — [1991] ECR I-2069.

14 — Judgment in Case C-69/89, in particular paragraphs 34 to 37; this was recently confirmed by the Court in its judgment in Case C-105/90 *Goldstar* v *Council* [1992] ECR I-677, paragraph 33.

'This approach implies that where the trading houses export under their own name, their exports will be subject to the duty applying to "others", unless they show that the bearings exported emanate from a given manufacturer to the exports of which a lesser individual duty applies. This result takes account of the possibilities open to the trading houses to obtain bearings for export from any of a large number of different manufacturers.' [15]

I do not regard as decisive the fact that a similar recital does not occur in the preamble to Regulation No 374/87: what is important is that the Council adopted the approach advocated here in a situation (then too the issue involved duties imposed on a number of the manufacturers referred to here as regards dumping of certain ball bearings and tapered roller bearings), in which the problems of application arising from Regulation No 2089/84 were of the same nature as in this case. That approach must therefore be adopted by analogy here in the event of ambiguity of the provision before us.

14. Certain objections may undoubtedly be raised against the solution recommended here. Thus the Commission points out that a broad interpretation — according to which, be it repeated, imports effected through intermediate exporters are subjected to the individual rates set out with regard to items 1 to 7 in column 4 for imported products of the manufacturers mentioned in column 2 — would considerably reduce the safety-net function of the residual rate set out in column 4 of item 8, that it would call forth a torrent of lawsuits and hence would impair legal certainty and the uniform application of the table by the numerous national customs officers.

Without undervaluing the importance of these objections, I should nevertheless like to point out that we are dealing here with problems which are to a large extent to be ascribed to ambiguities or lacunæ in the Community legislation itself, that is, to the fact that the wording of the table leads, on a literal interpretation, according to the Commission's own admission (section 8 above) to a result which was clearly not intended. It is therefore in my view not appropriate for the Council or the Commission to plead now the resultant difficulties of application. Such difficulties ought to have been avoided by the drafting of clear, consistent but sufficiently well-balanced legal texts.

Moreover as regards the argument based by the Commission on the safety-net function of the residual rate: it appears clearly from Recital (22) to Regulation No 374/87 that the dumping margin determined for this residual category is intended was to penalize exporters who do not adopt a cooperative attitude in relation to the Commission's investigation into anti-dumping practices or to prevent certain exporters from evading the anti-dumping duty. The residual rate has

15 — Recital (11) in the preamble.

therefore essentially the purport of a 'penalty', which again shows that the category of 'Other' exporters to which it relates must be understood restrictively.

15. At the hearing the Commission also argued that Findling had neglected for years to approach the Commission in accordance with Article 14 of the basic Community regulation with a view to obtaining a modification or cancellation of the anti-dumping payments which it had incurred.

That is not a convincing argument either. First of all the Commission admits that there had indeed been even repeated contacts between Findling and itself. From the national file it appears that Findling expressly discussed this problem with the Commission at least once, namely on the occasion of an interview between Findling's authorized representative ('Prokuristin'), Mrs Findling, and the Commission on 30 May 1990. Moreover it appears from the documents before the Court that in the course of the main proceedings pending before the court of reference, at least during the period between 12 March 1990 and 15 April 1991 (see section 4), the Commission agreed with the idea of a teleological interpretation advocated by Findling. Since the question referred to the Court of Justice for a preliminary ruling by the court of reference is dated 7 May 1991 and since the Commission's written observations (containing its new point of view) were submitted in this case only on 9 August 1991, Findling was quite justified in thinking during the first period that it needed to take no formal steps in the context of Article 14 of the basic regulation.

16. As the answer to the first question is in the affirmative there is no need for me to go into the second question raised by the court of reference.

Conclusion

17. Having regard to the foregoing considerations I suggest that the Court should answer the first question as follows:

The table set out in Article 1(3) of Regulation (EEC) No 374/87 must be interpreted as meaning that it is sufficient, for the purpose of applying the individual rates relating to the products indicated in the third column of items 1 to 7, that it may be shown that the bearing units were manufactured by an undertaking referred to in the second column and corresponding to the rate relating thereto, for the account or to the order of the exporters whose names are set out in the first column, irrespective of whether the products are finally exported to the Community by an intermediate trader.